and settlement as restricted by the codicil of 17th November 1879, and £2000 in respect of the codicil of 5th February 1880.

William Fergusson, the sole accepting trustee, appeared as the first party.

The question proposed to the Court was—"Upon a sound construction of the trust-disposition and settlement and codicils thereto of the late Dr Dunlop, is the party hereto of the second part entitled to payment of £20,000 from the party of the first part, or is he entitled to a payment of £18,000?"

It was argued for the second party—The second codicil cancelled the first and set up the eighth purpose of the trust-disposition and settlement.

It was argued for the third party that the writings must be read together. The sum to be paid was £18,000. A subsequent codicil did not revoke a prior one by implication—*Green* v. *Tribe*, June 18, 1878, 9 Chanc. Div. 231, 47 L.J. 783.

At advising—

Lord Young—This case as Mr Murray stated it is very simple, and does not admit of much argument. The question is more one of impression. The facts are within the compass of a single sentence. The testator left a legacy in his original trust-deed of £18,000 reduced by a codicil to £16,000, and then increased by a subsequent codicil which is in these terms:—"In addition to the legacy or legacies left to my nephew Andrew Vans Dunlop Best, in the eighth purpose of my trust-disposition and settlement which was executed by me in February last, I hereby leave him two thousand pounds sterling." The question being whether the legacy here referred to as the legacy left in the eighth purpose of the settlement is that legacy as diminished by the codicil of November, it is impossible to have a very confident opinion as to what was intended, as there is some ambiguity. The inclination of my own opinion—I do not give it with confidence, but it is the true legal result I think, and not contrary to the intention of the testator—is that he wishes to revert to the original legacy and to increase the amount of it by £2000. I do not mean to suggest anything approaching to a general rule as to the effect of a subsequent codicil on a prior one. I think it is clear enough that if the first codicil had simply cancelled the eighth purpose of the trust, and the last codicil left £2000 in addition, then I think without doubt the revocation would have been superseded and the legacy restored by the addition of £2000. The case here, however, is not so clear. As Mr Murray put it, there is some improbability in the argument that the testator intended first to leave a legacy, then to deduct from it, and then to add what had been deducted.

I think that the true meaning and legal effect of the second codicil is that the testator must be held to say—the legacy which I at one time intended to diminish I now wish to increase by £2000. I quite understand the argument and views of the opposite party, but putting them in opposite scales I think the views I propose to give effect to are the heaviest. I should suggest that the Court should answer the question put to them by saying that the second party is entitled to get £20,000 from the third party.

Lord Gifford—This case though short is a difficult one. It turns on two considerations very nearly balanced. There is certainly difficulty at getting at the will and intention of the testator. He made no less than fourteen codicils in one year, and was perpetually doctoring his settlement. Now, when he came to make the last of these two codicils, I am by no means sure that I can hold that he had all the former codicils distinctly in his mind. For if he had, I cannot think that he would have expressed himself as he did. He had, I think, reverted to the eighth purpose of the trust, and read it over so far as concerned his two nephews, and he deals with it as if he had said, Having reconsidered the eighth purpose of my settlement, I now want to make an addition to its provisions. That, I think, is a fair paraphrase of the codicil of February 5th, and, though with much hesitation, I have come to the same conclusion with Lord Young.

Lord Justice-Clerk—This case is so short that I am not disposed to make any remarks on your Lordships' opinions or to express a formal dissent. My hesitation would have rather led me in an opposite direction. I read the codicil as referring to all the settlements made for his nephews, and that the testator meant by the first codicil to deduct £2000, and by the second to add it on again. Still, I do not formally dissent, and agree in answering the question as your Lordships suggested.

The Court were of opinion that upon a sound construction of the trust-disposition and settlement and codicils thereto of the late Dr Dunlop, the second party was entitled to payment of £20,000 from the party of the first part.

Counsel for First and Second Parties — A. Graham Murray. Agents — Tods, Murray, & Jamieson, W.S.

Counsel for Third Parties—Dean of Faculty (Fraser, Q.C.)—Kirkpatrick. Agents—W. & J. Cook, W.S.

Friday, November 5.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

JAMIESON AND ANOTHER (LORD HUNTLY'S TRUSTEES) *v.* STEVENSON AND ANOTHER (LORD J. F. G. HALLYBURTON'S TRUSTEES).

Entail—Right of Heir of Entail in Possession to Cut and Sell Timber.

In 1838 A by a trust-disposition directed his trustees after executing the trust purposes to denude in favour of B, his nephew, and a certain series of heirs of entail, but provided that the heir in possession at the time should not be entitled to cut down the growing timber on the estate without consent and authority of the trustees, such consent to be given only when cutting was advisable for the preservation of the woods; "declaring also that the produce of all fallen trees or cut timber or bark shall be applied in discharge of the various burdens

on my trust estate." In 1839, by deed of ratification and explanation, after directing his trustees to denude as soon as possible after his wife's decease without issue, he declared "that the principal sums of all debts, legacies, and provisions shall be charged and chargeable upon and affect only the fee of my said lands and estate, and that the rents thereof shall be chargeable with annual payments only; and I further declare that the free revenue shall not be accumulated during the subsistence of this trust, nor applied in payment of capital debts or provisions, but, on the contrary, shall be regularly paid over to my nephew B and the heirs of entail substituted to him." . . . *Held* (*rev.* Lord Rutherfurd Clark, Ordinary), on a construction of these deeds, that the heir in possession was entitled to cut and sell the timber and use the proceeds as his own property.

Entail—Heir in Possession—Bona fide *Perception and Consumption—Acquiescence.*

An heir of entail in possession cut and sold timber on the estate and used the proceeds as his own. The trustees of a succeeding heir sued his representatives after his death for count and reckoning and payment of the sums so realised, on the ground that he was not entitled, in terms of the deed of entail and other deeds, to use such proceeds as his own. The defender pleaded (1) *bona fide* perception and consumption; and (2) acquiescence, in respect the pursuers had been party to a litigation in which the trust accounts of the said estate for a large portion of the period in question were examined, reported on, and finally approved.—*Plea* of *bona fide* consumption (*aff.* Lord Rutherfurd Clark) *repelled;* that of acquiescence (*rev.* Lord Rutherfurd Clark) *sustained.*

Observations per curiam on the nature and applicability of the doctrine of *bona fide* perception and consumption.

