sentations and warranty of the defenders. [*His Lordship then expressed his concurrence with the Lord Ordinary as to the results of the evidence on the question of breach of contract, and the pursuers' right to reject the huts.*]

There remains for consideration the question of the estimation of the damage consequent on the defenders' breach of contract, and its amount. In such cases the rule which is most usually applied is, that the damage is the difference between the contract price and the market price at the time when the breach of contract is ascertained—that is generally on the arrival and examination of the goods. This rule certainly presupposes that a purchaser for resale is not to lose his profit on the adventure, because if he acts upon the rule—that is, if he supplies himself with goods at the market price of the day—he is able to make the same profit on the substituted goods that he would have made on the goods to be supplied under the contract, only his profit is paid to him in two portions, so much by the sub-vendee, and the balance by the seller who is liable in damages. The principle seems to be this, that the first purchaser has a duty to do what is within his power to lessen the loss to the seller by replacing the goods at the current price of the day, and that if he fails in doing so he will only recover from the seller the same sum which the seller would have had to pay in case the purchaser had supplied himself elsewhere? But is it to be said that if such goods cannot be had at any price in the place of delivery, then the seller, who is in fault, is to pay nothing, and the whole loss is to fall on the purchaser who has fulfilled his part of the contract by paying the price. The affirmative was in substance maintained by the defenders' counsel, because they contended that there was no precedent for assessing the damages otherwise than by a reference to market price as the standard of value. But plainly where there is no such standard the damage must be ascertained in some other way, so that the seller shall be put to indemnify the purchaser against such inconvenience as the parties might necessarily foresee or contemplate as the result of a failure of duty on the part of the seller.

In the present case the huts were in the makers' knowledge sent to South Africa for re-sale. It could not be supposed that the pursuers would want 108 Pioneer huts for their personal use in the colony, and besides it appears from the documents that the defenders had constituted the pursuers their sole "agents" for sale within the colony. If huts could have been obtained in the colony at wholesale prices, it would have been the pursuers' duty to supply themselves so as to lessen the loss to the defenders, but as this could not be done, I am afraid the consequence is that the whole loss must fall on the defenders. That loss is of course the commercial profit which the pursuers have been prevented from making on that part of their capital which is locked up in the defenders' hands. I agree with the Lord Ordinary that when a claim of damage is based on estimated profit we ought to be very cautious in accepting the estimate presented to us. I should not be disposed in any case to allow more than ordinary commercial profit, even if it were clearly proved that in the circumstances of the place of shipment larger profits might have been made, because ordinary commercial profit represents the loss which the seller contemplates, or ought to contemplate, as the result of his negligence, and according to the opinions expressed in *Hadley* v. *Baxendale* and cognate cases, this is the measure of the seller's liability.

The Lord Ordinary has awarded £500 in two sums, viz., £350 for loss of profit, and £150 for travelling expenses and outlays specially proved. The sum of £350 is equal to a profit of about £3, 7s. on each of 108 huts rejected. The profit on the huts which were sold is proved to have been from £7 to £11, 10s., and the Lord Ordinary's estimate is therefore a low one.

This leads me to say in conclusion that my opinion is—and in this I think your Lordships agree—that the pursuers are not entitled to separate awards of interest on the price and damages; and for this reason, that the estimation of profit presupposes that a price is due and is paid. But we are satisfied that but for the allowance of interest the Lord Ordinary would have given a larger sum in name of damages, and therefore I do not propose to your Lordships that we should make any alteration on the terms of the interlocutor.

The Court adhered.

Counsel for the Pursuers—Comrie Thomson—M'Lennan. Agents—Macpherson & Mackay, W.S.

Counsel for the Defenders — Ure — J. Clark. Agents—Maconochie & Hare, W.S.

Wednesday, December 2.

FIRST DIVISION.

[Lord Low, Ordinary.

HOILE *v.* CHAPLIN AND OTHERS.

MORE *v.* CHAPLIN AND OTHERS.

Trust—Liferent—Irritant Clause—Construction—Bankruptcy—Trustee—Power of Sale.

