sequence of such feudalisation as has taken place in Orkney. I think that the tenure may be adopted without the adoption of an incident of Scots feudal law not essential to the tenure and peculiar to the particular feudal system of Scotland. It must, I think, be admitted that the feudal system was first adopted in Scotland, and that the particular law of salmon-fishings was afterwards engrafted on it, and necessarily so, for it is peculiar to Scotland. I do not find it difficult in the circumstances to reach the conclusion that the Scots feudal system has been adopted *sparsim* in Orkney, in matter of tenure, or as a means of conveyancing, but that the peculiar Scots law of salmon-fishings has not been thereby made applicable to those parts of Orkney only which have been feudalised.

"If in Scotland it required feudal custom to render that *regale*, and to appropriate it to the Sovereign, which is naturally a part and pertinent of land, and as such would naturally go to the vassal by his charter—Erskine, ii, 6, 13 and 15—where there is no such feudal custom such natural part and pertinent must, I think, remain a part and pertinent, as apparently it does in other countries than Scotland.

"I do not ignore the fact that in some grants the Crown has expressly included fishings. But I cannot in this, which was doubtless the act of the Scottish conveyancer, find proof that the feudal customs of Orkney had raised these fishings into a separate tenement and *jus regale*, or that, had these words not occurred in the charters, the Crown could have prevented, by process of law, its vassals taking salmon within the bounds of their lands.

"It is, I think, sufficient proof that no such custom has arisen, even in those parts of Orkney where title has been feudalised, that no instance has been given by the Crown, where during the four centuries and a half that Orkney has been under its sway the Crown has vindicated its alleged right. The Crown does not maintain that it has fished or let fishings, or has interfered to prevent those not deriving right from it from fishing. It is in vain, therefore, I think, to contend that the feudal custom of Scotland has become that of Orkney.

"In fact one, and probably the most potent, reason for the growth of the custom in Scotland, viz., the value of the fishings, has not existed in Orkney. The fishings have been of little or no value hitherto, and the present is the first known assertion of the alleged right on the part of the Crown.

"I have abstained from referring to the defender's titles, though they illustrate the situation, as to do so is unnecessary for my judgment.

"I shall sustain the second and fourth pleas for the defender, and assoilzie him from the conclusion of the summons, with expenses."

Counsel for the Pursuer — Solicitor-General (Ure, K.C.) — Pitman. Agent—Thomas Carmichael, S.S.C.

Counsel for the Defender—Johnston, K.C. —Macphail. Agents—Hamilton, Kinnear, & Beatson, W.S.

Saturday, January 18.

FIRST DIVISION.

(Before Seven Judges.)

[Bill Chamber.

EARL OF MANSFIELD, PETITIONER.

Entail—Trust—Disentail—Date of Entail —Entail Amendment Act 1848 (11 *and* 12 *Vict. cap.* 36), *secs.* 2, 27, *and* 28—*Entail Executed Long Subsequent to Truster's Death in Implement of Trust, never Constituted, to Buy and Settle Lands in England or in Scotland.*

By codicil to his testament, a testator, who died in February 1840, bequeathed a certain sum to named individuals as trustees for the purpose of buying lands and hereditaments in England or Scotland, and settling them on a series of heirs. The trust was never constituted, but in 1866 the general representative of the testator, on the narrative of the trust, that he had received more than the sum bequeathed thereto, and that he had purchased a certain estate in Scotland in 1846 for a sum also considerably greater, executed a disposition and deed of entail of that estate in favour of the series of heirs. In 1907 the heir of entail in possession, born in 1864, presented a petition to disentail, in which he claimed to be entitled to do so without consent of the next heir.

Held (in a Court of Seven Judges, *diss.* Lords M'Laren and Pearson) (1) that the entail was an entail in execution of the trust; (2) *distinguishing Lord Advocate* v. *Stewart*, May 15, 1902, 4 F. 11, 39 S.L.R. 617, that Scottish estate having been settled in implement of the trust, section 28 of the Entail Amendment Act 1848 fell to be applied; (3) *following Black* v. *Auld*, November 4, 1873, 1 R. 133, 11 S.L.R. 48, that the date of the entail in virtue of that section was February 1840; (4) that no distinction could be drawn between so much of the estate as might be held to represent the sum bequeathed and so much as might be held to represent an excess thereover; and consequently (5) that the petitioner was entitled to disentail the whole estate without the next heir's consent.

The Entail Amendment Act 1848 (11 and 12 Vict. cap. 36), enacts—Section 2—"Where any estate in Scotland is held by virtue of any tailzie dated prior to the said first day of August One thousand eight hundred and forty-eight, it shall be lawful for any heir of entail born on or after the said first day of August, being of full age and in possession of such entailed estate by virtue of such tailzie, to acquire such estate in whole or in part in fee-simple, by applying to the Court of Session for authority to execute, and executing, and recording in the register of tailzies, under the authority of the Court, an instrument of disentail in the form and manner hereinafter provided. . . ."

Section 27—"Where any money or other property, real or personal, has been or shall

be invested in trust for the purpose of purchasing land to be entailed, or where any land is or shall be directed to be entailed, but the direction has not been carried into effect, it shall be lawful for the party who, if the land had been entailed in terms of the trust, would be the heir in possession of the entailed land, and who in that case might by virtue of this Act have acquired to himself such land in fee-simple by executing and recording an instrument of disentail as aforesaid, to make summary application to the Court, as hereinafter provided, for warrant and authority for the payment to him of such money, or for the conveyance to him of such land in fee-simple; and the Court shall, upon such application, and with such consents, if any, as would have been required to the acquisition of such land in fee simple, have power to grant such warrant and authority."

Section 28—"For the purposes of this Act, the date at which the Act of Parliament, deed, or writing placing such money or other property under trust, or directing such land to be entailed, first came into operation, shall be held to be the date at which the land should have been entailed in terms of the trust, and shall also be held to be the date of any entail to be made hereafter in execution of the trust, whatever be the actual date of such entail."