By trust-disposition, dated 2d February and recorded 7th September 1835, the late Lord Douglas Gordon Hallyburton conveyed to trustees therein named (with power to himself to add to their number should he see fit) his lands of Pitcur and others in the counties of Perth and Forfar, the ultimate purpose of the trust being that the trustees should convey the estates to such person as the truster should appoint. By a trust-disposition and deed of entail executed by him, of date 13th August and recorded 27th August and 15th November 1839, after sundry purposes, the truster provided,—"And further considering that for the preservation of my family and memory, and for the continuance of my lands and estate of Pitcur in the family of Huntly, and in testimony of the regard and affection I bear to my brother George Marquis of Huntly, and to my nephews, the sons of the said Marquis of Huntly, I have resolved to execute an entail of my said lands, and to settle the same upon a certain series of heirs, and in the exercise of the powers specially reserved to me by the foresaid trust-disposition, dated the 2d day of February 1835, to nominate and appoint the persons for whose behoof the said Hunter Gordon and Patrick Chalmers, my trustees foresaid, hold my said lands under the said trust-disposition; therefore I hereby direct and appoint the said Hunter Gordon and Patrick Chalmers, and their successors, as soon as they shall have executed the trusts reposed in them by the said trust-disposition, and other the trusts hereinbefore specified, to denude of my said lands and estate, and to give, grant, and dispone, heritably and irredeemably, to Lord John Frederick Gordon, third son of George Marquis of Huntly, and the heirs-male descending of his body, whom failing to the most noble George Marquis of Huntly, my brother, whom failing to Charles Earl of Aboyne, the eldest son of the said Marquis, and the heirs-male descending of his body," whom failing as therein mentioned. This deed contained also a reservation of power to the truster to revoke and alter the foresaid course and order of succession as to all the heirs of tailzie except his nephew Lord J. F. G. Hallyburton and the heirs-male of his body, and to recal the said disposition and deed of entail in whole or in part, and to sell or burden or gratuitously dispose of the estate. The same deed contained this further clause:—"And for the preservation of the growing timber and plantations on my said lands and estate of Pitcur, I hereby direct and appoint the said Hunter Gordon and Patrick Chalmers, my said trustees, to reserve the timber and plantations on my said estate when they convey the said lands to the said Lord John Frederick Gordon and the other heirs before mentioned: And it is hereby provided and conditioned that it shall not be lawful to the said Lord John Frederick Gordon, or the whole heirs of entail, to cut down the growing timber or plantations, or any part thereof, without the consent and authority of my said trustees; and that my said trustees shall not be empowered to give such consent unless the growing timber or plantations on my said estate shall require such cutting down or thinning for their better preservation: Declaring also that the produce of all fallen trees, or cut timber, or bark, shall be applied in discharge of the various burdens charged on my said estate: But reserving to myself full power at any time during my life to direct and appoint my said trustees to cut down and dispose of such parts of the said growing timber and plantations as I shall think fit, the proceeds thereof to be disposed of as I shall direct."

By deed of ratification and explanation, dated 20th and recorded 28th March 1839, the said Lord Douglas G. Hallyburton ratified and confirmed his trust-disposition of 1835, and of new conveyed the lands of Pitcur to the trustees for the purposes and under the conditions and declarations specified in the previous deeds. This deed contained the following clauses:—"*First*, I declare that the principal sums of all debts, legacies, and provisions shall be charged and chargeable upon and affect only the fee of my said lands and estate of Pitcur and others, and that the rents thereof shall be chargeable with annual payments only; and I further declare that the free revenues of my said estates shall not be accumulated during the subsistence of this trust, nor applied in the payment of capital debts or provisions, but, on the contrary, shall be regularly paid over to my nephew Lord John Frederick Gordon and the heirs of entail substituted to him, as the same shall arise—that is, the rents and revenues of these estates after de-

ducting all public burdens, interest of debts, and provisions, jointures, annuities, and other annual charges: *Second*, Notwithstanding my injunction on the trustees to denude in favour of my said nephew Lord John Frederick Gordon and the heirs of entail substituted to him, only after the other purposes of the trust have been fulfilled, I now hereby authorise and direct my said trustees to denude as soon as possible after my wife's decease without issue, taking care, however, when doing so, to secure heritably on the estate such of the debts and provisions or annuities as may then still exist and remain unpaid: *Third*, And even during my wife's liferent I authorise my said trustees to denude as aforesaid, provided the same be done with my wife's concurrence, and upon an opinion given by counsel that her provisions, and the other provisions made by me, have been duly secured. . . . *Sixth*, As the intention of keeping up the foresaid trust is merely to secure payment and fulfilment of the various provisions made by me, I hereby declare that, so far as may be consistent with that object, and under reservation always of my said wife's right to the mansion-house of Pitcur and adjoining grounds, as provided by the said deed of 1838, the whole management of the said lands and estate of Pitcur and others, situated in the counties of Perth and Forfar, shall, notwithstanding the subsistence of the said trust, be given to my said nephew Lord John Frederick Gordon and the substituted heirs of entail in their order, who shall have full power, under the limitations of the prescribed entail, to grant leases, to excamb grounds, and to make provisions on his or their wives and children or grandchildren, as permitted by the prescribed entail, in the same manner as if they were actually infeft and possessed of the said lands and estate, and to avail themselves of the statute 10th George the Third, chapter 51, made to encourage the improvements of entailed estates in Scotland, and the later statutes of the 5th George the Fourth, chapter 87, and the 6th and 7th William the Fourth, chapter 42, and generally to exercise all the powers of administration competent to an heir of entail in possession which may not be inconsistent with the purposes of the said trust, hereby directing my said trustees to concur in and to give full effect to all such acts and deeds as aforesaid of my said nephew Lord John Frederick Gordon, or the existing heir of entail beneficially entitled to my said estate for the time being."

By second deed of ratification, dated 16th June 1840 and recorded 20th January 1842, the said Lord Douglas G. Hallyburton, *inter alia*, directed as follows:—"I hereby direct that the name of my brother, the most noble George Marquis of Huntly, shall be entirely omitted in the substitution in the said prescribed deed of entail, hereby expressly revoking my former nomination of him or in his favour, and declaring that my said estates of Pitcur and others shall be conveyed by strict entail to my said nephew Lord John Frederick Gordon and the heirs-male descending of his body, whom failing to Charles Earl of Aboyne, the eldest son of the said Marquis, and the heirs-male descending of his body, whom failing" as therein mentioned.

Lord Douglas G. Hallyburton died on or about 25th December 1841, and the trustees entered on their office. The woods on the Pitcur estates were very extensive, and the trustees from time to time cut down considerable quantities of timber, acting, when they did so, on the advice of persons skilled in forestry, to the effect that the wood was ripe for cutting or required thinning in the course of judicious management. They dealt with the proceeds of the sales of timber as revenue, applying the same towards meeting the annual charges on the estate, and paying over the surplus, when there was any, to Lord J. F. G. Hallyburton. In taking this course they acted on an opinion of counsel given by Mr (afterwards Lord) Rutherfurd.