A disposition and settlement which conveyed certain estates in liferent and fee, prohibited the liferenters from "selling, mortgaging, or otherwise disposing" of their interest, and provided that "such sales and mortgages" should be void, that "all deeds or instruments purporting to be a sale or mortgage of such interest or any part thereof" should be null and void, and that "all parties signing such deeds or instruments" should thereby forfeit their rights in favour of the person next in

succession. Two of the liferenters granted trust-deeds for behoof of creditors, conveying their liferents. These trust-deeds were superseded by the sequestration of their estates.

Held (1) that a trust-deed for creditors being neither a sale nor mortgage was not affected by the resolutive clause; and (2) that the trustee in bankruptcy was entitled to all the liferent interests without incurring any irritancy.

George Robertson Chaplin of Colliston died in 1869 leaving a disposition and settlement by which he conveyed the lands of Cookston and Unthank, in the sheriffdom of Forfar, to David Souter Robertson of Lawhead, in liferent for his liferent right and use allenarly, and after his death to George Robertson Chaplin, son of David Souter Robertson, also in liferent, for his liferent use allenarly, and the heirs of his body in fee; whom failing to Thomas Robertson Chaplin, another son of David Souter Robertson in liferent for his liferent use allenarly, and the heirs of his body in fee; whom failing to Catherine Robertson Kirkland or Hoile for her liferent use allenarly, and the heirs of her body in fee; whom failing to the heirs of the body of the said David Souter Robertson in fee; whom failing to certain other persons named therein in fee. He further conveyed the lands of Auchingray, in Lanarkshire, in similar terms in liferent to David Souter Robertson, and after his death to his sons George Robertson Chaplin, whom failing to Stewart Souter Robertson, whom failing to David Souter Robertson, and their respective issue in fee, whom failing to certain other persons therein named in fee. He further conveyed the lands of Bowhouse, in Stirlingshire, in similar terms in liferent to David Souter Robertson, and after his death to his sons Thomas, whom failing to George, and their respective issue in fee, whom failing to the heirs of the body of David Souter Robertson in fee, whom failing to certain other persons therein named in fee.

The said disposition was granted under certain conditions, which were declared to be inherent qualities of the conveyance, and, *inter alia*, under the conditions that "all parties who shall at my death, or at any time thereafter, have any beneficial interest, contingent or otherwise, under this settlement are hereby prohibited from selling, mortgaging, or otherwise disposing of such interest, excepting always sales or mortgages by parties who are absolute fiars of any of the said estates, and it is hereby stipulated and provided that such sales or mortgages, if made, shall be void, and all deeds or instruments purporting to be a sale or mortgage of such interest, or any part thereof, shall be null and void, and all parties signing such deeds or instruments shall thereby forfeit and lose all right and benefit under this settlement, and shall give place to the next in succession, who shall be entitled to come in the right and place of the party signing such deeds or instruments."

David Souter Robertson died in 1878. George Robertson Chaplin thereupon succeeded to the lands of Cookston, Unthank, and Auchingray in liferent, and Thomas Robertson Chaplin to the lands of Bowhouse also in liferent. They were both unmarried.

In February 1869 they executed trust-deeds conveying their whole estates, and *inter alia* their liferents, to George Auldjo Jamieson and Francis More for behoof of their creditors. These trust-deeds were, however, superseded by the sequestration of the estates of George and Thomas on 30th December 1890 and 30th January 1891 respectively, and Francis More was elected as trustee on both estates.

The trustee thereafter, on 7th May 1891, raised an action for declarator that he had right to sell these liferents without incurring a forfeiture.

Mrs Hoile and her children, and the trustee on the bankrupt estate of Stewart Souter Robertson (David Souter Robertson's eldest son) appeared and opposed the action, and pleaded—"(2) Inasmuch as no decision in this action will be *res judicata* in any action challenging the validity of the proposed sale, the action is premature and incompetent. (3) The liferent interests in question not being adjudgable, no title to the same has passed to the pursuers. (5) In respect that by signing the trust-deeds for behoof of their creditors referred to, the liferenters have forfeited the said interests, the action should be dismissed."