On February 27, 1907, the Right Hon. Alan David, Earl of Mansfield, heir of entail in possession of the entailed estate of Logiealmond in the county of Perth, presented a petition for authority to disentail that estate.

On 16th March the Junior Lord Ordinary (GUTHRIE) appointed J. C. Fenton, advocate, *tutor ad litem* to Lord Scone, the only son of the petitioner and heir-apparent to the estate, who was a pupil, and remitted the petition to Alexander Wallace, W.S,, to inquire and to report.

In his report, dated June 25, 1907, Wallace stated—"It humbly appears to the reporter that in point of form the petition is properly framed and sets forth everything that is necessary in the circumstances. . . .

"It humbly appears, however, to the reporter that the granting of the prayer of the petition by your Lordship depends upon whether the petitioner is right in saying that for the purposes of the petition the date of the entail is 18th February 1840. If he is right, then the petitioner, having been born after the date of it, is entitled to disentail without any consent. But if the entail falls wholly or partly to be dealt with according to its actual date, namely 2nd February 1866, then, as the petitioner was born in 1864, he cannot disentail (wholly or in part as the case may be) without the consent of the nearest heir, and as the nearest heir is a pupil such consent can only be given by his *tutor ad litem* after the value of his interest has been fixed and provided for. When an entail is granted in terms of a trust there seems no doubt that, for the purposes of an application like the present, the date of the entail is the date when the trust comes into operation—this apparently being quite clear from the Act 11 and 12 Victoria, cap. 36, section 28, and the decision in *Black* v. *Auld*, 1 R. 133. But the circumstances of the present case are somewhat peculiar, and the reporter thinks it his duty to direct your Lordship's attention to them.

"By a codicil to the last will and testament of the Right Honourable William Earl of Mansfield, bearing date 11th June 1838, the testator gave and bequeathed to Sir George Clerk, Baronet, William John Law, and Cuthbert Ellison, the sum of £150,000 in trust, that they or the survivors or survivor of them, or the executors or administrators of such survivor, should, as soon as a proper and convenient purchase or purchases could be found, lay out and invest the money in the purchase of hereditaments in England or Scotland, of a clear and indefeasible estate or inheritance in fee-simple, either freehold or copyhold or both, and settle and assure the same or cause the same to be conveyed, settled and assured so and in such manner as that the same might go along with and be holden and enjoyed by such person or persons as for the time being should, as heirs-male of his body, be entitled to the peerage, honour, and title of Earl of Mansfield, in the county of Middlesex, which he then had, and was entitled to so far, and to be unalienable and inseparable therefrom so far as the rules of law or equity would permit. . . . The codicil further provided that Sir George Clerk, William John Law, and Cuthbert Ellison, or the survivors or survivor of them, or the executors or administrators of such survivor, should invest the money or such part as should remain in their hands, and declared that any profits arising from such investments should be added to the capital sum directed to be entailed, and that the dividends, interest, and annual proceeds arising or accruing should be paid to the person or persons as would be entitled for the time being to the rents, issues, and profits of the lands, tenements, and hereditaments so to be purchased, in case the same had been purchased and settled as aforesaid. It also contained various other clauses not material to the present question. . . .

"The disposition and deed of entail of the estate of Logiealmond is dated 2nd February 1866, and was registered in the Register of Entails on the 16th day of May 1893. It is granted by William David Earl of Mansfield, son of the said William Earl of Mansfield. It proceeds on the consideration that the said William Earl of Mansfield by his last will and testament, dated 11th June 1838, nominated, constituted, and appointed the said William David Earl of Mansfield his sole executor, and on consideration of the foregoing first mentioned codicil, which is fully narrated. It then proceeds, 'Considering further that the said William Earl of Mansfield, my father, having died on or about the eighteenth day of February Eighteen hundred and forty, and his said last will and testament having been duly proved in the Prerogative Court

of Canterbury on the twenty-eighth day of March thereafter, I, as sole executor thereby appointed, proceeded to realise the personal estate of my said deceased father, and in that character acquired and became possessed of funds to an amount exceeding the said sum of one hundred and fifty thousand pounds given and bequeathed by the before recited codicil to the said Sir George Clerk, William John Law, and Cuthbert Ellison, as trustees for the purchase and settlement of lands and heritages as therein directed, and whereas the said trustees did never accept or act in the execution of the said trust, and I did not pay over to them the said sum of One hundred and fifty thousand pounds, but have retained that sum and have been in the enjoyment of the interests and annual proceeds thereof since the time when the same came into my hands, and I am still a debtor to the said trustees therefor; and whereas at the term of Martinmas Eighteen hundred and forty-six I purchased and acquired in fee-simple the lands, baronies, and others hereinafter described and disponed, commonly called the lands and barony of Logiealmond and others, at the price of Two hundred and three thousand pounds, ... and that I have been in possession of the said lands, baronies, and others since the said term of Martinmas Eighteen hundred and forty-six, but no conveyance thereof in favour of the said trustees, nor deed of settlement or entail in terms of the said codicil, has yet been executed by me, and now seeing that I am willing and desirous to carry the trust committed to the said Sir George Clerk, William John Law, and Cuthbert Ellison, trustees foresaid by the codicil before narrated, into execution, in so far as the same relates to the application of the said sum of One hundred and fifty thousand pounds in the purchase of lands and heritages to be settled and entailed as aforesaid, by conveying and settling or entailing the said lands, baronies, and others, in manner herein underwritten; and whereas the said Cuthbert Ellison, one of the trustees named in the before-recited codicil, died on the day of , and the said Sir George Clerk and William John Law, being now the only surviving trustees, have declined to accept of or act in the said trust, and have devolved the whole purposes of the said trust and of the execution of the same, and of the whole powers and instructions specified and contained in the said codicil, upon me, conform to their declinature and devolution of trust dated the thirtieth day of July and third day of August, both in the year Eighteen hundred and sixty-three; therefore, in implement of the trust created by the said codicil, I have assigned, disponed, and conveyed, as I by these presents assign, dispone, and convey.'

