directly to a prosecution in one of Her Majesty's courts. But it bears on the present question, because the necessary implication of the provision is that a trustee who gives in an imperfect return would be liable for the penalty but for the relaxation which is enacted in his favour, and the implication necessarily applies to everybody else as well as a trustee.

On the plea that the action is too late, I again agree with the Lord Ordinary. Had the matter stood on the Taxes Management Act 1880 alone, I should hold, with the Lord Ordinary, that the plea was bad. The scheme of sub-sections (3) (4) and (5) of sec. 21 is the following: (3) and (4) define the jurisdiction of the High Court as including, under (3), suits for penalties exceeding £20, and, under (4), belated suits for penalties of all amounts. Then (5) defines the jurisdiction of the other courts as applying to suits instituted within twelve months for penalties not exceeding £20. This system is not perhaps expressed in the section in the most luminous order, but the meaning is perfectly plain.

On the Act of 1890 I have nothing to add to what the Lord Ordinary has said.

I am for adhering.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR was absent.

The Court adhered.

Counsel for the Pursuer—D.-F. Asher, Q.C.—Young. Agent—Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for the Defender—Ure, Q.C.—Abel. Agents—Gill & Pringle, W.S.

Friday, December 3.

SECOND DIVISION.

[Lord Low, Ordinary.

EDMOND *v.* LORD PROVOST OF ABERDEEN AND OTHERS.

Succession—Fee and Liferent—Disposition to A in Liferent and "After his Death" to B in Fee—Intestacy.

A executed a disposition of the lands of K. to B, his son and heir-at-law, "in liferent, but for his liferent use only, and after his death to the Provost of Aberdeen [*here followed the names of certain other officials*] and their successors in their respective offices, and Gray Campbell Fraser, advocate in Aberdeen . . . as trustees for the uses, ends, and purposes specified or to be specified by me in any writing under my hand."

B, after his father's death, raised an action for the purpose of having it declared that the effect of the words "after his death" in the dispositive clause was to prevent the deed operating as a disposition either *de presenti* or *a morte testatoris*, and that he was entitled to the fee as intestate succession.

Held (*aff.* Lord Low) that there was a valid conveyance of the fee of the lands of K. to the trustees named, and that the intention of the truster by the use of the words "after his death" was merely to postpone the period when the trust would become operative.

Trust—Constitution of Trust—Conveyance to Trustees for Purposes to be Specified by Separate Writing — Order to Open Sealed Envelope before Period Prescribed by Truster to Ascertain whether it Contained Specification of Trust Purposes—Resulting Trust.

By holograph disposition A disponed the lands of K. to his son B "in liferent, but for his liferent use only, and after his death" to the holders of certain offices and an individual named, "and such others as he might nominate as trustees, for the uses, ends, and purposes specified or to be specified by me in any writing under my hand." A also reserved his own liferent and dispensed with delivery. A died leaving a trust-disposition and settlement in which he dealt with his whole means and estate, heritable and moveable, except the lands of K., of which (he stated) he had granted a separate disposition. In his repositories was found a sealed envelope bearing a holograph endorsation, whereby he directed that the enclosed deed was not to take effect till after his son's death, and enjoined his trustees and executors not to open the envelope until that date. Unless this envelope contained directions as to the trusts on which the lands of K. were to be held, A left no such directions. After his father's death, B brought an action in which he concluded for declarator that the holograph endorsation upon the sealed envelope did not, either by itself or along with the document, if any, which the said sealed envelope contained, affect the succession to the lands of K. He claimed accordingly that there was a resulting trust in his favour as heir-at-law. The pursuer called as defenders (1) the trustees mentioned in the disposition of K., and (2) his father's testamentary trustees. The former averred that the sealed envelope contained a specification of the trust purposes relating to the lands of K., and moved for an order that it should be opened.

The Court (*diss.* Lord Trayner) *ordered* the Clerk of Court to open the sealed envelope and to communicate to the parties the terms of the specification of the trust purposes, if any, relating to the lands of K., contained in the enclosed document.

On 30th May 1888 Mr Francis Edmond, advocate in Aberdeen, granted the following holograph disposition of his lands of Kingswells: — "I, Francis Edmond, advocate in Aberdeen, for certain good causes and considerations, do hereby give and dispone to and in favour of John Edmond, advocate in Aberdeen, my young-

est son in liferent, but for his liferent use only, and after his death to the Provost of Aberdeen, the Principal of the University of Aberdeen, the Principal of the Free Church College in Aberdeen, the Minister of the Gilcomston Free Church in Aberdeen, and the Minister of the Free Church at Kingswells, all for the time being, and their successors in their respective offices, and Gray Campbell Fraser, advocate in Aberdeen, and such others as I may afterwards nominate, and the acceptors or acceptor, as trustees for the uses, ends, and purposes specified, or to be specified by me, in any writing under my hand [then followed a description of the lands disponed] together with all my right and interest in the said lands and others; but always with and under the burden of the subrent payable by me to the trustees of the late Andrew Jopp during the life of their nominee, and the annuity of £350 payable to Mrs Mary Shier or Edmond, my wife, during her life, under our contract of marriage. And I reserve my own liferent. And I dispense with delivery. And I consent to registration.—In witness whereof," &c.

This disposition was registered in the Books of the Lords of Council and Session for preservation on 19th January 1889.

On the extract of this deed the following power, dated 4th November 1891, was endorsed by Mr Francis Edmond:—"I, Francis Edmond, advocate in Aberdeen, the granter of the deed of which the foregoing is an extract, do hereby confer on John Edmond, advocate in Aberdeen, power to output and input tenants, and to grant leases of my said lands or any parts thereof, for a period not exceeding nineteen years, upon such terms and conditions, and for payment of such rents as he shall think proper.—In witness whereof," &c.