In 1854 the trustees raised a multiplepoinding in the Court of Session to obtain exoneration of their past actings, and in order that the deed of entail to be executed by them in favour of Lord J. F. G. Hallyburton and the other heirs might be judicially adjusted. The said deed was duly executed and recorded, and contained the following clause:—"Reserving always the timber and plantations on the said estate, which, for the preservation of the growing timber and plantations on the said lands and estate, we are by the foresaid deed, called a trust-disposition and deed of entail, directed and appointed to reserve when we convey the said lands and estate to the said Lord John Frederick Gordon Hallyburton and the heirs before mentioned; and it is hereby conditioned and provided that it shall not be lawful to the said Lord John Frederick Gordon Hallyburton, or the whole heirs of entail, to cut down the growing timber or plantations, or any part thereof, without the consent and authority of us as trustees foresaid, or of our successors in office, which consent, it is declared by the said last-mentioned deed, we shall not be empowered to give unless the growing timber or plantations on the said estate shall require such cutting down or thinning for their better preservation; by which deed it is likewise declared that the produce of all fallen trees or cut timber or bark shall be applied in discharge of the various burdens charged on the said estate." Among the defenders and claimants in the action of multiplepoinding were Lord J. F. G. Hallyburton and the late, and also the present, Marquis of Huntly. In 1855 a remit was made to the Auditor of the Court of Session to audit the trust accounts for the preceding year; and in his report the Auditor observed—"It has been seen that in the trust-deed of 1838 there is a direction to the trustees, when executing the entail, to reserve the timber, a declaration that the heir of entail should not be entitled to cut timber without the previous consent of the trustees, and a provision that the produce of such timber as might be cut should be applied towards extinction of the truster's debts. In the subsequent deed of March 1839, again, there is a declaration that the free revenues of the truster's estate should be paid to the heir of entail for the time. In accordance with this last declaration the annual produce of the woods has been held as revenue, and applied as directed. In framing the deed of entail, however, the trustees have properly inserted the reservation and declaration made by the truster; and as this implies the continuance of the trust in so far as relates to the protection and superintendence of the woods, it may be requisite to qualify the exoneration of the trustees by an exception from

its operation of this partial subsistence of the trust."

On 14th February 1856 the Lord Ordinary approved of the trust accounts for 1854 as audited, and ordained the trustees to pay to Lord J. F. G. Hallyburton, in terms of his claim, the whole free revenue for the year 1854. In like manner the revenue for 1855 was subsequently paid to him. On 9th January 1869 the Lord Ordinary exonered and discharged the trustees of their whole actings and intromissions between 31st December 1854 and 31st December 1867. Since then no active steps had been taken in the process.

Lord J. F. G. Hallyburton died on 29th September 1878, and was succeeded in the estate, in terms of the said deed of entail, by the Marquis of Huntly, who disentailed and sold the estate.

The present action was raised by Lord Huntly's trustees against the trustees of the late Lord J. F. G. Hallyburton. The summons concluded for declarator that Lord J. F. G. Hallyburton, as heir of entail in possession of the lands and estate of Pitcur, was, in terms of the deeds above set forth, bound to apply the whole proceeds realised by him from the sale of the fallen trees or cut timber or bark on the said estate in extinction of the debts, legacies, and provisions, &c., charged upon and affecting the fee of the said estate; and to have his trustees ordained to produce an account of his whole intromissions with the proceeds realised from such sales during the period of his possession—31st January 1856 to 29th September 1878; and to pay the pursuer £15,000, or such other sum as should be ascertained to be the amount of the balance of these intromissions.

The pursuers pleaded—"(1) The said deceased Lord John Frederick Gordon Hallyburton having been bound to apply the whole proceeds realised by him from the sale of the timber on the said lands and estate of Pitcur in extinction of the debts, legacies, and provisions, &c., charged upon and affecting the fee of the said estate, and having failed so to do, decree ought to be pronounced in terms of the declaratory conclusion of the summons."

The defenders pleaded—"(3) There being no obligation imposed upon the late Lord John Frederick Gordon Hallyburton by the trust-settlements of the late Lord Douglas Gordon Hallyburton, or by the entail of the estate of Pitcur, to apply the proceeds of the sale of wood to the extinction of the burdens upon the fee of that estate, the defenders are entitled to be assoilzied from the conclusions of the summons. (4) The late Lord John Frederick Gordon Hallyburton having *bona fide* received and consumed the proceeds of the sales of wood on the estate of Pitcur, so far as not necessary for estate purposes and to keep down the annual charges upon the said estate, and in accordance with the construction of the trust-settlements of Lord Douglas Gordon Hallyburton, sanctioned by the interlocutors of the Court in the action of multiplepoinding and exoneration, the defenders are entitled to be assoilzied from the conclusions of the summons. (5) The Marquis of Huntly having, in the full knowledge of the circumstances, acquiesced in the receipt and application of the said proceeds by the said Lord John Frederick Gordon Hallyburton, the pursuers, as claiming through him, are barred from raising the present action."

The Lord Ordinary (RUTHERFURD CLARK) found, decerned, and declared in terms of the declaratory conclusions of the libel, and appointed the defenders to lodge in process an account of the late Lord J. F. G. Hallyburton's intromissions with the proceeds of such sales during the period in question. His Lordship added this note:—

"*Note.*—The question in this case turns on the construction of two deeds executed by the late Lord Douglas Gordon Hallyburton, dated respectively 27th August 1838* and 28th March 1839. By a previous *inter vivos* trust-deed Lord D. G. Hallyburton had vested the estate of Pitcur in trustees, and the deeds which have been just mentioned contained his instructions with respect to the disposal of it. It is sufficient to say that he directed his trustees to entail on the late Lord John Frederick Gordon Hallyburton as institute, and a series of heirs. This was accordingly done by a deed of entail executed on 16th and 17th July 1855, and on the death of Lord J. F. G. Hallyburton the Marquis of Huntly succeeded as heir of entail. He subsequently disentailed the estate with the necessary consents, and has sold it.

"The question is, whether under the clause contained in the deed of August 1838, and quoted in the condescendence, the 'produce of fallen trees or cut timber or bark' was appropriated to the payment of the capital of the burdens on the estate, of which a considerable number remain undischarged. It is admitted, on the one hand, that Lord J. F. G. Hallyburton cut down a considerable quantity of timber; and, on the other hand, it is not disputed that the cutting of the timber was an act of ordinary and proper administration, the timber so cut being either ripe wood or thinnings.

"(1) The defenders objected to the pursuers' title. Assuming the claim to be otherwise well founded, they contended that the title to sue was not vested in the Marquis of Huntly alone, but in him and the heirs of entail with whose consent the estate was disentailed. The Lord Ordinary cannot adopt that view. By the disentail the Marquis became the absolute proprietor of the estate, and has right to all the dispositions which have been made in favour of the heirs of entail. If the produce of the timber is applicable to the payment of the debts which are charged on the estate, and if it had been so applied, the Marquis would have been so much the richer. It is suggested that he would have had to pay more for the consents of the next heirs, and that in consequence they have an interest. But the defenders, it is thought, have no title to raise any such question. By the disentail the next heirs have surrendered all their interest, and it seems to be impossible in this case to enter on the conditions of the surrender.

"(2) Again, the defenders maintain that the meaning of the truster was that the produce of the timber was to be applied in keeping down the interest of the debts on the estate, and they point to a clause in the deed of 1839, called a 'deed of ratification and explanation,' in which it is directed that the free rents and revenues shall not be accumulated, but paid over to Lord J. F. Gordon Hallyburton.

"The Lord Ordinary is of opinion that the case

* On page 47, line 16 from foot of first column, *for* 1839 *read* 1838.

of the pursuers is well founded. He thinks that the just construction of the deed of 1838 is, that the produce of the timber was to be applied in the payment of the capital of the debts affecting the estate, and this direction was not recalled by the subsequent deed of 1839. It is true that the produce of ripe timber and of thinnings would fall to the heir in possession, and that it may be regarded as a part of the revenue of the estate; but it is thought that the deed of 1839 did not refer to the income derived from this extraordinary source, but only to the ordinary rents of the estate; for the truster directed the trustees to 'reserve the timber and plantations on the estate.' The timber was thus to remain in their hands, and the deed of 1838 contains the only direction as to the application of the produce. This special direction was not, it is thought, recalled by the general direction that the rents were not to be accumulated. It is true that the reservation of the timber would not reserve any separate feudal estate in the trustees; but it very strongly indicates what the truster meant as to the application of the money derived from time to time from this source.