"It thus appears that on the death of William Earl of Mansfield, his son William David Earl of Mansfield, as his executor, entered upon and realised his estate; and that, had the terms of the codicil of 11th June 1838 been then carried out, he would, as executor, have paid to Sir George Clerk, William John Law, and Cuthbert Ellison, the sum of £150,000, with which to purchase lands to be entailed. That he received, as executor of his father, more than the said sum. That in 1846 he purchased, at the price of £203,000, the property of Logiealmond. That in 1866, nothing having been done to implement the codicil, and one of the trustees appointed by the codicil having died, the other two trustees refused to accept the trust and devolved the purposes of it upon William David Earl of Mansfield, who, 'in implement of the trust created by the said codicil,' executed an entail of the property which, in 1846, had cost £203,000. The cost of the estate was thus £53,000 more than the sum directed to be dealt with, making it doubtful if the entail was granted wholly in execution of the trust. The deed of entail was granted by William David Earl of Mansfield as an individual, so that there is no intervention of any trustee who in an independent capacity might have acquired the estate from him for £150,000 (even if that were less than its true value) and thereafter entailed it in terms of the trust created by the codicil. It may be, therefore, that the entail as a whole, or so far as the value of the estate was in excess of £150,000 at the date when the entail was granted, must not be looked upon as dating for the purposes of the present petition from 11th April 1840, when the codicil came into operation, but as dating for all purposes from 2nd February 1866, when it was executed."

The Lord Ordinary having verbally reported the cause, the First Division, after hearing counsel for the petitioner and the *tutor ad litem*, on 18th July, appointed it to be argued before the Division with Three Judges of the Second Division.

Argued for the petitioner—When landed estate in Scotland was settled by deed of entail in execution of a trust, the date of the entail was the date when the trust became operative—in this case 1840—Entail Amendment Act 1848, sec. 28. If it were not so, the whole policy of that Act, which struck at entails made after its passing, and at all evasions of its terms by trusts, would be nullified. Section 28 was not inoperative because there was an alternative given to the trustees to invest in English land, for the entail was actually made of Scots lands—*Black* v. *Auld*, November 4, 1873, 1 R. 133, 11 S.L.R. 48. Were that not so, to defeat the policy of the statute it would only be necessary to insert an option in the direction to the trustees, to buy lands in Scotland *or elsewhere*. *Lord Advocate* v. *Stewart*, May 15, 1902, 4 F. 11, 39 S.L.R. 617, did not apply to the present case, where an election had been made and money had been invested in Scots and which had been entailed on a series of heirs. Nor, for the same reason, was there any question as to the trust in this case answering the requirements of a trust within the terms of section 27, to which section 28 was said to refer back. Here the entail had been made in pursuance of a

direction to trustees, although they had an option, and under section 28 its date was that of the deed containing that direction. The deed of entail of 1866 was in fact an execution of the trust direction. Though it might be informal as a deed of devolution, the beneficiaries could condone such informality. The lands entailed had no doubt been bought in 1846 for £203,000, but there was nothing to show what was their true value at that date or at the date of entailing, or that the entailer had anything further in view than simply to execute the direction in his father's trust. The prayer of the petition should be granted.

Argued for the respondent (Lord Scone's *tutor ad litem*)—The option to purchase English lands prevented the application of section 28, which was peculiar to Scotland. Unless the money in question was indefeasibly dedicated to the purpose of Scots lands, the Scots entail statute did not apply—*Lord Advocate* v. *Stewart* (*cit. supra*), Lord Robertson at p. 18, and Lord Lindley at p. 19, where a distinction was drawn between money which was actually subject to the jurisdiction of the Scots Courts and money which merely might become so. In *Black* v. *Auld* (*cit. supra*) the fact that such an option existed had been overlooked, so that decision did not apply to the present case. Section 28 merely referred back to section 27, and allowed entails to be reckoned as of an artificial date when of a particular class, namely, such as were described in section 27; but here the case was different, as in consequence of the option the money for the purchase of entailed lands had never become subject to the Scots entail statutes. Moreover, section 27 could not have contemplated such a trust as this, as there was no one *in titulo* to acquire under it. The date of this entail must, therefore, be held to be the date of the deed of entail, viz., 1866. Further, the entail here was not truly in execution of the trust; the trustees never applied themselves to elect between Scots and English lands. The entailer was a mere debtor in a money obligation, who constituted himself a trustee, and contrary to the trust direction he made himself institute in the entail instead of liferenter. This was in no sense an execution of a trust, so section 28 did not apply. Further, it was impossible to say accurately what sum had been invested in entailed lands on the mere narrative that the lands entailed had cost the entailer £203,000 in 1846. The excess of that sum over £150,000, in any case, had only been entailed in 1866, but for the whole estate the date of the entail should be held to be the date of the deed of entail. On the point as to the entailer having made himself institute instead of liferenter as directed by the codicil, *Studd* v. *Cook*, May 8, 1883, 10 R. (H.L.) 53, 20 S.L.R. 566, was referred to.

At advising—

LORD PRESIDENT—William, third Earl of Mansfield, died in 1840. Part of his testamentary writings consisted of a codicil by which he left the sum of £150,000 to trustees whom he named. The trust purpose was to buy land in England or in Scotland, and settle it as therein prescribed upon a series of persons who may be described as in the first instance the persons entitled in their order to succeed to the Earldom of Mansfield. The phraseology used is technical and appropriate to English conveyancing; but it may be taken in accordance with the decision of the House of Lords in *Studd's* case, 10 R. (H.L.) 53, that had the trustees bought land in Scotland they would have appropriately complied with the direction by executing a Scotch deed of strict entail.

