have returned a verdict in which they find for the defenders upon the issue in the action at the instance of Hinshaw against Fleming Reid & Co., and in the counter action they find in favour of Fleming, Reid & Co., with a verdict for £300. We have heard the case very elaborately argued, and we have studied the evidence with all attention. We have also had the benefit, under the recent arrangement of the Act of 1868, of the presence of our brother the Lord-Justice Clerk, who tried the cause, and we certainly have derived very great advantage from the information which he has communicated to us as to the course of the trial. We learn from him that the jury who tried this cause was a jury certainly of average intelligence, if not more so; that they bestowed great attention and pains upon the case, and seemed thoroughly to comprehend the question which they had to dispose of. There is no reason at all, either in the opinion of the Lord-Justice Clerk or in the opinion of any member of the Court, to doubt that the construction of the contract given to them by the presiding Judge was followed by the jury. The question therefore which they had to determine was a purely jury question, arising in the course of mercantile dealing, and we should not be ready to disturb a verdict in such a case under almost any circumstances. But it is enough to say that, as regards the present case, we see no reason whatever for disturbing either the one verdict or the other. The rules therefore which have been granted will be discharged.

Agents for Hinshaw & Co.—Murdoch, Boyd & Co., S.S.C.

Agent for Fleming, Reid & Co.—William Mason, S.S.C.

Friday, July 2.

TENNENT *v.* TENNENT'S EXECUTORS.

Trust — Irrevocable Deed — Delivery — Registration. Held, after a proof, that a trust-disposition and assignation, which contained *inter alia* a clause consenting to registration, and which was in fact registered, an extract being sent to the trust-disponee, was a delivered and irrevocable deed.

On 1st December 1862 the late Hugh Tennent of Wellpark executed a trust-disposition and assignation in favour of his son, Gilbert Rainy Tennent, and certain other parties, whereby he conveyed to them certain property for purposes set forth in the deed. The deed contained, *inter alia*, clauses declaring that the truster had delivered up to his trustees "the whole vouchers, writs, and title-deeds of the sums of money and land securities and others hereinbefore designed, disponed, and conveyed, to be kept and used by them in time coming for the purposes of this trust;" and consenting to "registration of the deed for preservation and execution, and also to registration in the General or Particular Register of Sasines." The deed was registered in the books of Council and Session in March 1863. In 1864 Hugh Tennent, shortly before his death, executed another deed, in which he stated, with regard to the deed of 1862, that in so far as that deed was expressed as to be in its terms irrevocable, the same was not his act and deed, it having been his will and intention to make it revocable at any time during his life; that he never delivered that deed or authorised delivery of it; that the recording was merely for safe preservation; and that he now recalled that deed. G. R. Tennent now asked declarator that the deed of 1862 was delivered and irrevocable, and that Hugh Tennent had no power to revoke or alter it. After a proof, the Lord Ordinary (BARCAPLE) found that the deed of 1862 was a delivered deed prior to the date of the second deed of 1864, and was irrevocable. The defender Hugh Tennent's trustees and executors reclaimed.

CLARK and WATSON for reclaimers.

GIFFORD and WEBSTER for respondent.

At advising—

LORD PRESIDENT—This action is raised by Mr Gilbert Rainy Tennent, describing himself as the only accepting and surviving trustee under a trust-disposition and assignation executed by his deceased father, Mr Hugh Tennent, on 1st December 1862. It is directed against the testamentary trustees of Mr Hugh Tennent as defenders; and it concludes for declarator that the deed of 1st December 1862, under which Mr Gilbert Tennent is, as he says, the sole surviving and accepting trustee, is a delivered and irrevocable deed, and that the granter thereof had no power to revoke or alter the same; *secondly*, for declarator that it is a subsisting conveyance of the several sums of money, lands, securities, and others therein specified and described; and *third*, that the pursuer is entitled to complete his title to the subjects described in the deed, and to enter into possession, and generally to execute the trust created by the said deed; and there is a subsidiary conclusion for prohibiting the testamentary trustees from interfering with the execution and administration of this trust. The defence maintained, on the part of the testamentary trustees of Mr Hugh Tennent, is, that this deed was in its nature a revocable deed; at all events, if not revocable in its nature, that it was retained in the custody of the granter, and was never delivered, and consequently that it was liable to be revoked, and was effectually revoked by the granter by another deed executed by him on 16th January 1864. To this, again, the pursuer replies that the deed founded on by him—the deed of 1st December 1862—was in its nature an irrevocable deed; that it was delivered by the granter; and that therefore he had no longer any power of revocation, and that the deed of revocation, dated on 16th January 1864, is therefore ineffectual. The whole question comes to turn upon the matter of fact, whether this deed was or was not delivered by the granter, because it is impossible to dispute that the deed is in its own nature an irrevocable deed. It is an absolute conveyance; it bears to convey the subjects which it embraces absolutely and irrevocably, and has upon its face all the marks and characteristics of an irrevocable deed. But the question whether it was delivered by the granter, although it be a question of fact, is yet one of considerable importance, and indirectly involves some important legal principles. Such being the nature of the case, I think it necessary to enter somewhat more into detail in giving judgment than I should have considered to be at all appropriate, if we had been dealing with a mere question of fact.

