If the pursuer could have proved that the jailor had granted a false certificate—that while he had aliment in his hands he had certified there was none—the case would have a different aspect, and he might be answerable in damages. But we have no such allegation, and we must assume that the jailor merely stated the fact, and therefore on that certificate he cannot be held liable in damages. He was bound to grant it. He could not have refused it, it being the fact that there was no aliment in his hands. All he had to do was to grant the certificate and leave the question of liberation to the magistrates.

But it is now said that we can see on record an averment that he had liberated the prisoner before granting the certificate. Such a statement ought to have been made in the pursuer's condescendence, but it is not there. We are told that we can find it in the pursuer's answers to the statement of facts of the magistrates, and no doubt something like it is there, but that is not the proper place for it. But even supposing it had been properly averred, I doubt very much if, where in point of fact a certificate is granted that there is no aliment and the debtor is liberated, the mere fact of the warrant being got afterwards would found a claim of damages at the instance of a creditor. I do not see what the creditors had to complain of in this, and on the whole matter I think the appeal should be dismissed.

Lord Gifford—I am of the same opinion. I do not doubt that a direct action lies against a jailor who wrongfully lets a prisoner out. But for such an action to lie the creditor must make very precise and accurate allegations in regard to the wrongdoing, and we have not such here.

I take it that the jailor is not the proper judge of when the ten days have elapsed in point of law; all the jailor has to do is to certify any fact within his knowledge.

We are also told that the jailor had superseded the town-clerk, and had taken the certificate to the magistrates himself. I think he did nothing wrong in this. It is said that he interfered at the examination, but I cannot assume that without a far more precise statement than is made.

I concur, that upon the record as it stands there are sufficient circumstances to enable us to assoilzie the defender.

The Court dismissed the appeal.

Blair, for the magistrates, moved for expenses against the appellant, and also against Robert Broatch, who he stated was the true *dominus litis*. He argued that the parties could only have been brought here by the assignation above referred to, which was granted by Broatch for his own benefit only. The assignee was suing entirely for the benefit of the cedent.

Authorities—*Hepburn* v. *Tait*, May 12, 1874, 1 R. 875; *Mathieson* v. *Thomson*, Nov. 8, 1853, 16 D. 19.

Expenses were granted against the appellant, reserving the parties' claims against Robert Broatch.

Counsel for Pursuer (Appellant)—Nevay. Agent—W. N. Masterton, Solicitor.

Counsel for Magistrates (Respondents)—Blair. Agents—Hunter, Blair, & Cowan, W.S.

Counsel for Geddes (Respondent)—J. A. Reid. Agents—Ronald & Ritchie, S.S.C.

Wednesday, January 23.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

JOHNSTON AND OTHERS (ALLAN'S TRUSTEES) *v.* HAIRSTENS.

Trust—Limited Power of Assumption—Stat. 24 *and* 25 *Vict. cap.* 84 (*Trusts Act* 1861), *sec.* 1.

By a trust-deed executed in 1857 power was given to assume new trustees in the place of those who should resign, die, or become incapacitated. In 1864 two of the trustees, who were a quorum, assumed two additional trustees, and thereafter resigned. —*Held* (*rev.* the Lord Ordinary (Rutherfurd Clark) and following the decision in the case of *Maxwell Trs.* v. *Maxwell*, Nov. 4, 1874, 2 R. 71), that, under the Trusts Act of 1861, sec. 1, the new trustees were well assumed, and that the qualification stated in that section, that it was only to operate provided "nothing to the contrary was expressed in the deed," did not prevent its application in the circumstances.

Opinion (*per* Lord Justice-Clerk) that to limit the powers of assumption conferred by the Act there must be in the deed an express limitation in terms, and that an implication to that effect will not be sufficient.