Mrs Hoile thereafter, on 29th May 1891, raised an action for declarator that, *inter alia*, George Robertson Chaplin had forfeited his liferent, and Thomas Robertson Chaplin his prospective liferent in the lands of Cookston and Unthank by signing the trust-deeds for behoof of creditors, and that the right to these lands had devolved on her in liferent, and her children in fee, subject to defeasance in the event of George and Thomas dying survived by heirs of their bodies.

Francis More, the trustee on the sequestrated estates, opposed this action, and pleaded—"(2) The defender is entitled to absolvitor, in respect the liferenters did not incur a forfeiture of their rights by granting the conveyances in question."

The Lord Ordinary (Low) on 12th August 1891, in the action for declarator of right of sale, decerned in terms of the conclusions of the summons.

"*Opinion.*—In my opinion the pursuer is entitled to the decree which he asks, the liferents which are the subject of this action being liferents in possession of the bankrupts.

"The case seems to me to depend upon whether by the clause of Mr Robertson Chaplin's disposition and settlement, quoted in the condescendence, the diligence of creditors of liferenters in possession is excluded.

"The clause, in the first place, prohibits, *inter alios*, a liferenter 'from selling, mortgaging, or otherwise disposing of his interest.' In the second place, it is provided that 'such sales or mortgages, if made, shall

be void, and all deeds or instruments purporting to be a sale or mortgage of such interest, or any part thereof, shall be null and void.' In the third place, it is provided that 'all parties signing such deeds or instruments' shall forfeit their rights, and give place to the person next in succession.

"It is to be observed that there is this difference between the clause of prohibition and the clauses declaring the deeds null and the right of the granter forfeited, that the former clause strikes not only at sales and mortgages, but also at 'otherwise disposing of' the liferent, while the latter clauses refer to sales or mortgages only.

"It was contended for the defenders that the deed should be read as if the words 'or otherwise disposing of,' or equivalent words, had been continued throughout all the clauses. If the deed were so construed, it would strike at any sort of disposition, and probably even a gratuitous disposition would infer a forfeiture. In my opinion, however, it is not legitimate to read into the clause any words not inserted by the granter. It may be that the general words were omitted from the later clauses by mistake. But I cannot tell whether that was so or not, and I must assume that what the granter has said is that which he intended to say.

"The clause therefore stands thus—'Selling, mortgaging, and otherwise disposing of' the liferents are prohibited, but in the case of sales and mortgages only is the transaction to be null, and the right of the seller or mortgager forfeited. In these circumstances it seems to me that a gift of the liferent could not be challenged, and if that is the case I do not think that it is possible to say that the diligence of creditors is excluded.

"Even if the general words 'or otherwise disposing of' are to be held as implied in all the clauses, I am by no means satisfied that the diligence of creditors would be excluded, because I think that a clause of this sort is directed against voluntary alienations, and not against alienations brought about by operation of law, without the consent and contrary to the wish of the liferenter.

"By virtue of the 102nd section of the Bankruptcy Act of 1856 the pursuer is in the same position as if he had obtained a decree of adjudication of the liferents subject to no legal reversion. If therefore the diligence of creditors is not excluded, it follows that the right to the liferents is now vested in the pursuer, and that he is entitled to sell the liferents without incurring any irritancy or forfeiture, because he would sell as in his own right under the implied decree of adjudication, and not as in right of the liferenters.

"It was further contended that nothing had vested in the pursuer, because prior to the sequestration a forfeiture had been incurred by the liferenters having granted trust-deeds by which they conveyed these liferents to trustees for behoof of creditors. This question is directly raised in an action brought by Mrs Hoile to have it found that by executing and delivering the trust-deeds Messrs George and Thomas Robertson Chaplin forfeited the liferents. The present case and that at the instance of Mrs Hoile were argued before me at the same time, and I refer to my opinion in the latter case for the grounds upon which in my judgment the trust-deeds did not operate a forfeiture."

In the action for declarator of forfeiture the Lord Ordinary sustained the defender's defences and repelled the pursuer's pleas.

"*Opinion.*—The pursuer in this case seeks to have it declared that Messrs George and Thomas Robertson Chaplin forfeited the liferent rights which they had in certain estates under their father's settlement, by having granted in 1889 trust-deeds for behoof of their creditors, by which they conveyed to trustees the liferent rights in question. It is not disputed that if a forfeiture has been incurred the liferents devolve upon the pursuer.