Mr Francis Edmond died on 11th September 1892, leaving a trust-disposition and settlement dated 25th November 1890, and relative codicils. This trust-disposition proceeded on the narrative that the testator had granted a separate disposition of his lands of Kingswells in favour of his son John Edmond, advocate in Aberdeen, and others under the burden of an annuity to the testator's wife, and disponed to certain trustees his whole other lands, means, and estate, heritable and moveable.

In Mr Francis Edmond's repositories there was found after his death a sealed envelope bearing the following endorsation holograph of himself:—"The enclosed deed is not to take effect nor come into operation until after the death of my son John Edmond, and it would not be for his comfort or interest, or the advantage of others who may after my son's death have an interest, and I therefore enjoin my trustees and executors not to open the envelope, but to secure the deed to be strictly private in all its parts until my son's death.—FRANCIS EDMOND, 4th November 1891."

Unless this sealed envelope contained a writing under the hand of Mr Francis Edmond specifying the trusts upon which the estate of Kingswells was to be held after the death of Mr John Edmond, it was admitted that Mr Francis Edmond left no such writing at all.

Mr John Edmond was his father's only surviving child and heir-at-law.

On 11th October 1895 the disposition of Kingswells quoted above was registered in the Register of Sasines on behalf of John Edmond in liferent for his liferent use only.

No trustees under the conveyance of 1888 accepted office under the provisions of that deed.

On 14th June 1897 Mr John Edmond brought an action in which he called as defenders (first) the persons then holding the offices of Lord Provost of Aberdeen, Principal of the University of Aberdeen, Principal of the Free Church College in Aberdeen, Minister of the Gilcomston Free Church in Aberdeen, and Minister of the Free Church at Kingswells, and Gray Campbell Fraser, advocate in Aberdeen, who are in this report referred to as the Kingswells' trustees, and (second) his father's testamentary trustees.

The conclusions were for declarator (1) that the endorsation written on the sealed envelope found in Mr Francis Edmond's repositories did not by itself or along with the document, if any, which the said sealed envelope contained, in any way affect the succession to the lands of Kingswells, and (2) that the deceased Francis Edmond died intestate *quoad* the succession to the fee of the lands of Kingswells, and that the pursuer as his only surviving child and nearest and lawful heir was entitled to have himself served heir to the fee of these lands, or otherwise for declarator that under the disposition of 30th May 1888 the pursuer besides being liferenter of the lands of Kingswells, was holder of the fee of the said lands in trust with all the powers competent to and exerciseable by a trustee under the common and statute laws of Scotland, for behoof of himself or the other person or persons, if any, to whom they had been conveyed by the deed enclosed in the said sealed envelope, or otherwise if the said sealed envelope did not contain any deed containing a valid conveyance of the said lands, then in trust for himself and his heirs.

The pursuer set forth the deeds and facts mentioned in the foregoing narrative, and further averred that he had been obliged to make extensive alterations and repairs upon the mansion-house of Kingswells, and also upon the farm steadings, to enable the farms to be relet, and to comply with the requirements of the sanitary authorities, that he had spent upon the estate a sum of £3000, which expenditure was wholly of the nature of capital expenditure, such as a life-renter was under no obligation to make, but which was absolutely necessary in the proper administration of the estate, and to ensure the lands continuing to make a return sufficient to meet the sub-rent payable to Jopp's trustees and Mrs Edmond's annuity, and that the trustees mentioned in the conveyance of 1888 were unable to make any arrangement for reimbursing the

pursuer, because they could not know until the pursuer's death whether the document in the sealed envelope applied to Kingswells, and if so, what powers, if any, it might confer upon them, and also because, in any view, such powers could only be exercised after the pursuer's death, and by the holders at that time of the designated offices and Mr Campbell Fraser if then in life. The pursuer also stated that on obtaining decree in terms of the first conclusion he would serve heir to his father, and thereafter execute a deed binding himself not to alienate Kingswells, and obliging himself as at the date of his death to dispone the estate to the trustees under the disposition dated 30th May 1888, for the purposes specified in the document contained in the sealed envelope if applicable to Kingswells, and, if not, for behoof of the nearest heirs of Francis Edmond.

The defenders, the Kingswells trustees, averred, *inter alia* — "These defenders believe and aver that the enclosure in the sealed envelope before mentioned is a valid testamentary writing under the hand of the deceased, expressing the ends, uses, and purposes for which the lands are to be held in trust under the holograph disposition of 30th May 1888, after the pursuer's death."

The defenders, the testamentary trustees, averred, *inter alia*—"Believed and averred that the fee of said estate is disposed of by the document contained in the sealed envelope referred to, which is in the custody of these defenders. By his trust-disposition and settlement Dr Edmond disposed of the whole of his estate with the exception of the fee of Kingswells, and there is nothing else to which the sealed document can refer."

The defenders, the Kingswells trustees, pleaded, *inter alia* — "(3) The pursuer's statements are irrelevant, and insufficient to support the conclusions of the summons. (4) The fee of the lands in question having been validly disposed of by the holograph disposition of 30th May 1888, and the testamentary writing contained in the sealed envelope left by the deceased, the defenders should be assoilzied."

The defenders, the testamentary trustees, pleaded, *inter alia*—(2) The pursuer's averments are irrelevant.

On 20th July 1897 the Lord Ordinary (Low), after hearing counsel in the Procedure Roll, issued the following interlocutor:—"Finds that upon a sound construction of the disposition executed by the deceased Francis Edmond on 30th May 1888, the said Francis Edmond disponed the lands and estate of Kingswells to and in favour of the pursuer in liferent, but for his liferent use only, and to the Provost of Aberdeen, the Principal of the University of Aberdeen, the Principal of the Free Church College in Aberdeen, the minister of the Gilcomston Free Church in Aberdeen, and the minister of the Free Church at Kingswells, all for the time being, and their successors in their respective offices, and Gray Campbell Fraser, advocate in Aberdeen, in fee, as trustees for such ends, uses, and purposes, to come into operation after the pursuer's death, as the said Francis Edmond might specify by any writing under his hand: With that finding appoints the cause to be enrolled for further procedure, and grants leave to reclaim."

