usual, but according to my opinion it falls under the second of the categories to which I have referred, because I am unable to understand how the creditor in a bill can be the agent of the debtor for payment to himself. The duty of the debtor is to attend with the money. It is not a matter of technicality, but the fair meaning of the words of the bill is that the debtor undertakes to come and make payment. On this view of the case I agree that the diligence must fall, because the protest does not state that the debtor was not found at the place of payment.

LORD KINNEAR concurred.

LORD ADAM was absent.

The Court recalled the interlocutor of the Lord Ordinary, suspended the charge, and found the complainers entitled to expenses in the Outer House.

Counsel for the Complainers — Sym — T. B. Morison. Agent — George T. Welsh, Solicitor.

Counsel for the Respondents — Cook. Agent—John A. Robertson, Solicitor.

Friday, December 20.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

BYRES' TRUSTEES *v.* GEMMELLS AND OTHERS.

Trust — Trust-Disposition — Revocability — Trust for Administration — Testamentary Provisions — Delivery.

By trust-disposition a truster appointed certain persons to be "my trustees and managers of my affairs, and that absolutely," and conveyed to them her whole heritable and moveable property. She directed her trustees (1) to take possession of her property for the purposes after mentioned; (2) to give her the free income of her estates during her lifetime, she undertaking not to interfere with the trustees in any manner of way; (3) to dispose of her estates at her death to the persons named in the deed. The trust concluded by recalling and cancelling all prior settlements executed by the truster.

The deed was delivered by the truster to the trustees, who at once entered into possession of the trust-estate. At a date subsequent to the granting of the deed, and shortly before her death, the truster executed a revocation thereof.

Held (*rev.* judgment of Lord Kincairney) that the trust-disposition was of a testamentary nature, and was therefore revocable.

Murray v. *Macfarlane's Trustees*, 22 R. 927, *distinguished.*

Observed (*per* Lord Kinnear) that the question of the effect of delivery is always one of intention, and that to ascertain the intention with which delivery has been made, the deed itself must in the first place be referred to.

On 14th February 1894 Mrs Mary Henry or Byres, residing at Stranraer, executed a trust-disposition, whereby she appointed David Logan, Stranraer, and others, "my trustees and managers of my affairs, and that absolutely." The trust-disposition proceeded:—"And for that purpose I assign, dispone, and make over to them, and the acceptors and survivors of them, my whole heritable and moveable property, of whatever nature and description the same may be, wheresoever situated, together with all the title-deeds, vouchers, evidences and instructions thereof, and all as more particularly described in the title-deeds and documents in regard thereto: And I direct my said trustees as follows:—(*First*) My said trustees shall take possession of my estates foresaid, as I hereby authorise them to do for the purposes after mentioned: (*Second*) My said trustees will give me the free income of my said estates during my lifetime, and I undertake not to interfere with them in any manner of way: (*Third*) At my death I direct my said trustees to dispose of my estates after making payment of the legacies after mentioned: (*Fourth*) In the event of Mrs Catherine Byres or Gemmell, wife of John Dick Gemmell, veterinary surgeon, Ayr, surviving me and having lawful issue, two-thirds of my estates, and of the free income of said estates, will be given to her and to her children equally, share and share alike, thereafter; but in the event of no issue of the marriage, she, the said Catherine Byres or Gemmell, will have her liferent use allenarly of the said two-thirds of the free income of my estates, and the said John Dick Gemmell, her husband, will have the property purchased in the name of the said Catherine Byres or Gemmell, and be his property, and in that event the legacy after mentioned in his favour will lapse: (*Fifth*) In the event of the said John Dick Gemmell not succeeding to the said property purchased by me in the name of the said Mrs Catherine Byres or Gemmell, I leave him a sum of £500, and in that case he shall have the option of claiming the said property in lieu of said sum: (*Sixth*) The remaining one-third of my estates I direct to be divided, in the discretion of my said trustees, among my relatives, viz., the family of the late William Henry, crofter, Broadstone, Stranraer: (*Seventh*) Failing any issue of the marriage of the said Catherine Byres or Gemmell, with exception of the said property purchased by me in name of the said Catherine Byres or Gemmell, the whole of my estates will be equally divided among the family of the said William Henry: (*Eighth*) I direct my trustees to pay at my death to Archibald Drummond, Union Bank agent, Glasgow, the sum of £950 sterling, or such sum as my trustees find available, to make him and the said John Dick Gemmell equal as my

