[*25th April* 1839.]

(Appeal from the Court of Session, Scotland.) (No. 7.)

JAMES JOHN FRASER, Writer to the Signet, Appellant. —*Buchanan.*

JAMES CARNEGIE and others, Trustees of the late ALEXANDER STEVENS, Respondents.[1]—*John Stuart.*

Trust—Fraud.—A party executed a settlement in favour of certain trustees, who accepted and chose an agent to act for them: the agent in conjunction with one of the trustees, the husband of a cestui que trust, who was also heir at law of the truster, procured said cestui que trust to make up a title to part of the trust estate passing over the trust, and thereupon to execute a disposition in his favour, on the ground that it was in security of advances for the trust. The agent thereupon took infeftment, and executed a conveyance in favour of third parties: Held (affirming the decision of the Court of Session), that the agent was bound in the first instance, without awaiting the result of an accounting, to restore the estate in integrum against the real security created by the disposition and infeftment.

2D DIVISION.
Lord Ordinary
Moncreiff.

THE facts, as far as they relate to this appeal, are sufficiently detailed in the note by the Lord Ordinary and in the speech of the Lord Chancellor, but they will also be found at greater length in the next case.

[1] 14 D., B., & M., 676. Fac. Coll. 8th March 1836.

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Statement.

The respondents, as trustees of Mr. Stevens, brought an action of count and reckoning against the appellant for his intromission with his trust estate, in which the Lord Ordinary pronounced the following interlocutor, on the 20th January 1836:—"Sustains the "action, without prejudice to any question as to the "competency of the said John Stout and James Fyffe "resigning their office of trustees in any other matter "or discussion; and on the merits of the cause finds, "that from the nature of the transaction narrated "in the summons no reduction is necessary for "enabling the pursuers to maintain the conclusions "thereof: Finds, that the defender, being in the full "knowledge of the trust deed executed by the deceased "Alexander Stevens, and of the acceptance and actual "operation of that trust under which he admits "himself to have been the acting agent, was in malâ "fide to create or to accept of the bond and disposition "in security libelled on, whereby Mrs. Jean Stevens "or Fyffe, by her title completed as heir at law "of the said Alexander Stevens, disponed a valuable "part of the trust estate to the defender in security "of an assumed debt of 2,500*l.*, said to be contracted "by James Fyffe her husband, who, though named a "trustee, was expressly excluded from all personal "interest in the trust estate, and by three of the "children of the said James Fyffe; suppressing alto-"gether the said trust, and the rights and interests "thereby created: Finds, that the said defender farther "acted in malâ fide, in so far as he did take infeftment "on the said disposition and thereafter assign the "same to third parties for valuable considerations, "not disclosing to such third parties the existence

" and operation of the said trust: Finds, that whether " the debt acknowledged by the bond was a just debt " for money actually advanced to the parties therein " mentioned or not, and whatever may be the just " state of accounts between the defender and the " pursuers on the said trust estate, the defender is " bound in the first instance, and without waiting " the adjustment of any such accounts, to restore " the estate in integrum against the real security " created by the said disposition and the infeftment " thereon, as now standing in the third parties his " assignees.

" *Note.*—The Lord Ordinary is convinced that very " little is necessary to be said in explanation of the " above interlocutor. On the merits of the cause the " only difficulty is to imagine how it should be defended " at all.

" The short state of the case is this: Stevens the " brother of Mrs. Fyffe executed a settlement, by which " he conveyed his whole property, heritable and " moveable, to the trustees named: the trust was " expressly accepted. By the terms of it, there was " first a liferent to the testator's widow, and then " a liferent to Mrs. Fyffe, and on her death a " fee to her children, who were eleven in number " at the date of the disposition in security; and the " jus mariti of Mr. Fyffe (he being bankrupt) was " excluded. In this state of things, after the death " of the widow and another trustee, Mr. Fyffe, being " the only trustee resident in Scotland, employed the " defender, as he himself says, as agent in the trust; " and it is too clear that the very least of the case " is, that schemes were formed for making the trust