Opinion—"The late Mr Francis Edmond, who died in 1892, left (1) a disposition of the estate of Kingswells, dated in 1888; (2) a trust-disposition and settlement disposing of all his other means and estate; and (3) a sealed envelope upon which was written a direction to his trustees that it should not be opened until the death of the pursuer.

"By the disposition Mr Edmond disponed Kingswells to the pursuer, his son, 'in liferent, but for his liferent use only, and after his death to the Provost of Aberdeen, the Principal of the University of Aberdeen, the Principal of the Free Church College in Aberdeen, the minister of the Gilcomston Free Church in Aberdeen, and the minister of the Free Church at Kingswells, all for the time being, and their successors in their respective offices, and Gray Campbell Fraser, advocate in Aberdeen . . . as trustees, for the uses, ends, and purposes specified or to be specified by me, in any writing under my hand.'

"It is admitted that Mr Edmond did not leave any writing specifying the trusts upon which Kingswells was to be held after the pursuer's death, unless the sealed envelope contains such a writing.

"The pursuer took infeftment in 1895 upon the disposition in liferent for his liferent use only. The trustees under the disposition have not accepted office.

"The pursuer in the present action seeks to have it declared that his father died intestate *quoad* the fee of Kingswells, and that he, as his father's only surviving child, is entitled to have himself served heir to the fee of the said estate.

"The pursuer argued that the disposition to the trustees in the deed of 1888, being only after his death, the fee of the estate as at the testator's death is not disposed of, and that he as heir-at-law is therefore entitled to take it up.

"I do not think that there is any doubt as to what the testator's intention truly was. He intended to give the estate to his son in liferent, and to the trustees in fee, for purposes to take effect after the expiry of the liferent. The question is whether the disposition is capable of being construed so as to give effect to that intention. I think that it is. The pursuer contends that the disposition must be read strictly and literally as containing no gift of the fee until 'after his death.' It seems to me that by these words the testator intended no more than that the substantial fee in the trustees, and their right to the possession and administration of the estate, should be postponed until the pursuer's death. If the words 'after his death' had been introduced at a different part of the deed (as, for example, after the words 'as trustees') there would have been no difficulty, and seeing that, in my judgment, the intention is clear, I do not think that there is any incompetency in giving no greater or

further effect to the words, notwithstanding their position in the deed, than that which the testator intended them to have.

"Where a testator has left his estate in liferent and fee with the clear intention of disposing absolutely of the estate, it has never been held, so far as I know, that there was intestacy. Take the case of a disposition to a parent in liferent allenarly, and children *nascituri* in fee. In that case it is settled that there is a fiduciary fee in the parent. That rule was originally adopted to prevent the anomaly of the fee of a feudal estate being in suspense until the birth of children. Such a case has always been regarded as a case of undoubted testacy, and it has never been suggested that the heir-at-law could step in and carry off the fee of the estate.

Accordingly, even if, upon a sound construction of the disposition, there was no gift to the trustees until after the pursuer's death, I do not think that the result would be intestacy, but a fiduciary fee in the pursuer. I do not know that the rule to which I have referred has ever been applied, except in the case of parent and children, but I see no reason in principle why it should not be applied in analogous cases, even although the relation of parent and child did not exist.

"I do not think, however, that in this case there is any need to resort to the fiction of a fiduciary fee in the pursuer, because the trustees are in existence, and, as I have already said, I think that the disposition can be construed as importing an immediate conveyance of the fee to them, although they are not to enjoy the substantial fee until the pursuer's death.

"The view which I have expressed does not, however, afford a full solution of the question which is raised. The sealed envelope may not contain valid and effectual directions to the trustees in regard to the disposal of the estate after the pursuer's death. In that case there would be a resulting trust for the pursuer as heir-at-law, and the pursuer would, in that event be entitled to have the estate freed from the trust. The pursuer, therefore, has an interest to demand that the sealed envelope shall be opened now and its contents ascertained, and I think that it would be competent for the Court to order the envelope to be opened.

"The endorsation upon the envelope is in the following terms—'The enclosed deed is not to take effect nor come into operation until after the death of my son John Edmond, and it would not be for his comfort or interest, or the advantage of others who may after my son's death have an interest, and I therefore enjoin my trustees and executors not to open the envelope, but to secure the deed to be strictly private in all its parts until my son's death.—FRANCIS EDMOND, 4th November 1891."

"Now, I do not regard that endorsation as of the nature of a testamentary writing. It has nothing to do with the disposal or management of the testator's estate, but is merely a direction to his trustees as to the time when they are to make public the contents of a certain deed which he has left.

"I read the opening words of the endorsation, not as a declaration that the enclosed deed shall not take effect until the pursuer's death, but as a statement that as matter of fact it does not do so. That fact is narrated to explain how, consistently with the enclosed deed receiving full effect, it may be kept sealed up during the pursuer's life. The testator seems to me, in effect, to say that the envelope shall not be opened until it is necessary, in order to carry out his wishes, that its contents should be known. If, therefore, circumstances which the testator did not foresee render it necessary to ascertain the contents of the envelope, I think that it is competent to do so.

"The pursuer, however, states in a very emphatic way that his desire is to carry out his father's wishes in every respect, and that the object of the present action is only to ascertain who is now the fiar of the estate, in order that it may be duly administered during his (the pursuer's) lifetime, without loss to himself or deterioration to the estate.

"A finding, therefore, that the disposition conveys the fee of the estate to the trustees may serve the pursuer's purpose, and, accordingly, in the meantime, I propose to do no more than make a finding to that effect, and appoint the cause to be enrolled for further procedure."