sons-in-law in my said estate: (*Ninth*) I direct my said trustees to pay the following legacies, viz., to Margaret Caughie, my old servant, presently residing in Church Street, Stranraer, the sum of £100 sterling, if she survive me; to Janet Stewart, my old nurse, at present with me, the sum of £100 sterling, if she survive me; to Helen Steel Wilson, presently my nurse, and residing with me, the sum of £100 sterling, in the event of her remaining with me, attending and nursing me till my death, besides her wages as agreed on: (*Tenth*) My said trustees are hereby authorised to recover all documents pertaining to my said estates, with full powers: (*Eleventh*) An inventory and valuation will then be made up, including all accounts, to enable my said trustees to see the state of my affairs: (*Twelfth*) My trustees shall employ James Stuart Carnochan, writer, Stranraer, to be their law-agent and factor in my estates: I recal and cancel all prior settlements made and executed by me."

Mrs Byres' trustees at once entered upon office, took possession of the trust-estate, and made up titles to the heritage of the truster.

On 26th February 1894 the said Mrs Gemmell executed a trust-disposition and settlement, whereby she conveyed her whole estates, with full power to take possession of them, to the persons named in Mrs Byres' trust-disposition.

On 23rd and 26th April 1894 Mrs Byres and Mrs Gemmell executed a deed of revocation of their respective trust-dispositions.

Mrs Byres died on 27th May 1894, leaving a testamentary writing dated 23rd April 1894, by which she bequeathed her whole estates to her daughter Mrs Gemmell, and appointed her to be her executrix.

On 3rd August 1894 Mrs Byres' trustees raised an action of multiplepoinding and exoneration against Mrs Gemmell, the widow and children of the late William Henry, crofter, Broadstone, and the other beneficiaries under the trust-disposition, for the purpose of determining the respective rights of parties to the trust-estate. This action related exclusively to Mrs Byres' trust-deed and estate.

On 18th September 1894 Mrs Gemmell and her husband raised an action of declarator that both Mrs Byres' trust-deed and Mrs Gemmell's trust-deed had been revoked. The only defenders called were Mrs Byres' trustees, the pursuers and real raisers in the multiplepoinding.

In the preliminary stages of the multiplepoinding Mrs Gemmell and her husband alone compeared; and they objected to the competency of the action on various grounds.

On 29th January the Lord Ordinary (KINCAIRNEY) pronounced an interlocutor repelling the defences to the competency of the action, and ordering claims to be lodged. In his note, after disposing of the objections to competency, his Lordship pointed out that the question to be debated on claims was, whether Mrs Byres' trust-deed had been revoked, and added—"It is true that this question might have been tried in a declaratory action, and perhaps even more conveniently, and if I had thought that it could have been tried as well in the declaratory action which Mr and Mrs Gemmell have raised, I might have dismissed the present action as having become unnecessary; but I do not think so, for the reason that the parties having the beneficial interest under Mrs Byres' trust-deed are not called, and I doubt whether the trustees have a clear duty to represent them in regard to a question which does not regard their administration of the trust-estate but challenges their trust altogether."

Claims were thereafter lodged in the competition for (1) Mrs Gemmell and her husband, (2) Mrs M'Chlery and the other children of the late William Henry, and (3) Mrs Byres' trustees, for behoof of the pupil daughter of Mr and Mrs Gemmell, whose interest was antagonistic to that of her parents.

(1) With reference to Mrs Byres' trust-disposition Mrs Gemmell averred that it was granted under essential error, that it had been impetrated from her when she was weak and facile by fraud and circumvention, and that in point of fact it had never been delivered. In addition to pleas founded upon these averments, Mrs Gemmell pleaded—"(3) The said trust-disposition and settlement of Mrs Byres having been validly revoked by the said deed of revocation, the pursuers and real raisers became as at the date of the intimation to them of the said deed of revocation simply debtors of Mrs Byres to the extent of the fund *in medio*, and this claimant is accordingly entitled as her executrix-nominate and general disponee to be ranked and preferred to the whole fund *in medio*. . . . (5) The said disposition and settlement being the only valid and effectual deed regulating the succession to the deceased Mrs Byres' estates, this claimant is entitled to be ranked and preferred to the whole fund *in medio*."

