Tuesday, December 13.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

LORD ASHBURTON AND OTHERS *v.* ESCOMBE AND OTHERS.

Foreign—Jurisdiction—Heritable Creditor.

Held that a creditor infeft in heritable estate in Scotland under bond and disposition in security was subject to the jurisdiction of the Scots Courts in all actions relating to the lands over which his security extended.

Question, whether such creditor was subject to the jurisdiction of the Scots Courts in personal actions?

Foreign—Jurisdiction—Trust.

A proprietor conveyed his estates in Scotland to certain trustees, one of whom, E, was the creditor in a bond and disposition in security affecting the estates. E was resident in England. It was provided in the trust conveyance that the trustees might be called upon to denude of the trust when E and other specified creditors had been paid off. The proprietor conveyed the same estates in trust to another body of trustees, and these trustees having paid off the specified creditors except E, who refused to accept payment, brought an action against E as an individual, and against the trustees under the first trust-disposition, to compel E to accept payment and the trustees to denude of the trust. E pleaded no jurisdiction. The Court *repelled* the plea, *holding* that E, by accepting a trust for the administration of Scots heritage, became subject to the jurisdiction of the Scots Courts in all questions relating to the trust or the trust-estate.

Opinion of Lord M'Laren in *Kennedy* v. *Kennedy*, December 9, 1884, 12 R. 275, *approved*.

Title to Sue—Successive Conveyances of Heritage in Trust—Title of Trustees under Second Trust-Disposition to Compel Heritable Creditor to Discharge his Security, and to Call on Trustees under Earlier Trust to Denude.

A proprietor conveyed his estates in trust to E, the creditor in a bond and disposition in security over the estates, and to certain other persons. It was provided in the trust-disposition that the trustees might be called upon to denude when E and other specified creditors had been paid off. The proprietor subsequently obtained a large loan from A on the security of a postponed bond over the estates, and he handed over this loan to another body of trustees, to whom he also conveyed the estates in trust, directing them, *inter alia*, to pay off E and the other creditors specified in the first trust-deed in order to bring that trust to an end, and to repay A the amount of his loan. *Held* that the trustees under this second deed having paid off all the specified creditors except E, who refused to accept payment, had a good title to insist in an action in order to compel E to accept payment of his debt, and the trustees under the earlier deed to denude.

Question, whether A had a title to sue such an action?

Right in Security—Unrecorded Agreement between Debtor and Heritable Creditor—Right of Postponed Creditor or Trustees Infeft under Subsequent Trust-Disposition to Challenge.

A proprietor who had granted a bond and disposition over his estates for £20,000, with interest at 10 per cent., entered into an agreement with his creditor which provided that the creditor should not be obliged to accept payment of the sum due to him otherwise than by instalments extending over a period of ten years. This agreement was not recorded, and the proprietor subsequently granted a postponed bond over his estates to another creditor, and also conveyed his estates in trust to a body of trustees, whom he directed to pay off the prior creditor.

In an action by these trustees and the postponed bondholder against the prior creditor for the purpose of compelling him to accept payment of the sum due under his bond, *held* that the defender was entitled to refuse payment in respect of the unrecorded agreement between him and his debtor.

Trust—Agreement by Trustee for his Own Benefit.

A proprietor conveyed his estates in trust to certain persons, one of whom, E, was the creditor in a bond and disposition in security affecting the estate, which bore interest at 10 per cent. It was provided in the trust conveyance that when E and other creditors specified had been paid off the trustees might be called upon to denude. An agreement was afterwards entered into between E and the proprietor, in which it was provided that E should not be obliged to accept payment of the sum due under his bond otherwise than by instalments extending over a period of ten years. The proprietor subsequently conveyed his estates in trust to another body of trustees, who having paid off the specified creditors except E, who refused payment, brought an action against him to compel him to accept payment. *Held* that as there was no one whose interests E was bound to protect who could be said to have suffered prejudice owing to the agreement, E was entitled to found thereon and refuse to accept payment.

By bond and disposition and assignation in security, dated 20th and recorded 24th March 1891, Erskine Wemyss of Wemyss and Torrie, in the county of Fife, bound himself to pay to Edmund Escombe, at Whitsun-

day 1891, the sum of £20,000, which he had borrowed from him, with interest at the rate of 10 per cent. during the not-payment thereof. In security of payment Mr Wemyss disponed the estates of Wemyss and Torrie, and assigned five policies of insurance.