The pursuer reclaimed, and argued—(1) There was no conveyance of the fee of Kingswells which took effect either *de presenti* or *a morte testatoris*. Nothing was given till after the death of the liferenter. There was consequently now no disposal of the fee to them which was at present effectual to defeat the claim of the heir-at-law. This was not a testamentary deed, and there was therefore no presumption in favour of vesting *a morte testatoris*. (2) There was at the present time no ascertained fiar, for the conveyance was to the holders of certain offices at the date of the liferenter's death, and the persons who might hold these offices at that date could not be known till it arrived. There was no one who was entitled now in terms of the conveyance to take infeftment in fee. The fee was therefore not at present disposed of, and fell to the heir-at-law. (3) The doctrine of fiduciary fee was inapplicable. That doctrine only applied to the case of an estate being destined to a father in liferent allenarly, and to his children *nascituri* in fee. This was apparent from the history of the doctrine. See *Newlands* v. *Newlands' Creditors*, July 9, 1794, M. 4289. The case of *Maxwell* v. *Logan*, December 20, 1836, 15 S. 291, and 1st August 1839, Maclean & Rob. 790, did not really extend the rule. (4) Even if there was a valid conveyance of the fee to the Kingswells' trustees, there were no trust purposes for which they could hold it, and consequently there was a resulting trust for the heir-at-law. It was mere conjecture to say that the sealed envelope contained such purposes. The rule *de non apparentibus et non existentibus eadem est*

ratio applied. The Kingswells' trustees were not entitled to demand the opening of the packet because they had not accepted office. (5) Even supposing that the packet contained trust purposes relating to Kingswells, they were of no effect, and could have no effect, because the endorsation upon the envelope provided as its leading direction that they were not to take effect till after John Edmond's death. Subject to such a qualification there could not be any valid trust purposes, and there could only be at most a resulting trust for the heir-at-law.

Argued for the Kingswells trustees—(1) There was a valid conveyance of the nominal fee in the lands of Kingswells as at Mr Francis Edmond's death which vested in these defenders *a morte testatoris*, the beneficial enjoyment of the fee being postponed, as was necessarily the case, until after the liferenter's death. A conveyance of that kind did not cause intestacy as regards the fee, but on the contrary vested the fee in the disponees *a morte testatoris*—*Watson's Trustees* v. *Hamilton*, January 31, 1894, 21 R. 451, June 4, 1894, 21 R. (H.L.) 35; *Turner* v. *Gaw*, February 20, 1894, 21 R. 563, *per* Lord M'Laren at p. 567. This was plainly in its nature a testamentary deed, but if it was not, the alternative was not intestacy but vesting of the nominal fee in the trustees as at the date of the conveyance. Alternatively the pursuer was fiduciary fiar. That doctrine was not confined to cases of parent and child — *Allardice* v. *Allardice*, March 5, 1795, 3 Ross' Lead. Cas. (Land Rights) 655; *Ferguson* v. *Ferguson*, March 19, 1875, 2 R. 627; *Cumstie* v. *Cumstie's Trustees*, June 30, 1876, 3 R. 921, in which last case the fiduciary fee was for "heirs whomsoever." In either of these views there was no conveyancing difficulty with regard to the fee of these lands. There was no doubt as to Mr Francis Edmond's intention. In his will he showed that he supposed himself to have disposed of the fee of Kingswells. (2) It was conceded that if there were no trust purposes, then there was no trust except for the heir-at-law. But that could not be assumed, and it was denied. Whatever might be the general rule, owing to the form of the pursuer's summons, the *onus* of proving that there were no trust purposes lay on the pursuer in this case, and he did not propose to attempt to prove that no trust purposes were in existence. Apart from that, however, these defenders averred and proposed to prove that there were trust purposes in the sealed document. They asked that the envelope should be opened by order of the Court. The pursuer had no right or title to resist this being done. The envelope did not belong to him, and it was not in his custody. Primarily, of course, the envelope was in the charge of the testamentary trustees, and they opposed its being opened, but surely it was not in accordance with their duty to insist on obedience to the terms of the docquet on the envelope with the effect of defeating the testator's intention and giving the fee to the heir-at-law. It was a somewhat curious way of regarding the testator's wishes to obey scrupulously an injunction which was obviously of secondary importance, and thereby to defeat his obvious intention to dispose of the fee. An injunction was less peremptory than a command, though more so than a wish, and if obedience to this injunction was inconsistent with giving effect to the testator's leading intention, the trustees were not bound, and indeed were not not entitled to regard it. This objection to the opening of the packet ought not therefore to receive effect. But apart from that, in view of their averment as to its contents, they were not entitled to its custody or to oppose its being opened, but were bound to hand it over to the Kingswells' trustees, who desired that it should be opened. It was proper that the Court should order the opening of the packet so that it might be proved that there were trust purposes as averred by these defenders. Their demand was simply that the deceased's repositories should be searched to see if he had left any trust directions under his hand. It was plain that the testator intended to dispose of the fee of Kingswells for trust purposes, and supposed that he had done so. His intention should receive effect, even if it involved disobedience to the injunction on the envelope. It was said, however, that even if this envelope contained trust purposes they were rendered of no effect by the terms of the docquet. But on that supposition the docquet and the trust purposes would have to be read together, and supposing the trust purposes to be in themselves valid and effectual (as was *ex hypothesi* the case), the Court would not readily nullify the document itself in obedience to a somewhat strained construction of the docquet. It was to be observed that what Mr Francis Edmond had kept secret was not the conveyance of the fee, which had been already effectually made by the disposition, but only the directions as to what the trustees were to do. The pursuer's argument on the effect of the docquet seemed really to depend on the validity of his argument as to the effect of the disposition, and if that argument were unsound, then the argument on the docquet was unsound also. It was plain that a testator might convey lands in liferent, say to his widow, and in fee to trustees for purposes to be declared by the liferentrix at any time during her lifetime. In such a case the nature of the trust purposes, if any, would not be known till her death. (3) The averments as to difficulties in the management of the estate were irrelevant, but in any view they were no greater than these which occurred in every case where a father had a liferent allenarly with a fiduciary fee for his children *nascituri*.