The pursuers in this action were the assumed trustees under a trust-disposition in contemplation of marriage, dated in 1857, executed by Miss Helen Hairstens, afterwards Mrs Allan, and its purpose was the reduction of certain deeds executed by the late Mrs Hairstens, Mrs Allan's mother. The defenders were certain children of Mrs Hairstens, beneficiaries under the deeds sought to be reduced. By the above-mentioned trust-disposition Miss Hairstens had, in contemplation of her marriage, made over certain estate which she possessed to the following trustees, whom she named, viz.—Miss Barbara Hairstens and Miss Annie Thorburn Hairstens, and her brother James M'Whir Hairstens. Power was given them under the deed to assume new trustees in certain events. The clause was in these terms—"With power to the trustees, and survivor of them, to assume from time to time other trustees in place of such of their number as shall die or resign or become incapacitated, who shall have the same power as the original trustees."

In 1864 the Misses Hairstens assumed as new trustees the pursuers James Johnston, bank agent, Dumfries, and John Symons, writer there, and a few months thereafter they themselves resigned. James M'Whir Hairstens had all along refused to act with the assumed trustees, and though he was made a party to this action, he stated that it was against his will and authority.

The defenders' third plea-in-law in this action was to the effect that under the clause in the trust-deed the two pursuers had been wrongly assumed, and that therefore they had no title to sue.

The pursuers answered (1) that what had been done was authorised by the deed itself, and (2) that if not, in any case the Trusts Act 1861, sec. 1, applied. That clause was—"All trusts constituted by virtue of any deed or local Act of Parliament under which gratuitous trustees are nominated shall be held to include the following provisions, unless the contrary be expressed—that is to say, power to any trustee so nominated to resign the office of trustee; power to such trustee, if there be only one, or to the trustees so nominated, or a quorum of them, to assume new trustees;" and then certain other powers are given.

The Lord Ordinary (RUTHERFURD CLARK), by interlocutor dated 16th June 1877, gave effect to this plea and dismissed the action. His Lordship appended the following note:—

"*Note.*—The Lord Ordinary has pronounced this decision with much regret. He thought that the defenders, in their own interests, would have concurred in the necessary steps to cure the objection to the title, but they have insisted on judgment as the case stands.

"The Lord Ordinary is of opinion that the pursuers James Johnston and John Symons have not been well assumed as trustees. They were assumed by two of the three original trustees, who resigned on executing the deed of assumption. But, in the opinion of the Lord Ordinary, the trust-deed only enables the trustees to assume others in place of those who have resigned or died. Consequently, he thinks that the deed of assumption was beyond the competency of the granters.

"The pursuers hardly contended that the assumption was justified by the trust-deed. They relied mainly on the powers conferred by the Trusts Acts. But the Lord Ordinary has felt himself obliged to hold that this plea will not avail them. The trust-deed points out the cases in which the trustees may exercise the power of assumption. It would, he thinks, be inconsistent with its provisions to engraft upon it a general power of assumption."

The pursuers reclaimed, and argued—That though under the trust-deed itself there was not authority given to assume additional trustees, yet that the Trusts Act of 1861 (24 and 25 Vict. cap. 84), sec. 1, which gave unlimited powers of assumption, "unless the contrary were expressed," came in and supplied the deficiency in the powers conferred by the deed. The Act must apply unless there was an expression of prohibition, and that an application of such, which was all there was here, was not enough to take it out of the statute—*Maxwell* v. *Maxwell's Trustees*, November 4, 1874, 2 Rettie 71.

The defenders answered that there was a necessary implication from the truster not giving full powers, that she did not mean her trustees to have these powers, and that that inference of intention might be as well indicated by implication as by expression.

At advising—

LORD JUSTICE-CLERK—This is an action of reduction at the instance of the trustees of the late Mrs Allan, for the purpose of reducing various deeds executed by Mrs Hairstens, and this action is attempted to be stopped at the outset by a plea that the pursuers have not been properly assumed as trustees under Mrs Allan's trust-disposition.

It is said that the testatrix having given specific power of assumption to a limited effect, new trustees could only be assumed under the trust-deed, and that the power of assumption granted in the subsequent Trusts Act of 1861 is excluded by the terms of the trust-deed. The Lord Ordinary has entertained this plea, and holds that the pursuers were not well assumed.

