Sheriff-Substitute, on the other hand, deals with the case as one where there has been some misunderstanding. He says —"If so, she cannot have now a better title to sue anyone in whose hand the sum awarded may through some misunderstanding be deposited." Then he says—"The sum in question may have been remitted to the defender Hume under the erroneous impression that the defender had already settled with the pursuer." As I read the pursuer's case, it is not a case of misunderstanding or erroneous impression at all, but that the defender was not only bound to know but did actually know that he was getting this money for Miss Costin and not for himself. A plea-in-law has now been added appropriate to the averments of fraud.

LORD SALVESEN was absent.

The Court recalled the interlocutor of the Sheriff-Substitute and allowed a proof before answer.

Counsel for the Pursuer — Carmont. Agents—Beveridge, Sutherland, & Smith, W.S.

Counsel for the Defender—A. A. Fraser. Agent—R. T. Calder, Solicitor.

Wednesday, November 19.

FIRST DIVISION.

KENNETH (SHEDDEN'S TRUSTEE) *v.* DYKES AND OTHERS.

Trust — Discretionary Powers — Delectus personæ—Assumed Trustee.

A testatrix who died on 3rd June 1910 by her trust-disposition and settlement nominated and appointed two persons her trustees and executors and conveyed to them her whole estate, but by a subsequent codicil she recalled the appointment of one of the two so nominated. By the third purpose of her will she gave and bequeathed the whole residue of her estate "to my trustees," to be by them divided among such charitable and philanthropic societies, institutions, and objects in or connected with Glasgow as "my trustees" in their absolute and uncontrolled discretion should decide. Throughout her settlement the testatrix in referring to her trustees described them as "my trustees," except in the following instances—(*a*) she left £50 "to each of my said trustees" who should accept office; (*b*) she empowered her trustees to employ a law agent, "who may be of my said trustees' own number;" and (*c*) she declared that notwithstanding that she had bequeathed to each of "my said trustees" accepting office the foresaid legacy, "my said trustees" were to have the immunities and privileges of gratuitous trustees. Power to assume new trustees was not expressly given.

The sole appointed trustee died on 29th December 1910 without having made any allocation of funds, but on 30th September 1910 he had assumed a co-trustee, and this assumed trustee, on 22nd December 1911, executed a minute by which he allocated a sum of £500 to a certain Glasgow charity.

Held that the assumed trustee was entitled to exercise the discretionary powers conferred by the third purpose.

Opinion by the Lord President—"Whether or no there is *delectus personæ*, it appears to me, cannot be determined, either solely or mainly, by an examination of the discretionary powers given, or by the difficulty or delicacy of the exercise of these powers?"

A Special Case was presented by (1) William Kenneth, sole trustee acting under the trust-disposition and settlement of Miss Janet Shedden, Gourock, dated 11th February 1904, and two codicils thereto dated 11th February 1904 and 5th April 1907 (*first party*), (2) Mrs Margaret Shedden or Dykes, niece and sole next-of-kin of the testatrix, with the consent and concurrence of her husband the Rev. Thomas Dykes, D.D. (*second party*), and (3) the Royal Hospital for Sick Children, Glasgow, and the honorary treasurer thereof (*third parties*), in order to obtain the opinion of the Court on certain questions arising out of the said trust-disposition and settlement.

The *trust-disposition* and *settlement* of the testatrix was as follows:—"I, Miss Janet Shedden, . . . in order to settle the succession to my whole estate in the event of my decease, do hereby assign, dispone, and convey the whole means and estate of every description, heritable and moveable, wherever situated, that shall belong and be owing to me at the time of my decease, to Robert Scott Stewart, solicitor in Glasgow, and Andrew Stewart, solicitor in Glasgow, and the acceptor and survivor of them, as trustees and trustee for the purposes after specified; and I nominate and appoint the said Robert Scott Stewart and Andrew Stewart, and the acceptor and survivor of them, to be my executors and executor—[*By codicil dated 5th April* 1907 *the testatrix revoked and recalled the appointment of Robert Scott Stewart as trustee and executor*]: But these presents are granted in trust always for the purposes following, *videlicet*:—(First) I direct my trustees to pay all my just debts, sick-bed and funeral expenses, and the expenses of the trust hereby created: (Second) I give and bequeath the legacies following to the following persons and others respectively, and direct my said trustees to pay the same accordingly, namely—(*Primo*) £50 to each of my said trustees who shall accept office under these presents—[*Here followed a number of legacies*]: And said legacies shall all be paid as soon as possible after the lapse of six months from my decease, with interest from and after the lapse of such six months at the average rate of interest, if any, that my trustees shall have received from my estate, howsoever the same may be invested or wheresoever the same may be: And my trustees shall be the absolute judges as to what such average rate of interest is or