Of the same date Wemyss executed a separate agreement with Escombe, and a trust-disposition and conveyance. By the agreement Wemyss became bound in further security of the loan to pay annual instalments of £2000 at the term of Whitsunday in each year, from 1892 to 1901, into the hands of Edmund Escombe, and Joseph Guedalla, solicitor in London, it being declared that said instalments should be held by them "in trust for the ultimate liquidation of the debt on 15th May 1901, or on such prior date as the loan shall be called in" by Escombe. This agreement was not recorded.

By the trust-disposition and conveyance Wemyss conveyed to Escombe, Ferdinand Faithfull Begg, and himself, as trustees, his estates of Wemyss and Torrie, and the whole moveable property upon or in any way connected therewith, and certain policies of assurance in trust for the purposes afterwritten. In the 8th place he directed the trustees to apply the yearly income of the estate (*secundo*) in paying the principal sum of £20,000 due to Escombe, and the principal sum of £20,000 due under bond and disposition and assignation in security to Mrs Jane Spark; and (*tertio*) in paying debts due by the truster, but not secured over the trust-estate, and which were specified in the third schedule annexed to the deed. In the tenth place it was provided that as soon as the trustees should have made payment of the two sums of £20,000 due to Escombe and Mrs Spark, and have paid the unsecured debts, and all sums borrowed by themselves, and have been relieved by all obligations incurred by them, and reimbursed for all advances which they had made, they should denude of and reconvey the trust-estate to the truster.

After the execution of the trust-disposition the trustees entered into possession of the trust-estate, and proceeded to administer the trust.

A new agreement was subsequently entered into on 18th July and 23d September 1891 for the purpose of modifying the previous agreement between Wemyss and Escombe, dated 20th March. The parties to the new agreement were (1) Escombe as an individual, (2) Escombe, Begg, and Wemyss, as trustees under the trust-disposition of 20th March, (3) Wemyss as an individual, and (4) his wife, Lady Lilian Wemyss. It was agreed, *inter alia*, that the instalments of £2000 due under Escombe's bond and disposition and assignation in security should be payable at Martinmas in each year; that the instalments should be paid direct to Escombe, and applied by him in extinction of his debt; and that he should not "require or be bound to accept payment of the principal sum, or any part thereof, before the terms above fixed for payment of the instalments." This agreement was not recorded.

After the execution of this agreement Mr Wemyss entered into a new arrangement for settlement of his affairs. He borrowed the sum of £140,000 from Lord Ashburton upon the security of the estates of Wemyss and Torrie, and of certain policies of assurance, conform to bond and disposition and assignation in Lord Ashburton's favour, dated 27th October and recorded 5th November 1891. Wemyss also, in consideration of the loan he was receiving from Lord Ashburton, granted a trust-disposition and conveyance, dated 27th October and recorded 6th November, wherein he disponed to himself, George Levinge Whately, and William Nocton, as trustees, heritable estate belonging to him, and in particular the estates of Wemyss and Torrie, and the whole moveable property upon or in any way connected with the same, and certain policies of assurance, and further bound himself to make over to the said trustees the sum of £140,000 as soon as he received it. The trustees were directed in the second place to hold and apply the trust-estate, and the loan of £140,000 in payment of the two sums of £20,000 due to Mr Escombe and Mrs Spark, and of the sums due to the unsecured creditors, specified in the third schedule annexed to the trust-disposition and conveyance dated 20th March 1891, in order to obtain their consent to the termination of the trust thereby created, and generally to apply the trust-estate in order to secure the discharge of said trust. The trustees were further directed to repay the loan of £140,000.

On 3rd March 1892 Erskine Wemyss, George Levinge Whately, and William Nocton, the trustees acting under the trust-disposition and conveyance of 27th October 1891, and Lord Ashburton, raised the present action against Edmund Escombe, as an individual, and also against the said Edmund Escombe, Ferdinand Faithful Begg, and Erskine Wemyss, the trustees acting under the trust-disposition and conveyance dated 20th March 1891, as trustees and as individuals. The pursuers, in the first place, sought to have it declared that the defender Escombe was bound to accept repayment from the pursuers, the trustees under the second trust-disposition and conveyance, of the sum of £20,000 due to him under the bond and disposition and assignation in security granted by Wemyss in his favour, and to have Escombe ordained on payment or consignation of said sum to execute a discharge of said bond and disposition and assignation and security; and failing his granting such discharge, that it should be declared that the lands and policies of assurance were redeemed and disburdened of the foresaid bond and disposition and assignation in security. The pursuers further sought to have the defenders, as trustees, decerned and ordained to denude of and discharge the trust in their favour, and to discharge and disburden the lands and policies of assurance conveyed to them upon payment of said

sum of £20,000 to Escombe, or upon consignation of the same, and upon evidence being produced of the payment of the debts specified in the trust-disposition and conveyance of 20th March 1891 as being due to Mrs Spark, and the creditors specified in the third schedule annexed to said trust-disposition, and upon the defenders as trustees being relieved of all obligations undertaken by them, and repaid all advances and granted a full discharge of their intromissions as trustees; failing the defenders so doing the pursuers asked declarator that said lands and policies of assurance were redeemed and disburdened of the trust-disposition and conveyance; and that they belonged to the pursuers Erskine Wemyss, George Levinge Whately, and William Nocton, as trustees foresaid.