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" estate available to Fyffe himself, or to the defender " and others advancing money to him, to the prejudice " of the wife's liferent and the ultimate purposes " of the trust in the disposal of the reversion. Finding " that this could not be done directly, the defender " devised the plan of making a title in the person " of Mrs. Fyffe as heir at law, in which of course " the trust was not mentioned. The pursuers do " not complain of this, because it was in itself useful, " and should have been followed by a disposition " by her to the trustees; but instead of this the " defender immediately took the bond and disposition " in security for a debt stated simply as the personal " debt of Fyffe himself and three out of his eleven " children (even the wife disponer not being stated " as a debtor at all), and then having taken infeftment " assigned the security to certain creditors of his own, " concealing the existence of the trust. How this can " be attempted to be justified the Lord Ordinary " cannot conceive. The defender says that he had " made advances for the better aliment and for the " education and outfit of the family, and that there " was a power to the trustees in the trust deed to " sell or uplift part of the estate for the latter purposes. " But was this transaction anything like an execution " of such a power? The Lord Ordinary is constrained, " however unwillingly, to think that it was, on the " contrary, a very deliberate proceeding for defeating " the trust, and creating a security by covert con- " trivance which could not have been created even " by the surviving trustees concurring in any direct " trust act. But it was known that that could not be " even attempted.

"What may have been the state of the defender's "advances to Mr. Fyffe or for the family does not "appear to the Lord Ordinary to be very material, or "indeed at all material, to the chief point involved "in this action. The defender's statements on this "subject are denied by the pursuers, who state, on "very probable grounds derived from documents in "process, that the security was truly meant to be given "for money to be advanced, and which never was "advanced. But supposing it were otherwise, and that "the pressure of such a state of advance was the "stimulus which led to the extraordinary measure "adopted, would that at all justify it, or afford any "answer to the demand of the trustees that matters "shall be restored to the state in which they ought "to have been, whatever other questions may remain?

"The Lord Ordinary had some difficulty as to the "correctness of the proceeding without John Stout "concurring in the action; but,

"1. There is no plea on the title, or on that as a "defect in the form.

"2. The defender could not plead such a point, be-"cause his own case requires that he should say that "Stout had ceased to be an acting trustee long before "his resignation.

"3. The action is by a full quorum of three trustees. "Mr. Fyffe is necessarily called as a defender, and the "defender Mr. Fraser has by his pleadings in the "record rendered it impossible to discuss any question "as to the competency of Stout's resignation or the "necessity of his being a party. The last plea in law "refers to Mr. Fyffe alone.

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"If the defender reclaims the bond and disposition "ought to be printed."

The appellant reclaimed to their Lordships of the Second Division, who pronounced the following interlocutor, on the 8th March 1836.—"Adhere to the inter-

Judgment of Court, 8th Mar. 1836.

"locutor complained of; refuse the desire of the note; "find additional expenses due; allow the account of "expenses to be given in, and remit to the auditor "to tax and report. Farther, the Lords having con-"sidered the special circumstances of this cause, they, "before further answer, appoint the proceedings to "be laid before the Keeper of His Majesty's Signet "and the Commissioners, in order to report to the "Court their opinion thereon with reference to the "professional conduct of the defender, and that with "their earliest convenience."

Against these interlocutors Mr. Fraser appealed.

Appellant's Argument.

Appellant.—This action, as laid, cannot be maintained, inasmuch as the documents which have been founded on as instructing a title to pursue confer no such power. The appellant is called to account at the instance of certain individuals styling themselves trustees of the late Alexander Stevens, architect in Edinburgh; whereas these persons neither were originally appointed trustees nor have they by any lawful instrument been properly assumed into the trust.

Neither can this action be maintained, inasmuch as it is altogether "a fraudulent and collusive device "between the present pursuers and Fyffe with a view "of defrauding the defender of large sums of money

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Appellant's Argument.

"bonâ fide advanced." Moreover, it is not "main-
"tainable as laid, Fyffe never having been effectually
"excluded from the trust."

The Lord Ordinary has found that the action is brought by a full quorum of trustees; but, with all deference, even if a quorum have power to sue alone, which the appellant by no means admits, unless possibly after an application to and refusal by the other trustees to join in the action, it is clear that they ought to have designed themselves as a quorum in the summons, which they have not done.

By the original deed power is given to assume new trustees, "to be joined with themselves in the "management of the affairs committed to their care "by this deed." The warrant, therefore, which Stout and Fyffe had for nominating new trustees did not empower them to resign the trust, but, on the contrary, expressly recognizes their continuance in office; otherwise it would not have declared that the new trustees should be joined with the old trustees in the management. It is one thing to have a power to appoint persons to act along with other individuals, but it is another thing to have a power to appoint persons to act in place of other individuals.

Mr. James Fyffe and his wife were entitled to create an heritable burden in security of such advances; and inasmuch as the trust deed expressly declares, that "the purchasers shall be noways concerned with the "application of the price," the appellant has no concern whatsoever with the manner in which the monies so received were disposed of.