shall be; and said legacies and interest shall further be paid without any deduction of or for Government duty of any kind, all which duty shall be paid out of the residue of my estate; . . . and should there be any doubt as to the respective legatees, or any of them, whom it is my intention to favour, my trustees shall be the only judges in the matter, and their judgment and action shall be absolute and unchallengeable by or at the instance of any person, persons, or others whatsoever; and the mere receipts of the respective persons, officials, or bodies to whom my trustees shall actually pay such legacies respectively shall fully and finally discharge my trustees of the legacies and interest thereon so paid by my trustees: And (Third) I give and bequeath the whole residue and remainder of my estate, and all free proceeds thereof, to my trustees, to be by them paid, divided, and distributed to and among such charitable and philanthropic societies, institutions, and objects in or connected with Glasgow, and in such sums and proportions to each or the whole to any one of such societies, institutions, or objects, all as my trustees in their absolute and uncontrolled discretion shall decide; and I declare that the judgment and action of my trustees in such payment, division, and distribution shall be absolute and unchallengeable by or at the instance of any person or persons or others whatsoever, and that the mere receipts of the respective secretaries, treasurers, or other officials of the respective objects that my trustees shall select as to take benefit under this present provision shall fully discharge and exonerate my/ trustees of all sums of money that my trustees shall actually pay bearing to be in virtue hereof: And further, I declare that I have not favoured those of my relatives whom I might otherwise have been inclined to favour, because they have not made any attempt to show to me, nor did they attempt to show to my late sister, any such affection or attention as I or she might have expected: And I empower my trustees to sell the whole or any part of my estate by public roup or private bargain, and to employ a law agent or law agents, who may be of my said trustees' own number, or any firm of which they or either of them may be the partners or a partner; and to pay to such law agent or law agents out of my estate all reasonable charges for services rendered, including charges for attending all meetings of trustees, any law or practice to the contrary notwithstanding; and notwithstanding that I have bequeathed to each of my said trustees who shall accept the foresaid legacy of £50, I declare that my said trustees shall have and enjoy all the immunities and privileges of gratuitous trustees. . . ."

The codicil of 11th February made certain alterations in the amount of certain legacies, and the codicil of 5th April, as above noted, recalled the appointment of Robert Scott Stewart as trustee and executor.

The testatrix died on 3rd June 1910, and the said Andrew Stewart accepted office as trustee and executor foresaid, and proceeded to administer the estate in terms of the settlement. By deed of assumption dated 30th September, and registered in the Books of Council and Session 1st October 1910, Andrew Stewart assumed the first party as a trustee under the said trust-disposition and settlement and codicils, and along with the first party continued to administer the trust estate. Andrew Stewart died on 29th December 1910, and the first party as the sole trustee acting under the said trust-disposition and settlement and codicils since that date continued the administration of the estate.

The estate left by the testatrix consisted wholly of moveables and amounted to £6000 or thereby. It had been fully realised, and after fulfilment of all the other and prior purposes of the settlement and codicils there remained a sum of £3937, 1s. 2d. in bank upon deposit-receipt, representing the residue of the estate. No allocation had been made by the trustees up to the date of Andrew Stewart's death, but the first party by minute dated 22nd December 1911, bearing to be in exercise of the discretionary powers conferred by the said third purpose of the settlement before narrated, allocated a sum of £500 to the third party.

The first party *contended* that the bequest of residue was valid and not void from uncertainty, and that as Andrew Stewart had, in addition to the powers conferred on him by the settlement, the whole powers conferred by statute on gratuitous trustees, including the power to assume new trustees, the effect of the assumption of the first party by Andrew Stewart was to confer on the first party the whole powers conferred by the testatrix upon her trustees, including the power to select the institutions among which the residue of the estate was to be divided, and to allocate and pay the same to them in such sums and proportions as he should decide.