The pursuers averred, *inter alia*, that the said Erskine Wemyss, George Levinge Whately, and William Nocton, as trustees foresaid, had paid Mrs Spark the sum of £20,000 due to her, and had also paid the whole debts specified in the third schedule annexed to the trust-disposition and conveyance of 20th March 1891; that they had offered to pay Escombe the £20,000 due to him, and upon his refusing to accept payment had, after serving a notice of premonition upon him that the sum due under his bond would be paid at Whitsunday 1892, consigned said sum in bank in his name, and that the defenders, as trustees, had received rents and profits far more than sufficient to reimburse them for any outlays they had incurred in the execution of the trust created in their favour.

Defences were lodged by the defenders Escombe and Begg. The former averred, *inter alia*, that he was a domiciled Englishman, and had no residence or heritable property in Scotland.

The pursuers pleaded, *inter alia*—"(3) The alleged agreement of 18th July and 23rd September 1891 is not binding on the pursuers, in respect . . . (*b*) it has not been registered in the register of sasines, and cannot therefore restrict or modify the rights of Lord Ashburton under his bond and disposition in security, . . . and (*e*) even if otherwise valid (which is denied), it is *ultra vires*, and not binding on others than the trustees acting under the trust-disposition and conveyance of 20th March 1891."

The defender Escombe pleaded, *inter alia*—"(1) No jurisdiction. (3) No title to sue. (6) On a sound construction of the said bond and disposition and assignation in security, and of the said agreements, and particularly of the said agreement dated 18th July and 23rd September 1891, the pursuers are not entitled to insist in repaying the said loan, nor is this defender bound to accept repayment thereof, nor to grant a discharge, in the manner concluded for in the summons."

On 24th June 1892 the Lord Ordinary (STORMONTH DARLING) repelled the preliminary pleas for the defender Escombe.

"*Opinion.*— . . . The questions which I have to deal with now are (1) whether there is jurisdiction against Escombe, . . . and (3) whether the pursuers have a title to sue. My opinion on all of these is in favour of the pursuers.

"It is said that the real question in the case is with Escombe as an individual, and that he being a domiciled Englishman is not subject to the jurisdiction of this Court. It is true that the pecuniary question is, whether he is to receive an income of £2000 a-year for nine years longer on his loan of £20,000, but that involves not merely the question whether a landed estate in Scotland is to be disburdened of his security, but also the question which of two sets of persons are to be henceforward the proprietors and administrators of that estate in trust. I do not know what Court can determine these latter questions except the Supreme Court of Scotland, and yet they are so closely connected with the pecuniary question that it would be in the highest degree inconvenient to separate them. I am aware that convenience alone will not create jurisdiction, but I think there is one ground certainly, and probably there are others, on which Escombe is liable to the jurisdiction of this Court.

"In the first place, he is infeft as proprietor of land in Scotland. No doubt the title is a trust title, but one of the leading purposes of the trust is for payment of the principal and interest on his loan. He is therefore not merely a trustee, but a beneficiary of the trust. It can hardly be disputed that as trustee he is liable to jurisdiction in Scotland in all questions connected with the trust, including its interpretation, management, and endurance—See *Robertson's Trustees* v. *Nicholson*, 15 R. 914, expressly adopting Lord M'Laren's opinion in *Kennedy* v. *Kennedy*, 12 R. 275. But Mr Escombe's possession is not merely fiduciary; it is to a certain and very considerable extent beneficial, and therefore I think he comes within the rule stated by the late Lord President in the case of *Fraser* v *Fraser & Hibbert*, 8 Macph. 404, that 'the beneficial possession, whether natural or civil, of immoveable estate within the realm, whether permanent or temporarily, upon a good title of possession, is sufficient to found jurisdiction.' If so, the defender is amenable not merely in actions relating to the trust, but in personal actions as well, at all events, in those relating to his personal interest in the estate.

"If it were necessary I should be prepared to hold that he is liable also in his capacity as a bondholder infeft in Scottish heritage. He is not as such in possession of the land, but he is in possession of heritable estate in Scotland, and heritable estate of a kind satisfying two of the tests which have always been regarded as most material, for his interest is attachable by the diligence appropriate to heritage, and if he required to make his security effectual by maills and duties or poinding of the ground he would have to resort to the Scottish Courts. But I regard the first ground which I have stated as enough for the decision of the question. . . .

