and such as were beyond the reasonable contemplation of parties when the rights of surface and minerals were separated. There is some evidence adduced by the defenders, although not much, to the effect that the defenders' operations would have done no harm to the old toll-house or any erection of similar extent or weight. But that evidence cannot have much, if any, weight attached to it, for the reason that no question of that kind was put by the defenders to any of the pursuer's witnesses; the point seems only to have been raised after the pursuer's proof was closed.

On the whole matter, I am of opinion that the appeal should be dismissed and the judgment of the Sheriff affirmed.

LORD YOUNG, LORD RUTHERFURD CLARK, and the LORD JUSTICE-CLERK concurred.

The Court found in fact and law in terms of the Sheriff-Substitute's interlocutor of March 20th 1894.

Counsel for the Pursuer—Vary Campbell—Clyde. Agents—Drummond & Reid, S.S.C.

Counsel for the Defenders—Asher, Q.C. —Deas. Agents—J. & A. Hastie, Solicitors.

Friday, December 21.

SECOND DIVISION.

[Sheriff of Forfarshire.

M'INTYRE *v.* WESTWOOD'S TRUSTEES.

Husband and Wife—Mutual Trust-Disposition—Widow's Obligation to Aliment Stepchild.

In a mutual trust-disposition and settlement between husband and wife the spouses disponed the whole estate of which each was possessed to the survivor in liferent, but with a power to gratuitously dispone the whole of the estates so conveyed. There was also a declaration that the survivor should be bound to pay the cost of maintaining an imbecile son of the husband by a former marriage, "so long as he shall be unable to maintain himself." The son had funds of his own, amounting to about £360. The income of these funds was insufficient for his maintenance. The wife survived her husband.

Held that on a sound construction of the mutual trust-disposition she was not bound to contribute to the imbecile's maintenance until his own funds were exhausted.

Joseph Westwood was twice married. By his first marriage he had a son, William Stratton Westwood, who was an imbecile, and was confined in an asylum.

Upon August 28th 1877 Joseph Westwood and his second wife executed a mutual trust-disposition and settlement. By this deed the spouses assigned and disponed to the survivor the whole means, estate, and effects, heritable and moveable, then belonging or which should belong to each at death, in liferent, with the power of disposal hereinafter mentioned, and on the death of the survivor to three trustees named for certain purposes mentioned in the deed, "Declaring, as it is hereby expressly provided and declared, notwithstanding the restricted right of liferent hereby given to the survivor of us, that it shall be in the power of such survivor to sell, burden, or affect with debt, or even gratuitously to dispone the whole or any part of the estates and effects, heritable and moveable, above conveyed as fully and freely as if he or she were absolute fiar thereof: And declaring also, as it is hereby expressly stipulated, provided, and declared, that the survivor of us shall be bound to pay the cost of maintaining William Stratton Westwood, son of the said Joseph Westwood, in an asylum or elsewhere, so long as he shall be unable to maintain himself, and also to pay such sum annually as may be fixed by the trustees above named, or their foresaids, as the cost of maintaining any other children that may hereafter be procreated of the marriage between us, and the liferent provision and power of disposal hereby conferred upon the survivor of us is so conferred under the express burden of maintaining such child or children."

Joseph Westwood died on 23rd May 1883 survived by his widow, his son, William Stratton Westwood, and a son of the second marriage, Joseph Westwood. After his death the trustees named in the mutual trust-disposition and settlement entered upon the possession and management of the estate, and paid over the free annual income to the widow.

Mrs Westwood died on June 6th 1889 leaving a trust-disposition and settlement by which she conveyed to trustees named therein her whole means and estate, including all estate over which she had a power of disposal, for behoof of her son, Joseph Westwood, in the event of his surviving her (which happened).

At the date when the mutual trust-disposition and settlement was executed, William Stratton Westwood had moveable property to the value of over £360. Upon 21st May 1881 Daniel M'Intyre, who was one of the trustees under the mutual trust-disposition and settlement, was appointed *curator bonis* to William Stratton Westwood. The income of the ward's estate was insufficient to pay for his maintenance in the asylum, and in 1882 his father paid to the *curator bonis* £20, 15s. 4d., being the sum by which the expenditure of the ward's funds had exceeded the revenue at the date of payment.

For three years after her husband's death Mrs Westwood contributed nothing to the ward's support, but at Whitsunday 1886, and at each term of Whitsunday and Martinmas thereafter, she paid £20 to the *curator bonis*, and since her death her trustees had paid £40 annually towards the ward's maintenance.