William, third Earl, was succeeded in the title by his son William David, fourth earl, who was also his general representative. The general succession greatly exceeded £150,000. The trustees named in the codicil did not accept office, and nothing was done. So matters stood till 1866. In that year the fourth Earl of Mansfield executed a deed of entail of the estate of Logiealmond, which he at that time held in fee-simple, having purchased it for a sum exceeding £150,000. The narrative of that deed was as follows—[. . . *His Lordship read the narrative, quoted supra, in excerpt from reporter's report.* . .]

By this time the state of the family was that the fourth earl had an only son, Lord Stormont, who had three sons, of whom the third, born in 1864, is the present and sixth earl. As such he has succeeded under the destination in the said entail, and he presents this petition to disentail the said estate. His only son, Lord Scone, born in 1900, is a pupil, and is represented in this petition by his *curator ad litem*. The son is heir-apparent under the entail. The point, therefore, to be decided is what is the date of entail. If the date is the date of the execution in 1866, then, as the petitioner was born before that date, he can only disentail by having his son's consent valued and dispensed with; but if the date of the entail is the date when the trust-deed first came into operation—viz., 1840—then the petitioner, being born after that date, can disentail without consents.

The petitioner relies on the 28th section of the Rutherfurd Act, which is as follows: . . . [*Quotes supra*] . . . The expression "such money . , . such land" refers us back to the 27th section, the opening words of which are—"Where any money . . . has been or shall be invested in trust for the purpose of purchasing land to be entailed, or where any land is or shall be directed to be entailed, but the direction has not been carried into effect," &c.

The first answer that is made to the petition is that in this case the entail was not made in execution of any trust. I do not think this view is correct. It is true that the actual trustees did not accept and proceed to entail. But what was the position in 1866? The fourth Earl was still debtor in the sum of £150,000. It seems to me that at any time from 1840 till the expiry of the period of the long prescription the machinery of the trust could have

been reconstituted, the fourth Earl (or his representatives if he had died) been made to pay the £150,000, and the lands been bought and the deed executed. If then the fourth Earl, knowing all this, chose, as he did, to execute the entail himself, he being proprietor of the land to be entailed, and the value being admittedly over £150,000, I do not think that the transaction altered its quality because of that fact. Suppose the trustees had accepted, been paid the £150,000, and bought land off a third party, it would have been a perfectly competent form of conveyancing to execute the entail in the form of a disposition and deed of entail by that third party, leaving out altogether any conveyance to the trustees. That being so, can it be said to alter the matter because Lord Mansfield, the debtor in the £150,000, does the whole thing himself without going through the form of going to the Court to appoint trustees, who would then merely ask him to execute precisely the deed which he did execute. And further, that Lord Mansfield thought that the entail was being made in execution of the trust is clearly shown by the narrative of the deed itself. Another test is this, if the entail is not in execution of the trust-deed, then up till 1880 the trust-deed could still have been made available. Suppose the trustees, if alive, had tardily accepted, or if new trustees had been appointed by the Court, could they after 1866 have sued Lord Mansfield for £150,000? Surely the execution of the entail inevitably would have furnished a sufficient defence.

The second argument for the respondents raises a more general point. They call attention to the fact that the expression "the trust" in section 28 refers you back to section 27, and they say that "in trust for the purpose of purchasing land to be entailed" must necessarily mean Scotch land, for that alone can be "entailed," and that, inasmuch as this trust permitted of the purchase of English land, it cannot be a trust of the kind contemplated, and they rely on the case of the *Lord Advocate* v. *Stewart*, 4 F. (H.L.) 11.

So far as decision goes this case seems ruled in terms by the case of *Black* v. *Auld*, 1 R. 133. A reference to the report will show that in the trust-deed in that case there was an option to buy either English or Scottish land. But we must face the fact that, first, this point does not seem to have been argued, and second, the judgment of the House of Lords in the *Lord Advocate* v. *Stewart* had not yet been pronounced. I am, however, of opinion that *Black* v. *Auld* was rightly decided, and that the principles there laid down rule this case.

The question in the *Lord Advocate* v. *Stewart* was whether money held in trust did or did not answer the description of "entailed land" in the Finance Act, and was or was not liable to settlement duty. Now, inasmuch as money is not land, it could only become "entailed land" by force of statutory definition. The House of Lords held that whether money destined by trust-purpose for the purchase of land to be entailed was entailed land or not—as to which there was a difference of opinion between the Judges of the Court of Session and certain of the noble and learned Lords—that could never be predicated of money, which under the terms of the trust might never purchase lands which could be entailed, but which might purchase lands in a country other than Scotland to be settled by other forms, not those of Scotch entail, and in accordance with the clause of limitation of all taxing statutes, unless the property was specified as falling under the tax it must go free.

But the question here is, What is the date of the entail for all the various requirements of the Entail Statutes? and I think that section 28 takes entails as it finds them and fixes an artificial date. And where I think *Black's* case, 1 R. at p. 146, comes as an authority is not because it also affords an example of a trust deed where land other than Scotch might have been bought (for as I said that point was not argued) but because it fixes a date, the entail once having been made, in a case where antecedently it might have been truly said that there was no certainty that the entail ever would be made. In *Black's* case the entail was not to be made until Captain Black reached at least the age of twenty-five. It was to be made before he was thirty. Antecedently, therefore, it was not certain till Captain Black became twenty-five that the entail ever would be made. Nevertheless, the time having come when it ought to have been made, *i.e.*, Captain Black having passed the age of thirty, it was held that the date was the date of the trust deed and not the date when Captain Black became either twenty-five or thirty. I refer especially to the remarks of Lord President Inglis, which are too long to quote in full, but which show clearly that the whole difficulties of the situation were present to his mind. I quote, however, his conclusion:—"I am of opinion that this trust deed came into operation for the purposes of this Act—that is to say, with a view to the disentailing clauses of this Act—at the date at which the deed placing the money under trust came into operation as a deed for placing money under trust for the ultimate purpose of buying land to be entailed, and that is of course the death of the testator; because the deed is a *mortis causa* deed and did not come into operation during the truster's lifetime but came into operation the moment the breath was out of his body. The words in the section which probably create the greatest difficulty are those which enact that that date shall be held to be the date at which the lands should have been entailed in terms of the trust deed; and it does seem a little startling at first sight that when, according to the directions of the truster, it is not possible that lands should have been entailed in terms of the trust for a long period after the trust deed came into operation as a trust deed, yet still that the date of the trust deed is to be held to be the date at which the lands ought to