"The third question is raised by the

defender's plea of no title to sue. It is said that the only person having a title is Mr Wemyss himself, but I cannot adopt that view. The trustees under the deed of October 1891 were appointed for the express purpose of paying off this among other debts. Their title seems to me therefore clear, and it is obviously the interest of Lord Ashburton, as a beneficiary under that trust and a postponed bondholder, to have the estate cleared of a debt bearing such heavy interest as that of Mr Escombe.

"I shall therefore repel the first . . . and third pleas for the defender."

On 20th July 1892 the Lord Ordinary pronounced this interlocutor:—"Finds that the defender Edmund Escombe was bound to accept repayment from the pursuers the said Randolph Gordon Erskine Wemyss, George Levinge Whately, and William Nocton, as trustees foresaid, at the term of Whitsunday 1892, of the principal sum of £20,000 sterling, with interest thereon and penalties if incurred at said term, being the sums contained in and due under the bond mentioned in the summons; and in respect that the said sum of £20,000 and interest has been consigned in the name of the said Edmund Escombe by the said pursuers, decerns and ordains him to execute and deliver to the said pursuers, as trustees foresaid, a valid discharge of the foresaid bond and disposition and assignation in security, and lands and others therein conveyed in security, and to assign the policies of assurance, all in terms of the second conclusion of the summons: Further, in respect of the said consignation, and of the evidence produced in process of the payment of the debts and sums of money specified in the trust-disposition and conveyance dated 20th March 1891 as due to Mrs Spark, and the creditors specified in the third schedule annexed thereto, Finds and declares that the defenders the said Edmund Escombe, Ferdinand Faithful Begg, and Randolph Gordon Erskine Wemyss, as trustees foresaid, are bound to denude of and discharge the trust in their favour created by the said trust-disposition and conveyance above mentioned on being relieved by the pursuers, as trustees foresaid, of all obligations and liabilities undertaken or incurred by them, and reimbursed and repaid any expenses or advances disbursed by them in the execution of the trust, and on their obtaining from the said pursuers and the said Randolph Gordon Erskine Wemyss, as an individual, a full discharge and exoneration of their whole actings, intromissions, and management; and grants leave to reclaim, and *quoad ultra* continues the cause.

"*Opinion.*—On the main question in the case, viz., whether the defender Escombe is bound to accept immediate payment from the pursuers of a sum of £20,000 which he lent to Mr Wemyss in March 1891, or is entitled to refuse payment till 1901 in order that he may draw interest at 10 per cent. in the meantime, I am in favour of the pursuers.

"The bond in favour of the defender which is the only recorded deed prior to the bond in favour of Lord Ashburton leaves the debtor perfectly free to repay the principal at any term subsequent to Whitsunday 1891, for he binds himself to pay interest after that term only 'during the not-payment of the said principal sum,' and although there are provisions for a sinking fund at the rate of £2000 a-year down to 1901, that is merely an additional security for repayment of the principal in favour of the lender, and not a prohibition against repayment by the borrower at an earlier date.

"The defender appeals to an agreement between him and Wemyss of even date with the bond, but that seems to me to add nothing as regards this question to the terms of the bond. Both deeds make it quite clear that the defender was free to call in the loan at any time, and it would take very express and unequivocal words to debar the debtor from paying when he chose what the creditor could demand when he chose. It is enough, however, in my view, that this agreement was not recorded, and could not therefore affect the rights of a subsequent bondholder, relying, as he was bound to do, on the state of the records.

"The same answer holds good as regards the agreement of 18th July and 23rd September 1891, and therefore it is unnecessary to discuss whether it was duly executed." . . .

The defender Escombe reclaimed, and argued—*No jurisdiction*—The first and main conclusion of the action was a personal one, directed against the reclaimer as an individual, and was not concerned with real estate at all. Upon this conclusion all the subsequent conclusions depended. But the creditor in a bond and disposition in security, who was not otherwise subject to the jurisdiction of the Scots Courts, was not rendered liable to their jurisdiction in personal actions by the mere fact that heritable estate in Scotland was disponed to him in security of his debt. The contract under the bond was primarily a personal one founded on the debtor's personal obligation, and it did not make the creditor a proprietor, or even give him a title of possession such as a lessee had. It was not registered in the Books of Council and Session, and such registration alone could be said to be an appeal to the aid of the Scots Courts. Perhaps the reclaimer might be called upon as a trustee, and *quoad* the heritage covered by the trust conveyance, to answer in the Scots Courts, but that question only arose under the second and following conclusions of the summons, which could not be given effect to until effect was given to the first. *No title to sue*—The title to sue was in Mr Wemyss, and not in Lord Ashburton or the trustees, who were not the debtors in the bond. *On the merits*—The bond granted by Wemyss in the reclaimer's favour must be read along with the agreement of September 1891, which gave the reclaimer an undoubted right to refuse payment of the £20,000 except by the stipulated instalments. That agreement was not open to challenge. It