One of Mr Hugh Tennent's daughters, named Helen, was married to Mr Craigie of Dumbarnie, and Mr Craigie of Dumbarnie died, leaving her a widow with two infant daughters, in the year 1854. The estate of Dumbarnie was very much involved in debt; indeed so much so as to be apparently in a hopeless and irrecoverable position, so far as the

heirs were concerned; but the debts had been acquired by Mr Tennent, apparently with the purpose and prospect of being able to do something to save the estate of Dumbarnie; and the object of the deed that we are about to consider was to carry out that purpose. The way in which he set himself to do this was to leave in trust the whole of the debts and securities for debts, which he held over the estate of Dumbarnie; and to authorise his trustees, when the two girls came of age, who of course were heirs-portioners of the estate, to offer to them to clear off the whole incumbrances, if they would consent to entail the estate in the terms prescribed by this deed. The entail was to be, in the event of both the girls surviving majority, in favour of the eldest, and the heirs of her body, whom failing, of the younger and the heirs of her body; and failing these, two grandchildren of Mr Tennent and the heirs of their bodies, then the estate was to the pursuer, Gilbert Rainy Tennent, the granter's son, and the heirs of his body, and there were a series of substitutions of other members of the granter's family. In short, the effect of the deed, as regarded the ultimate settlement of the estate, was to exclude from the succession all heirs of the Craigie family, with the exception of the granter's two grandchildren and the heirs of their bodies; and it will be seen from the evidence that this was a favourite and settled object of the granter of the deed.

Now, although the deed bears something of an appearance of complication, it really requires very little further description, because that is the object of the granter, and the way in which he carried out that object was very well calculated to attain it. He conveys the whole of the debts and securities which he held over the estate to certain trustees, and to the acceptors, survivors and last survivor of them, absolutely and irrevocably, as trustees for executing the trust hereby created; and failing the trustees, he destines the subjects to the nearest heir-male of the last accepting and surviving trustee, who was to be major and in Great Britain at the time, the object of that last provision being to secure that there shall always be somebody to take up and represent this trust, so long as it is necessary.

Now, after the description of the subjects conveyed, there is a long exposition of the purposes of the trust; and besides the provision which I have already briefly described of what was to be done when the two girls came of age, there are also alternative provisions for the case of only one of them surviving and attaining majority, the case of one surviving and the other dying and leaving issue, and so forth. In short, all the possible alternatives are contemplated and provided for in this deed, but the object throughout is the same, and the result to be attained is the same. The estate of Dumbarnie is to be settled upon these two girls and the heirs of their bodies; but after them it comes in to the family of the granter, Mr Tennent, and all the other substitutes, called here, truly the members of his family. There is also in the eighth purpose of the deed evidence of a very strong determination upon the part of Mr Tennent that his object, in regard to the estate of Dumbarnie, shall in any event receive effect. He provides in the eighth place, "In the event of any unforeseen or unprovided for state of circumstances, arising in consequence of the death of my said two granddaughters, or either of them, or their issue, at any particular time or times, or from any other cause, I do hereby fully authorise and empower my trustees, according to their discretion, to make such arrangements, and to execute such deeds and writings, as fully and freely in all respects as I could have done myself, before granting these presents, or as they may consider proper for giving effect to my intention of settling the said whole sums of money, principal and interest, and lands, securities, and others hereinbefore assigned, disponed, and conveyed on my said granddaughters and their issue, in the order and manner aforesaid in fee." The deed also contains a consent to registration for preservation and execution, and also to registration in the General and Particular Register of Sasines. Now, this clause, although very shortly expressed, means all that clauses of much greater length formerly meant, in virtue of a statute made to that effect. It means that the granter not only consents that the deed shall be registered in the books of Council and Session, but it implies the appointment of a procurator, who is to act for the granter of the deed in obtaining such registration; and the deed being so registered is to have the effect of a registered deed, just as much as if the old long clause had been inserted. And so also with the consent to registration in the General and Particular Register of Sasines. That is just as effectual as if there had been a precept of sasine in the old form, upon which an instrument of sasine might have passed.