The Lord Ordinary has not gone into detail in this matter, nor has he given us the grounds on which he goes when he finds that the Trusts Act can afford the pursuers no advantage. I have come to the conclusion that the provisions of the Trusts Act do apply, and are quite sufficient to validate the pursuers' appointment.

The trust-deed was executed in 1857, and a limited power was given in it of assuming new trustees. Now, it is said, and said truly, that, as far as the law at that time was concerned, the pursuers would not have been properly assumed in consequence of that specific provision.

But then, in 1861 an Act was passed (Trust Act, 24 and 25 Vict. cap. 84), the first section of which provides as follows—[*reads as above*]. Now, that this statute applies to such deeds as we have here I have no doubt at all, and the only question we have to decide is—"Is the contrary expressed?"

I am of opinion that the contrary is not expressed. The statute says, if you want your trustees not to have this statutory power, you must say so plainly. It was argued, and the argument is plausible and entitled to consideration, that the express and limited power given in the deed shows that the testatrix had had her attention directed to this point, and had purposely restricted the power. As I have said, the argument is plausible, but I am of opinion that it cannot prevail. I think the implication sought to be put upon the terms of the deed cannot be so put. There are many other things which the testatrix does not express which it might be equally well argued are by implication excluded, but which undoubtedly would be allowed, and therefore I am driven back to the ground I have already indicated, that where the Act states that trustees will have a certain power, they must be held to have it unless the contrary is expressed, and it will not be sufficient if the contrary is implied.

This principle seems to have been given effect to in the case of *Maxwell*, 2 Rettie 71. Upon the whole matter, though it is a question of considerable difficulty, I think the Lord Ordinary is wrong.

LORD ORMIDALE—It appears from the note to the Lord Ordinary's interlocutor now under review that the reclaimers had maintained before him their right to appoint new trustees in the manner they did—first, in respect they had power conferred on them to do so by the trust-deed in question itself; and secondly, in respect of the power given to that effect by the second section of the Trusts Act of 1861, 24 and 25 Vict. cap. 84.

But the reclaimers expressly gave up in their argument here the first point, and I think it very clear that it could not be sustained. The question comes therefore to be confined to the effect of the statutory power founded on.

The statute only gives power to assume new trustees "unless the contrary is expressed in the deed itself." And this raises the question—Whether the contrary is expressed in the deed with which we are now dealing? The deed does not give an unqualified power of assumption of new trustees, but only power to the trustees therein named, "and survivor of them, to assume from time to time other trustees in place of such of their number as shall die or resign or become incapacitated." I must own that for some time I was unable to resist the impression that there is here what I might fairly hold to be an expression contrary to the appointment of trustees in the circumstances which have occurred. The statute, in the words "unless the contrary is expressed," does not specify any precise form or words in which the contrary must be expressed. That is left quite general, and therefore it might very well be argued that the contrary might be expressed in the deed in various ways and different words, the object of the statute being that the true meaning of the deed in this respect should be left to be collected from its terms in each case as it occurred.

But then it was argued in favour of the appointment in the present case that the principle, if not the identical question, had been decided in the recent case of *Maxwell's Trustees* v. *Maxwell*, November 4, 1874, 2 Rettie 71; and after a careful consideration of that case, and in particular of the opinions of the Judges as reported in deciding it, I have ultimately come to think that that is so.

In these circumstances, I cannot withhold my concurrence—given, however, with difficulty and hesitation—in the opinion which I understand both your Lordships have formed, to the effect that the interlocutor of the Lord Ordinary reclaimed against ought to be recalled.

Lord Gifford—The sole question to be decided at present is—Whether the pursuers James Johnston and John Symons have or have not been lawfully assumed as trustees under the testamentary trust-disposition and settlement of Mrs Allan? and on the whole I have come to be of opinion that they were well assumed, and that the Lord Ordinary's interlocutor should be recalled. It is so far satisfactory to find that the Lord Ordinary would have decided in this way if he thought he could, for he tells us that he pronounced the judgment under review with regret.