Argued for the defenders, the testamentary trustees—The packet ought not to be opened, and these defenders were bound to resist the demand to that effect, because the testator had directed that it should not be opened. This injunction was not contrary to law or public policy or to the real intention of the testator, and unless upon one or other of these grounds, the trustees

ought not to be ordered, in defiance of the testator's direction, to give up the envelope for the purpose of being unsealed.

At advising—

LORD MONCREIFF—The first question which we have to decide is, whether the disposition executed in 1888 by Mr Francis Edmond of the lands of Kingswells disposed effectually of the fee of that estate. The Lord Ordinary has held, and I think rightly, that on a sound construction of that deed Francis Edmond disponed the lands of Kingswells to the pursuer, his son John Edmond, in liferent for his liferent use only, and to the persons therein named in fee, as trustees for purposes to be afterwards specified by the disponer by any writing under his hand.

But the Lord Ordinary's judgment by no means exhausts the conclusions of the action.

I may leave out of view the alternative conclusions, because they were not maintained in argument; but the pursuer maintained that even assuming that the Lord Ordinary's interlocutor is sound, he is entitled to insist in the first conclusion of the summons, which is to the effect that the endorsation on the sealed envelope, dated 4th November 1891, does not either by itself or along with the document, if any, which the envelope contains, affect the succession to the lands of Kingswells. The pursuer's position is this—that as heir-at-law he cannot be deprived of any part of his father's heritable estate unless it has been effectually and beneficially conveyed to some one else; that it lies upon the defenders to prove that trust purposes exist; and that as they have not done so and cannot, owing to the truster's prohibition, do so, he is entitled to the fee of the estate, or at least to demand a conveyance thereof as a resulting trust from the Kingswells trustees. By insisting in the first conclusion of the summons the pursuer has fairly challenged the defenders, the Kingswells trustees. Without knowing what are the contents of the envelope it is impossible to affirm the first conclusion of the summons that they do not in any way affect the succession to the lands of Kingswells; and it is equally impossible to affirm the defenders' contention that they do affect it. The only way in which the question can be satisfactorily solved is by ordering the envelope to be opened. In saying so I have fully in view the injunction of the truster not to open the envelope until his son's death. But I think that if we have to choose between leaving this envelope unopened and ordering it to be opened, we shall do less violence to the testator's wishes if we adopt the latter course. To sustain the pursuer's argument would be to use the expression of the truster's wishes that the envelope should not be opened, as a reason for defeating the truster's clearly expressed intention that he, the pursuer, should only have a liferent of the estate and that the fee should be devoted to purposes which may be, and in all probability are, contained in the envelope.

It is in the interests of all parties that the matter should be cleared up in this process. It may be that the envelope contains no directions as to Kingswells; and, speaking for myself, I should be willing, if the parties agreed among themselves, that the envelope should be opened by the Clerk of Court, and that if he says that the enclosures do not contain any reference to Kingswells the envelope should be resealed. If the parties cannot agree as to this, I am of opinion that the motion of the Kingswells trustees for proof should be granted. This of course involves the opening of the sealed packet.

LORD YOUNG—I am of the same opinion as that which has just been expressed by Lord Moncreiff.

I am of opinion in the first place that there is here a good *de presenti* conveyance to those persons who have been referred to as the Kingswells trustees—that is, the holders of certain offices really representing the University and city of Aberdeen and the Free Church, who are nominated trustees. I am of opinion that there is a good *de presenti* conveyance to them, and that the argument founded upon the words "after his death" is altogether unsound.

But if I had any doubt about that—and I have none—I cannot regard this as other than a *mortis causa* deed, a testamentary deed—that is, not a deed in pursuance of any contract or business arrangement, but a voluntary and gratuitous conveyance, by a proprietor of his estate after his death among his relations and friends who are the objects of his bounty. That is a very sufficient definition of a testamentary and *mortis causa* deed. It is the disposal by a man voluntarily of his estate after his death among those whom he means to take it, and by the Conveyancing Act of 1868 it is provided that it shall be competent to any owner of land to settle the succession to the same in the event of his death not only by conveyance *de presenti*, according to the existing law and practice, but by any expression of his will which would be valid and effectual with respect to personal estate. I am therefore of opinion upon that ground that there is a good disposition of this estate in liferent and in fee after the death of the liferenter, and that the argument of the pursuer to the contrary is unfounded.

But then the pursuer states an argument in support of his contention that he is to be regarded as the fiar, and ought to be declared to be so by this Court, to the effect that there are no trust directions, no trust purposes. Now, I quite assent to the argument that, when anyone creates a trust and expresses no trust purposes, or the purposes which he expresses fail, then there is a resulting trust for himself if he continues in life, or if not, for those who after his death come in his place. If a man makes a trust of any part of his estate, or of the whole of it, to take effect in his lifetime, and either declares no trust purposes, or the purposes which he has expressed fail, there is a resulting trust for him-