(2) Mrs M'Chlery and the other children of William Henry, together with his widow, made similar averments of weakness, facility, fraud, and circumvention with regard to Mrs Byres' revocation of her trust-deed.

They pleaded, *inter alia*—"(2) The said trust-disposition and settlement having been delivered and acted on, was not revocable, and, *separatim*, the same not having been validly revoked or altered, is the only subsisting disposition of the fund *in medio*."

(3) Mrs Byres' trustees averred that immediately after executing the trust-disposition Mrs Byres personally delivered it to them. They claimed the whole fund *in medio*, to be administered by them in terms of her trust-disposition, and in support of this contention pleaded that the deed was irrevocable.

On 3rd December 1895 the Lord Ordinary pronounced the following interlocutor:—"Finds that the trust-disposition executed

by the now deceased Mrs Mary Henry or Byres on 14th February 1894 was irrevocable, if duly delivered, and that it has not, if delivered, been effectually revoked: On the motion of the pursuers, finds them entitled to the expenses of raising and bringing the action out of the fund *in medio:* Further, finds them entitled to their expenses against the defenders Mr and Mrs Gemmell incurred in reference to the defences to the competency of the action, and reserved by interlocutor dated 29th January 1895: Allows Mr and Mrs Gemmell a proof of their averments in regard to the delivery of the trust-deed of Mrs Byres, dated 14th February 1894, and to the pursuers and to the claimants Mr and Mrs M'Chlery, and others mentioned in No. 24 of process, a conjunct probation: *Quoad ultra* reserves all questions of expenses: Grants leave to reclaim."

Opinion.—. . . "It is maintained, on the one hand, that Mrs Byres revoked her earlier deed; and on the other hand, that that deed was irrevocable.

"That, however, is not the sole question raised, for Mrs Gemmell now avers distinctly that the first trust-disposition was never delivered, while the other claimants aver that it was. Further, Mrs Gemmell avers that the first trust-deed was fraudulently impetrated from Mrs Byres while she was physically weak and unable to understand what she was doing. Conversely, the claimants Mrs M'Chlery and others aver that she was of sound mind when she executed the first deed, but that the revocation and second trust-deed were fraudulently impetrated from her when she was weak and facile.

"It appears to me that there is nothing which I have hitherto decided which can prevent me from entertaining and deciding all these pleas; but I think that it is not in accordance with our ordinary practice to try the questions raised as to the validity of the deeds except in actions of reduction. At the same time I reserve my opinion as to the competency of trying these issues in this multiplepoinding, and, at all events, the consent of parties might obviate the necessity of raising reductions.

"In these circumstances all the parties pressed me to decide *in limine* the question as to the revocability of the first trust-disposition on the footing that it was competently executed, and on the footing that it was delivered. No one disputed that it might be revoked if it had never been delivered. The pleading might take this form, that the averment that the deed was delivered was irrelevant, seeing that it was revocable and revoked. All parties were of opinion that it would be convenient to take this course; and though I am by no means clear as to the convenience of that course, yet, as the question was carefully argued, and as the authorities were fully discussed, I have come to think that I may comply with the wishes of the parties, in the hope that elsewhere the same course may be followed.

[*After reciting the terms of the trust-disposition his Lordship proceeded*]—"Now the question put is, whether this deed was entirely revoked? There is no question about its partial revocation. Nobody but the Henrys and the trustees have pleaded that it is irrevocable. In particular, neither Archibald Drummond nor any of the other legatees have appeared to state that plea. The trustees represent that they consider it their duty to take that plea in order to protect the interest of Mrs Gemmell's child, a pupil born after Mrs Byres' death, seeing that the interests of the pupil and of Mrs Gemmell are antagonistic. I understand that no child of Mrs Gemmell was alive when Mrs Byres executed the trust-deed now in question.