have been entailed. It seems as if in a case like this it was a provision of the statute that the direct contrary of what the truster provided shall be carried into effect. But that is really not so, because it is a mere artificial date that is here created, and created for a special purpose, for the purpose of securing the full and effectual operation of the disentailing clauses of the statute. And it was a provision of a very necessary kind, because if this clause were to be read otherwise, a man might succeed, by means of trust directions, in keeping up the money or the land for so long a period before it was actually entailed that there should be parties in the enjoyment of the money or the land substantially under all the restrictions and fetters of an entail although the entail has not been executed down to a very late period, it may be for two or three generations. The consequence of that in regard to such a trust deed would be to defeat the leading object of the statute, and to enable a truster to bind a succession of persons not born at the date of his trust deed. Now that, I think, is a conclusive argument against the construction of the 28th section contended for by the respondents, and upon that ground I am for adhering to the Lord Ordinary's interlocutor."

Upon that I make two remarks. First, that in one sense *Black's* case was *a fortiori* so far as difficulty was concerned, because while there was impossibility during the period up to the vesting of the entail to be executed, here there is only uncertainty; and second, that so far as defeating the statute is in his mind, it would indeed be an easy way to defeat it by inserting a power in a trust deed to make it optional to buy foreign land. Put in its simplest form my opinion comes to this, that section 28 applies to all entails as it finds them, and that if an entail has been *de facto* made in virtue of the directions of a trust, then section 28 settles the date as the date of the trust first coming into operation, even although there may have been contingencies which, if they had operated, would have prevented an entail ever being executed at all.

Last of all, the respondents argue that in so far as the estate of Logiealmond exceeds £150,000 in value it must be held to be entailed for the first time in 1866. I do not think we can inquire into that matter. It seems to me that by the narrative of the deed the fourth Earl was content, so to speak, to give up Logiealmond as in exchange for the discharge of his debt of £150,000, and that we cannot go into the question of the exact value as at that date.

I am therefore for granting the prayer of the petition.

LORD M'LAREN—I am afraid I am unable to concur with the majority of the Court in this case. The case has been reported by the Lord Ordinary to this Division of the Court on the question whether the petitioner, the Earl of Mansfield, is entitled to disentail the estate of Logiealmond without consents, or whether he is in the position of being unable to disentail without the consent of the nearest heir, in which case, as the nearest heir is a pupil, the required consent can only be given by his *tutor ad litem* after the value of his interest has been fixed and provided for. This question again depends on the date, actual or constructive, of the entail under which the lands are held. The estate is held under a disposition and deed of entail made by William David, fourth Earl of Mansfield, bearing date 2nd February 1866, and registered in the Register of Entails 16th May 1893. If the date of the deed of entail (1866) is to be taken as the true or legal date of the entail, then the petitioner, who was born on 25th October 1864, is not in a position to disentail without consent. But the theory of the petition is that the deed of entail was executed in fulfilment of a trust constituted by the testamentary writings of William, third Earl, who died in the year 1840, which we are asked to hold to be the date of the entail. If it is so determined, Lord Mansfield would be entitled to disentail the estate without his son's consent, because on that assumption he was born after the date of the settlement.

The question arises in this way. By a codicil to the last will of the third Earl the testator gave and bequeathed to three trustees (who did not accept the trust) the sum of £150,000, in trust, to lay out and invest this sum of money in the purchase of lands and estate in England or Scotland, and to cause the same to be settled and assured so as to be holden and enjoyed by such person or persons as, for the time being, should be entitled to the peerage honour and title of Earl of Mansfield. The codicil prescribed certain further limitations which it is not necessary to repeat, and it directed that the annual proceeds of the invested money should be paid to the persons who would be entitled to the rents of the lands to be purchased, in case the same had been purchased and settled as aforesaid.

The testator made another codicil, dated 11th June 1838, but I understand that in the events which have happened this codicil does not bear upon the question under consideration.

It appears from the narrative clause of the deed of entail of 1866 that the granter, the fourth Earl, was his father's sole executor, and that in that character he had acquired and become possessed of funds to an amount exceeding the prescribed sum of £150,000; that, as the entailer narrates, "the trustees did never accept or act in the execution of the said trust, and I did not pay over to them the said sum of £150,000, but have retained that sum and have been in the enjoyment of the interests and annual proceeds thereof since the time when the same came into my hands, and I am still a debtor to the said trustees therefor." It is then narrated that in 1846 Lord Mansfield had purchased Logiealmond at the price of £203,000, and that he was

desirous to carry the trust into execution by conveying and settling or entailing this estate in manner underwritten. He accordingly assigned and disponed Logiealmond in terms of his father's trust destination, and under the fetters of a strict entail.

The determination of the date of the entail for the purposes of the Entail Amendment Act (11 and 12 Vict. cap. 36) depends on section 28, but the 27th section has also to be considered. The effective date, according to the 28th section, is "the date at which the Act of Parliament, deed, or writing, placing such money or other property under trust or directing such land to be entailed, first came into operation." The part of section 27 which bears on the construction is the introductory expression "where any money or other property real or personal, has been or shall be *invested in trust* for the purpose of purchasing land to be entailed"; in the case there defined the party who would be the heir in possession of the lands may get payment of the money in question under the same conditions as would apply to the acquisition of lands in fee-simple.