The trust-deed contains a limited power of assumption somewhat peculiarly expressed—[*reads clause as above*]. And the question is—Whether the expression of this limited power prevents the operation of the much larger power conferred upon trustees by the first section of the Trust Act of 1861 (24 and 25 Vict. cap. 84). The provision is—[*reads as above*].

Now, the question is—Whether in the trust-deed now before us "the contrary be expressed?"—that is, whether the deed expressly provides that the powers conferred by the statute shall not take effect, and I am of opinion, though not without some difficulty, that it does not. The precise point arose in the case of *Maxwell's Trustees* v. *Maxwell*, November 4, 1874, 2 Rettie 71, where the question related to a power to resign, but was otherwise precisely parallel to the present question, and it was held unanimously, to use the language of Lord Deas—"The fact that a limited power of resignation was conferred by the trust-deed could not possibly prevent the application of the subsequent enactment, which conferred an unlimited power of resignation." Substituting the word "assumption" in place of "resignation," this decision is directly applicable to the present case, and I concur in the grounds and reasons of it.

For the real question is not what was the intention of the testator—not what kind of power of assumption did she intend to give—but what is the meaning of the statute? In what cases did the statute intend to confer the statutory power of assumption? Now, what is it that the statute says? It says this—Every truster shall be held to confer—shall be held by force of this statute to confer—certain powers, and among others a general and unlimited power of assumption, unless the truster provide expressly to the contrary. Implication will not do; guessing at what the intention of the truster might possibly be will not do; the conferring a special or particular power in special circumstances will not do. If the truster does not wish the statute to take effect, he must expressly say so, and nothing else will do. Every trust-deed shall be held as embodying the statute, unless the truster expressly prohibit this, for the granting of a limited power does not exclude the possession of a larger one. All trustees have power to sell the personal estate when necessary. It will not deprive them of this power that a trust-deed confers special power to sell certain specific articles.

The reason of the thing is strongly in favour of the application of the statute. Suppose two of the three original trustees had declined to accept, could the sole acceptor, who might reside in England, or perhaps abroad, not assume other trustees in their room? He could not do so under the deed, for non-accepting trustees have neither died or resigned or become incapacitated, and these are the only cases that the deed provides for; but the statute supplies the defect, and was meant to do so, and there is no provision either express or implied that an omission like this shall not be supplemented. I think therefore that the interlocutor reclaimed against should be recalled; that we should find that James Johnston and John Symons have been validly assumed; and *quoad ultra* remit to the Lord Ordinary to proceed in the cause.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming note for James Johnston and another against Lord Rutherfurd Clark's interlocutor of 16th June 1877, Recal the interlocutor complained of: Find that the pursuers are validly assumed as trustees, and remit the cause to the Lord Ordinary: Find the appellant entitled to expenses since the date of the Lord Ordinary's interlocutor, and remit to the Auditor to tax the same and to report, reserving all questions of other ex-

penses: Grant power to the Lord Ordinary to decern for the expenses now found due; and decern."

Counsel for Pursuers (Reclaimers)—Kinnear—J. D. Dickson. Agents—Davidson & Syme, W.S.

Counsel for Defenders (Respondents)—Asher—Jameson. Agents—Scott, Bruce, & Glover, W.S.

Wednesday, January 23.

SECOND DIVISION.

SPECIAL CASE—LEARMONTH AND SINCLAIR'S TRUSTEES.

Apportionment—Between Heir of Entail and Executor—Where Bond of Annuity granted to Widow of Heir—Apportionment Act (33 *and* 34 *Vict. cap.* 35) *sec.* 4.

The proprietor of an entailed estate by antenuptial contract of marriage provided an annuity of £300 to his widow, the first term's payment whereof after his death was declared to be "for the half-year to follow;" the contract also provided £500 for mournings and interim aliment. Subsequently this annuity, under the Aberdeen Act, 5 Geo. IV. cap. 87, was made a charge upon the entailed estate by bond, wherein the payments were described as "for the half-year preceding." Upon the death of the granter the £500 for mournings and interim aliment was paid.—*Held*, in a question between the succeeding heir of entail and the testamentary trustees, that the first half-year's annuity was a "just allowance" under the 4th section of the Apportionment Act (33 and 34 Vict. cap. 35), and fell to be apportioned between them in the same way as the rents of the entailed estate.