"I have found the question whether Mrs Byres' deed was revocable or no, supposing it was delivered, a very difficult one; for I am much impressed with certain features in the deed of a character apparently testamentary. It bestows 'legacies'; it revokes all 'previous settlements'; and, but for previous decisions, I might have leaned to the view that the deed was testamentary; but I think that the previous cases point too decidedly in the opposite direction, and that on the decisions I am obliged to hold that the deed was irrevocable if delivered.

"The description of the estates conveyed is very wide, yet it does not include *acquirenda.* It is not a conveyance of the estate as it might exist at the date of the granter's death. It is a conveyance *de præsenti; prima facie* it divests the granter, and it may be doubtful whether she could have been reinvested excepted by a conveyance from the trustees. The trustees are directed and empowered to take possession of the estates. It was to have immediate operation. The trustees were to pay the liferent of it to the granter; but that seems the only effect which it was to have during her life, and if there had been no provision in the deed but that, I think she might have revoked it notwithstanding her somewhat singular undertaking not to interfere. I would have had difficulty in holding that the fourth purpose, by which two-thirds of her estate is directed to be given to Mrs Gemmell and her children, would prevent revocation, seeing that Mrs Gemmell is not maintaining that it does, and seeing, as I understand to be the fact, that she had no children alive at its date. If the deed had conferred no other right, I think that the principle of the cases of *Morison* v. *Dick*, February 10, 1854, 16 D. 529, and *Mackenzie* v. *Mackenzie's Trustees*, July 10, 1878, 5 R. 1027, in which it was held that where a deed conveyed no interest to any living person it was not beyond the granter's power to recal would apply; but by the sixth clause a clear right is conferred on the family of the truster's brother William Henry. It is not to be payable until after the truster's death; but it is a right conferred by a deed assumed to be delivered during life, and in such a case I consider that the decision compels the conclusion that the trustees, when they received the estate, held it for these beneficiaries.

"In that view I must hold that the present case is of the same nature as the cases

in which a delivered deed conferring a right, whether accruing immediately or in the future, whether vested or contingent, has been held to be irrevocable. The more important and most closely applicable of these cases seem to be these—*Turnbulls* v. *Tawse*, April 15, 1828, 1 W. and S. 80; *Smitton* v. *Tod*, December 12, 1830, 2 D. 225; *Spalding* v. *Spalding's Trustees*, December 18, 1874, 2 R. 237; *Mackie* v. *Gloag's Trustees*, March 9, 1883, 10 R. 760; *Robertson* v. *Robertson's Trustees*, June 7, 1892, 19 R. 849; and *Downie's Curator Bonis* v. *Macfarlane's Trustees*, July 20, 1895, 32 S.L.R. 715. The case of *Spalding's Trustees* is especially valuable for the exposition of the law by the late Lord President. His Lordship was indeed in the minority; but it is to be remarked the case was not decided on the ground that the deed was revocable, but on the ground that the posthumous child, to which the case related, was a prior creditor. As to the irrevocability of the deed, the Court seem to have been equally divided. I would refer in particular to the opinion of Lord Rutherfurd Clark in the case of *Mackie* v. *Gloag's Trustees*. Many other cases were quoted, but I think that they, or some of them, relate to different categories of law, and I regard as inapplicable cases in which deeds were held irrevocable because granted by a married woman for her own protection, or because they partook of the character of marriage-contracts, and, on the other hand, cases where deeds were held to be revocable as donations *inter virum et uxorem*. Counsel for Mrs Gemmell relied somewhat specially on *Costine's Trustees* v. *Costine*, March 19, 1878, 5 R. 782; *aff. Wightman* v. *Costine*, March 6, 1884, 11 R. (H.L.) 10; but I am not able to see that that case applies.

"It may not be impossible to regard a deed as in part revocable and in part irrevocable, as was done in the case of *Leckie* v. *Leckie's Trustees*, November 22, 1776, M. Presumption, No. 1. But there the decision turned on delivery, and it was held that the deed was delivered as a disposition of heritage, and not delivered as regards moveables—apparently rather a difficult position. I think, however, that in this case I cannot distinguish between the various parts of the deed; nor really does the question arise whether a partial revocation would have been effectual. My judgment, in any view, can only affect the parties who have appeared. I cannot, however, do more than find that the deed, if delivered, was irrevocable and has not been revoked; and it will be necessary to ascertain whether there was delivery or not."