As affecting the legal date of the entail under consideration, three questions arise: (1) Considering that under the codicil which directed the settlement of landed estate the trustees had an option to purchase lands either in England or in Scotland, can it be held that a trust for the execution of a Scottish entail came into operation until an election was made as between English and Scottish estate? (2) Can it be held that there was in any true sense an investment in trust for the purposes of the codicil until the estate of Logiealmond was settled by a deed of entail? (3) If these questions are answered in favour of the petitioner, is not 1866 the true as well as the actual date of the settlement as regards the excess of the value of the lands over £150,000?

On the first question my opinion is that it ought to be answered in the negative. The hypothesis of the 28th section is that there is a deed or writing placing money under trust, and by referring back to the 27th section we see that the trust in contemplation is a trust "for the purpose of purchasing land to be entailed." No other species of trust are contemplated except a trust of purchase money, or a trust of lands to be entailed. I think it is also clear that the entail considered in section 28 is an entail of Scottish estate, because the provisions of the statute have exclusive reference to Scotland. On this hypothesis the 28th section provides that the date when the deed or writing "first came into operation" shall be held to be the date of any entail to be made thereafter in execution of the trust. Now, to put the case most favourably for the argument of the petitioner, let it be supposed that Lord Mansfield's trustees had accepted the trust, that the money had been paid over to them, and that in the year 1866 the entail of Logiealmond was executed by the trustees. At any time before 1866 it would have been open to the trustees to purchase and settle a landed estate in England, and I do not see how in the case supposed the codicil could be said to have come into operation as a trust for the purchase and entailing of lands in Scotland until the trustees had made their election. At most it was only a power or an alternative direction. But then the alternative direction only comes into operation as a Scottish trust when the trustees have elected between the two members of the alternative. This brings the case within the principle of the case of *Lord Advocate* v. *Stewart* (*Sprot's Trustee*), where it was held by the House of Lords that an alternative direction of this nature did not bring the money into the category of "entailed estate" (1902, App. Cas. p. 344). The fact that the second alternative is the purchase and settlement of lands in England does not seem to be very material to the question. The case would be just the same if the alternative had been to establish a picture gallery or to make provisions for the family of the heir. Again, I think that it makes no difference in this question that the money was never paid to trustees. The fourth Lord Mansfield took it upon himself to administer the trust, and his administration has been accepted. But if it is granted that he was a virtual trustee, then he had an election as between English and Scottish estate; and if he was not a trustee, then the entail is his own act, and the date of the deed is the date of the entail.

It is necessary, however, to attend to the principle of the decision in *Black* v. *Auld*, 1 R. 133, because there the testator had directed an entail which could not come into operation so as to confer a benefit on anyone until the institute of entail (the testator's second son) had attained the age of twenty-five, and yet it was held that the date of the testator's death was the date when the trust first came into operation. This is a decision of a Court of Seven Judges, and the leading opinion, that of Lord President Inglis, proceeds largely on the policy of the Entail Amendment Act, and the obvious motive of the 27th and subsequent sections, which was to prevent evasion of the enactments restricting the duration of entails by the instrumentality of trusts, liferents in succession, or other limitations in perpetuity. But then I think the determining element in *Black* v. *Auld* was this, that by the death of the testator it was irrevocably fixed that there should be an entail, if there were heirs to take, though the benefit to be taken by the institute was postponed. As it happened, the institute was the only person in existence taking benefit under the trust, and he was thus enabled successfully to claim the fund, but that circumstance was not allowed to affect the construction of the Act of Parliament, and the entail was held to have come into operation when according to the conception of the will there was an unqualified, though postponed, trust purpose for constituting an entail. In the present case there was not an unqualified purpose or direction for the entailing of land in Scotland; and

while it is easily seen that by means of alternative directions the duration of a proposed entail may be prolonged to an extent somewhat exceeding the contemplation of the Entail Amendment Act, yet, if this result follows, it is only because the Act of Parliament has not explicitly dealt with this particular mode of prolongation. The statutory provisions are altogether within the domain of positive law, and I do not think we can be guided by analogy, or can hold that a Scottish trust had come into operation at a time when, consistently with the testator's wishes, his money might have been diverted into a different channel of investment.

"If my opinion is well founded, the date of the entail is 1866, and the petitioner will be under the necessity of purchasing the consent of his pupil son. But it is proper that I should also answer the other questions that arise. On the second of these questions, and reading the 27th and 28th sections together, I think the 28th section presupposes that there is "money invested in trust for the purpose of purchasing land to be entailed." The words I am quoting are in the 27th section, but I think that on sound construction they must be read into the 28th, because the 28th section is to some extent of the nature of a proviso to the 27th, and does not profess to repeat in words at length all the conditions of the cases with which it deals. Now, in the present case there never was any specific investment of money for the purpose of providing an entailed estate in favour of the Earls of Mansfield in their order. On the declinature of the appointed trustees it would have been open to any of the prospective heirs of entail to have the trust constituted by the appointment of new trustees or a judicial factor. Or again, the fourth Lord Mansfield might have voluntarily put the sum of £150,000 beyond his control so as to impress it with a trust for the purposes of the codicil. But neither of these things was done, and until the year 1866 the money, or its equivalent in land, remained subject to the order and disposition of Lord Mansfield. I consider, therefore, that there was no effective trust in the sense of the statute during the period antecedent to 1866.

On the third of the questions I have stated, I think it is perfectly clear that in so far as the value of the estate of Logiealmond exceeded the sum of £150,000 plus any profits derived from investments of that sum before the purchase, the surplus value of the entailed estate must be taken to be properly settled by the fourth Lord Mansfield. To the extent of such surplus value the entail is not an instrument in execution of any antecedent trust, and in any view of the case this value would not be acquired in fee-simple by the present Earl except on the basis of the consent of the next heir.