"The defenders point out that the purpose of the direction to reserve the timber was for the 'preservation of the growing timber and plantations.' So it was; but this cannot, it is thought, affect the construction of the clause which disposes of the proceeds of the cut and fallen timber.

"(3) The defenders pleaded that the proceeds of the timber had been *bona fide* received and consumed by Lord J. F. G. Hallyburton, and that in consequence they are not bound to account for them. But the Lord Ordinary thinks that the plea is not well founded. It is certain that the trustees and Lord J. F. G. Hallyburton believed that the latter had absolute right to the proceeds of the timber; that they entertained this belief in *bona fide;* and that in consequence Lord J. F. G. Hallyburton received and consumed the proceeds. But there is here no competing title. The rights of the parties must be determined by the directions of the truster only, and any error in the construction of the trust-deed cannot affect the rights of the beneficiaries under it.

"(4) The defenders also pleaded acquiescence. But in the opinion of the Lord Ordinary there is no foundation for this plea."

The defenders (Lord J. F. G. Hallyburton's trustees) reclaimed, and argued—(1) On a sound construction of the deeds set forth, Lord J. F. G. Hallyburton as heir of entail in possession was entitled to cut down and sell the wood and use the proceeds as his own. (2) *Bona fide* perception and consumption of the profits. A colourable title was a foundation for this plea; there was no necessity for a case of competing titles—Ersk. Inst. ii. 1, 27; *Duke of Roxburghe*, Feb. 17, 1815, F.C.; *Menzies* v. *Menzies*, July 3, 63, 1 Macph. 1025; *Duke of Buccleuch* v. *Hyslop*, March 10, 1824, 2 Sh. App. 43; *Leslie* v. *Earl of Moray*, Feb. 2, 1827, 5 S. 284; *Johnston* v. *Johnston*, July 20, 1875, 2 R. 986; *Scott* v. *Heritors of Ancrum*, Feb. 25, 1795, M. 15,700; *Lord Advocate* v. *Drysdale*, April 24, 1874, 1 R. (H. of L.) 27; *Haldane* v. *Ogilvie*, Nov. 8, 1871, 10 Macph. 62; *Carnegie* v. *Scott*, Dec. 9, 1830, 4 W. & S. 431. (3) Acquiescence. Lord Huntly was barred from this action by the proceedings in the multiplepoinding to which he was a party. He had acquiesced in the receipt and application by Lord J. F. G. Hallyburton of the proceeds of the timber sales.

The pursuers (respondents) replied—(1) The Lord Ordinary's construction of the deeds was sound. The direction of the deed of 1838 was not recalled by that of 1839. (2) There was no room in this case for the application of the doctrine of *bona fide* consumption. That applied only to cases of possession on an apparently valid title and subsequent eviction from the subject. There was here no competition of titles. Hence the authorities cited on the other side did not apply —Stair ii. 1, 23; *Agnew* v. *Stair*, July 22, 1828, 3 W. & S. 286. (3) The actings of Lord Huntly did not ground a plea of acquiescence.

At advising—

Lord President—The late Lord Douglas Hallyburton having formed the intention of settling his estate of Pitcur upon his nephew Lord Frederick Gordon Hallyburton and a certain series of substitute heirs, executed three deeds for the purpose of carrying that intention into effect. The first of these was a trust-deed executed in 1835, the terms of which are not material to the present question, and the other two deeds, which are deeds of instructions and explanations to his trustees, were executed respectively in 1838 and 1839. The trustees, acting under the powers conferred upon them by these deeds, had a deed of entail prepared and executed in the year 1855 conveying the estate to Lord John Frederick Hallyburton and the substitutes of tailzie, in terms of the directions of the truster.

The question raised in the present case is, whether Lord John Frederick Gordon Hallyburton as heir of entail in possession was entitled to cut timber on the estate and use the proceeds of the sale of that timber as his own property, or whether he was under obligation to cut only under the advice and superintendence of the trustees, and pay over the proceeds of the sale to them for the purposes specified in Lord Douglas Gordon Hallyburton's deeds of settlement? It is to be observed that the timber upon this estate was of very great extent, and there were large plantations of fir which fell to be cut at a certain age and planted over again, so that in addition to the ordinary natural proceeds of the timber there were occasional very large cuttings and very large sales of timber which afforded a considerable revenue. It is admitted, on the one hand, that Lord John Frederick Gordon Hallyburton had during his possession cut a very considerable amount of timber; but it is admitted, on the other hand, that nothing was done that was not in accordance with the fair administration of the estate, and particularly of the timber upon the estate; so that the question really comes to be, whether the timber belonged to the heir in possession, and fell to be cut by him at his own discretion, and the proceeds kept by himself, or whether there was any restriction upon him in that respect?

The summons concludes for declarator that the whole proceeds realised by him from the sale of the fallen trees or cut timber or bark on the said estate should be applied in extinction of the debts, legacies, and provisions, &c., charged upon and affecting the fee of the said estate, and that the defenders, who are the representatives of