was not a good objection to it that the reclaimer, who was a trustee, took a benefit under it to himself, for the agreement was a mere readjustment of the respective rights and interests of the reclaimer and Wemyss, and in no way prejudiced the interests of those for whom the reclaimer was bound to act. At anyrate every person whose interests could be said in any sense to have been prejudiced had been paid or satisfied, and there was now no one at whose instance the agreement was open to challenge. It could not be challenged by Wemyss, for he had not been induced to enter into it by unfair means, but it was for his benefit at the time when it was entered into. His trustees could have no higher rights that he had, and Lord Ashburton, the postponed bondholder, who had only a *jus crediti* under the second trust, could not compel the trustees to do anything which their author could not require them to do. Nor could Lord Ashburton directly insist on the reclaimer taking repayment of the £20,000, for there was no contractual relation between them of any kind. A debtor, if not otherwise barred, might come forward and pay up the debt, but he might also fetter himself as to the time or mode of repayment, and a postponed creditor had no right to interfere with a personal contract of that kind. He was entitled to rely on the records for the protection of his security, but that was not affected by the argument, and it must receive effect, although not appearing on the face of the records.

Argued for the pursuers—*Jurisdiction*—The defender was infeft under his bond and disposition in security in Scots heritable estate. His interest was attachable by the diligence appropriate to heritable estate in Scotland. Such infeftment was sufficient to found jurisdiction, if not in personal actions generally, at anyrate in all actions relative to the lands held in security by him. By registering his bond the creditor had invoked the aid of the Scots Courts, and they alone could aid him in making his right effectual. Apart, however, from his bond, the defenders, having accepted a disposition in trust for the administration of heritable estate in Scotland, were clearly subject to the jurisdiction of the Scots Courts in all questions relating to the trust. The trust was eminently a Scots trust as it was granted by a domiciled Scotsman, and the trust-estate was entirely situated in Scotland. The Scots Courts must therefore have jurisdiction to determine questions relating to the trust—*Kennedy* v. *Kennedy*, December 9, 1884, 12 R. 275; *Robertson's Trustee* v. *Nicholson*, July 13, 1888, 15 R. 914. *Title to sue*—Lord Ashburton had a most material interest in the subject-matter of the action, and the trustees under the second trust simply came in the place of Wemyss, whose title was undoubted. *On the merits*—The agreement of September was *ultra vires* of the trustees who were parties to it, as it conferred on a particular debtor a preference to a large sum of money, and Lord Ashburton, as coming in the place of the creditors whose debts had been paid out of the loan made by him, had a right to object to this burden being placed on the trust-estate. The agreement was also invalid because it conferred a benefit on one of the trustees, who thus became *auctor in rem suam—Penton, &c.*, v. *Penton's Trustees*, January 9, 1863, 1 Macph. 245. Even if binding on Wemyss the agreement was not binding upon the trustees under the later trust-deed, nor upon Lord Ashburton, as it had not been recorded. The trustees held a proprietary right under the disposition in their favour, which was in form an absolute disposition, and were entitled to rely upon the records. This contract with the truster was of a highly onerous character, and placed them in an analogous position to singular successors buying on the faith of the records, and their rights could not be affected by a continuing burden of which they had no notice. Even if the reclaimer had right to refuse immediate payment of the debt due to him, that was not a reason for the defenders refusing to denude of the trust created in their favour, for his right would be equally good against the trustees under the second trust-deed.

At advising—

LORD KINNEAR—The main question in this case is, whether the defender Edmund Escombe is bound to accept immediate payment of the sum of £20,000, for which he holds a heritable security over the pursuer's estate of Wemyss and Torrie, and to discharge his security, or whether he is, on the other hand, entitled to refuse payment otherwise than by annual instalments of £2000, and to draw interest on the unpaid balance at the rate of 10 per cent.?