Now, it seems to me impossible to doubt that the conception of this deed was, that it was to come into immediate operation. It was not a trust which was to come into operation only upon the death of the granter, though that might be held irrevocable as a conveyance. But this trust was to come into immediate operation. The trustees under this deed, as soon as they received delivery of it, were not only entitled to put it upon record for preservation and execution, but also to take infeftment, or in other words, to record it in the Register of Sasines, which is equivalent to infeftment now; and thereupon they were entitled at once to enter upon the management of the trust-estate, and to administer it for the purposes of the trust. They were, among other immediate purposes, directed to provide an annuity for the two girls, until they came to the age of twenty-one; and in respect of that annuity having been provided for by this deed, there is no other provision for these young ladies until they attained that age. They are left orphans; and the granter of the deed knew very well that as far as their own patrimonial estate was concerned it would yield very little for their maintenance.

Now, the question is, whether this deed, which the moment it was delivered was to come into active operation, was *de facto* delivered by the granter? I think the best evidence upon this subject is to be found in the correspondence. There are a number of statements made by witnesses with regard to the intentions of the granter, which I do not think are entitled to very much weight. In a question of this kind one looks rather to the acts of parties, and to the contemporaneous evidence of these acts, as shown by letters under their own hands, than to the gloss and colour which after desires and objects may have impressed upon the mind of witnesses.

Mrs Craigie died in April 1862, and at that time a deed was in course of preparation of the same nature generally as that which was afterwards executed, and with which we are now dealing; but the death of Mrs Craigie rendered it necessary to cancel the draft of that deed, and to prepare a new