Lord John Frederick Gordon Hallyburton, should be decerned and ordained to hold count and reckoning for their whole intromissions with the whole proceeds realised by him from the sale of timber and bark on the said estate from the 31st of January 1856 to the 29th day of September 1878—that is to say, for the period immediately following the execution of the deed of entail to the date of Lord John Frederick Hallyburton's death. Now, the whole of this question depends entirely, in the first instance at least, upon whether there was any special provision limiting the right of the heir of entail in possession, for apparently nothing was done by Lord John Frederick Hallyburton that was not within his proper power of administration. There are two deeds that require our attention in determining this question—the deed of 1838 and that of 1839. Now, by the deed of 1838 the arrangement made by Lord Douglas Hallyburton was, in the first place, that the trustees should make provision for a great variety of purposes, jointures, and other things which had been provided for by other deeds of settlement; and then he provides—"I hereby direct and appoint the said Hunter Gordon and Patrick Chalmers, and their successors, as soon as they shall have executed the trusts reposed in them by the said trust-disposition, and other the trusts hereinbefore specified, to denude of my said lands and estate, and to give, grant, and dispone, heritably and irredeemably, to Lord John Frederick Gordon;" and so on. Now, according to the provisions of this deed, it is to be observed that the trustees were not to denude till all the other trust purposes had been accomplished, and therefore the time for making the deed of entail could have been indefinitely postponed. Now, it is this deed which contains the clause upon which the pursuers specially found. It is in these terms—"And it is hereby provided and conditioned that it shall not be lawful to the said Lord John Frederick Gordon, or the whole heirs of entail, to cut down the growing timber or plantations, or any part thereof, without the consent and authority of my said trustees; and that my said trustees shall not be empowered to give such consent unless the growing timber or plantations on my said estate shall require such cutting down or thinning for their better preservation; declaring also that the produce of all fallen trees or cut timber or bark shall be applied in discharge of the various burdens charged on my said estate." Now, the contention of the pursuers upon this clause is that the proceeds of the timber when cut down and sold were to be applied in discharge of the capital of the burdens charged upon the estate, and they support the contention upon the ground that the words used by the testator can have no meaning or effect unless that is their proper construction, the proceeds of the ordinary sales of timber necessarily forming part of the natural revenue of the estate, although it may be revenue varying very much in amount from year to year, and like all other natural revenue primarily applicable to the keeping down of interest on burdens, and that an heir in possession cannot receive the rents or revenue of the estate until so much of them as is necessary for that purpose shall have been so applied. It required no special provision in the deed to produce that effect, because that would be the natural and legal application of these revenues, even after the deed of entail was executed and the heir entered into possession; therefore they say if there is revenue beyond what is required for keeping down the natural burdens on the estate, in the shape of proceeds of sales of timber, that is here directly ordered to be applied to diminish the capital of the debt. I am disposed to agree with the views of the pursuers on this matter. We see very well from the nature of the plantations on this estate there would come into the hands of the trustees or the heir in possession occasionally a very large sum, arising from the cutting down of plantations in the course of one year, or two years; and in point of fact that happened. There was a very large sum realised more than once—but certainly once—in the course of Lord John Frederick Gordon Hallyburton's possession—a sum quite beyond what could be called the average returns from timber—and if the interest of the burdens had been provided for otherwise, and a large sum came into the hands of the trustees or the heir in possession from this source, I cannot imagine that the words of this clause could be read otherwise than as a direction to pay it over in discharge of burdens—that is to say, capital—the annual interest having been already provided for from the proper source, viz., from the income of the estate; and therefore, without going further into this matter, I confess that I do not entertain very much doubt that if this deed of 1838 had stood alone we should have been bound so to construe it. But this deed of 1838 must be read in connection with the deed of the subsequent year—that of 1839,—which makes a very considerable change upon the arrangements of Lord Douglas Gordon Hallyburton. He had altered his mind in various ways in regard to the way in which his trustees were to deal with this estate, and among other things it is very important to observe that by the second purpose of this deed of 1839 he provides, that whereas the trustees had been directed by the previous deed to denude in favour of the heirs of entail only after the other purposes of the trust had been fulfilled, he now by this deed authorised and directed them to denude as soon as possible after his wife's decease without issue, taking care, however, when doing so, to secure heritably on the estate such of the debts and provisions or annuities as might then exist and remain unpaid. And he provides still further, that even during the subsistence of his wife's liferent they may denude in favour of the heir, provided the same be done with the lady's concurrence and with sufficient security for the provisions made for her. And then further, in the sixth purpose of the trust, he makes this provision—"As the intention of keeping up the foresaid trust is merely to secure payment and fulfilment of the various provisions made by me, I hereby declare that, so far as may be consistent with that object, and under reservation always of my said wife's right to the mansion-house of Pitcur and adjoining grounds, as provided by the said deed of 1838, the whole management of the said lands and estate of Pitcur and others, situated in the counties of Perth and Forfar, shall, notwithstanding the subsistence of the said trust, be given to my said nephew Lord John Frederick Gordon and the substituted heirs of entail in their order, who shall have full power, under the

limitations of the prescribed entail, to grant leases, to excamb grounds, and to make provisions on his or their wives and children or grandchildren, as permitted by the prescribed entail, in the same manner as if they were actually infeft and possessed of the said lands and estate." Now, it is very clear that the position of Lord John Frederick Hallyburton, or any other heir of entail, after the execution of this deed of 1839 was very different from what it would have been under the deed of 1838. In the first place, they might be put in possession by the trustees at a much earlier period, and even during the subsistence of the trust, and before the deed of entail was executed they were to be allowed to deal with the estate and its administration just as if they were heirs of entail in possession under an executed deed of tailzie. I do not mean to say that through this alteration of the scheme of the testator it necessarily follows that the provision regarding the cutting of timber and the application of its proceeds is to be held as altered, because in the last clause of this deed the testator expressly declares that this deed shall not be held or construed to infer or import any alteration or innovation thereof, or of any of the clauses therein contained, except to the extent before specially specified and declared; and therefore if we had no more to go upon than the clause to which I have already adverted, I think that would prevent us from implying that any alteration was to be made on the clause in the previous deed regarding timber.

But then we have a clause which I have not read in its order, but which now calls for particular attention—the clause that makes the first alteration on the provisions of the previous deed. It is the first, and it is in these words—"I declare that the principal sums of all debts, legacies, and provisions shall be charged and chargeable upon and affect only the fee of my said lands and estate of Pitcur and others, and that the rents thereof shall be chargeable with annual payments only; and I further declare that the free revenues of my said estates shall not be accumulated during the subsistence of this trust, nor applied in the payment of capital debts or provisions, but, on the contrary, shall be regularly paid over to my nephew Lord John Frederick Gordon and the heirs of entail substituted to him, as the same shall arise,—that is, the rents and revenues of these estates after deducting all public burdens, interest of debts, and provisions, jointures, annuities, and other annual charges." Now, I think this clause is not open to construction at all. Nothing can be more clear and definite than the intention here expressed that the principal sums of all kinds of burdens shall be charged and chargeable upon and affect only the fee of the testator's lands and estate. Now, really under these words, unless you can say the proceeds of the sales of timber are part of the fee of the estate, I do not see how you can possibly apply them to the reduction of the capital debt without going in the direct face of the testator's own words. They are to be charged and chargeable on the fee. And still further, annual debts are to affect only the income and the amount of the free revenue, no matter from what source arising—are not to be applied in payment of capital debts or provisions, but are to be paid over to the heir of entail in possession. Now, I think it is impossible to doubt that that completely reversed the previous deed. Nothing can be clearer than that by the first deed he directed the proceeds of the sale of timber to be applied in discharging capital debts, while by the second deed he reversed what he had previously done. The one deed says, "Use a certain part of the revenue of my estate to pay off debts;" the other says, "No part of the revenue of my estate shall be so applied." And therefore it appears to me that this deed expressly, and not by implication, but by words susceptible of only one meaning, passed over entirely all those directions in the previous deed regarding the application of money arising from the sale of timber. I therefore come to a conclusion the opposite of that of the Lord Ordinary, and am for assoilzieing the defenders.

But there have been some other pleas mentioned by the defenders to which it may be right that we should advert, as this case may possibly go further, and I am therefore disposed not to withhold my opinion as to them. They are the fourth and fifth pleas. I need not read them, but may just say that they are pleas of *bona fide* perception and consumption and acquiescence.

I think the plea of *bona fide* consumption is not applicable to this case, assuming that the first deed has received its proper construction, that the income derived from the sale of timber is to be applied in discharge of capital burdens. The doctrine of *bona fide* consumption I think applies only to the case of a person who has possessed on an apparently good title, which is afterwards found to be invalid, and has thus lost possession, and who has been evicted from the estate and is asked to account for the rents which he has received during the period of his possession. In short, it is a plea that is based on the possession of a subject and eviction from that subject that lets in the doctrine of *bona fide* perception and consumption. There is no eviction here at all. There is no bad title. The title of Lord John Frederick Gordon was perfectly good. He never was evicted, and never could be evicted, from any part of the subject. But supposing the deed of 1838 was to stand alone, the question would arise whether he is entitled to use the whole revenue of the estate for his own behoof or for some purpose of his own? That would not, I apprehend, be a case where the doctrine would apply, and I am therefore prepared to repel that plea.