"The pursuer founds upon the clause in the late Mr Robertson Chaplin's settlement quoted in the condescendence.

"The clause prohibits *inter alios* a liferenter taking under the settlement 'from selling, mortgaging, or otherwise disposing of' his interest, and it is then declared that 'such sales or mortgages' shall be void, that 'all deeds or instruments purporting to be a sale or mortgage' shall be null and void, and that 'all parties signing such deeds or instruments' shall forfeit their right in favour of the persons next in succession.

"The pursuer maintains that the trust deeds to which I have referred are struck at by this clause, and that the execution and delivery of them involved a forfeiture of the rights of the granters in favour of the pursuer.

"I am of opinion that the contention of the pursuer is not well founded. It is true that the part of the clause prohibiting alienation refers not only to sales or mortgages, but to 'otherwise disposing of' the interest, and the latter words are perhaps wide enough to cover a trust-deed for creditors; but the part of the clause in which the transaction is declared void and a forfeiture to be incurred refers only to 'sales and mortgages.' I do not think that it would be legitimate to read into the clause any words which it does not contain, and therefore I am of opinion that no forfeiture is incurred unless the liferent is either sold or mortgaged.

"In the present case there was no sale. The trust-deeds are very much in the ordinary form. The estates of the granters, and, *inter alia*, the liferent rights, are conveyed to trustees, who are authorised to enter into possession and to administer for behoof of the creditors. A general power of sale is given to the trustees, and they are empowered, if they think it expedient, to apply for an Act of Parliament for authority to sell the liferented lands. Such a deed may result in a sale, and a sale by the trustees under it would, in so far as the forfeiture clause is concerned, be equivalent to a sale by the granter; but the deed does not itself constitute or operate a sale.

"Is, then, a trust-deed for behoof of creditors a mortgage within the meaning of the clause? 'Mortgage' is not, I imagine, a proper term of Scotch law at all, and I do not know what precisely is the meaning and effect of the word. *Prima facie* a trust-deed for behoof of creditors is not a mortgage, and certainly is not (to use the words of the clause in the settlement) a deed 'purporting to be a mortgage.' I believe, however, that the right of a mortgagee is somewhat similar to that of the creditor in a bond and disposition in security; and I think that the term 'mortgage,' as used in the clause, may fairly be taken as referring to the conveyance of the liferent right, or whatever the interest of the party may be, to a creditor in security, and for payment of his debt. But that is not what is done in a trust-deed for behoof of creditors. There is no conveyance to any creditor, but an assignation of the right to trustees, in order that they may administer it for behoof of the general body of creditors. I think that it would be an unwarranted stretch of language to call such a transaction a mortgage.

"I am therefore of opinion that no forfeiture has been incurred, and that the defenders are entitled to absolvitor."

Mrs Hoile and her children reclaimed, and argued—1. *In the action for declarator of forfeiture*—The conditions in the disposition and settlement had been declared inherent conditions of the right, and by granting these trust-deeds the liferenters had incurred a forfeiture. This had been recognised in *Kirkland* v. *Kirkland's Trustees*, March 18, 1886, 13 R. 798, and *Chaplin's Trustees* v. *Hoile*, 18 R. 27. This was a sale, as it was an alienation for a consideration, viz., that creditors should abstain from diligence. Alternatively, it was a mortgage in the popular sense, as it was for security of creditors. Further, the irritant clause referred to and embraced the prohibition against "otherwise disposing of the liferent." The deeds had subsisted for more than sixty days, and creditors had acquired right under them, and therefore the sequestration did not obviate a forfeiture. The intention of the testator was that on alienation the liferenters' right was to determine. This must be given effect to—Lewin on Trusts (8th ed.) 101; *ex parte Syston*, L.R., 7 Ch. Div. 145; *Hurst* v. *Hurst*, L.R., 21 Ch. Div. 278. 2. *In the action for declarator of right of sale*—This action was premature, as the trustees might never sell these estates. The Court would not therefore decide this question *ab ante* and on a hypothesis—*Lord Galloway* v. *Lord Garlies*, June 26, 1838, 16 S. 1212; *Harveys* v. *Harvey's Trustees*, June 28, 1860, 22 D. 1310. The 102nd section of the Bankruptcy Act 1856 did not vest these liferent estates in the trustee, for adjudication could not have touched them, assignees being excluded. The trustee only took the estates *tantum et tale* as they stood in the bankrupts, and could not assert a power of sale incompetent to the latter.