LORD KINNEAR—I agree with the Lord President. The question really is whether the petitioner holds the estate of Logiealmond under an entail executed in terms of a trust for the purchase of land to be entailed. If he does, then upon the plain terms of the 27th and 28th sections taken together, the date of the entail under which he holds must be the date of the deed which put the money in trust. It is beyond all question that the third Earl by his will, which came into force in 1840, did put a sum of £150,000 in trust in order that it might be applied either in the purchase of land in Scotland to be entailed according to the law of Scotland, or else in the purchase of land in England to be entailed on the same series of people according to the law of that country; and it is beyond question that the deed upon which the present Earl holds purports in terms to be executed by the fourth Earl in performance of the trust created by his father's will. If that is a true recital, then the question is plainly answered in favour of the present Earl.

But then it is said that that is not a correct recital, and that in truth the estate of Logiealmond was not entailed in execution of any trust, but for some other cause, which I understand to be the mere will and pleasure of the fourth Earl to settle his own estate upon a series of heirs of his own selection. There are two points taken by the respondent in support of his contention. In the first place, it is said that the trust undoubtedly created by the third Earl's will never came into operation. The trustees declined to act, nothing was done in execution of the trust, and the fourth Earl, who made the deed of entail, was not acting in the execution of a trust, because although he was the heir and executor of the truster, no trust had been committed to him. It is quite true that the trustees declined to accept, but then it is elementary and fundamental that the failure of trustees to accept does not affect the beneficial interest of the objects of the testator's bounty. There can be no question that the failure of the trustees to take up the trust did not relieve the sole executor and heir of the truster of the obligation to account for the £150,000 to be applied in terms of the trust. If any application had been made to this Court to supply the defect of administration arising from the failure of the trustees, there would have been no difficulty in giving effect to it; and if any person entitled to benefit under the entail directed by the third Earl had brought an action to compel the fourth Earl to account for the £150,000, and put it into the hands of a judicial factor or trustees appointed by the Court, there could have been no good answer to such an action. Therefore I think that the fourth Earl was stating his own position perfectly correctly when he said—"I have obtained this money, and being in possession of the money my father destined for the purchase of entailed estate, am bound to carry out the purpose defined in his will"; and if he had thereupon said—"I therefore put the £150,000 into a trust, or into the hands of a judicial factor, in order to carry out the directions of the truster," there could have been no further question. It makes no difference that instead of paying the money to purchase land he gave the land he had already purchased, to be

entailed in accordance with the directions of the trust deed. It was given as an estate of the full value of £150,000, and I think it must be held that it was a perfectly sufficient surrogatum for the money. Nobody has taken any objection to the method of satisfying the fourth Earl's obligation by the transfer of land instead of the payment of money, and I think if any objection were taken it would be too late to raise it now. We must take it as the consequence of the whole treatment of the situation by all the parties interested in it that the estate of Logiealmond is a good and sufficient surrogatum for the £150,000; and I can see no reason for disputing the assertion that it was settled as performance of the obligation to provide that sum of money for the purchase of land to be entailed. Therefore we must take the entail made by the fourth Earl as truly an entail in execution of the trust created by his father.

But then, if that be so, it is said that there is a greater difficulty, because the third Earl never created a trust which answers the description in the 27th section of the Entail Act at all. He did not put money in trust for the sole purpose of buying and entailing land in Scotland, but put it into the hands of trustees, who had a discretion either to buy land in England and settle it according to the law of England, or to buy and entail land in Scotland; and it is said that, during the whole period which might elapse between the date of the trust deed coming into force and the date when the fourth Earl made his entail, there was no Scotch entailed estate which could be brought within the scope of the Entail Act of 1848.

Now I entirely agree that so long as the money remained in the hands of the trustees, to be ultimately appropriated either to the purchase of land in England or to the purchase of land in Scotland, there was no Scotch entailed estate. That is quite clear. Money is not entailed estate, and nothing that was said in the House of Lords in the case of the *Lord Advocate* v. *Stewart*, 4 F. (H.L.), 11, at all suggests anything to the contrary. The Lord Chancellor, I think, puts it quite clearly that nobody can call money entailed estate except by the application of some interpretation clause in the Finance Act which the House of Lords was then considering. But apart from verbal criticism, I think it clear enough, upon the authority of the *Lord Advocate* v. *Stewart*, and for my own part I should say that it was clear upon the plain construction of the statute, even if we had no authority to guide us, that so long as money remains subject to a discretion vested in trustees to buy land in Scotland or to buy land in England, it cannot be treated as if it were already converted into entailed land in Scotland, so as to support a demand for immediate payment under the 27th section of the Entail Act, because such a claim would be completely defeated by a resolution of the trustees to buy land in England. So long, then, as the destination of the money is in suspense, the right given to a future heir of entail by the 27th section cannot be put in force. I think this follows from the judgment of the House of Lords in the *Lord Advocate* v. *Stewart*. But the moment the suspense is determined by the purchase of land and the execution of a deed of entail, it is ascertained at the same time that land has been purchased and entailed in the due performance of a trust. It is nothing to the purpose that an alternative course might have been followed. The trustees have none the less executed a trust by which money was put into their hands for the purchase and entail of land in Scotland. If this be so, the fact that during the interval, while the final destination of the money was uncertain, the person who ultimately became heir of entail could not require immediate payment to himself, does not create the slightest difficulty to my mind in referring the terms of the 28th section to the terms of the 27th section for the mere purpose of ascertaining what is meant by "the deed placing such money under trust." Any difficulty which might have arisen in the construction of the 28th section itself is removed by the decision in *Black* v. *Auld*, 1 R. 133, which I agree with the Lord President is directly in point. It must be kept in view that the artificial date which is created by the 28th section is not the date of the performance of the particular trust. It is the date when the deed itself comes to be operative, and therefore there can be no difficulty in the application of that enactment owing to any lapse of time or any contingency which might postpone the specific performance of the trust to buy and entail land. It is just because such purchase and entail may be indefinitely postponed that the statute creates an artificial date for determining the conditions of disentail. The date to which the statute refers is the date when the deed came into operation, and I apprehend that the deed comes into operation when it is a testamentary deed, on the death of the testator, and that nothing which happens afterwards can alter that condition of things.