In February 1893 the *curator bonis* raised an action in the Sheriff Court of Forfarshire against Mrs Westwood's trustees for (1) payment of £152, 14s. 5d., the sum by which the ward's estate had been diminished during the years in which Mrs Westwood had not contributed to his support; and (2) to have it found and declared that William Westwood was unable to maintain himself, and to ordain the defenders to pay to the pursuer such a sum as, added to the income of the ward's own estate, would be enough to maintain him in the asylum.

It was admitted that the ward's brother, Joseph Westwood, was his heir both in heritage and in moveables.

The pursuer pleaded—"(1) The defenders, as trustees of Mrs Westwood, holding the trust funds under their charge, so far as derived from Mr Joseph Westwood's executors, subject to the burdens imposed by the mutual settlement, and in particular, under the burden of paying to the pursuer annually such sum as may be necessary, when added to the income of the ward's own estate, to pay the cost of maintaining the said William Stratton Westwood in an asylum, so long as he is unable to maintain himself, the pursuer is entitled to decree as craved. (2) The said William Stratton Westwood being unable to maintain himself in the sense intended to be conveyed by the testator, the pursuer is entitled to decree as craved. (3) The actions and expressed intentions of the said Joseph Westwood when alive show what he intended by the words, 'so long as he shall be unable to maintain himself,' contained in his mutual settlement."

The defenders pleaded, *inter alia*—"(4) The said William Stratton Westwood not being yet 'unable to maintain himself,' the defenders are not bound to undertake his maintenance, and therefore the declarator sought is untenable.

Upon June 12th 1894 the Sheriff-Substitute (CAMPBELL SMITH) found "that under the mutual trust-disposition and settlement of Joseph Westwood and his second wife, the said wife, as his widow, after his death, which occurred on 23rd May 1883, was bound to contribute to the support of William Stratton Westwood, the imbecile son of a former marriage, so long as she lived, and he was unable to support himself, whatever sum, in addition to the revenue of his own estate, was necessary to support him in a lunatic asylum or other suitable home, so that his capital might remain undiminished at the time of her death, which occurred 6th June 1889, and to that extent sustains the relevancy of the action: *Quoad ultra* finds that the facts stated do not warrant the second conclusion, and *in hoc statu* dismisses it as irrelevant: Allows to the pursuer a proof of the amount of deficit in the payment of his ward's board, in excess of his own personal income, that had not been provided for on the death of his stepmother on 6th June 1889," &c.

Upon appeal the Sheriff (COMRIE THOMSON) pronounced this interlocutor—"Finds that on a sound construction of the mutual trust-disposition and settlement mentioned on record, the lunatic must pay for his own maintenance until his funds are exhausted: Therefore sustains the appeal, recals the interlocutor of the Sheriff-Substitute, dismisses the action, and decerns, &c.

"*Note.*—The question here is, whether the defenders are bound to supplement the annual income of W. S. Westwood to meet the charges of his maintenance, or whether his curator is bound to employ his ward's capital, the defenders being only liable for his support when his funds are exhausted. I adopt the latter view. The pursuer misquotes the words of the deed when he substitutes 'as far' for 'so long as.' It is quite possible that it was the intention of the father of the lunatic to make a provision in accordance with the pursuer's contention, but I cannot so read the words of the document.

"I agree with the Sheriff-Substitute that there is nothing in this action to justify a finding as to what may be the liability of the defenders in future."

The pursuer appealed, and argued—This action was important in the ward's interests, because, if this obligation were not implemented, he might, if he recovered, find that his whole estate had been expended in his maintenance, and, although the trustees might be willing to continue the allowance, they must hand over the capital to Joseph Westwood when he attained majority, and he might not be willing to bear the necessary expense. The clause in the agreement was an obligation that the survivor of the spouses should maintain the imbecile "so long as he was unable to maintain himself." The obligation must be equal to the minimum obligation of the father according to law. The father was bound to maintain his son if the son had no funds of his own, but if the father had funds belonging to the son, and showed that he had expended part of these on his son's maintenance, he was entitled to take credit only for the interest year by year, and could not diminish the capital—*Maxwell* v. *Brown*, 1669, M. 1435; *Duncanson, &c.* v. *Duncanson*, 1715, M. 8928; *Creditors of Kimmerghame* v. *Hume*, 1731, M. 11,438; *Steel's Trustees* v. *Cooper, &c.*, June 16, 1830, 8 S. 926; *Fairgrieves* v. *Hendersons*, October 30, 1885, 13 R. 98. That being the state of the law, the intention of the father was clearly shown by the fact that he had supplemented the income of his son's estate so as to produce a sum sufficient for his maintenance, and the clause ought therefore to be read as meaning that the trustees under the mutual settlement were bound to implement the income of the ward's estate, so long as that income was insufficient to provide for his maintenance.