Argued for the respondent—1. *In the action for declarator of forfeiture*—The irritant clause alone affected sales and mortgages. Trust-deeds were not struck at by it. In *Chaplin's* case the Court had not considered the question of forfeiture. The clause fell to be strictly construed—*Fairlie* v. *Cuningham*, March 3, 1857, 19 D. 596, and March 28, 1860, 22 D. (H. of L.) 8; *Cathcart* v. *Cathcart*, July 18, 1835, 5 S. & W. 315. Further, the sequestration had purged any irritancy—Sandford on Entails (2nd ed.) 454, and *Price* v. *Price*, there quoted, p. 461; *Abernethie* v. *Forbes*, 1 Rob. App. Cas. 434. The pursuer could not claim the liferent, as the present liferenters might have issue; nor could the income be accumulated, as there was here no trust. The law of England was inappropriate and different. 2. *In the action for declarator of right of sale*—Here there was a trustee in a sequestration instead of a trustee on a voluntary trust-deed, as in *Chaplin's* case. He therefore took the estate as if on a decree of adjudication after expiry of the legal—19 and 20 Vict. c. 79, sec. 102. There was here no valid prohibition against gratuitous alienation, as there was no clause strong enough to restrict to a mere alimentary right—*Rogerson* v. *Rogerson's Trustee*, November 6, 1885, 13 R. 154—nor any clause carrying over the right to other persons on forfeiture, as in *Trappes* v. *Meredith*, November 3, 1871, 10 Macph. 38. *Kirkland's* case dealt solely with a *spes successionis*, while here the right was one *in possessione*. But even if gratuitous alienation were struck at, a deed done *in invitum* by diligence of creditors was not—*Lear* v. *Leggett*, 2 Simon's Rep. 479—*aff.* 1 Russell & Mylne's Rep. 690; *Avison* v. *Holmes*, 1 Johnson & Fleming, 530.

At advising—

LORD PRESIDENT—Both these actions relate to the effect of the same deed, and in my opinion the Lord Ordinary has decided both actions rightly. The first question is, whether by granting a private trust in favour of creditors the right of the liferenter has been forfeited? It is necessary to the party asserting the affirmative that he should prove that there has been a forfeiture under the terms of the trust-disposition and settlement of Mr George Robertson Chaplin. Now, the proviso in that deed is the prohibition of "selling, mortgaging, or otherwise disposing of—applying the words to the present case—the liferent interest. In the irritancy clause there is at all events an appearance of a narrower scope, because the provision is that "such sales or mortgages, if made, shall be void." Now, Mr Law has maintained that the latter words "such sales or mortgages" in the irritancy clause must be held to comprehend not only selling and mortgaging, but also, as described in the prohibitory clause, "or otherwise disposing of such interest." In my opinion that would be contrary to sound construction. It appears to me that by the selection of these words the truster has evidenced that "otherwise disposing"—as indeed the words themselves import—means some-

thing different from either selling or mortgaging, and I do not think it possible to hold that, when he takes the first two instead of the whole three words as descriptive of the object of the irritancy, he means the same thing as what he had expressed in the whole three.

The remaining question is, whether this trust-disposition can be called a mortgage in the sense of that trust-disposition and settlement of Mr George Robertson Chaplin? Now, I suppose, without pressing into the argument the cases which turn on a construction of deeds of strict entail, it is enough to affirm that, where a forfeiture is sought to be enforced you must clearly show that according to the first and ordinary construction of the terms used the heir in possession was consciously—I will not say consciously, but necessarily—acting in contravention of what has been prohibited. That leads us to consider what is the meaning of the word "mortgage." It is, of course, not a term of our law, but at the same time it has a sufficiently definite meaning, and I think in its primary sense it means a particular charge upon property. To say that a trust-disposition for behoof of creditors generally is a mortgage would strike one as, if not a misapplication, at all events a very loose use of that term; and if that observation be correct, then I think it is impossible to hold that this deed is a mortgage in such a sense as to infer forfeiture under this settlement. On that ground I think the Lord Ordinary is right in the first action.