The claimants Mr and Mrs Gemmell reclaimed. At the hearing the reclaimers presented a note craving that the action should be sisted until the determination of an action of reduction of the trust-disposition which they had raised. The Court refused the note.

LORD PRESIDENT—The parties have concurred in adopting one order of dealing with the questions raised in this case, and they claimed the decision of the Lord Ordinary on this footing, and we have now before us a reclaiming-note impeaching the soundness of the Lord Ordinary's decision on the question submitted to him. On reflection I think it would not be right to interfere with the course of procedure thus deliberately adopted. Of course nothing irretrievable will follow from our refusal of Mrs Gemmell's motion.

LORD ADAM—I concur. I think there is a great deal to say for the view that the question of fact should have been disposed of before the question of law, but as circumstances stand the question of the irrevocability of this deed has been raised first, and both parties have agreed that it should first be disposed of, and have acted on that footing up to the present time. That being the case I do not think we should now alter the course of procedure.

LORD M'LAREN—I do not doubt that if the parties had concurred in asking that the reclaiming-note should now be sisted in order that a reduction should be tried, the Court would have dealt with it as they desired. But it seems to me that the reclaimer and respondent have equal rights in the issue of the reclaiming-note, and that the respondent is entitled to insist that the note should be disposed of in order to have the questions it involves settled, unless some good reason can be shown for sisting it. Now, these considerations being evenly balanced, I think the result is that the case should go on.

LORD KINNEAR—I agree. I think the parties had agreed to the order of procedure which the Lord Ordinary has adopted, and I think that one party should not be allowed unreasonably to throw over that order.

The hearing accordingly proceeded.

Argued for the reclaimers — The Lord Ordinary was wrong. The whole tenor of the deed was testamentary, and was aptly summed up in the third purpose. There was, in the first place, the conveyance of a *universitas*, which was a note of testamentary intention—*Spalding* v. *Spalding's Trustees*, December 18, 1874, 2 R. 237. There was, indeed, an indication of the granter's purpose that the trustees should manage her affairs for her, but everything else was purely testamentary. She used the words "at my death," she bequeathed what she expressly called "legacies," the amount of the "two-thirds" and "one-third" of her estate mentioned in the fourth and sixth purposes could only be determined at her death. Finally, there was an explicit revocation of all prior settlements, which was precisely what might be expected in a will. The deed conferred no *jus quæsitum* on anyone, and the case fell within the category of *Murison* v. *Dick*, February 10, 1854, 16 D. 529; *Fernie* v. *Colquhoun's Trustees*, December 20, 1854, 17 D. 232; and *Mackenzie* v. *Mackenzie's Trustees*, July 10, 1878, 5 R. 1027. It was therefore distinguishable from *Turnbulls* v. *Tawse*, April 15, 1825, 1 W. & S. 80, where the House of

Lords held that the children had a vested interest in the estate of the truster as much as if there had been a direct conveyance to them *nominatim;* from *Smitton* v. *Tod*, December 12, 1839, 2 D. 225, where the decision proceeded upon the view that the ends and purposes of the trust precluded the inference that the trust-deed was irrevocable; from *Mackie* v. *Gloag's Trustees*, March 6, 1884, 11 R. (H. of L.) 10, where the trustees were directed to hold for the benefit of the beneficiaries, and the deed contained a power of apportionment which was held by Lord Watson (p. 17) to be inconsistent with the idea that the fee still remained in the truster; from *Robertson* v. *Robertson's Trustees*, June 7, 1892, 19 R. 849, where there was a conveyance not of a *universitas* but of certain specific subjects, and where none of the provisions were contingent on the truster's death; from *Murray* v. *Macfarlane's Trustees*, July 17, 1895, 22 R. 927, where there was a direction to the trustees to accumulate, and a declaration that the deed was irrevocable; and from *Shedden* v. *Wilson*, November 29, 1895, 3 S.L.R. 154, where there was a declaration that the trust-estate should not be affectable by the deeds of the truster. Here there was no more than a promise by the truster not to interfere with the trustees.