The second party contended that the bequest of residue was void from uncertainty. [*This was given up at the hearing of the case.*] She further contended that as the testatrix made no provision for continuing the trust after the death of the original trustee, the discretionary powers conferred by the trust-disposition and settlement were personal to him, that the first party had accordingly no power to carry out the third purpose of the said settlement, and that the foresaid minute by him was of no effect. She further contended that upon the death of Andrew Stewart without having exercised the discretionary powers conferred upon him by the testatrix, the residue of the trust estate fell into intestacy and was payable to her as sole next-of-kin.

The third parties contended that the bequest of residue was not void from uncertainty, that the residue of the estate had not fallen into intestacy as claimed by the second party, that the first party had the full powers conferred by the testatrix upon her trustees under her settlement, and that accordingly the said minute of allocation was valid and sufficient, and entitled the third parties to payment of the sum thereby allocated.

The *question of law* for the opinion and

judgment of the Court was—"2. (*a*) Is the first party, as assumed trustee foresaid, entitled to exercise the discretionary powers as to residue contained in the said purpose? Or (*b*), Did the residue of the estate of the testatrix fall into intestacy upon the death of the said Andrew Stewart without having exercised the discretionary powers conferred by the settlement?"

The case was heard on the 5th, 18th, and 19th November.

Argued for the second party — Where trustees named were given the power, not merely of apportioning a fund amongst certain charities, but also the power of selecting the charities, and where there was no express power given to assume trustees, the presumption was that the discretionary powers conferred were confined to the trustees nominated by the testator. That rule was to be deduced from the following authorities:—*Hill's Trustees* v. *Thomson*, October 30, 1874, 2 R. 68, 12 S.L.R. 20; *Simson and Others*, January 27, 1883, 10 R. 540, 20 S.L.R. 359; *Robbie's Judicial Factor* v. *Macrae*, February 4, 1893, 20 R. 358, esp. Lord M'Laren at p. 362, 30 S.L.R. 411; *Grieve's Trustees* v. *Wilson*, 1904, 12 S.L.T. 347. In *Hill's Trustees* (*cit. sup.*), where the trust deed did not contain a power of assumption, it was held that the power of apportionment was personal to the original trustees. In *Simson and Others* (*cit. sup.*), where the trust deed gave the trustees the power of making advances of capital, the Court, on the application of a judicial factor, granted him authority to make an advance of capital on the ground that power of assuming trustees was given and that the idea of *delectus personæ* was thus excluded. In *Robbie's Judicial Factor* (*cit. sup.*) the trust deed did not contain express power of assuming trustees, and discretionary powers were given to select the charitable objects. The Court held that the discretionary powers were personal to the trustees and could not be exercised by a judicial factor. In *Grieve's Trustees* (*cit. sup.*) the trust deed contained a power of assuming trustees, and the discretionary powers were of apportionment and not of selection, and on these grounds it was held there was no *delectus personæ*, and that the powers could be exercised by new trustees appointed by the Court. The case of *Allan* v. *Mackay & Ewing*, November 13, 1869, 8 Macph. 139, where authority was given to a judicial factor to exercise a power of increasing an annuity, was exceptional, because all parties having an adverse interest had consented, and there were accumulations struck at by the Thellusson Act. Reference was also made to *Dick* v. *Ferguson*, 1758, M. 7446; *Ireland* v. *Glass*, May 18, 1833, 11 S. 626; and *Laurie and Another* v. *Brown and Others*, 1911, 1 S.L.T. 84. The law in England seemed to be the same. Thus Sir William Grant, M.R., said in *Cole* v. *Wade*, 1807, 16 Ves. 27, at p. 44—"Wherever a power is of a kind that indicates a personal confidence, it must *prima facie* be understood to be confined to the individual to whom it is given; and will not except by express words pass to others to whom by legal transmission the same character may happen to belong." This statement of law was approved by Eldon, L. Ch., on appeal, *sub nomine Walter* v. *Maunde*, 19 Ves. 423, at p. 424. It was true that Farwell, J., in *Eastick* v. *Smith*, [1904] 1 Ch. 139, thought that statement of principle was inconsistent with *Crawford* v. *Forshaw*, [1891] 2 Ch. 261, but that merely decided that a person nominated executor, but who had not accepted office, was not entitled to prevent nominated executors who had accepted office from exercising discretionary powers. Moreover, it had not been noticed that *Cole* had been approved in the House of Lords. If the law of England was not now as expressed by Sir William Grant in *Cole*, it was because of the Trustees Act 1893 (56 and 57 Vict. cap. 53), sec. 36, which did not apply to Scotland, but in any case it accurately stated the law of Scotland. Reference was also made to *Sykes* v. *Sheard*, 1863, 2 De G. J. & S. 6; *Hibbard* v. *Lamb*, 1756, Amb. 309; Lewin on Trusts (12th ed.), pp. 752-4; Farwell on Powers (2nd ed.), p. 460.