If that be so, it is unnecessary to consider the more subtle and difficult questions which have been discussed in the latter part of the speeches both for the pursuer and the respondent.

The second action relates to the claim of the trustee in the sequestration to dispose of this estate or liferent. There the pleas to a certain extent go over the same ground, but what we have to consider, apart from the question I have already discussed, is whether the trustee in the sequestration is excluded by the terms of this trust-deed from realising the right of the bankrupt. Now, if the right of the bankrupt be such as the Lord Ordinary thinks it is in his decision in the first action, I cannot say I think there is much difficulty as to the right of the trustee. He is vested in the bankrupt's right of liferent, which is not protected against anything but sales and mortgages. The trustee comes in for the purpose of realisation, and in my opinion he is entitled to dispose of this.

Mr Law has taken a point which I mention thus late, because it really arises in connection with this point. He has addressed an argument to us that the action is incompetent; but the position of the trustee is that his statutory duty is that of realisation, and he is at once confronted with the question whether this is estate which he is entitled to dispose of. He brings into Court a person who has a sufficient interest at all events to raise the question, and in my opinion there is nothing premature in his thus proceeding.

Accordingly, I am in favour of adhering to the Lord Ordinary's interlocutor in both cases.

LORD ADAM—I am of the same opinion. The question raised in the first action is, whether George Robertson Chaplin has forfeited a certain liferent interest in the lands of Cookston and Unthank, to which liferent interest he acquired right by the settlement in his favour by the late George Robertson Chaplin of Colliston, and that question depends on the construction of a certain prohibition contained in Mr George Robertson Chaplin's trust-disposition and settlement. Now, the terms of this are set forth in the condescendence — "All parties who shall, at my death or at any time thereafter, have any beneficial interest, contingent or otherwise, under this settlement are hereby prohibited from selling, mortgaging, or otherwise disposing of such interest, excepting always sales or mortgages by parties who are absolute fiars of any of the said estates; and it is hereby stipulated and provided that such sales or mortgages, if made, shall be void, and all deeds or instruments purporting to be a sale or mortgage of such interest, or any part thereof, shall be null and void, and all parties signing such deeds or instruments shall thereby forfeit and lose all right and benefit under this settlement, and shall give place to the next in succession, who shall be entitled to come in the right and place of the party signing such deeds or instruments."

The question arises, whether this trust-deed in favour of creditors granted by George Robertson Chaplin is a deed or an act — "selling or mortgaging or otherwise disposing of such interest." Now, the first question in regard to this point is, whether there is any effective resolutive clause striking against "otherwise disposing of such interest." I concur with your Lordship that there are no such words, and I agree with your Lordship that without having recourse to the malignant construction that used to be put on clauses in deeds of entail, we are bound, as we always do, to construe forfeiture clauses with strictness. I think that is an invariable rule in the law of Scotland. We are to give them reasonable, but we are to give them strict construction.

Now, we find here that the irritant clause strikes at "such sales or mortgages." These are the only things struck at, and it is only the rights of the parties signing such deeds that are affected. That being so, I am clear that the only question before us to consider is, whether this trust granted by George Robertson Chaplin is a sale or mortgage? That is to my mind the question in this case. Now, I agree with your Lordship that it is certainly not a sale. No doubt it contains powers of sale, but that is a very different thing from saying that it is a deed selling the right, because, of course, granting power to sell is granting a mandate to sell, and if that mandate be

never executed there is never a sale of the subject. Therefore on that ground it is impossible to say that this trust in favour of creditors is a deed of sale.

In the next place, I agree with your Lordship that it is not a mortgage. What a mortgage may be I should be very unwilling to attempt to define. I do not think it is at all necessary to do that, for I agree with your Lordship that, as I have said before, we are not, in construing this deed, to have recourse to what the word mortgage may mean in general language. That is not the question. The question is, whether this is a mortgage by the law of Scotland, and I am quite clear it is not.