On the other hand, and without going into any detail on the matter, I think it is right to express my opinion that the plea of acquiescence on the part of the pursuers is applicable to the conduct of the next heir of entail, the Marquis of Huntly, who subsequently disentailed the estate, and that the plea of acquiescence against him is well founded, because I think there is no doubt that by his conduct, and the conduct of all concerned, Lord John Frederick Gordon was impressed with the belief, and acted upon the belief, that the revenue arising from timber belonged to himself.

The result of my opinion therefore is, that upon a sound construction of the deed of 1839 there was no restriction upon Lord John Frederick Gordon in regard to the timber at all; but even if that were ruled otherwise, I should be inclined to repel the plea of *bona fide* perception and consumption and sustain that of acquiescence.

Lord Deas—It makes no practical difference in the result whether we hold that the Lord Ordinary's interlocutor should be reversed in respect of the terms of the one deed or of the other, for it is clear that if the last deed be maintained, it does not matter much whether under the first deed the result would have been the same or not. I find, however, that according to the best judgment I can form, I should have come to the same conclusion upon the first deed as upon the second. I think that the whole object of the maker of that deed was to preserve the timber for the amenity of the estate. He says so in that deed, in these words—"For the preservation of the growing timber and plantations on my said lands and estate of Pitcur, thereby direct and appoint my said trustees to reserve the timber and plantations on my said estate when they convey the said lands to the said Lord John Frederick Gordon." And then he provides that it shall not be lawful for Lord John Frederick Gordon, or the whole heirs of entail, to cut down the growing timber or plantations, or any part thereof, without the consent and authority of the trustees, and the trustees shall not have power to give that consent unless the growing timber or plantations shall require such cutting down or thinning for their better preservation. It is impossible to read that part of the deed without seeing that the preservation of the timber on this estate was the great leading cause in the mind of the testator, and very anxiously provided for; and I think the words "for the preservation of the growing timber and plantations," &c., gives a clue to the meaning of the rest of the clause. And then the testator reserves power at any time to direct and appoint the trustees "to cut down and dispose of such parts of the said growing timber and plantations as I shall think fit, the proceeds thereof to be disposed of as I shall direct"—that is, as he shall direct by any future clause in the deed. And then there is the declaration "that the produce of all fallen trees," &c., "shall be applied in discharge of the various burdens charged on my said estate." By the latter words I take it the testator meant to say that the proceeds should be applied in discharge of the various burdens in their order, annual burdens being plainly contemplated. There is nothing here to show that the powers of the heirs of entail to deal with the proceeds of this timber as annual income were restricted, and that it was the intention of the testator that they should be applied to the capital. And then when we come to the second deed it says expressly that they are not to be applied to capital. But then that becomes of really very little moment, as I said at the outset, when we come to the second deed. The terms of the second deed seem to favour that view. It declares that the conveyance is granted "for the uses, ends, and purposes, and with and under the whole conditions, provisions, and declarations, specified and contained in the said deeds, executed by me as aforesaid, with the following explanations, alterations, and additions." And then it goes on to say what these are; and the first is—"I declare that the principal sums of all debts, legacies, and provisions shall be charged and chargeable upon and affect only the fee of my said lands and estate of Pitcur and others, and that the rents thereof shall be chargeable with annual payments only." And he further declares that "the free revenue of my said estates shall not be accumulated during the subsistence of this trust, nor applied in the payment of capital debts or provisions, but, on the contrary, shall be regularly paid over to my nephew Lord John Frederick Gordon and the heirs of entail substituted to him, as the same shall arise—that is, the rents and revenues of these estates after deducting all public burdens, interest of debts, and provisions, jointures, annuities, and other annual charges." And then they are to secure heritably on the estate such of the debts and provisions or annuities as may then (the period of denuding) still exist and remain unpaid. And then the clause goes on in the same terms—"*Lastly*, I hereby expressly declare that these presents are granted in corroboration and explanation only of the foresaid trust-disposition, and trust-disposition and deed of entail executed by me as aforesaid, and shall not be held or construed to infer or import any alteration or innovation thereof, or of any of the clauses therein contained except to the extent before specially specified and declared." In short, my view would be, that he had the same purpose in view in the first deed as in the second, although I think the second deed makes most material alterations. But whether that be so or not, the result is the same, that the deed of 1839 applies to the fee, and not annual payments. I am therefore of opinion with your Lordships that the interlocutor of the Lord Ordinary cannot be allowed to stand.

The view I take of the case leaves no room for the question of *bona fide* perception and consumption, and although I do not take the same view of the legal construction of the deed as your Lordship, I am yet inclined to agree with your Lordship's view of this plea, and also in regard to the plea of acquiescence.

Lord Mure—Upon the construction of the deeds I have come to the same result as your Lordship and Lord Deas.

If the case had turned upon the peculiar terms of the clause as to cutting wood contained in the deed of 1838, I should have had some doubts whether the pursuers' claim was well founded. I do not think I ever saw such deeds relating to timber before. But when I read the clause along with the deed of ratification and alteration of 1839, I think it is quite clear that whatever may have been the effect of the first deed on the right of the heir in possession to cut timber, that by the second deed at all events he had right to do so, and was thereby placed in a much more favourable position than he was under the deed of 1838. Under that deed of 1838, as I understand the general rule of law applicable to cases of this kind, he was placed in a much more restricted position than any ordinary heir of entail would have been, because I understand an heir of entail has right to cut and have the benefit of timber on the estate when ripe and fit for use, and that the law was laid down in cases in this Court, and dealt with in the case of *Boyd*, March 2, 1870, 8 Macph. 637, where the same question as to the right of an heir of entail to cut timber was raised, and where it was held that the heir was entitled to cut it, provided it was done in the proper administration of the estate, and that he was only restricted as to the timber

growing around the mansion-house. Now, in this original deed of 1838 the heir of entail was deprived of all rights which an ordinary heir of entail would have had. But the second deed, and that clause in it which your Lordship has read, that the principal sums of all debts, &c., should only affect the fee of the estate, &c., clearly changes the position of the heir of entail in this case, and therefore I think he was under this latter deed, and in carrying out a proper administration of the estate, entitled to apply the earlier proceeds of the wood cut by him in the way in which he did, and that being so I think it unnecessary to say more in reference to this part of the case. That I think is enough to free the defenders from the claim here made by the pursuers.