one in a somewhat different form; and we see from the correspondence that Mr Simon Campbell, who was acting in this matter as agent for the late Mr Tennent, had got the new deed put in shape by the month of July 1862. He writes a letter of that date to Mr Gilbert Tennent, who was also taking an active share in the preparation of this deed by desire of his father, in which he says, "I have extended anew the trust-disposition and assignation by your father of the Dumbarnie debts, with the various alterations made thereon in consequence of the death of Mrs Craigie, and of certain changes resolved on by your father as to the amount of provisions," &c. Then he says he thinks the extended draft is in conformity with Mr Tennent's desires, and with the original draft, except in so far as that fell to be altered. He adds this paragraph:—"Before signing the deed, your father should again examine it carefully, to see that it is in all respects conformable to his intentions; and if he should wish it to be altered or amended in any respect, you had better return it to me for that purpose, and the alterations will be made without any delay. As soon as the deed is executed it should be given into the stamp-office. As it is a deed *de presenti*, and irrevocable, it will be subject to the 'settlement' duty of 5s. per £100; and I think that, as in the former case of the trust-deed of £6500, we should get an adjudication stamp so as to avoid any future question as to the sufficiency of the duty paid." Of the same date, Mr Campbell also writes to his client Mr Hugh Tennent, and says, "I have to-day written to Mr Gilbert, with the trust-disposition and assignation of the Dumbarnie debts, that he may hand it to you, and that you may execute it after carefully examining it, and being satisfied that it is quite conformable to your intentions. I have at the same time returned to him the conveyance of these debts, which, before being stamped, you had executed, but not delivered, and which, in consequence of Mrs Craigie's death, is now to be superseded by the new deed. The old deed had better be destroyed or cancelled when you execute the new." He says further, with reference to another deed—a general settlement which was then in course of preparation for Mr Hugh Tennent—"This being a testamentary deed requires no stamp; but in the Dumbarnie deed, which is irrevocable, there will be a duty of 5s. per £100." Now, it was thus very clearly brought under the notice of Mr Hugh Tennent, the granter of the deed, that that which he was about to execute was an irrevocable deed. There can be no doubt about that. But, even if he had had such a doubt about it after receiving that letter, his mind must have been still more clear on the subject by what followed. Mr Gilbert Tennent was not quite satisfied with the framing of the deed, and there was a good deal of difficulty and a good deal of correspondence about that. He seems to have been somewhat hard to please in various matters connected with the framing and execution of this deed; but it is not necessary to advert to this in detail. I pass over the correspondence of the next two or three months as not very material, and come down to a letter written by Mr Campbell to the late Mr Tennent on 13th October, which appears to me to be very important. He says,—"On the 7th inst. I sent Mr Gilbert a copy of the Dumbarnie deed revised by an English counsel, but he seems to be not yet satisfied regarding it. I now write to remind you that this deed is referred to in your general settlement as being executed, or about to be executed, and that it therefore may be virtually held as a part of your settlement. The sooner, therefore, it is executed the better. I would have written to Mr Gilbert himself to this effect, but I am not sure whether he is aware of your having executed the general settlement, or that it refers to the Dumbarnie deed." Now, Mr Tennent had executed this general settlement by that time. This letter is dated 13th October, and the general settlement was executed on the 7th of that month; and the reference which is made in the general settlement to the Dumbarnie deed is not, by any means, immaterial in this question. It is in the general settlement provided and declared that the sums of money which he had advanced and paid to several beneficiaries (who are named there) shall be taken as part payment of their shares of the residue, "and that the whole sums, principal and interest, secured over the estate of Dumbarnie and other heritable subjects which belonged to the deceased Maurice Carmichael Craigie, and which are now due to me, and which sums I have conveyed, or am about to convey, by an absolute and irrevocable trust-disposition and assignation to trustees for behoof of the said Christina Harriet Craigie and Mauricella, otherwise Maurice Georgiana Helen Craigie, and for other purposes, but under the deduction of such payments to account of the said interest, if any, as I may receive during my life, shall be reckoned debts due by the said Christina Harriet Craigie and Mauricella, otherwise Maurice Georgiana Helen Craigie, as heirs-portioners of their said father, to my estate, and shall be accounted as part of their said share of the residue and remainder of my said estate and effects." Now, here again is a distinct statement in the general settlement of Mr Tennent, that he has by an absolute and irrevocable trust conveyed, or is by said trust about to convey, these debts to a separate body of trustees. The correspondence proceeds until, on 7th November, Mr Campwrites again to Mr Tennent:—"As I mentioned in my letter to you of the 13th ult." (that is the letter of 13th October), "it is desirable that this deed should be completed and executed without delay, as it is referred to in your general settlement, and may be considered a part of it." He still urges the same reason for immediate action as regarded this Dumbarnie deed. Then, on 28th November, Mr Campbell again writes to Mr Tennent,—"I have by this post sent Mr Gilbert the Dumbarnie deed, that you may execute it. And as it is referred to in your general settlement, and may be held to be a part of it, the sooner it is returned the better, that it may be given in to the stamp-office." That was for the purpose explained in a former letter—that an adjudication stamp might be placed on it, to save all question as to the sufficiency of the deed. Mr Tennent answers this letter by one dated the next day, the 29th, in which he says,—"The Dumbarnie deed will be returned on Monday," and accordingly, on Monday the 1st of December, he writes again to Mr Campbell,—"I addressed you on Saturday night, to which refer, and this forenoon I sent the Dumbarnie deed by post, witnessed by two of our clerks." Now, here then is the time when the deed, after a great deal of delay, and a great deal of criticism, and examination, and consideration, both by Mr Tennent himself, by Mr Campbell his agent, and by his son Gilbert, is at last deliberately executed by Mr Tennent, and sent to his agent. There is one matter of fact that immediately follows upon this which does not appear in the correspondence, but which I think very