self, and the trustees will have to convey the property back to him, although he has given them possession of it; and so here, if there are no trust purposes, then the trustees to whom there is, according to my opinion, a good conveyance, will hold the estate upon the legal title which is given to them as a resulting trust, the beneficial estate being in the heir of the truster, the disponer. But the Court will not proceed upon that view or declare a resulting trust, or deprive the trustees of the property, until they are satisfied that there are no trust purposes, or that those which have been declared have failed, or that they are inoperative, and they will not come to that conclusion until all reasonable means have been taken to ascertain whether or not there are any such trust purposes still subsisting. The time necessary for that purpose, or what is to be done for that purpose, will vary according to circumstances, but if there is a trust created—that is to say, if there is a conveyance to trustees, it is the duty of these trustees to see that all reasonable means are taken in order to ascertain whether there are trust purposes or not, and what they are, so that an opinion may be formed, and indeed a judgment arrived at, as to whether they are operative and still subsist. That may involve more or less time. It may involve the execution of a commission abroad, and a search being made in the repositories of the deceased in a distant land. There is no limit to the reasonable suppositions which may be made as to the time which it may take to ascertain whether there are trust purposes operative and still subsisting—that is to say, which may still be executed—and I should not hesitate to give it as my opinion that if the truster declared in his deed of trust that the estate was to be held by the trustees for purposes which were not to be communicated to them, for purposes declared in a deed which he had entrusted to anyone he chose to name, and which was to be delivered over six months, or six years, or only after the death of the liferenter, we could not say "Here is a trust without any purposes at all." Whether we should give effect to that desire of his, that there should be no communication of what the purposes were until after the expiry of a longer or shorter period, is another matter depending upon circumstances. But assuming the circumstances to be such that we should not do anything in order to enable those purposes to be ascertained before the period specified by the truster, I should hold it to be quite clear—it is so in my opinion—that that would not be in any respect fatal to the trust. Even if the truster had ordered that the trustees to whom he conveyed the property should hold it for such purposes as some-one else, say his wife, should declare and provide—if he said, "I convey this to A, as trustee, to hold for such trust purposes as my wife shall declare at any period of her life"—I can see no rational objection to that as a good trust, or any ground in law or reason upon which the Court should declare it bad, or that a person who is in the full possession of his senses is not entitled to convey his own property to A as trustee to hold for such purposes as his wife, or any other person he named, should in his or her lifetime declare, and I think that the trustees would be bound to hold it, or if the trustees named declined to accept, that the Court would be bound to provide a substitute trustee to hold the estate as the owner had declared until it was ascertained what those trust purposes were, or whether there were any.

Now, that being the opinion which I have, which is altogether fatal to the whole case of the pursuer, I come to consider how we ought to deal with the motion of the trustees who are named and referred to as the Kingswells trustees, to the effect that this envelope ought to be opened. My own opinion is that it is not only a proper motion on their part, but that they would not have done their duty had they not made it. Of course they cannot say whether they will act as trustees or not until they know the purposes, but they are called as defenders in this action as being the trustees named in the deed, and the conveyance to whom in the deed is challenged by the pursuer. I have already stated the grounds upon which I think that challenge is not well founded, and that the conveyance is well made to them, and that if there had been any defect in it it would have been our duty, according to the well-known rule of law which governs the duty of the Court in trust matters, to supply their place, but if we find that there is a good conveyance to them, then it is their duty to take all reasonable means in order to ascertain what the purposes of the trust are—whether there are any, what they are, whether they still subsist, and are practicable—because if they are to act as trustees, which they will judge of when they have seen what the purposes are, they will have a duty with respect to the estate during the subsistence of the liferent. The subsistence of the liferent may be longer or shorter—nobody can tell how short or how long; but they will have a duty as trustees to see that the estate does not suffer by ill-treatment or ill-usage. I am not making any suggestion of a reflection upon the liferenter, but it will be the duty of the trustees—a duty which is dependent upon rules of law—to look to the safety and the good management of the estate with reference to the ultimate trust purposes. Now, they cannot discharge that duty until they see whether this conveyance to them is to be operative, and therefore had there been no envelope here, and no deed in it such as we have to deal with, I should have thought it according to their duty that they should ask the aid of the Court to ascertain whether there were trust purposes, and what they were. If, after all reasonable inquiry, and after a reasonable lapse of time, it should appear that there was no ground for the belief that there were any trust purposes, that the only legitimate conclusion was that there were none, we would not prolong the time for declaring a

resulting trust, and giving the property to the person to whom the resulting trust took it. But this is so strongly the reverse of a case where there is no reasonable ground to believe that there are trust purposes declared, either still subsisting and operative and to be executed or not, that, on the contrary, there is every ground for believing such trust purposes to be in existence. This is not conjecture in the bad sense of that term in which we use it when we say "that is a matter of mere conjecture, it is fancy, it is guess-work." It is not a case of that kind at all. It is quite clear upon the facts and circumstances of the case. It is a legitimate and just conclusion drawn by the trustees from the facts laid before us here. It is as legitimate and well-founded an averment as can be made on record. It is quite as well-founded as the averment which is often made by a party to a case to the effect that from certain facts he infers that his adversary knew something, and accordingly that he believes and avers that his adversary did know it. He comes to the Court and says—"From facts and circumstances which have come to my knowledge I must reasonably conclude that he knew it, and I make the averment that he did, and I ask all the aid the Court can give me in order to establish that fact." Now, is it not a reasonable conclusion that this envelope does contain instructions relative to this estate of Kingswells? In the first place, we have the statement by the truster in the deed "for the uses, ends, and purposes specified or to be specified by me in any writing under my hand." It is reasonable to suppose that he would leave a writing under his hand specifying his instructions. Upon 4th November 1891 he made the codicil which is endorsed on the extract of the conveyance of Kingswells, referring to his son's liferent of Kingswells, and giving him power to output and input tenants, and to grant leases of his lands, or any part thereof not exceeding nineteen years, and for payment of such rents as he should think proper. That codicil of 4th November 1891 relates to the estate of Kingswells and his son's liferent in it. Now, that is the date of the endorsement upon this envelope, that same date, 4th November 1891, and he declares in it—"The enclosed deed is not to take effect nor come into operation until after the death of my son John Edmond," and he enjoins his trustees and executors not to open the envelope during his life.