[*After narrating the facts of the case*]—The defender has stated two preliminary pleas: First, that as he is domiciled and is presently resident in England, this Court has no jurisdiction; and secondly, that the pursuers have no title to sue. I agree with the Lord Ordinary that neither of these pleas is well founded. The defender is infeft in lands situated in this country both under his bond and disposition in security and also as trustee under the trust-disposition. There is high authority for holding that the possession of any beneficial right and interest in land which may be attached by the diligence appropriate to heritable estate is sufficient to found jurisdiction. I do not think it necessary to consider whether upon this ground the infeftment of a heritable creditor will subject him to the jurisdiction of the Courts of this country in personal actions, but at all events he must be subject to the jurisdiction in all actions relating to the lands which he claims to hold in security. By the registration of his disposition in security he appeals to the Courts of the territory within which the land is situated, and it is certain that there is no other tribunal which can either make his right effectual while it subsists, or clear the estates of the encumbrances with which he has affected it when the right is determined. But if this were doubtful, there can, in my opinion,

be no question that by their acceptance of the disposition in trust for the administration of the Scotch heritable estate the defenders have become liable to the jurisdiction of this Court in all questions relating to the trust or to the trust-estate. I desire to adopt the opinion of Lord M'Laren in the case of *Kennedy* v. *Kennedy*, 12 R. 275, which was approved by the Court in the case of *Robertson's Trustees* v. *Nicholson*, 15 R. 914. His Lordship says—"Where a trust is constituted in Scotland and has to be executed in Scotland, the Supreme Court of this division of the United Kingdom has jurisdiction over the whole subject-matter of the trust, including in that expression not only the interpretation of the trust, but the duty of making due provision for its continuance, and a power in case of negligent administration of calling the trustees or trustee to account." It follows, on the same principle, that we have jurisdiction to determine whether the trust still subsists, or whether it has been brought to an end, so as to entitle the truster to a reconveyance.

I also agree with the Lord Ordinary that the plea as to want of title to sue is not made out. If the action had been brought at the instance of Lord Ashburton alone, I should have thought it very doubtful whether he had sufficient title to maintain its conclusions as laid. He has a very material interest in the subject-matter of the action, but the proper title to maintain it appears to me to be in the trustees in the second trust conveyance and not in himself, but then I see no reason to question the title of the trustees. It is not disputed that Mr Wemyss himself would have a perfectly good title to demand a discharge of his debt upon offering payment, and to demand a reconveyance on the averment that the trust purposes were at an end, and, if he has a good title, the question whether his trustees, who are in his place, have a title equally good depends entirely on whether the action is within the scope of their authority. Now, I apprehend there can be no question that it is within their authority, and that they are not only empowered to pay this debt and recover the estate from Mr Escombe and his co-trustees, but that that is a duty expressly laid upon them by the trust-deed which they have undertaken to discharge by accepting the trust.

But then, assuming that the pursuers have a good title, we have next to consider the question of right, and if that depended exclusively upon the bond in favour of the defender and the relative agreement of the same date, I should not think it doubtful that the defender would be required to accept payment, to discharge the debt, and to denude of the trust. I see nothing in either of these documents to prevent the borrower from paying the debt and clearing his estate at Whitsunday on the usual premonition. If the debt is paid, or, which is the same thing, if the defender is bound to accept the money now consigned, then I think it equally clear that the defenders are bound to denude of the trust upon all obligations and liabilities which they have incurred in execution of the trust being discharged, and upon their being repaid the advances which they may have disbursed, because it is expressly stipulated in the trust-conveyance that upon payment of these two debts — the debt due to Mr Escombe and the debt due to Mrs Jane Spark—and upon the payment of the debts specified in the third schedule, the trustees shall denude and reconvey the whole trust-estate vested in them. Now, it is not disputed that the debt to Mrs Spark has been paid, or that the debts in the third schedule have also been paid. It is not alleged that the trustees have borrowed money which they may be called upon to repay, and therefore all the conditions upon which the trust is to be determined have been performed if the debt of £20,000 can now be paid to Mr Escombe, and if he can be compelled to discharge his security.

But then the defender maintains that he is not bound to accept payment, because under the agreement of September 1891 he cannot be required to accept payment otherwise than by the annual instalments there stipulated, and if that be a valid and effectual objection, I do not see how the pursuers can succeed in either of the two conclusions. They cannot compel the defender to accept payment contrary to his bargain, and if he is not bound now to discharge the debt and the security, they cannot obtain decree in terms of the subsequent conclusion, because that conclusion for denuding is demanded clearly as the consequence of the obligation to discharge, and is maintained upon the ground that the debt is no longer subsisting, but is to be treated as discharged, in respect that Mr Escombe is no longer entitled to withhold the reconveyance of the trust-estate.