Apportionment—Between Heir and Executor—Interest on Heritable Bond over Entailed Estate.

An heir of entail disentailed his estate, and before re-entailing granted a heritable bond, which was a real and effectual charge against the entailed estate.—*Held* that the interest on the bond for the half-year in the course of which he died was apportionable between the succeeding heir of entail and his testamentary trustees.

Apportionment—Between Heir of Entail and Executor—Drainage Rent Charge.

A proprietor borrowed money for improvements over his entailed estate under the provisions of the Private Money Drainage Act 1849 (12 and 13 Vict. c. 100) repayable capital and interest by half-yearly instalments.—*Held* that the payment due for the half-year in which he died formed a proper deduction from the apportioned rents as between the succeeding heir of entail and the testamentary trustees, both in equity and under the provisions of section 66 of the Improvement of Land Act 1864 (27 and 28 Vict. cap. 114).

Observations on the case of *Lady Maitland*, 1st Feb. 1877, 4 R. 422.

Heir and Executor—Entail—Local Custom.

Where an ancient custom existed that the price of any woodwork added by the tenant in farm-steadings should, unless the work was removed, be repaid to him by the landlord at the ish of the tack—*held* (*diss.* Lord Ormidale) that this custom had the force of law, and that in an entailed estate the obligation fell, not upon the personal representatives of the deceased heir, but upon the succeeding heir of entail.

Observations upon the case of *Bell* v. *Lamont*, June 14, 1814, F.C.

This was a Special Case for Colonel Learmonth of Dean, factor *loco tutoris* to Sir John Rose Sinclair of Dunbeath, of the first part, and Dame Margaret Learmonth or Sinclair, widow of the late Sir John Sinclair of Dunbeath, and others, Sir John's trustees of the second part. The circumstances under which the case arose were as follows:—On 9th July 1821 Sir John Sinclair, and Miss Learmonth executed an antenuptial contract of marriage, by which Sir John obliged "himself, his heirs-male, taillie and provision, his heirs of line, and his heirs, executors, and successors whomsoever, without the benefit of discussion of one heir or heirs for the relief of others which may be claimed or allowed by law, to make payment to the said Margaret Learmonth in case she shall survive him, during all the days of her life after his decease, of a free liferent annuity of £300 sterling, exempted from all burdens and deductions whatsoever, and that at two terms in the year, viz., Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the first Whitsunday or Martinmas after his, the said John Sinclair's, decease, for the half-year to follow;" and he thereby obliged himself to infeft Margaret Learmonth in a liferent locality of such parts of the entailed estate of Barrock as would amount to, but not exceed, a third part of the free rent thereof, in the terms of and conform to the disposition and deed of entail thereof; and further "to make payment to Margaret Learmonth, in case she survives him, of the sum of £500 sterling in lieu and place of her claim for mournings, and in full of her claim for aliment from the day of his death to the first term's payment of said annuity," &c.

Sir John Sinclair succeeded to Barrock on the death of his father on 8th June 1820, being infeft upon a deed of entail executed by his grandfather and dated 8th May 1787. Subsequently by bond of annuity dated 28th November 1825, he bound himself on the narrative of the Act 5 Geo. IV. (Lord Aberdeen's Act), granting power to heirs of entail to provide their widows with annuities, and on the further narrative that he was desirous of implementing the obligations incumbent on him in his contract of marriage, to "pay and deliver to the said Margaret Learmonth or Sinclair, my spouse, a free annuity of three hundred pounds sterling yearly, during all the days of her natural life, in case she shall survive me, at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the first term of Whitsunday or Martinmas next and immediately following the decease of me the said John Sinclair, for the period preceding, and the next term's payment at the succeeding term of Martinmas or Whitsunday for the half-year preceding."

On 20th December 1849 Sir John Sinclair presented a petition under the Act 11 and 12 Vict. c.