On these grounds I agree with your Lordship that the interlocutor is right. In my view the private trust-deed is not struck at by the prohibition which the settlement affords. And if that be so, it is unnecessary to decide any of the other somewhat difficult questions raised in this case.

The second action is an action by the trustee in the sequestrated estate to have it found that he is entitled to sell and dispose of the liferents. I think the Lord Ordinary's decision is right in that case too, and, as your Lordship has said, the construction we have put upon the prohibitive clause in the other case goes far to settle this case, because if we are to hold that the irritant and resolutive clauses only apply to the cases of sale and mortgage, then we are in this position—that we have nothing here but this liferent, except that the party in liferent use is prohibited from selling or mortgaging it. But I think the right which the trustee had acquired is acquired neither by sale nor by mortgage. If it were competent or possible to have excluded validly the contraction of debt in this case, it might possibly have been reached in that way. If he could contract debt, then the trustee in the sequestration could acquire the right. But I do not see how the right of the trustee can be struck at by this clause. It was argued—and I think rightly argued—that gratuitous alienation is not prohibited by this deed, and if that be so, the case falls under the 102nd section of the Act 19 and 20 Vict. c. 79, for that section says that in all cases where the holder of a right of property can alienate land, then the trustee shall have the same rights as if he had obtained a decree of declarator of expiry of the legal. If that be so, then George Robertson Chaplin could have gratuitously alienated, and his trustee has undoubted right to the decree he asks for.

LORD M'LAREN—So far as my observation extends, I should say that hitherto testators and settlers of estates have recognised the futility of attempting to put the enjoyment of their estates under limitation, and have confined their efforts to securing the descent of the fee unencumbered by the acts of those who have the enjoyment of it in succession. But the deed of Mr Robertson Chaplin proceeds on a different footing altogether, because he, or whoever prepared the deed, must have known that under the present statutory law a deed in such terms could have no effect in the direction of perpetuating the fee, but that whoever took the fee under the deed necessarily had the full dominion and disposal of the estate. But he has attempted to limit the powers of the persons who are to take life interests in his property, and that not under a way with which we are familiar in such deeds by constituting an alimentary trust, but by words of open and undisguised restraint on the powers of the liferenter over the estate which is given to him.

Now, the Lord Ordinary in construing these limiting clauses has proceeded, as I think correctly, on the rule of strict construction. I think that this is the true principle of construction to be applied to such clauses—to all clauses which are of the nature of restraints on the disposing power. I am not prepared to say that in the construction of entails the Courts have applied any different rule of construction from that which would be proper in construing any clause directed against alienation. That was certainly the view expressed by Lord Wensleydale in one of the later cases—I think the *Kintore* entail—where he defined the rule of construction in this way—that if there were two possible constructions of a clause, both equally probable, that one which was favourable to freedom should be preferred rather than one which would have the effect of restraining the right of the grantee. But no judge has gone so far as to say that if there are two possible constructions, and the construction which is consistent with a limitation of the grantee's powers be the better construction of the two, you are to reject that and adopt the less tenable construction, the one which is evidently not the true construction, because it is favourable to liberty. That is all that I understand is meant by the rule of strict construction. It means only this, that between two arguments which appear equally probable, you ought to prefer the view that is favourable to liberty.

Applying that principle to these clauses, I think there can be no reasonable doubt that we are not entitled to treat the trust in favour of creditors as a mortgage. In the first place, mortgage is not a term of art in our law, but giving the word its evident or more general meaning, we may say that it is a kind of security or deed by which a landowner obtains money on the security of his property. Now, in a certain sense a trust for creditors is a deed of security, but its essential quality is that it is a deed by which the granter appoints someone to administer his estate for the benefit of persons to whom he has already contracted debt. It is therefore not a deed of security in the ordinary sense—a voluntary deed of alienation in consideration of a present advance—but is really a deed in fulfilment of legal obligations for payment of debts already contracted. There is here no prohibition against contraction of personal debt, and there could not well be in a deed of this class. Accordingly, it appears to me to be a reasonable view of

the clause that the testator only intended to prohibit the grantee from raising money on his life interest by way of mortgage, but not to prohibit the granting of such deeds as might be reasonably necessary for the extrication of the grantee's affairs. I therefore prefer that construction as being the one which is most favourable to the grantee's powers, the presumption being that such clauses are inserted for the benefit of the grantee.