It is said that the appellant as agent, being cognizant of the trust, ought not to have made the advances,

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and if he did so it must be at his own risk. This proposition, with great deference, is not a correct one. The appellant admits that he was agent under the trust as it then existed; that is to say, he was the agent of Mr. James Fyffe, who gave himself out and was considered to be the only acting trustee under Stevens's settlement; and the appellant dealt with Fyffe as a party having full power to deal with the trust estate, and upon that supposition made the advances in question.

Appellant's Argument.

The law of Scotland does not, like the Courts of Equity in England, recognize any incapacity in a law agent to deal with his clients; he is as capable of buying from and selling to them as any other person; but even the English Court of Chancery would support such a transaction as the present.[1]

Without hearing the counsel for the respondents the Lord Chancellor immediately proceeded as follows:—

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, of all the clear cases which have ever come under my consideration this is the clearest, and admits of the least doubt; in fact it would be scandal to the law of Scotland if it did admit of doubt. Two courts in Scotland have already decided against the appellant, and in those decisions I do most cordially concur. It has been said that the case ought to be sent to a jury, but the mere statement of the facts would in any civilized country entitle the plaintiffs below to a decree. In opposition to the inter-

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[1] Williams v. Piggott, 1 Jacob, 598; Pitcher v. Rigby, 9 Price, 79; Montesquieu v. Sandys, 18 Vesey, 302; see Gibson v. Jeyes, 6 Vesey, 266; Wood v. Downes, 18 Vesey, 120; Sugden's V. & P. chap. xiv. sec. 2; Gordon v. Trotter, 11th July 1833, 11 S. D. & B. p. 696.

locutors of the Courts below it has been said, that they would injuriously affect the character of the appellant. Well, if they do, how can that be helped? This injurious effect is the necessary consequence of those acts in which he is concerned.

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The following are the circumstances of the case to which in particular, my Lords, I would direct your attention. A trust deed was executed by Mr. Stevens to provide for the support of his wife in case she should survive him, and after her death to provide for her children. This deed, after providing for certain contingencies, then proceeds in these terms:—" In the fourth " place, after the decease of the said Margaret Stout " my wife, and failing children of my body then exist- " ing, my said trustees, or survivors or survivor, and " foresaids shall apply the free annual produce of my " heritable and moveable estate to the aliment, main- " tenance, and support of Jean Stevens, spouse of the " said James Fyffe, my sister, and the aliment and " education of her children of the present or any other " subsequent marriage, in such way and manner as " shall appear to my said trustees best suited to the " comfort and advantage of her and her family. De- " claring always," (and this, my Lords, deserves particular attention,) " as it is hereby specially provided " and declared, that the said James Fyffe during the " subsistence of the marriage between him and the " said Jean Stevens, or any other husband she may " marry in case of the death of the said James Fyffe, " shall have no concern with the rents and annual " proceeds of my means and effects, heritable and " moveable, in virtue of his jus mariti, courtesy of Scot- " land, or any other title whatsoever, and that the

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" same shall neither be liable to their deeds nor sub-
" jected to the legal diligence of the creditors of the
" said James Fyffe, or any future husband of the said
" Jean Stevens. In the fifth place, after the decease
" of the said Jean Stevens my sister, my said trustees
" shall convert my whole subjects and effects into cash,
" and divide the free proceeds thereof equally amongst
" the children procreate or to be procreated of the
" body of the said Jean Stevens of her present or any
" subsequent marriage, equally betwixt them share
" and share alike; whom failing before majority or
" marriage, my said trustees shall make over the whole
" residue of my means and effects to my own nearest
" heirs or assignees whatsoever. And it is hereby
" specially provided and declared, that my said trustees,
" and survivors or survivor of them, and foresaids, shall
" have full power and liberty, in the event of my
" leaving no children of my own body, to sell any part
" of my heritable subjects, or uplift any debts due to
" me for the purpose of fitting out any of the said Jean
" Stevens's children in life, putting them to appren-
" ticeships, or such like, or laying out the same in any
" other way advantageous to her family; on this con-
" dition always, that the said Margaret Stout's consent
" be previously had thereto, and she fully and com-
" pletely satisfied and secured as to her liferent of the
" sums so uplifted and applied in manner aforesaid."

He then empowers the trustees to sell and dispose of any part of the property. He then gives powers to the trustees, " and the survivors or the survivor of them, if
" they think proper, to assume any person or persons to
" be joined with themselves in the management of the
" affairs committed to their care by this deed, declaring

"that such trustees so to be assumed shall have the "same powers and privileges, vested in them as are "hereby vested in my said trustees before named."