Argued for the third parties—The question here was really one of construction, for the true test was, was there anything in the deed which showed that the testatrix only intended the powers conferred to be exercised by the trustees named and not by their successors in office nor by anyone else—*Hill's Trustees* v. *Thomson* (*cit. sup.*), *per* Lord Moncreiff; *Grieve's Trustees* v. *Wilson and Others* (*cit. sup.*), *per* Lord Low; *Simson and Others* (*cit. sup.*), *per* Lord President Inglis at p. 544, and Lord Shand at p. 546. The same test was applied in England—*Byam* v. *Byam*, 1854, 19 Beav. 58, *per* Sir John Romilly at p. 66; *Crawford* v. *Forshaw* (*cit. sup.*), *per* Lindley (L.J.), and Bowen (L.J.); *Eastick* v. *Smith* (*cit. sup.*); Lewin on Trusts (12th ed.), p. 754. This construction was unlikely, as it clearly appeared she did not wish her relatives, whom she had considered lacking in attention, to benefit. Moreover, where the testatrix wished to refer to the trustees nominated by her, she referred to them as her "said trustees," and where as in the residue clause she simply used the word "trustees" she included therein any holders of the office. For she must be assumed to have known that by the Trusts Acts 1861, section 1, power to assume trustees would be read into her will.—The Outer House case of *Blair and Another* (*Malcolm Macfarlane's Trustees*) v. *Helen Macfarlane's Trustees and Another*, 1896, 4 S.L.T. 23, was on all fours with the present case and ought to be followed. The cases of *Hill's Trustees* v. *Thomson* (*cit. sup.*) and *Robbie's Judicial Factor* were distinguishable from the present, because there the terms of the deeds clearly indicated that the testator placed special reliance on the discretion of the trustees named, and, moreover, in *Robbie's Judicial Factor* the person claiming to exercise the power was a judicial factor and not an assumed trustee. In *Cole* v. *Wade* also personal confidence was declared in the persons named, and the dictum of Sir William Grant must be read *secundum*

subjectam materiem. As a rule of general application it was dissented from by necessary implication in *Crawford* v. *Forshaw* (*cit. sup.*), as pointed out by Farwell (J.) in *Eaglick* v. *Smith* (*cit. sup.*).

Counsel for the first party adopted the argument for the third parties.

At advising—

LORD PRESIDENT—The question presented for our consideration in this Special Case is whether the assumed trustee under the trust-disposition and settlement of Miss Janet Shedden may validly exercise a discretionary power which the testatrix confided to her original trustee. I am of opinion that he can.

As is not unusual, the trust-disposition is silent here on the subject of the assumption of trustees, and, that being so, we must hold that the deed contains a power of assumption, the contrary not being expressed. That has been the law of Scotland by statutory enactment since the year of 1861 (24 and 25 Vict. cap. 84), sec. 1. The precise effect of the statute is equivalent to an inscription in the deed of a power of assumption of new trustees. The trustee thus assumed derives his authority from the testatrix, and is, from the moment of his appointment, I think clothed with all the powers, discretionary or otherwise, confided to the original trustee, unless the testatrix has clearly indicated a contrary intention. No contrary intention is to be found in the deed before us, because the residuary clause runs as follows—"I give and bequeath the whole residue and remainder of my estate and all free proceeds thereof to my trustees, to be by them paid, divided, and distributed to and among such charitable and philanthropic societies, institutions, and objects in or connected with Glasgow, and in such sums and proportions to each, or the whole to any one of such societies, institutions, or objects, all as my trustees in their absolute and uncontrolled discretion shall decide; and I declare that the judgment and action of my trustees in such payment, division, and distribution shall be absolute and unchallengeable.