Well, I shall attend immediately to the question how far that injunction ought to be followed. But the conclusion arrived at by his own trustees that this envelope contains directions as to the estate of Kingswells is all but irresistible—indeed, I think altogether irresistible. Nobody has suggested any other estate that it would apply to. Now, then, are the Kingswells trustees in the discharge of their duty, warranted in asking that we should see what is in the deed? If there is nothing in it, if it is a piece of blank paper, or if it contains no directions with reference to the estate of Kingswells, then the pursuer will have his way; there will be a resulting trust; for it is not suggested that in that event it will be worth delaying the case any further, and that will terminate the case in a way favourable to the pursuer. And, on the other hand, if it does contain directions relative to the estate of Kingswells, it is in the interest of the beneficiaries in the trust that that should be known to the trustees, and that cannot be ascertained otherwise than by opening the packet. If there are instructions we will be able to judge whether they are still operative, or whether the time for acting upon them has gone past, and we shall then ascertain whether the trustees will accept, or put upon us the duty of nominating other trustees. I am therefore of opinion that in the interest of all parties we ought to direct this envelope to be opened notwithstanding the truster's injunction, and I may say that if the argument which has been stated to us to the effect that the result of following the direction not to open the envelope will be to destroy the trust altogether, and to give the estate in fee to his son, had been stated to the truster, we have no reason to conclude that he would have assented to that, but every reason to conclude the contrary. I am therefore of opinion that in answer to this motion which has been made by the trustees, who are in this action declared to be the trustees to whom the estate is given, we must direct this envelope to be opened by the Clerk of Court in presence of the parties. The parties are all reasonable. If it appears that there is nothing in the envelope relative to the estate of Kingswells, then the parties will agree in informing us to that effect, and then there will be no trust purposes, and a resulting trust for the pursuer, but if, on the contrary, there are directions for the guidance of the trustees of Kingswells, then these must be judged of by the trustees nominated in order that they may determine whether they will accept or not, and act accordingly, or, if otherwise, then we have a duty in the interest of those who may be beneficiaries under the directions given, to provide other trustees who shall take charge of the property in the meantime, and act in the execution of the trust. I do not think it will be difficult to formulate an interlocutor which will carry out these views as to the opening of the envelope, but I desire to say—and that is in accordance with the views of Lord Moncreiff, for we interchanged views upon that matter—that the parties should exercise a discretion in the matter, and do, when it is opened, all that they discreetly consider necessary in order to preserve undivulged anything which they shall be of opinion the testator wished to remain undivulged.

Lord Trayner—In the interlocutor now submitted to review, the Lord Ordinary has not disposed of this case, but has only found that on a sound construction of the disposition executed by the late Mr Edmond, he disponed his estate of Kingswells to the pursuer in liferent, and to the defender Mr Mearns and others in fee, but

that in trust only for such ends, uses, and purposes as he might specify by any writing under his hand, such purposes to come into effect only after the pursuer's death. The debate before us was not confined to the question whether the finding of the Lord Ordinary is right, but extended beyond the scope of that finding, the pursuer maintaining his right to have decree in terms of one or other of the alternative conclusions of the summons, while the defenders resisted the pursuer's obtaining any decree, and maintained, as I understood, that the action should be dismissed. The defenders Mearns and others (in the event of the action not being dismissed) asked for a proof of their averments set forth in Answer 12 as to the contents of the sealed packet. As it is not desirable to occasion unnecessary expense, I am prepared to decide the case on the argument we have heard without sending the case back to the Lord Ordinary, but in doing so I must state the grounds on which my judgment is based, as I cannot concur in the views which have just been expressed.

The finding of the Lord Ordinary, so far as it goes, appears to me to be sound. I think there was a good conveyance by Mr Edmond to the pursuer in liferent and the trustees named in fee, and that the words "after his death" mean no more than that the beneficial fee, the actual enjoyment or possession of it for certain purposes was not to commence until after the liferent had expired. The fact of Mr Edmond having recorded the conveyance during his lifetime was relied on by the defenders as showing this to be Mr Edmond's intention, but I doubt whether any argument can be based upon that fact, for Mr Edmond did not record the deed in so far as the fee was concerned. The warrant of registration is confined to a registration on behalf of the liferenter. The deed is not registered in the Register of Sasines *quoad* the fee, and the trustees are not vested feudally therewith. They have, however, in my opinion, a good personal title at this moment to the fee of Kingswells as trustees for uses and purposes to be found in any writing under the hand of Mr Edmond, because the deed, although not recorded, is a delivered deed. It dispenses with delivery. But the difficulty I have felt all along in the case is this, that so far as appears—so far as has been shown to us—Mr Edmond left no writing under his hand expressing the purposes for which the trustees were to hold the estate of Kingswells. If he left no such writing, and expressed no such purposes, then the trust created by his disposition would be a resulting trust for the benefit of Mr Edmond's heir, that is, the pursuer, who would be entitled to call upon the trustees to denude in his favour of any right vested in them. It was suggested, rather than maintained, on the part of the trustees, that from the form of the pursuer's action he had imposed on himself the *onus* of showing that the testator had left no writing expressing the purposes of the trust. I do not think so. I think the pursuer's position is this—he is the heir, and entitled as such to any heritage not validly disposed of to his exclusion by his author. The estate of Kingswells has not been disposed of to the exclusion of the heir unless trust purposes have been expressed, and it lies upon anyone maintaining that such purposes have been expressed to prove that. The heir's claim stands upon his heirship, and anyone who opposes that claim must make good his opposition. Accordingly, I take it that the pursuer as heir is entitled to the estate of Kingswells unless the trustees can show by the production of a writing under the testator's hand that they hold for trust purposes which exclude the heir. If the trustees do not admit this view, they at all events feel the force of it, for they allege and offer to prove that the sealed packet in question contains such a writing. This brings me to consider whether anyone has a right to demand that the sealed packet should be opened. Have the trustees any such right? Well, in the first place, they are only trustees named by the testator—they are not trustees in fact, because they have not accepted office. As yet they have no duties to perform, and they can perform none until they accept the office conferred upon them. Till then, they cannot be called on to do anything in the way of administration—in short, till then they have neither the rights nor the duties of trustees. They may never accept office; they may never be trustees. In these circumstances I think they have no right to ask that the sealed packet shall be opened. I am far from saying that as trustees, accepting and acting, they would have such a right, but until they accept office I think it clear that they have no such right. But they say they are entitled to prove their averments, and in order to do this, the sealed packet must be opened. Their averment is this—[*his Lordship read the averment of the Kingswells trustees quoted above*]. That is not an averment of fact; it is a conjecture. Mr Edmond did not communicate to them the contents of the sealed packet—they know nothing of its contents. Their belief only comes to this, that the sealed packet contains the trust purposes because these trust purposes do not otherwise appear to exist. The endorsation on the packet does not warrant either their belief or their averment, for it does not even hint that its contents have any reference to the estate of Kingswells. On the ground therefore of their not being as yet trustees entitled to act in that character, and that what they call their averments are mere conjecture, I am not disposed to allow them access to the contents of the sealed packet. But if such access is not accorded to them, nobody else wishes it. The pursuer does not; and the testamentary trustees of Mr Edmond, in whose custody the packet is, and to whom it belongs, object to its being opened. I think they are right to object, and could not do otherwise without violating their first duty, namely, obedience to and fulfilment of the wish and injunction of the testator. It has been said that to open the