The Lord Ordinary had also before him the question of *bona fides*, and his Lordship's view on that point was that he did not think the plea well founded; and he says in his note, on this part of the case—"It is certain that the trustees and Lord J. F. G. Hallyburton believed that the latter had absolute right to the proceeds of the timber, that they entertained that belief in *bona fide*, and that in consequence Lord J. F. G. Hallyburton received and consumed the proceeds. But there is here no competing title." And on that ground—that there was here no competing title—his Lordship held that the plea did not apply. Now, that being so, I am not quite sure that the Lord Ordinary is right that there can be no case of *bona fides* unless there are two sets of competing titles; I am not sure that that is the only case where that doctrine can be applied. I think it is not so absolutely necessary to have two sets of competing titles. It is, in my opinion, enough if there are two adverse and competing rights under the same title, and under such a title I think the doctrine of *bona fides* might properly enough come in as it did in that case of *Boyd* to which I have referred. And I take that case as an illustration; there Boyd, the heir in possession, was cutting wood, as the next heir thought to the injury of the estate, and instead of lying by and allowing the heir to do so he interfered and insisted that as heir he was entitled to stop that proceeding, and latterly he brought an action of interdict, and in that way succeeded in doing so. Now, where there are two rights of that sort contained in the same title—one the right of the heir in possession, and another that of the next heir—it appears to me that the latter is entitled to come in and assert his right, and that he ought not to stand by and allow the heir in possession to go on in the belief that he has an unchallengable right, it may be, as in this case, to cut wood and to use the proceeds as his own. Now, if in *Boyd's* case the next heir had stood by and allowed his elder brother to cut wood and consume the proceeds for a certain number of years, thereby lessening the annual proceeds from year to year until the elder brother's death, and thereafter raised an action against his representatives for the proceeds of the wood received and consumed, I am inclined to think that two competing titles would not have been necessary to raise the plea of *bona fides*, and so I have said I am not sure that two competing titles are necessary to raise such a plea.

But then as to the plea itself. I find in the passage in Erskine to which we were referred in the argument (ii. 1, 25) it is stated "that a *bona fide* possessor is one who, though he be not truly the proprietor of subjects which he possesses, yet supposes himself proprietor upon probable grounds." And then in the passage in section 27, which was founded upon by the pursuer, Mr Erskine expresses the opinion that a person in possession of a subject on a title apparently good and sufficient is not bound to restore. Now, here it is admitted that the party possessed upon a title not merely apparently good but perfectly good. He had the opinion of counsel, (the late Lord Rutherfurd) to the effect that he was entitled to cut the wood. The matter had been considered doubtful, and advice was taken upon it, and that advice was followed. And in the whole circumstances of this case it appears to me that the plea might be properly enough raised, and although I do not give any decided opinion on the subject, I may say that I am not satisfied that the plea of *bona fides* cannot apply. I go no further than that except to say that if this case does fall within the category of cases for which the doctrine has been applied, it has at all events all the elements necessary to raise it.

There is another point in this case which we do not have in any of the other cases, viz., acquiescence on the part of the Marquis of Huntly, who knew all the facts connected with the previous history of this trust. He knew that good advice had been taken as to the right of the trustees and the heir of entail to cut wood, and that it had been followed under proper inspection and advice, and, lastly, that it was matter of consideration in the action of multiplepoinding in this Court, to which the Marquis was a party and appeared, and the interlocutors in which were pronounced by the Judges on the reports of men of skill. I am therefore of opinion, upon these and the other surrounding facts, that everything that was done was known to, and if not approved was certainly not timeously or at all objected to by, the Marquis of Huntly; and I am therefore of opinion still further that there is here such a case of acquiescence on the part of the Marquis of Huntly as now prevents the present pursuers, his trustees, from succeeding in their claim in this action.

Lord Shand—My brother Lord Deas has expressed very much the opinion that I entertain in regard to the same construction of these two deeds. We have the two deeds before us, and we have to construe them taken together, and taking them together I quite concur in the result arrived at by your Lordships. But I must say at the same time that if I had to determine this question upon the first deed alone, so far as I am concerned my opinion would have gone the same way. The alternatives which are presented by way of construction are these—either that the proceeds of the wood growing upon this estate are to be applied in the ordinary way in which such proceeds are applied—in payment of the natural burdens—and belong to the heir along with his other rents and proceeds, or by the creation of a sinking fund which shall be kept and applied for payment of the capital sums with which the estate is burdened. And it appears to me to be reasonable in construing which of these two alternatives shall be adopted, that unless it is clearly declared that such a fund shall be formed, the other course shall be adopted, viz., that the pro-

ceeds of this wood shall be applied to the extinction of such burdens as the rents or any part of them would be. And that being so, I think it may be observed, in the first place, that this clause does not contemplate an endurance of a long period of years and the producing of a considerable sum of money, but that it is limited to the ordinary fallen trees, the timber cut in the course of thinning, and the bark which may be produced and which may be in a condition for sale. In short, it is just the ordinary cropping of wood upon the estate. Then, in the next place, I observe that the purpose of the clause is really, as announced by the testator, the preservation of the amenity of his estate. There is no indication in the clause that his purpose is to reduce debts. On the contrary, the testator directs his trustees, for the preservation of the growing timber and plantations on his estate, to reserve the timber and plantations when they are conveying the estate, and he declares that the heirs shall not be entitled to cut timber without the consent of the trustees, and that the trustees shall not give such consent "unless the growing timber or plantations on my said estate shall require such cutting down or thinning for their better preservation." The clause also discloses a necessity for keeping up the trust, for it might be necessary, with a view to the preservation of this timber, that the trustees should give their consent to the cutting of wood. Then there follow the words by which it is said the truster directed the proceeds of the timber to be applied in payment of capital debts—"Declaring also that the produce of all fallen trees or cut timber or bark shall be applied in discharge of the various burdens charged on my said estate." It appears to me that these words must be held to have in contemplation only such burdens as were of an annual nature. No doubt the word "annual" is not used, but in my opinion the fair reading of the words is that the truster contemplated the application of the proceeds of this timber to the payment of the various annual burdens upon the estate. It was asked in the course of the argument what the meaning of this expression "various burdens" was? I have no difficulty about that. The testator had said the trustees were to reserve the timber. If he had said nothing about how the money was to be applied, would it have been thrown into the general trust-funds and applied to purposes foreign to the rest of the deeds? I think not. But then the last purpose of the deed is a reservation to the testator of full power to himself during his life to direct and appoint his trustees "to cut down and dispose of such parts of the said growing timber as I shall think fit, the proceeds thereof to be disposed of as I shall direct." Now, if there had simply been a direction to the trustees, "You shall reserve the timber," I think the probability would have been, that without some direction about it the proceeds of that timber would have gone into the general trust-funds. But he does quite the opposite, for he says that although the timber is to be reserved, the proceeds shall be applied to the discharge of the various annual burdens on the estate; for I cannot read this clause as recommending the establishment of a sinking fund. And, accordingly, without saying more upon this part of the case, I am, as I have already said, of the opinion that if the deed of 1838 had stood alone it would have barred the pursuers from raising and insisting in this action.

But when we take the other deed the case is made perfectly clear. The other deed confirms my views upon the first, because the clauses that there occur are now introduced in this way, that notwithstanding what I have said in my previous deeds that the rents are to be applied in a certain way, I wish the contrary to be done. We have general words used, and the words "rents" and "revenues" used again and again with reference to the annual charges on the estate. I think, therefore, that the second deed carries out the testator's purpose, and does so in terms quite unambiguous. So much for the construction of the deeds.