It is impossible, I think, to spell out of the residue clause so expressed anything approaching *delectus personæ*. The powers are here conferred on "my trustees, whoever they may be," as I read the deed, whether original, assumed, or it may be nominated by the Court. If they are lawfully in the saddle, they are clothed with these discretionary powers. They are given to "my trustees" as trustees and not as selected individuals. The powers are, no doubt, wide, for they embrace not merely the apportionment of the residue among the charities but also the selection of the objects of the testatrix's bounty. But however wide they may be, inasmuch as the testatrix has virtually empowered her original trustee to assume a new trustee without placing any limitation upon the exercise of the powers conferred by the settlement, it would not be in our power, I think, even if we desired, to limit the powers of the assumed trustee.

There are more ways than one in which a testator may indicate an intention to deny to an assumed trustee powers confided to original trustees, but the question whether or no there is *delectus personæ*, it appears to me, cannot be determined either solely or mainly by an examination of the discretionary powers given or by the difficulty or delicacy of the exercise of these powers. If a testator desires to debar an assumed trustee from exercising discretionary powers it is very easy to say so, and if it is not said either expressly or impliedly I know no reason why the Court should assume that it is intended. To place an assumed trustee in a position of inferiority—to place an exceptional disability upon an assumed trustee—would, it appears to me, tend to defeat the object of the statute as well as the object of the testator, for the very type of man who would naturally be selected to be a trustee by the original trustee, or, it may be, by the Court to exercise discretionary powers, would, of course, refuse to take office if he were placed in an inferior position—a position of disqualification in contrast to the original trustees. And we can see very plainly in the present instance how entirely the intentions of this testatrix would be frustrated if we sustained the contentions of the second party.

In expressing this opinion I have had fully in view all the Scottish authorities which were quoted to us, and I am satisfied that my opinion is not in conflict, but on the contrary is in harmony, with all the prior cases. It is, no doubt, satisfactory to find that the law of England in this chapter runs parallel with the law of Scotland. But the similarity between the two systems of jurisprudence ought not in my opinion to affect our judgment here. Both sides of the bar maintained that the law of England was in favour of their contention, but both sides of the bar very frankly acknowledged that had it been otherwise they would have invited us to reject the law of England. And so we would, for after all in these will cases the sole object of the Court is to ascertain and to give effect to the intention of the testator, and I cannot for my part hold that a Scotch testatrix, or her man of business, in framing a Scotch settlement is bound to know and to have in view the law of a foreign state.

I am therefore for answering the first question, as we were invited to do, in the negative, the second question in the affirmative, and the third question in the negative.

LORD JOHNSTON—I concur in the result at which your Lordship has arrived. We have had in this case a very able and anxious argument on the general question, as well as the special question, raised in this case; but I desire to say that, so far as I am concerned, I treat the case entirely as a case with special circumstances enabling one to arrive at a conclusion without any consideration of the more general questions, on which I desire to reserve my opinion.

I agree with your Lordship that the trust settlement in question must, from its terms, be taken to be written in view of the statu-

tory provisions which admit of the assumption of new trustees. It is very probable that the testatrix did not fully appreciate the distinction between original and assumed trustees, or know anything about the provisions of the Trust Acts, but all this was certainly before those who drew her will, and their understanding must be held to be her understanding if she puts her signature to the deed which they prepared.

That being so, what I find is that there is in the settlement a very marked distinction between the expressions which apply solely to the trustees nominated, and expressions which apply to trustees generally. Where she refers solely to two trustees nominated, Mr Robert Scott Stewart and Mr Andrew Stewart, she carefully distinguishes them as "my said trustees." Where she refers to her trustees generally she refers to them as "my trustees." I think that she meant to distinguish, and that the distinction is perfectly sufficient for the decision of this case, because when she comes to bequeath the residue of her estate for such charitable objects and in such proportions, "all as my trustees in their absolute and uncontrolled discretion shall decide," she does not use the special term "my said trustees," but the general term "my trustees."