I cannot say that I think much difficulty arises from the phrase "the date at which the land should have been entailed in terms of the trust." I do not say that I have no difficulty in fixing the exact meaning of that phrase. But I take it to be clear that it does not refer to any date at which it can be found that the trustees ought in fact, and in the due execution of their duty, to have made a deed of entail, because that time never can by any possibility coincide with the date when the deed creating the trust comes into operation. There must always in the nature of things be an interval of time, less or more, between the coming into force of a trust deed and the time when the trustees proceed to carry out their trust, and it seems to me obvious that the contingency for which the enactment provides is not only an undue delay by trustees to perform their duty, but also any indefinite postponement contemplated by the truster himself. The general meaning of the words seems to be that we are to assume that instead of putting his land

or his money in trust for the purpose of an entail, the truster should have made the entail himself. But any practical difficulty is entirely removed by the subsequent part of the clause, which really does not admit of more than one construction, and it is that the date of the trust deed coming into operation shall be held to be the date of any entail to be made hereafter in execution of the trust, whatever be the actual date of such entail. The true answer to all the criticisms which have been made upon the 28th section seems to me to be that of Lord President Inglis, that the statute for its own purposes has imposed an artificial date upon all entails of a certain class, and it is of no consequence that this artificial date may not square with the facts which have determined the actual date of a particular deed of entail. I therefore agree with your Lordship in the chair that the petition must be granted.

LORD LOW—I concur with your Lordship in the chair and with Lord Kinnear. Your Lordships have so fully expressed my views upon the case that I do not think I could usefully add anything to what has been said.

LORD ARDWALL—I also concur in the opinions expressed by your Lordship and Lord Kinnear.

LORD PRESIDENT—Lord Stormonth Darling concurs in my opinion, and Lord Pearson concurs in the opinion of Lord M'Laren. We will remit to the Lord Ordinary to grant the prayer of the petition.

The Court remitted to the Lord Ordinary to grant the prayer of the petition.

Counsel for the Petitioner—Cullen, K.C. —Chree. Agent—F. J. Martin, W.S.

Counsel for the Respondent (Lord Scone's *tutor ad litem*)—The Dean of Faculty (Campbell, K.C.)—J. R. Christie. Agent—F. J. Martin, W.S.

Saturday, January 18.

FIRST DIVISION.

[Sheriff Court at Kilmarnock.

HARVIE *v.* SMITH.

Bankruptcy—Notour Bankruptcy—Constitution of Notour Bankruptcy—Expired Charge for the Sum of Expenses Contained in a Decree—Small Debts (Scotland) Act 1835 (5 *and* 6 *Will. IV, c.* 70)—*Debtors (Scotland) Act* 1880 (43 *and* 44 *Vict. c.* 34), *sec.* 6.

Decree was pronounced against a tenant for two principal sums of £12 and £35 with £40, 3s. of modified expenses. The landlord having charged for the £40, 3s. on the extract decree, and the charge having expired, petitioned for cessio. The tenant maintained that he was not notour bankrupt inasmuch as the £40, 3s. was not a debt to which the Debtors (Scotland) Act 1880, section 6, applied, imprisonment for it not having been "rendered incompetent" by that Act, but having been incompetent prior to it under the Small Debts (Scotland) Act 1835, sec. 1.

Held that the expired charge was good evidence of notour bankruptcy, in respect that (1) the provisions of section 6 of the Debtors (Scotland) Act 1880 applied to all cases in which by that Act imprisonment had been rendered incompetent, even though at its date imprisonment in such cases was already incompetent; and (2) the sum of £40, 3s., contained in the charge, was outwith the provisions of section 1 of the Small Debts (Scotland) Act 1835.

The Small Debts (Scotland) Act 1835 (5 and 6 Will. IV, c. 70), repealed by the Statute Law Revision Act 1891 (54 and 55 Vict. c. 67), provides, section 1, that it shall not be lawful to imprison any person "on account of any civil debt which shall not exceed the sum of £8, 6s. 8d. exclusive of interest and expenses thereon. . . ."

The Debtors (Scotland) Act 1880 (43 and 44 Vict. c. 34), which abolished imprisonment for debt, except in certain specified cases, enacts (section 6)—"In any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment followed by the expiry of the days of charge without payment, or where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment followed by the lapse of the days intervening prior to execution without payment having been made. Nothing in this section contained shall affect the provisions of section 7 of the Bankruptcy (Scotland) Act 1856."

Marion Harvie of Little Auchengree, Dalry, Ayrshire, presented in the Sheriff Court at Kilmarnock a petition for cessio against William Smith, farmer, residing there, in which she averred that the defender had been charged, at her instance, to make payment of a sum of £40, 3s. of modified expenses in virtue of an extract decree of the Sheriff of Ayrshire dated at Kilmarnock 9th May 1906; that the charge had expired without payment, and that the defender was accordingly notour bankrupt. The extract decree was for two sums of (*a*) £12 and (*b*) £35 in addition to the said sum of expenses.

On 5th August 1907 the Sheriff-Substitute (D. J. MACKENZIE), after hearing parties on a caveat lodged by the defender, made the usual order for service and intimation of the petition, holding that there was *prima facie* evidence of the defender's notour bankruptcy.

"*Note.*—It is argued on behalf of the debtor that he is not notour bankrupt, in respect that the debt which he was charged to pay was one for expenses in an action at the instance of the petitioner. This argument is founded on the provisions of the 6th section of the Debtors Act 1880,