But in case a different view should still be entertained if the case goes further, I am prepared, so far as I am concerned, to say that if the construction of these deeds were the opposite, and if the question had been raised *tempestive*, and it was held that there was to be such a sinking fund, I should hold that the trustees who represent the Marquis of Huntly are precluded from raising this question. The defenders rest their defence upon two grounds, viz., (1) *bona fide* perception and consumption, and (2) acquiescence, and my opinion is favourable to both of these defences. It is not disputed by the counsel for the pursuers, and cannot be disputed, that you have the two elements that are usual for the support of the plea of *bona fide* perception and consumption. You are here dealing with the annual proceeds or income of an estate, you have the most absolute *bona fides*, and you have a colourable title that cannot be questioned, because all parties acted in the belief, and reasonable belief, that the person who was drawing these proceeds and using them had a title to do so; and finally you have parties who were in the position of having a competing right, and who could have asserted it at the time. Now, it may be said that these circumstances do not bring this case within the category of those cases in which the plea of *bona fide* perception and consumption has been sustained. It is said such a case should have two elements, viz., eviction and two competing titles. But are these of the essence of the plea of *bona fide* perception and consumption? I say I think not. Take the first of them, eviction. The plea does not arise from eviction. Eviction occurs and gives occasion to state the plea of *bona fides*. Eviction is not of the essence of that plea. The answer is, I admit, —I am turned out of the estate, and I have consumed the rents.

But in regard to the next point—that is, the case where you have two titles concurring and opposing, and (as Lord Mure has explained very clearly) the case of two adverse interests arising under the same title. In the latter case the next heir is in a position to consent to the act of the heir in possession, or to assert his right and stop that act, and if he does not he will be held to have allowed the heir to consume the fruits. I think the substance of the plea of *bona fide* perception applies to that case. But I do not think that there should be competing titles such as your Lordship has referred to; for, as I have said, I agree with Lord Mure that two adverse competing interests arising under the same title are quite sufficient to raise the plea.

But I think the case is freed from difficulty by

the acquiescence of the Marquis of Huntly. What are the facts in regard to that? The pursuers here representing the Marquis of Huntly demand the proceeds of this wood from 1855 to 1878, a period of twenty-two years, while for eleven years the trust affairs were the subject of a judicial process in which the Marquis of Huntly was a party, and the very subject of this annual cutting of wood and appropriating the proceeds was prominently brought before the parties, and particularly by the reports of the Auditors of this Court, to whom the case was remitted, one of these being by the late Mr Hunter, and another by the present auditor Mr Baxter, who had succeeded to that office. I do not need to go into the details of these reports. It is sufficient to say that the Marquis of Huntly was a litigant in the cause, and allowed them to be approved of. The heir was thus entitled to assume that his right was recognised, and great injustice would be done to him and his representatives if, after having acted with the consent and acquiescence of all interested, the Marquis of Huntly should afterwards be entitled to come and demand that the proceeds of all of these wood cuttings should be repaid, and not merely for the last period of eleven years, but for the first period of eleven years, when the trust matters were in Court and were approved of, and which approval plainly authorised the heir to go on as he had been doing. Upon these grounds I am of opinion that the interlocutor of the Lord Ordinary should be recalled and the defenders assoilzied.

The Court pronounced judgment recalling the interlocutor of the Lord Ordinary, assoilzieing the defenders, and finding them entitled to expenses.

Counsel for Pursuers (Respondents)—Kinnear—Robertson. Agents—Henry & Scott, S.S.C.

Counsel for Defenders (Reclaimers)—Asher—Mackay. Agents—Lindsay, Howe, Tytler, & Co., W.S.

Saturday, November 6.

SECOND DIVISION.

[Sheriff of Midlothian.

MEIKLE & WILSON *v.* POLLARD (SMITH'S TRUSTEE).

Lien—Retention.

A firm of accountants was employed by a party—who subsequently became bankrupt—to do certain professional work for him. To enable them to execute this work the business books of the bankrupt were put into the accountants' hands. *Held*, in a question with the bankrupt's trustee, that the accountants were entitled to retain the books until paid for the work they had done.

In the month of January 1880 Mr James Smith, merchant, Kirkliston, employed Messrs Meikle & Wilson, accountants and business agents in Edinburgh, to collect certain outstanding debts which were due to him, and to negotiate for the sale of his Kirkliston business. To enable his employees to carry out these instructions, Mr Smith handed over to them a list of the debts to be recovered and two business books. Messrs Meikle & Wilson thereupon proceeded to examine the business books, to write letters to the debtors, and to effect the sale of the Kirkliston business. A sum of £2, 15s. due to Mr Smith was in this way recovered, and the sale of the business was completed.

On the 6th of February 1880 Mr Smith, who had become insolvent, granted a trust-disposition of his whole means and estate to Mr James Pollard, chartered accountant, Edinburgh, for behoof of creditors. At the meeting when the disposition was agreed to be granted by Mr Smith, Mr Meikle was present, but did not accede to the disposition. At this time Messrs Meikle & Wilson had an account against Mr Smith for the above-mentioned transactions. A balance of £16, 1s. 10d. was claimed as still due. In order to enforce payment of this debt Messrs Meikle & Wilson retained possession of the business books which had come into their hands.

Shortly after the trust-disposition was granted Mr Pollard requested Messrs Meikle & Wilson to deliver up to him, as the trustee on Smith's estate, the business books in their possession. Messrs Meikle & Wilson refused to do so, on the ground that they had a right of retention over the books until payment of their account. Mr Pollard thereupon petitioned the Sheriff to ordain Meikle & Wilson to deliver to him, as trustee on Smith's estate, the whole vouchers, writs, title-deeds, lists of book debts, and in general the whole documents in their possession relating to or forming any portion of Smith's estate. The petitioner pleaded, that being in right of the whole means and estate of the said James Smith in virtue of the disposition in his favour, he was entitled to delivery of the documents sued for. The defenders replied, that having acquired actual possession of the documents from the owner thereof to carry out his instructions to them as accountants and business agents, and having done so, they had a right of lien or retention over them for their charges.

The following interlocutor and note were issued by the Sheriff-Substitute (HALLARD):—"Having heard counsel on the defenders' plea of retention, repels said plea."

"*Note.*—The authorities to which the Sheriff-Substitute was referred at the debate in support of the proposition that an accountant has the same lien over his employer's writs as a law-agent are not sufficient to support that plea. In *Stewart* v. *Stevenson*, Feb. 23, 1828, 6 Shaw 591, the accountant who successfully pleaded the lien was an officer of Court. In *Bruce* v. *Irvine*, Feb. 7, 1835, 13 Shaw 437, the point was reserved, although it is true that in the Lord Ordinary's interlocutor there is an important observation on the case of *Stewart*. The case of *Renny and Webster* v. *Myles and Murray*, Feb. 8, 1847, 9 Dunlop, New Series, 619, is not in point, except as illustrating the disinclination of the Court to extend the writer's lien beyond the limits assigned to it by previous authorities—Lord Mackenzie quoting the pithy maxim, *quæ contra tenorem juris fiunt non sunt trahenda ad consequentias.*

"If, therefore, the defenders' plea has any valid foundation, it must be identical with that of the artificer who retains the article he has made or repaired in security of the sum due as