I am by no means desirous of touching upon the more general question, because I am not satisfied that, given terms different from what we have here, such a discretion given to trustees would not be properly confined to the trustees nominated. And I am moved a good deal in that direction by the consideration that it was only with very great difficulty that the Courts came to hold that a bequest such as this — to charitable societies to be selected by some one else—was not a delegation of the power of testing which could not be supported at law. This seems to me to be a considerable extension of these decisions, because it is not merely the delegation to persons named to select the objects of the testator's testamentary intention, but the delegation to named persons to choose other persons to choose the objects of the testator's testamentary intention.

I therefore desire to reserve my opinion upon the general question, and still more so upon the question whether such powers can be competently transferred to the nominees of the Court, whether trustees or judicial factors.

LORD MACKENZIE—The question in this case is whether an assumed trustee is entitled to exercise the discretionary powers contained in the settlement. The duty of the Court is to carry out the intention of the testatrix as expressed by her. The determination of the question therefore depends, in my opinion, upon the construction to be put upon the terms of the settlement. If from the language used it appears that there was a special *delectus personæ* the discretionary power will not transmit. If, however, there is no reason for holding that the testatrix intended there should be any special *delectus personæ*, there is no reason why the powers should not be exercised by an assumed as well as by the original trustees. The position of matters was that at the date of the death of the testatrix there was only one trustee nominated by her, the appointment of the other having been revoked by codicil. That she contemplated that this trustee might resign, sufficiently appears from the declaration that the original trustees, notwithstanding they were legatees under the settlement, should have and enjoy all the immunities and privileges of gratuitous trustees. This included power to resign, which was only conferred by statute. Although no express power to assume new trustees is given by the settlement, this, to my mind, is not of importance, because there must be read into it the statutory power of assumption, and the testatrix must be presumed to have known the law in regard to this. It must therefore be held that the testatrix did not intend the trust purposes to fail through failure of the original trustees. It was argued, however, that the powers conferred under the third purpose are so wide, being powers of selection and not mere administration, that this afforded ground for holding that they were only to be exercised by the original trustees. The fact that the testatrix conferred this power on "my trustees," and not on "my said trustees" (the expression used in other parts of the settlement), shows that she did not limit the exercise to the trustees nominated by herself only. Further, I cannot leave out of view that there is in the settlement an express declaration of her reason for not favouring her relatives, which I think goes to support the argument against the claim of the next-of-kin. It was not contended that the third purpose was void from uncertainty, nor do I think in view of recent authorities that there was room for argument on this point. It is not necessary to review the authorities in Scotland, as the question is one of construction. We are not here concerned with the question whether discretionary powers such as these could be exercised by a judicial factor who is an officer of Court. Therefore the case is not the same as that of *Robbie's Judicial Factor* (20 R. 358). The decisions in the Outer House by Lord Kincairney in the cases of *Blair* (*John Macfarlane's Trustee*) v. *Malcolm David Macfarlane's Trustees* and *Blair and Another* (*Malcolm Macfarlane's Trustees*) v. *Helen Macfarlane's Trustees and Others* (4 S.L.T. 22, 23), appear on all fours with the present. The observations of Lord Low in the case of *Grieve's Trustees* (12 S.L.T. 347) were made with reference to purposes of a very peculiar character. We were referred to a number of cases in England, the more recent of which certainly contain nothing contrary to the conclusion at which I arrive. If I may say so, it appears to me that what Bowen (L.J.) says in the case of *Crawford* v. *Forshaw* ([1891] 2 Ch. at p. 267) might well be taken as applicable to the case in hand—"I regard this case as purely one of construction—one in which, therefore, we may well be guided, and in which I am personally very glad to be guided, by the

reasoning in previous cases and by general principles of law, but in which we are not concluded by authority." It was argued that the law as regards assumed trustees in England was statutory, and we were referred to the Act 56 and 57 Vict. cap. 53, sec. 37. This, however, only applies to trustees appointed by the Court.

I am therefore of opinion that question 2 (*a*) should be answered in the affirmative and the other questions as proposed by your Lordship.