Argued for the defenders—The only obligation upon the defenders to provide for the pursuer's maintenance was contained in the clause in the mutual trust-disposition, and the question must be decided solely on the footing of what that clause meant. The meaning was plain that so long as the ward had funds which could be

applied for his maintenance, the defenders were not liable for his support. With regard to the cases cited by the pursuer, in all of them the father was alive, and could be sued for any moneys expended on his children.

At advising—

LORD JUSTICE-CLERK—The question in this case is, whether under the provisions of this mutual trust-disposition and settlement the trustees under Mrs Westwood's trust-disposition, who hold the only funds out of which the obligation can be made effectual, are bound to pay back to William Stratton Westwood's *curator bonis* a sum equivalent to three years' aliment, which had been paid out of the capital of the ward's own estate. Mrs Westwood was no doubt liable to pay the cost of maintaining the ward in an asylum if he could not maintain himself, but she has left the whole estate to trustees for behoof of her own son, and the trustees are now paying the extra amount over the interest on the ward's own capital necessary for his maintenance, so that the present question only relates to a period of three years during which that amount was not paid.

The case is of no importance unless the ward should recover, but I think that, as he is possessed of certain estate which can be used for his maintenance, it cannot be said that he is unable to maintain himself so long as that exists. I think the judgment of the Sheriff is right.

LORD YOUNG—I do not think that the matter is doubtful upon the construction of the clause in this mutual trust-disposition and settlement, which provides that the survivor of the spouses should have the duty of maintaining this ward in an asylum or elsewhere "so long as he shall be unable to maintain himself." When this provision first came into operation he had an estate of some £300, so that he was able to maintain himself for a period of six years at the rate of £50 a-year, and the case would have been just the same if he had been able to maintain himself for one year or for twenty years, although the income of his capital might not have been sufficient to maintain him.

I think that the construction the curator seeks to put upon this clause, that the trustees are bound to pay over yearly a sum which along with the ward's income, will be sufficient for his support, is not maintainable, and that so long as the ward is able to maintain himself this clause does not come into operation. I therefore agree with the Sheriff's judgment.

LORD RUTHERFURD CLARK—I am of the same opinion.

LORD TRAYNER—I agree, but I wish to say that I give my opinion entirely upon the case raised upon record, and decided by the Sheriff upon the words of the clause in the mutual trust-disposition and settlement. It is not necessary to deal with the larger question that has been argued, but I do not wish by my silence to be held as agreeing with the views that have been expressed on the part of the curator.

The Court dismissed the appeal.

Counsel for the Pursuer — W. Campbell—Constable. Agent—J. S. Sturrock, W.S.

Counsel for the Defenders—Salvesen. Agent—J. Smith Clark, S.S.C.

Saturday, December 22.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

INGLIS *v.* GILLANDERS.

Succession—Trust-Disposition and Settlement—Entail—Direction to Entail Lands on Heirs of Another Entailed Estate—Disentail.

In his trust-settlement a testator directed his trustees to execute a deed of entail of his estate of Newmore to and in favour of a series of heirs therein specified, "whom failing to my nephew, J. F. G., Esquire of Highfield, and failing the whole persons above specified, then from respect to my deceased grandfather, G. G., Esquire of Highfield, to the heir in possession of the estate of Highfield under the entail thereof for the time, and to the other heirs-substitute in said entail in the order set down in said entail successively, declaring that my object and intention is that, failing the above series of heirs named by me, then the said lands and estate hereby conveyed are to be held by the heir of entail of the estate of Highfield along with the said estate of Highfield." In a codicil the truster desired it to be understood that the destination to J. F. G., as well as the subsequent destination to the heir in possession of the estate of Highfield, was made by him out of respect to the memory of his late grandfather, G. G. of Highfield.

The trustees executed a deed of entail, in which they disponed the lands of Newmore to the series of heirs other than the heirs of entail of Highfield in the very words of the destination contained in the trust-deed, "whom failing to J. F. G., Esquire of Highfield, who is the heir now in possession of the estate of Highfield, under the entail thereof executed by G. G., Esquire of Highfield . . . and failing the said J. F. G., then to the other heirs-substitute in said entail of Highfield in the order set down in said entail respectively, viz."—The heirs-substitute as they stood at the time were then enumerated in their order.

Held (*rev.* judgment of Lord Kyllachy) that the trustees had not acted *ultra vires* in making the destination of the estate of Newmore to the