important. It is described by Mr Gilbert Tennent in his evidence at page 10. He says,—"Shortly after the Dumbarnie deed was executed, my father delivered over to me all the securities affecting the estate." Now that is a very significant fact undoubtedly, because it not only recognised Mr Gilbert Tennent as representing the children, who were the primary beneficiaries under the deed, as their guardian, but it was an act in favour, in part implement, of the principal deed which he had executed, because that deed contained an obligation upon him to deliver up these securities and the assignations of them which stood in his own name; and here he does that particular thing specifically which it is provided by the deed he should do. There is no further movement upon the matter, except carrying through the affair of the stamp, until we come to a letter, but a very important letter certainly, by Mr Campbell to Mr Gilbert Tennent, of 12th January 1863. Now, this letter being addressed to the pursuer, Mr Gilbert Tennent, is perhaps hardly direct evidence against the granter of the deed, if it had not been that it was certainly communicated to him; but having been communicated to him it does become very important evidence. Mr Campbell says that he has got the deed from the stamp-office, and that matter is all right,—"You will be so good as to inform me whether I should send the deed to you or to Mr George Moncrieff of Perth (who remitted me the stamp-duty upon it), if he be to act in this matter for the trustees." Now here is the introduction of another person, Mr George Moncrieff, and by no means an unimportant person, with reference to the question whether this deed was intended to be delivered. Mr George Moncrieff was the factor on the Dumbarnie estate. He was not an agent of Mr Tennent; but as this deed was intended really for the purpose of rescuing the Dumbarnie estate from destruction, it was thought reasonable that, out of the rents of that estate, Mr Moncrieff should be called upon to pay the stamp-duty upon the deed. That was done accordingly, so that really a part, and no very inconsiderable part, of the expense of this deed of conveyance was paid out of the rents of the estate belonging to the beneficiaries, and that was done at the desire of the granter Mr Tennent. Then Mr Campbell, seeing that to be the case, very naturally says, "as he remitted me the stamp-duty, probably he (Mr Moncrieff) is the proper person to act in this matter for the trustees. Shall I send the deed to him?" Now, if the answer to that upon the part of Mr Tennent, the granter, or of Mr Gilbert, representing the purpose of his father, had been to desire Mr Campbell to send it to Mr Moncrieff, and it had been sent accordingly, it seems to me pretty clearly that that would have operated delivery. But Mr Campbell goes on, "as it is a *de presenti* deed and irrevocable, there should be no doubt as to its delivery, and therefore I think that, without delay, an acceptance should be written upon it by the trustees, or as many of them as are willing to accept, and that a sederunt book should be got for the trust. The deed itself should be kept by one of the trustees, to be named for that purpose, or by their factor, if they are to appoint one." And the factor they would have appointed in all probability would have been just this Mr George Moncrieff. Then he says further on in the same letter, after mentioning another trust-assignation of £6500, with which we have nothing to do at present—"as both of these trusts are likely to subsist for a long time, you will consider whether it would not be advisable to put both the deeds upon record for preservation." Now, this is the letter of one business man to another. Mr Simon Campbell was a writer to the Signet in Edinburgh; Mr Gilbert Tennent was a writer in Glasgow of considerable practice; and, as between these correspondents, I cannot suppose there would be much difficulty in either of them understanding that, if that suggestion was complied with, the deed was out of the hands of the granter. But Mr Campbell at least, whatever Mr Gilbert Tennent's opinion might be, would not be staggered by that at all, because in this very same letter he expresses his urgent desire to be that there should be no doubt about this being a delivered deed. That is the great object he has in view, acting for Mr Hugh Tennent. Now, the next letter in point of date is one from Mr Hugh Tennent to his son Gilbert, and there he says—"I wrote you on the 15th, and I have received yours of the same date. I herewith return the three transfers which one of the clerks can witness. George and myself agree with Mr Campbell as to the registration of the different deeds alluded to, though it does not add to their validity, as well as to other suggestions he makes as to the deed for legacies, but if you wish it, it can stand over till I return, when you will be able to let me know the expenses." And then follows a paragraph which lets out quaintly enough the prevailing motive which lies at the bottom of all Mr Hugh Tennent's proceedings in this matter. "Ammy informs me that Helen [by Helen, I understand him to mean his deceased daughter, Mrs Craigie] told Miss Craigie that, failing her own children, that she would give back Dumbarnie to the Craigies—that, I presume, is now effectually stopped. Who is the person that succeeds yourself in the entail? Is it Hugh, William, or Charles?" He thinks that this conspiracy to prevent the Dumbarnie estate from devolving upon the whole succession of Tennents, and giving it back to the Craigies, is effectually defeated—but how? Not by the bare execution of this deed, if it was to stop there. That would not do it. But by his making that deed effectual by delivery. He knew as well as anybody that that was necessary, but if he had the smallest doubt of it when he wrote that letter, I do not think he could have much doubt of it after he received the letter of Mr Simon Campbell, dated 17th February, which is the next of the series, for there Mr Campbell says, "I use the freedom of sending you prefixed a copy of a letter which I wrote to Mr Gilbert on the 12th ult., as to delivering the trust-assignation of the Dumbarnie debts, and the previous trust-assignation of £6500 to the respective trustees, and I request to hear from you in answer as early as convenient. As these deeds are not of a testamentary nature, they should be delivered without delay; for if, at the time of your death, they should remain in your own repository, or in the hands of your agents, or any other person on your account, they would be held to be undelivered deeds, and therefore of no effect." Now, just let us consider here for a moment what would have been the result if this Dumbarnie deed had remained an undelivered deed, and therefore of no effect. Why, Mr Tennent's whole purpose and object would have been frustrated, because he had left to his grandchildren, the Craigie girls, a share of the residue of his estate,—a very large sum of money it would have been, which would have enabled them, if they got it, to clear off all the debt upon the Dumbarnie