Under these circumstances two trustees died: one of the surviving trustees lived in England; the other, Captain Fyffe, was living in Scotland. Unfortunately the management of the property fell to this individual, who by the trust seems to have been in some degree excluded from the management, and who does not appear to have been very fit for the office. It appears that when this management devolved on him he was labouring under difficulties, in fact that he was greatly involved in debt. In these circumstances Mr. Fraser the appellant became concerned as law agent in the arrangement of the trust affairs: so far there is no dispute. It appears that soon after this, a negociation was commenced to sell part of the property; this failed. An endeavour was next made to raise some money on it by way of pledge or mortgage; this also failed. It appears, however, that at a subsequent period the security was executed under which the present appellant claims. By the bond executed by James Fyffe and three of the children, the appellant had the personal security of those parties, at all events, for the repayment of the advances which he had made. Not content with this, however, he takes also from Mrs. Fyffe a disposition in further security of part of the property as heiress at law to her brother, and without taking any notice of the deed of trust. This is not only important to be considered, but it goes to the substance of this case. Now, it is submitted by the appellant that that is not proved; why, it is the case that is proved, from beginning to end. Then it is said that it is no objection, because it is

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not unusual where money has been previously advanced for the support of the family to sell a part of the estate for that purpose. That may be often done as to part, where the parties for whose behoof the advances are made have such an interest as will entitle them to dispose of a part, but it goes to the very substance of the present case that these children had only an expectancy. The provision is not for the children of Mrs. Fyffe only by her then husband, but the children she might have by any other husband. If there was an expectancy in the children, and if they had thought proper to bind their expectancy, it is unnecessary to consider what might have been the effect of such a transaction. But it turns out that the deed proceeded on a false recital, that the money was not advanced for three of the children, but for the support of the whole family. Even taking it, according to that which is stated in justification of this transaction, not to have been money advanced, as the deed itself imports, but that the money had been advanced for the support of the family generally, it would have been an advance which the trustees would not be entitled under the trust deed to dispose of the estate to repay, because the trust is only to apply the year's income as it arose for the maintenance of the family. If, therefore, this insolvent husband had advanced money, or Mr. Fraser had advanced money, for the support of the family, there would be no ground for charging on the corpus of the estate any accumulated amount of money so advanced; the trust prohibited that, and the parties, the cestuique trusts, would not be liable; and the importance of this false recital is obvious, for if the fact had been correctly recited according to the now representation of the appel-

lant, it would have constituted no debt, and, therefore, no consideration for such a charge.

The security bears date the 1st of May 1830, and there is a letter dated the 24th of June, which I see is in the certified copy of the proceedings, and, therefore, must have been before the Court below. Now, that letter shows the connexion between that professional person and his client:—

LETTER from Captain JAMES FYFFE to JAMES JOHN FRASER, W. S., then residing in London.

" Dear Sir, Edinburgh, 24th June 1830.

" At a conference a few days previous to your
" leaving Edinburgh, at which were present yourself,
" Mrs. Fyffe, and myself, you intimated to us that on
" the following Monday your clerk would give
" Mrs. Fyffe or myself the sum then immediately
" required, and that I might intimate to remaining
" creditors that on the 20th May last you would pay
" them off. Confiding, therefore, as I conceived I had
" every right to do, in your promise so given, I gave
" the intimation, and Mr. Jamieson was applied to
" on Monday, who said he had no money then, but to
" call in a day or two, and he would have funds.
" After being repeatedly applied to, he ultimately
" several weeks since, declared that he had no money,
" and as frequently said that day after day you were to
" be in Edinburgh. I am, therefore, from the peculiar
" circumstances under which I am placed, again re-
" quired to address you in the matter. You were, when
" you intimated as above to me, perfectly aware of the
" difficulties under which I labour, and which have
" been very considerably increased by your withhold-

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" ing the pecuniary aid promised by you at the two " distinct periods as aforesaid, even to my incarcera- " tion by one creditor, who, with others, considered " that a noncompliance with a settlement on the 20th " of May was mere fiction on my part towards them. " I feel all this the more grievous, as you know that I " have done every thing you required on my part. I " am loath to attribute blame in the matter, for per- " haps it may be ascribed to negligence in some other " quarter; but how is it that you did not make any " reply to a letter which I gave Mr. Jamieson to for- " ward to you, which you surely must have received?"