Argued for the respondents—The Lord Ordinary was right. The true test was the intention of the granter of the deed, and here she had *prima facie* divested herself of her estate at the time of granting the deed. There was no conveyance of *acquirenda*. The whole fee of her estate was disposed of in a series of directions to convey, and the fact that payment was postponed till the date of the granter's death was not inconsistent with the present gift of a fee. In *Turnbulls* v. *Tawse* the purposes were, first, payment of the truster's debts; and secondly, payment of the free income to the truster's widow; and thirdly, the protection of the estate for behoof of the fiars. In *Smitton* v. *Tod* there were purposes which must be carried out during the granter's lifetime. Here, too, the proper management of the truster's estate during her lifetime was plainly contemplated. But in *Spalding* there was no purpose to satisfy during the granter's lifetime except the payment of the income to himself. *Fernie* was a case of *donatio inter virum et uxorem*. In *Mackenzie* there was no person in existence whose benefit was contemplated, and Lord Young put the judgment on the ground that Miss Mackenzie was only proposing to alter her former deed in order to execute a postnuptial marriage-contract containing reasonable provisions for the husband and children. The true analogy in *Mackenzie's* case was a protected succession under a marriage-contract.

At advising—

LORD M'LAREN—It is a very well-settled rule of law that a trust for the administration of the granter's affairs in his lifetime, including the payment of his debts, does not divest the granter. Notwithstanding the execution of such a deed, he retains the radical beneficial interest in his estate. He may revoke the deed at pleasure, or may even, without noticing the trust, make an effectual destination of his property to heirs or legatees. When the trust as originally constituted contains words of disposal of the fee or reversion, then it is a question of construction whether an irrevocable right is intended to be given to the beneficiaries, or whether the beneficial provisions are properly and in substance testamentary.

In general, if the beneficial provisions are expressed in the form of a direction to trustees to divide the surplus estate at the granter's death, and if there is nothing in the deed establishing an intention on the part of the granter to renounce the power to revoke, which, as I have said, always remains to him when the trust is for administration, then I should say the trust is one for administration first, and for testamentary purposes afterwards, but that no right is given to anyone in the truster's lifetime. But, of course, an owner of property may divest himself in his lifetime of all his rights, including the right to revoke the deed by which he divests himself. There is no difficulty in framing such a deed as when delivered will give an indefeasible interest to the beneficiaries named in it. If the primary purpose of the trust is administration for the granter's benefit, then I think the presumption with reference to any further declaration of purposes is that the granter does not part with the power of future disposal. But this presumption may be displaced by a clear expression of the intention to constitute an immediate beneficial interest in the persons favoured.

There are two modes of doing this, which have been very much considered in the decisions—that is to say, if the deed either directs the trustee to hold or stand possessed of the estate for certain persons in fee subject to the granter's life interest, or if the right given to the beneficiaries is declared to be irrevocable, in either case it is perfectly clear that the granter has divested himself of all future interest in or control over his estate, excepting as to the liferent, or whatever right he reserves to himself. The case of a trust to hold receives illustration in *Turnbull* v. *Tawse*, in *Spalding*, and *Mackie* v. *Gloag's Trustees*, where the trust-deed narrates that it was intended that the residue should be "effectually secured" to the spouses in liferent and their children in fee, and I think in nearly all the cases that were cited. In the most recent decision bearing on this point—*Murray* v. *Macfarlane's Trustees*, decided in this Division (22 R. 927)—I do not find in the report that the truster had used words expressing the wish that the trustees should immediately hold for the beneficiaries, but there does occur that very important provision in a question of this kind, that the deed was declared to be irrevocable. That of course means that the deed was to be irrevocable in all its provisions; that the

interest given to the fiars was irrevocable, and therefore that the estate was put beyond the granter's control.

Now, in the present case I find neither a direction to the trustees to hold for the persons who are to take at this lady's death, nor the renunciation of her power to revoke. Indeed, I do not think that any clause indicative of intention to pass an immediate interest to the beneficiaries can be pointed out in this deed. It is purely a trust for the management of the truster's affairs in her lifetime with certain testamentary purposes superadded, beginning with the expression "I direct my trustees to divide." In these circumstances it appears to me that Mrs Byres did not intend to part with her control over her estate, and that she was entitled to revoke the trust. It follows in my opinion that the deed under consideration, if not effectually revoked (for we are told that there is some extrinsic objection to the revoking instrument), was at least subject to revocation, and reserving the effect of extrinsic objection, that it was well revoked by the deed granted a month before the truster's death.