Now, the Lord Ordinary has disposed of this question connected with the agreement of September upon grounds with which I am unable to concur. His Lordship says that the agreement of September was not recorded, and therefore that it could not affect the rights of a subsequent bondholder, relying, as he was entitled to do, on the state of the records, and the conclusion at which he arrives, also after consideration, is that Lord Ashburton, being a subsequent bondholder, is entitled to disregard this personal agreement altogether, and therefore to treat the debt as presently discharged, and to maintain the conclusions of the present action in consequence. But if the agreement has not been recorded in the register of sasines, it does not affect the land in a question with purchasers or subsequent bondholders. It follows that in competition with Lord Ashburton, or any other subsequent bondholder, the defender must stand on his prior bond, and can take no benefit from the unrecorded agreement. If the estate were to be brought to sale, and creditors were to be ranked upon the proceeds in their order, the defender could be ranked for nothing more than the unpaid balance of his debt, with the interest actually due. He could not claim to rank in priority to Lord Ashburton for any future or contin-

gent claims for interest at 10 per cent. until 1901 in virtue of the agreement of September, but the non-registration of the agreement will not deprive it of validity as a personal contract between the borrower and the lender, and whether it is good or bad as a personal contract appears to me to be no concern of any subsequent bondholder. A heritable creditor has no title or interest to challenge personal agreements which do not come into competition with him, and I am unable to follow the reasoning on which it is held that Lord Ashburton as a postponed creditor is entitled to challenge the validity of a personal agreement on the express grounds that it does not affect the land which forms the subject of the security, and therefore cannot be brought into competition with him. Nor do I think the non-registration of the agreement is of any materiality in a question with the trustees. If it is good as a personal contract, the debt must be extinguished in terms of the obligation before the creditor can be called upon to discharge the debtor and discharge his security.

But a different objection was maintained in argument which seems to me to require serious consideration. It is said that the defender as a trustee was precluded from making any bargain for himself or for his own benefit with reference to the subject of his trust, because the doctrine well-established with reference to purchases by trustees at a sale is equally applicable to bargains of any description by which persons holding a fiduciary character may obtain a benefit for themselves during the subsistence of the trust. Now, there can be no question that the agreement is a transaction between the defender as trustee along with others, and the defender himself as a creditor of the trust, and it was argued very forcibly that that is a transaction which involved a direct breach of the duty which he had undertaken as a trustee. It is said that the trust is for payment of debts, and therefore that it was one of the first duties of the trustees for such a purpose to clear the estate of a debt carrying an inordinate amount of interest, but instead of making any attempt to clear the estates the defender makes a bargain with himself to the prejudice of other creditors, by which the debt is to be kept alive until 1901 even although the trustees shall be in funds to clear it off. Now, if it can be shown that this transaction was in prejudice of interests which the defender was bound to protect, I could have little difficulty in holding that it could not be sustained, but then a bargain by a trustee during the subsistence of the trust is not absolutely bad; it is reducible on the ground of breach of duty or misconduct on the part of the trustee, but it is valid until it is set aside, and the ground of the reduction must be that the trustee has failed in his duty to those who may challenge the transaction, or on whose behalf it may be challenged; and he cannot be allowed to retain a benefit which he has acquired at the expense of persons for whom he was bound to act. This was decided in the case of *Fraser* v. *Hankey & Company*, 9 D. 445, and the doctrine then laid down has not since been called in question, and therefore the question we have to consider is whether the defender has obtained a benefit for himself to the prejudice of any actual or possible interest of anybody for whom he was bound to act. The persons who are said to be prejudiced are the creditors specified in the third schedule annexed to the trust-deed. The prior heritable creditors are in no way affected, because their preferable securities could not be impaired by anything done subsequent to the recording of their bonds, but it is said that the agreement brought in an additional debt due to the trustee himself in front of the debts due to the creditors in the third schedule. These creditors had not acceded to the trust, and are not said to have been aware of its existence, and it may be questioned whether the defender had undertaken any duty towards them which would preclude him from entering into a new transaction with the truster, but however that may be, it appears to me to be a conclusive answer to the argument founded upon their interest, that their debts have been paid and discharged, and that neither they nor anybody in their right appear to challenge the transaction. There is no one that can be said to be prejudiced except the truster himself, and the question therefore is whether this agreement can be set aside at the instance of the truster and of the truster alone, because the pursuers stand in his right, and can have no better title to challenge the transaction than he himself. Now, the trust stands upon a contract between the truster and the defender for their mutual advantage, for the better security of the defender's debt, and for the management of the pursuer's estate. It is a trust that could be brought to an end at any time by mutual agreement of truster and trustee irrespective of the interests of any third person. I am not aware of any authority for disallowing a contract between two persons in that situation, provided it be apparent that the truster contracted with his trustee notwithstanding the relation which he had himself created, and the purpose and effect of which must have been present to his mind at the time when he entered into the contract, and provided also that there is no fraud or concealment, and no undue influence on the part of the trustee. But it is not alleged that the defender took any unfair advantage of his position as trustee, or of any knowledge he may have acquired in the execution of his trust, and there is nothing in the existence of the trust-deed to prevent the parties from contracting on equal terms. It is true that the bargain is favourable to the trustee, and it may be a very bad bargain for the truster, but that is not a ground for setting aside a contract between persons who are capable of managing their own affairs.