It then goes on to state matters of debt, and then Mr. Fraser's answer, on the 29th June 1830, says: " The person who was to advance the money did not " deem the security sufficient; I have not been able to " get it elsewhere, but I am in daily expectation of it. " I will be in Edinburgh in the course of eight days, " when I hope to get matters arranged to your satis- " faction." Now, taking the security, that letter, and the answer to it, I think there is no great difficulty in forming a satisfactory conclusion as to the nature of the transaction between these parties.

It is said that Mr. Fraser had no notice or might be supposed to be ignorant of Mr. Stout being a trustee; it does not appear to me to be very material, in the course ultimately adopted, whether that was so represented or not, because he did not take the security from Mr. Fyffe as trustee; if he had, there was no power in Mr. Fyffe to execute any such charge on the estate. What he pretended to take was a security from a married woman and from the three children. Now, to say that a party having a trust deed in his possession,

appointing two persons as trustees, is to make a title against the cestuique trusts, because he did not know that one of the trustees had accepted the trust, is absurd, and it is impossible there can be any law or any rule in Scotland which can so affect the rights of parties in Scotland or in any civilized country. The party sees on the deed who are the trustees. If he deals with one without inquiring about the other, he must necessarily be liable to all the consequences that may result from the other being a trustee. If he chooses to assume that he is dead, or that he never was known, or if he chooses to believe Captain Fyffe without inquiry, it is impossible that that circumstance can be taken in his favour. That, however, is not the nature of the transaction: the transaction is a security taken from the wife and children,—the wife who is anxious to protect her husband against his debts, and the children who derive no benefit from the money transaction between Mr. Fraser and the father. Then we have Captain Fyffe in his character of trustee abusing his trust, committing a gross breach of trust, endeavouring to deprive his wife and family of a benefit the settlor intended they should have, and we have Mr. Fraser, either for the accommodation of his client Captain Fyffe, or for his convenience, or for some consideration that might have passed between himself and Captain Fyffe, making himself a party to that transaction, and now claiming against the wife and against the cestuique trusts a title to the property which was the subject of that trust.

Having got this property, he thought the safest way was not to take it to himself, and passing over the trustees of whom he had most distinct knowledge, he

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makes up a title in order to extend the fraud to some third party; and therefore making up a title in Mrs. Fyffe as heiress to the settlor, he succeeds probably in representing to some third party advancing the money, that there is a clear title, and of course of the trust deed the party advancing the money had no information. However that may be, an interest is created in a third party, but the cestuique trusts, those who are attempted to be so defrauded, apply and ask for relief; and the relief they ask, so far as it is considered by the interlocutor pronounced, is, that those who have been parties to this transaction may do what is here prayed, in order to restore them to the situation in which they were previously; because it is only the second and third heads of relief to which the interlocutor pronounced applies. The first is not touched; that is left for further consideration. The first is: "That "James John Fraser, defender, ought and should be "decerned and ordained by the decree of the Lords of "our Council and Session to exhibit and produce "before our said Lords a full and particular account "of his whole actings in regard to the property of the "said trust estate, and to hold just count and reck-"oning with the pursuers as trustees foresaid for the "same." That is reserved, and the interlocutor does not touch that.

The next the interlocutor does touch, and it gives the relief prayed: "The said defender ought and should "be decerned and ordained by decree foresaid to "reconvey, renounce, and give up the title created "in his favour by the bond and disposition in security "before mentioned, so far as he himself has still any "interest therein, and also to free and relieve the said

" heritable property in Charlotte Street as aforesaid " of the burdens constituted over the same by means " of the title fraudulently made up as before stated " in the person of the said Mrs. Jean Stevens or Fyffe, " by discharging and paying off the debts contracted " on the faith of that title, and by getting the said " heritable securities extinguished, and to make pay- " ment to the pursuers as trustees aforesaid of the " rents of the property over which the said security " was fraudulently created since the date of the said " bond and disposition in security. And in the event " of the said James John Fraser failing so to do, then " and in that case the said James John Fraser and " the said James Fyffe ought and should be decerned " and ordained by decree foresaid jointly and severally, " one or other of them, to make payment to the " pursuers, as trustees foresaid, of the sum of 2,500*l.* " sterling as the loss or damage which the trust estate " has sustained through the title fraudulently made " up as aforesaid in the person of the said Mrs. Jean " Stevens or Fyffe, and the burdens thereby con- " stituted in favour of third parties over the said " heritable property, with legal interest of said sum " from and since the date of said title till paid."