LORD KINNEAR—I have come to the same conclusion. I think the question is one of intention, which depends upon the construction of the particular instrument before the Court, and also upon the effect of delivery being made during the lifetime of the granter, for we are to assume that the deed was delivered. There can be no question that delivery of a deed which operates a divestiture of the granter, is in general a very conclusive proof of the granter's intention that the deed should have immediate effect against him, because delivery of a deed to take immediate effect can in general have no other meaning than that it is intended to put the instrument beyond the power of the granter. But the question of the effect of delivery must always be one of intention, and in order to ascertain the intention with which it has been made we must go in the first place to the deed itself. If it appears that the only or the main purpose of delivery is that trustees to whom it is delivered should hold for donees named in the deed against the donor, the granter of the deed, there can be no doubt that the deed is irrevocable. But that is not a necessary inference in the present case, because delivery was indispensable for the primary purpose of the deed, which is not donation, but the management of the truster's estate during her lifetime. It is, I think, clear, both from the terms of the inductive clause and of the directions given to the trustees, that that is the primary purpose of the deed, for what this lady says is—"I do hereby appoint" certain parties named "my trustees and managers of my affairs"—that is, of her own affairs and those of her donees—"and for that purpose I assign and make over to them my whole estate," and then she goes on to say that the trustees are to take possession of the estate, and to give the free income to her during her lifetime, and she undertakes not to interfere with them in any way, that is to say, with their management of the estate on her behalf—a clear indication to my mind that she had put her estate into the hands of the trustees for purposes of management. The granter then goes on further to make certain provisions which are purely testamentary in their nature. I agree with Lord M'Laren that there is no difficulty in engrafting testamentary provisions upon a conveyance in trust for purposes of management, and it appears to me that that is all this lady has done.

I do not think it is necessary to consider the series of cases which were quoted to us, because I think the question is one of construction, and in construing one deed very little assistance is to be derived from the construction put upon other deeds conceived in different language. There is, however, one point which was discussed, and which I think it not immaterial to notice. It appears to me that besides the other distinctions which Lord M'Laren has pointed out between this case and *Murray* v. *Macfarlane's Trustees*, it is a material difference that there was in that case a direct expression of the granter's intention that the deed should not be revocable. When a deed remains in the custody and control of the granter, it matters very little whether it is declared to be revocable or irrevocable, because that question must depend upon the substance of the deed, but when a deed is delivered to third parties or to trustees for third parties, and the only question is whether or not it is the intention of the truster to make an absolute gift of the subjects conveyed, such a declaration may be a material element for consideration on the construction of the deed, and tends to show, if it does not show conclusively, that delivery was made for the purpose of divesting the granter and enabling the trustees to hold against him. The reservation of a liferent or the provision that the trustees shall pay a liferent to the granter does not appear to me to create any difficulty in arriving at the conclusion that delivery was intended to operate absolute divestiture of the granter, because the effect of the conveyance to trustees in such terms is to limit the right of the granter, and, if he does nothing more than give the fee to other parties, and direct the trustees to pay him the liferent, the deed discloses no reason for immediate delivery except an intention to give an immediate interest in fee to the persons whom he desires to favour. But when the granter makes it clear that his main purpose is to provide for the management of the estate during his lifetime for his own behoof, that is a sufficient reason to account for delivery of the deed, and displaces the inference that it was made for the purpose of enabling the trustees to hold the estate for the donees and against the granter.