LORD SKERRINGTON—I concur for the reasons explained by your Lordship in the chair.

The Court answered branch (*a*) of the second question of law in the affirmative, and branch (*b*) in the negative.

Counsel for the First Party—Anderson, K.C.—Aitchison. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Second Party—Constable, K.C.—C. H. Brown. Agents—E. A. & F. Hunter & Company, W.S.

Counsel for the Third Parties—Cooper, K.C.—Alexander Brown. Agents—Martin, Milligan, & Macdonald, W.S.

Friday, December 5.

SECOND DIVISION.

[Lord Skerrington, Ordinary.

PROVIDENT ASSOCIATION OF LONDON *v.* COWAN AND OTHERS.

Contract—Ground Annual.

Held that a deed which purported to be a contract of ground annual between a party of the first part and the same party of the second part was void, on the ground that a man cannot by any deed constitute a debt by him to himself.

Right in Security—Real Burden—Constitution of Real Burden—Ground Annual.

A party attempted to create a ground annual by a deed which purported to be a contract between himself of the first part and himself of the second part. By a second deed he sold, assigned, and disponed to certain trustees the ground annual "to be uplifted and taken . . . in virtue of" the first deed, furth of subjects which by the second deed he thereafter disponed in real security to the trustees. The second deed contained no personal obligation by the disponer. In an action by the trustees against singular successors of the disponer for declarator that under the first and second deeds a ground annual was validly constituted a real burden on the subjects, or alternatively that under the second deed they were infeft in the subjects in real security for payment of a yearly sum of the amount of the ground annual, the pursuers admitted that the first deed was void.

Held that the pursuers were entitled to decree in terms of either declaratory conclusion, on the ground that (1) a ground annual might be constituted a real burden although the deed creating it contained no personal obligation by the granter, and (2) that by the second deed the disponer had warranted the debt he professed to assign, and had also homologated the personal obligation undertaken by the first deed, and had not only disponed the obligation to the pursuers, but had also disponed to them in security thereof the subjects therein mentioned.

Henry Cowan and others, trustees for the time being of the Committee of the General Assembly of the Church of Scotland for the Endowment of Chapels of Ease, *pursuers*, brought an action against the Provident Association of London, Limited, and also against David Livingston Dryburgh and William Gray, both of Edinburgh, being the parties interested in certain heritable subjects in Gilmore Place, Edinburgh, to which they acquired rights at a date subsequent to the date of the recording of the deeds hereafter mentioned, *defenders*, in which the conclusions were for declarator "that under and in terms of (1) contract of ground annual between Peter Simpson, S.S.C., Edinburgh, heritable proprietor as therein mentioned, of the one part, and the said Peter Simpson of the other part, dated 3rd, and recorded in the Division of the General Register of Sasines applicable to the county of Edinburgh 6th, both days of December 1883, and (2) disposition and assignation by the said Peter Simpson in favour of . . . the said Committee of the General Assembly of the Church of Scotland . . ., dated 8th, and recorded in said Division of the General Register of Sasines 11th, both days of December 1883, . . . or otherwise and *alternatively* under and in terms of the said disposition and assignation, a ground annual of £4, 5s. 11d., to be uplifted and taken furth of and from all and whole that piece of ground on the south side of Gilmore Place, Edinburgh, . . . being the subjects disponed in the third place in the above-mentioned disposition and assignation, was validly and effectually constituted a real burden on the said subjects, and that the pursuers as trustees foresaid are now in right thereof; *or otherwise and alternatively . . . that under and in virtue of the said disposition and assignation the pursuers and their successors in office as trustees for behoof of said committee are validly and effectually infeft, as from the date of recording the said disposition and assignation, in the said piece of ground, and that in real security for the payment by the said Peter Simpson and his heirs and executors and personal representatives whomsoever to the pursuers and their successors in office as trustees foresaid of the yearly sum of* £4, 5*s.* 11*d. payable half-yearly in perpetuity, commencing the first term's payment at the term of Whitsunday* 1884 *for the half-year preceding, and the next term's payment at Martinmas thereafter, and so forth at the said two terms in all time coming.*" [The italicised words were added by way of amendment.]