The trust therefore, in my judgment, is well constituted, but that does not prevent subsequent creditors (whose interests are not recognised by the trust) from taking separate measures for the purpose of having the estate brought under judicial administration, and I agree with your Lordships that the clause under construction in no way strikes at the diligence of creditors, or at distribution under the process of sequestration.

The result therefore is, that I agree with the Lord Ordinary in the conclusion he has come to regarding the second action in sustaining the right of the trustee in bankruptcy to attach this estate.

LORD KINNEAR—I also concur with reference to both actions. The conclusive consideration appears to me to be that there is nothing struck at by the irritant or resolutive parts of the clause in question except deeds or instruments purporting to be sales or mortgages, and therefore whatever else may have been prohibited, the only question we have to consider under the action of forfeiture is, whether a conveyance in a trust-deed for the benefit of the whole creditors of the granter of the conveyance is a sale or mortgage? I am very clearly of opinion with your Lordships that it is not a sale. It is a mandate to sell, and undoubtedly if the trustees had carried their mandate into effect it might well have been said that the clause of forfeiture had come into operation. But then they did not carry out the mandate, because they were advised that before doing so they should ascertain what the effect of that clause was, and having brought an action into Court for that purpose they discovered they could not do what they might otherwise have done. The first conveyance therefore never was anything but a mandate to sell. It has so far not been sold at all. The mandate was never carried out, and the mandate has fallen, and therefore I am unable to say that any forfeiture has arisen on that ground. If the power to sell was not carried out, then the only effect of that first conveyance was to put the trustees into the administration of the estate.

The only remaining question therefore is, whether a deed appointing trustees to administer the liferent interest of the granters for the benefit of all their creditors is a mortgage? Now, I agree with what your Lordships have said, that "mortgage" is not as used in this clause a term of ours which has any strict definite meaning. The word is not altogether without technical signification in the law of Scotland, because it is a statutory term for a kind of security created or allowed by Act of Parliament to be created for railway and other undertakings; but it is clear enough it is not in that sense the word is used in this clause, and therefore the only conclusion is that it is used in a popular sense as a word of ordinary language. Now, it appears to me that as a word of ordinary language it can have no definite meaning, because the persons who use it to describe securities over land are using a word without adverting particularly to the legal operation of such securities as they intended to describe, and therefore I should myself have very great difficulty in construing a clause of a deed—either of a testamentary or any other written instrument—where the term "mortgage" occurs, if it were absolutely necessary for the purpose of such construction to consider whether the security intended to be described was a security that would never need to be sold, or in what particular manner it was supposed the land affected by it was to be held. But I agree with your Lordships that, whatever else it may be, at all events it must be a particular security over land in favour of some particular creditor, and therefore cannot be extended so as to embrace a general trust of this kind for the administration of an estate for the benefit of all creditors alike.

As to the second action, I agree with your Lordships. I think it is very clear that the clause in question does not prohibit the liferenter from contracting debt. It follows that it does not protect the liferent interest from the diligence of creditors; and it follows again that if his interest is not protected from his creditors' diligence it may be held in sequestration by the vesting clauses of the Bankruptcy Act.

The Court adhered.

Counsel for Mrs Hoile and Others—J. A. Reid—Law. Agent—John Rhind, S.S.C.

Counsel for F. More — W. Campbell—C. K. Mackenzie. Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, December 8.

SECOND DIVISION.

BAILLIE'S TRUSTEES *v.* BAILLIE.

Succession—Fee and Liferent—Liferent of Whole Heritable Estate—Income of Mineral Field Opened but not being Worked at Date of Testator's Death.

A husband directed his trustees to hold his whole heritable estate for his wife, and to pay her, in the event of her surviving him, "during her lifetime, the free annual proceeds of said estate, and of minerals therein." Certain parts of the estate had been opened by the testator in his lifetime with the view of being worked for minerals, but had