packet will do no harm to anyone, and would relieve the embarrassment of which the pursuer complains in his condescendence. Neither proposition is by any means certain. But the testator had the right to say that the packet, which was his own, should not be opened before the date fixed by him for doing so. If the concealment of its contents should lead to a result other than the testator intended, nobody would be to blame for the frustration of the testator's intentions but himself. Further, I am not prepared to allow the defenders (the Kingswells trustees) a proof of their averment by giving access to the sealed packet. I think such proof unnecessary. Such a proof can only be asked in this process to substantiate the defence made in answer to the pursuer's claim. If the pursuer's claim is rejected, there is no need to prove the defence. In my opinion, the action should be dismissed, and that for the following reasons. The first conclusion of the summons is for declarator that the endorsation on the sealed packet, either by itself "or along with the documents, if any, which the said sealed envelope contains," does not affect the succession to the estate of Kingswells as conveyed by the deed of 30th May 1888. That conclusion calls on us to declare the effect or non-effect of a deed which is not before us. I am unable to say what the effect of "the deed, if any, which the said sealed envelope contains," may be on the conveyance of May 1888, until I see it, and the pursuer does not consent to my seeing it. I do not blame him for this; I think he is right not to consent to the packet being opened or its contents disclosed. If the words I have just quoted are omitted from the conclusion, then possibly there would be no difficulty (I see none) in declaring that the endorsation on the envelope does not affect the conveyance referred to in the conclusion. But such a declarator would not be given, as it leads to no practical result. The second conclusion is to the effect that Mr Edmond died intestate *quoad* the succession to the fee of the lands of Kingswells, or alternatively that the pursuer holds the same as fiduciary fiar. I have already explained why, in my view, the pursuer cannot get a decree in terms of either of these conclusions. The conveyance of May 1888 does dispose of the fee of the said lands, and therefore there is no intestacy, and under that conveyance no right is conferred on the pursuer in the fee either of a fiduciary or other character; the fee is conferred on the Kingswells trustees.

In my view, therefore, the right course now to adopt would be to adhere to the interlocutor of the Lord Ordinary, and therefore to dismiss the action as irrelevant. I cannot concur in making any order on the testamentary trustees to open the sealed envelope as matters now stand; and it is unnecessary to pronounce any such order if my view of the pursuer's summons is correct. No opinion has been expressed to a different effect. On the contrary, as I have understood the opinions of my brethren who have spoken before me, they agree with me that the pursuer cannot succeed in getting decree under any of his conclusions. If the pursuer's action is dismissed, matters will be precisely the same as if it never had been raised or were now abandoned. And it is worth noting that if the pursuer had not raised this action the trustees were apparently contented to wait for the opening of the sealed packet until the time arrived at which, according to the testator's wish, that should be done. Such an attitude on the part of the Kingswells trustees has, if I may say so, my entire approval. If they think proper now to raise any proceedings in order to ascertain what the purposes of the trust are, and for access to the sealed envelope in order thereto, I shall consider the application when it is made. But under this action they can get no valid decree or order whatever. They are not *in petitorio*. The most they can get is absolvitor.

The LORD JUSTICE-CLERK was absent.

The Court pronounced the following interlocutor:—

"Affirm the finding in the interlocutor reclaimed against: Further, on the motion of the defenders first called in the summons, being the disponees in fee of the lands and estate of Kingswells, and with the view of ascertaining whether the sealed envelope, with an endorsation written thereon, referred to in the first conclusion of the summons, contains any writing under the hand of the deceased Francis Edmond specifying the uses, ends, and purposes of the trust created by the disposition of the deceased Francis Edmond dated 30th May 1888, and if so, the terms thereof, Order and appoint the defenders second called in the summons, being the trustees under the trust-disposition and settlement of the said deceased Francis Edmond dated 25th November 1890, and codicils thereto, to deliver to the Clerk of Court the said sealed envelope, and direct the Court to open the same in presence of the agents of the parties, or such of them as may choose to attend, and to inform them of the terms of any writing therein in so far as relating to the specification by the said deceased of such uses, ends, and purposes as aforesaid: Continue the cause that this may be done, and direct that it shall thereafter be put to the roll for further procedure."

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