On the whole, therefore, I am of opinion that no sufficient reason has been adduced for refusing effect to the agreement of September 1891. If that be so, the defender

cannot be called upon to accept immediate payment, and to discharge his debt and his security over the pursuer's lands. It follows, I think, that the pursuer cannot succeed in the action for compelling the defender to denude of the trust and reconvey the estate. I by no means intend to indicate any opinion that the defender is entitled to withhold a reconveyance of this estate until November 1901. We are not called upon to consider upon what conditions he may be compelled to reconvey other than those which are set forth in the present action. All that I should propose to decide is that the defender cannot be compelled to reconvey upon the grounds libelled, namely, that his debt has been fully paid and discharged, and that in consequence of that discharge the trust in his person and that of his co-trustees has come to an end.

On the whole matter I am therefore of opinion that the Lord Ordinary's interlocutor ought to be recalled, and that the defender ought to be assoilzied from the conclusions of the action, but that the defender's pleas as to title and jurisdiction ought to be repelled.

LORD ADAM, LORD M'LAREN, and the LORD PRESIDENT concurred.

The Court recalled the interlocutor of the Lord Ordinary, repelled the preliminary pleas for the defender Escombe, and assoilzied the defenders from the conclusions of the action.

Counsel for the Pursuers—Lord Adv. Balfour, Q.C.—W. Campbell. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender Escombe—Sol.-Gen. Asher, Q.C.—Dundas. Agent—David Turnbull, W.S.

Counsel for the Defender Begg—C. S. Dickson. Agents—A. P. Purves & Aitken, W.S.

Thursday, December 15.

FIRST DIVISION.

[Sheriff of Lanarkshire.

DONNACHIE *v.* THOM.

Process—Appeal—Jury Trial—Judicature Act 1825 (6 *Geo, IV. cap.* 120), *sec.* 40.

The pursuer in an action of damages for personal injury having appealed under the 40th section of the Judicature Act for jury trial, the Court *refused*, on the motion of the defender, to remit the cause back to the Sheriff for proof, and ordered issues to be lodged, although the amount in dispute between the parties was trifling.

James Donnachie sued James Thom in the Sheriff Court at Glasgow for payment of £50 as damages for injuries sustained by his pupil child Elizabeth, who had been run over by a horse and gig driven by the defender.

The defender admitted liability for the injuries sustained by the child, and tendered £15, with the expenses of process, in reparation thereof, subject to the pursuer proving that the child in question was his lawful issue.

Prior to the raising of the action the pursuer had offered to take £25, besides medical and legal expenses.

The Sheriff-Substitute having allowed a proof on the question of damages, the pursuer appealed to the First Division, and moved the Court to order issues to be lodged.

The defender objected that, looking to the smallness of the sum in dispute, the case was unfitted for jury trial, and moved the Court to remit back to the Sheriff for proof.

The pursuer submitted that the course proposed by the defender was not in accordance with the practice of the Court in the case of actions of damages for personal injuries.

The Court, in respect of the nature of the action, refused the defender's motion and ordered issues.

Counsel for the Pursuer—Christie. Agents—Simpson & Marwick, W.S.

Counsel for the Defender—Ure. Agents—Webster, Will, & Ritchie, W.S.

Saturday, December 17.

FIRST DIVISION.

MACDONALD *v.* HIGHLAND RAILWAY COMPANY.

*Process—Warrant to Cite Witnesses in England—Affidavit—*17 *and* 18 *Vict. c.* 34 *—Skilled Witnesses.*

Mrs Macdonald raised an action against the Highland Railway Company for payment of £3000 as damages for injuries alleged to have been sustained by her in an accident at Ballinluig on 17th July 1891. The defenders admitted the fact of the accident, and their liability for injuries caused thereby, but denied that the pursuer's ill-health, if it existed, was due thereto. The case having been set down for trial at the Winter Sittings, the defenders presented a note to the Court, wherein they stated that in November 1892 the pursuer, who resided at Wimbledon, had been medically examined on their behalf by two English doctors, and craved the Court to grant a warrant under the Act 17 and 18 Vict. c. 34, to cite the pursuer, the said doctors, and two nurses, also resident in England, said to have attended on the pursuer. No affidavit was lodged in support of the note.

The Court *held* (1) that an affidavit by the defenders' agent to the effect that the witnesses mentioned were necessary and material must be lodged