Now, the substance of that is this;—here has been a charge fraudulently created on this property, you have been instrumental in creating it, having been the instrument by which a fraud has been committed, you are in the first place decreed to relieve the estate from that burden; if you fail in doing that, whether there is a title existing in a third person which you cannot get rid of, or not, if you fail to restore the cestuique

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trusts to the place in which they ought to be if the fraud had not been committed, you are decreed liable to repay the trust that loss which it sustained by the breach of trust. It is so as against Captain Fyffe the trustee and the professional person who takes a benefit from the trustee. Now, that is according to the ordinary course of proceeding in this country, and there is nothing suggested to show that that most wholesome rule of indemnifying cestuique trusts against any fraud committed by their trustees is not consistent with the law of Scotland, or that it is excepted from the act for the trial by jury. It is compensation for a breach of trust, which in the first instance is directed to be set right by a restoration of the property itself to the party; not by way of damages, but by returning that property which the law will assume to be in their hands, and whether it be money which ought to be in their hands or not, the Court will consider it in their hands, and administer it therefore subject to the provisions of the trust deed.

My Lords, the fourth head is also not touched by the interlocutor, which is, that the defender ought to be decreed to make payment to the pursuers of the expenses; that forms no part of the interlocutor. The first remains untouched; the substantial relief is as expressed in the interlocutor of the Lord Ordinary on the second and third heads. Then the interlocutor being pronounced, and this being carried into the Inner House, there was added to this interlocutor of the Lord Ordinary a reference to the proper authorities there, to consider the conduct of Mr. Fraser in his professional character. It is quite immaterial

and unnecessary to consider whether that could be the subject of appeal, because I feel quite satisfied, if your Lordships by appeal have jurisdiction to entertain the merits of Mr. Fraser in his professional character, that acting for a trustee he was acting for the cestuique trusts. He had a duty to perform, not for Mr. Fyffe for whom he was acting, but for Mrs. Fyffe and the children of that family. That duty he grossly violated, and I think it was an extremely proper course to pursue, to refer it to the proper authorities to consider what course under those circumstances ought to be adopted with respect to him; therefore it is quite unnecessary to consider how far the Court should have jurisdiction. If your Lordships should be of opinion that the Court had jurisdiction, then they most properly exercised it.

Another objection in point of form was, that the present pursuers have no character in which to sue, because they are not properly constituted trustees. My Lords, the trust deed authorizes the trustees to appoint other trustees, who are to have the same power which they had themselves. Now, the argument is, that although there was a power to appoint new trustees to join with the existing trustees, there was no power in the old trustees to retire. Now, whether that be so or not, the record is thus framed: the record is by the trustees appointed, and about the validity of their appointment there can be no question. If there was no power in Mr. Stout to retire from the trust, then Mr. Stout remains a trustee with them; if, on the other hand, Mr. Stout had power to retire from the trust, then the present pursuers are the sole trustees.

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But supposing Mr. Stout had no power, the result would have been that the present pursuers, with Mr. Stout, will constitute the trustees. The present pursuers are also the major part of the trustees and competent therefore to sue, and Mr. Stout, if a trustee at all, is a trustee out of the jurisdiction of the Court residing in England, and has so little to do with the trust that the foundation of the appellant's case is that he is no trustee at all. It would be strange indeed if that argument should prevail, but it is quite consistent with the fact of Mr. Stout being a trustee manifestly out of the jurisdiction, for the Court to entertain jurisdiction on the application of those who clearly are trustees, whether with Mr. Stout or not, is a matter immaterial for the present purpose.

My Lords, it does not appear to me that there is a shadow of doubt on the propriety of the decision which has been come to by the Court below, and it would be most lamentable if it were otherwise according to the admitted facts. I am not adverting to any doubtful facts; I am adverting to written documents, which show what the history of this transaction was. It is sufficient for your Lordships to come to a decision, that this instrument ought not to exist or to have any validity against the cestuique trusts, that is, against the wife and children of this family, and that those who were instrumental in creating this burthen on the property of the cestuique trusts should be directed to restore the property so injured by them either in specie or by compensation to the amount raised by them. That is in fact the whole case we have to adjudicate on, and if your Lordships agree with me

in the opinions I have submitted to your consideration, the course I propose to your Lordships will be, to affirm the interlocutor of the Court below, with costs.

FRASER v. STEVENS'S TRUSTEES.

25th April 1839.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this house, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

T. C. KER—ROBERT SCOTT, Solicitors.