LORD ADAM—I am of the same opinion. I agree that the question is one of construction, namely, what was the intention of the granter? Now, I think that this is a deed of a compound nature. It is granted in the first place for the purpose of giving

trustees the management of the truster's estate, and the remaining purposes are purely testamentary. I see no inconsistency in these two objects being combined. It has been assumed throughout the discussion that the deed was a delivered deed, and in the view I take it necessarily was so, because delivery was necessary to put the trustees in possession and enable them to enter upon the management of the granter's estate. The object and intention of the deed was not to protect any right contingent or vested on the part of beneficiaries, but purely to vest the trustees with the management of the estate. If so, it follows that the trustees held during the granter's life for her and no one else, and I agree that a party who appoints trustees to manage his estate for him can put an end to the arrangement when he likes. No doubt the granter undertakes in this case not to interfere with the trustees, but that is a mere promise which she might keep or not just as she liked. Accordingly the possession which the trustees had was in my view entirely for her, and not for the benefit of any of the parties named in the testamentary parts of the deed. I need not go over these, but I may point out that the granter winds up by recalling "all prior settlements made or executed by me" which appears to me to suggest in so many words that this is a settlement. I think it is. I think it gave no right, vested or contingent, to beneficiaries, and that the deed was delivered only for the purpose of the temporary management of the estate by trustees.

The LORD PRESIDENT was not present at the advising.

The Court recalled the interlocutor of the Lord Ordinary in so far as it found that the trust-disposition was irrevocable if duly delivered, and had not, if delivered, been revoked; found that the said trust-disposition was revocable; recalled said interlocutor also in so far as it allowed a proof in regard to the delivery of the trust-deed; *quoad ultra* adhered to the said interlocutor; found the respondents David Logan and others as trustees of Mrs Byres, and Mrs M'Chlery and the other claimants specified in No. 24 of process, liable jointly and severally to the reclaimers in expenses since the closing of the record in the competition: *Quoad ultra* reserved the expenses of the competition so far as not decerned for; and remitted the case back to the Lord Ordinary in order to proceed further therein, with power to deal with the Auditor's report, and to decern for the amount of the taxed expenses.

Counsel for Pursuers and Real Raisers—M'Lennan—Wilton. Agent—P. Pearson, S.S.C.

Counsel for Defenders and Reclaimers (Mr and Mrs Gemmell)—Lord Advocate Pearson, Q.C.—Guy. Agents—Henderson & Clark, W.S.

Counsel for Defenders and Respondents (Mrs M'Chlery and Others)—Kennedy. Agents—Martin & M'Glashan, S.S.C.

Saturday, December 7.

SECOND DIVISION.

(With Lord Adam and without Lords Young and Rutherfurd Clark.)

[Lord Kincairney, Ordinary.

RUSSELL, HOPE & COMPANY *v.* PILLANS.

Process—Summons—Amendment of Record—Court of Session Act 1868 (31 *and* 32 *Vict cap* 100), *sec.* 29.

In an action of damages for breach of contract by a firm of iron merchants against a rivet manufacturer, the pursuers averred that they entered into a contract with the defenders for a supply of rivets to enable them to fulfil a contract which they had made with a firm of shipbuilders; that by reason of the defenders' failure to supply the rivets, the pursuers had been found liable to the firm of shipbuilders in an action at their instance in the sum of £175 as damages, and in £172, 18s. 11d. as costs, and that in addition their own costs in the said action amounted to £232, 8s. 10d. The pursuers accordingly sued for repayment of these sums from the defenders and for payment of a further sum of £23, 9s. 6d. stated to be the pursuers' loss of profit upon their contract with the defenders. The Lord Ordinary (Kincairney) assoilzied the defenders from the conclusions of the summons.

The pursuers reclaimed, and presented a note to the Court asking to be allowed to amend their summons by adding an alternative conclusion, to the effect that the defender should be decerned to pay £300, with a relative statement in the condescendence that this was the difference between the contract price of the rivets and the price at which they could have been obtained in in the market at the date of the breach of contract.

The Court (*diss.* Lord Adam) refused the note.

By section 29 of the Court of Session Act 1868 (31 and 32 Vict. cap. 100) it is enacted:—"The Court or the Lord Ordinary may at any time amend any error or defect in the record or issues in any action or proceeding in the Court of Session upon such terms as to expenses and otherwise as to the Court or Lord Ordinary shall seem proper; and all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made: Provided always that it shall not be competent by amendment of the record or issues under this act to subject to the adjudication of the Court any larger sum or any other fund or property than such as are specified in the summons or other original pleading unless all the parties interested shall consent to such amendment."