estate, and so to make themselves unfettered heirs-portioners of that estate, free to leave it to whom they chose; but on the other hand, if this deed was delivered, and therefore of effect, he had put them in such a position that they could not very well refuse to accept the terms that he offered them. The temptation which he held out in that deed, and the penalty of refusing to yield to the temptation, were so very striking and imperative that they obviously were sufficient to secure that the entail should be made in the terms which he desired, and that, failing his grandchildren and the heirs of their bodies bearing the name of Craigie, the estate would come to the Tennents, and would not go to any other Craigies. Now that is the alternative that Mr Campbell presents to him in this letter. In his own letter immediately preceding this, just a month before, he lets out distinctly what a determined purpose he had on this subject. Mr Campbell lays before him in this letter that if this deed is found undelivered in his repositories at the time of his death, his whole object regarding the Dumbarnie estate will be frustrated, and therefore that it is absolutely indispensable that it should be made a delivered and irrevocable deed during his lifetime. That he brings as distinctly before him, I think, as anything very well can be by that letter. Now, what followed upon it? Mr Tennent writes on 11th March to his son Gilbert—'Campbell sends me a copy of his letter to you of the 12th January, wherein he urges steps to be taken *forthwith* for the delivery of the Dumbarnie deed, and that for £6500 to the respective trustees, for if at the time of my death they are found in my repository or that of my agent, they will be held to be *undelivered* deeds, and therefore of no effect." Plainly, therefore, he quite understood what Mr Campbell had communicated to him. "May I therefore beg your immediate attention to the above, and refer you to the further particulars stated in said letter of 12th January as to the acceptance of the trustees written upon them." Mr Gilbert Tennent after this apparently has some communication upon the subject personally with Mr Campbell; and the result of that was a resolution that the deed should be recorded. That was the arrangement made apparently between Mr Gilbert Tennent and Mr Campbell; and observe, that this arrangement follows immediately upon that expression of desire by Mr Tennent, the granter of the deed, that steps should be immediately taken to put the delivery beyond doubt. Mr Campbell, following upon the conversation that had passed between him and Gilbert Tennent, writes thus on 25th March to Gilbert—"Agreeably to the desire expressed in the letter which you mentioned you had recently received from your father, that the trust-assignation by him to the Dumbarnie debts should be carried into effect without delay, and as arranged at our meeting yesterday evening, I have this forenoon lodged the deed to be recorded in the Books of Council and Session, and I expect to get you an extract of it early next week. I now write to say that upon receiving the extract I propose, first, to send it to you that you and your brother Mr Charles may accept as trustees," and so forth. Then on 7th April, having got his extract, he sends it to Mr Gilbert Tennent. "I have only this day been able to get from the register the extract from the trust-disposition and assignation by your father of the Dumbarnie debts, which I have sent to you by book-post." Now Mr Campbell, after the letter of Mr Hugh Tennent, communicated to him by Gilbert, had delivered the deed itself to Mr Gilbert Tennent without recording it, I do not see how that could have been held to be anything but delivery of the deed in the full sense of the term, because Gilbert was the leading trustee under the deed, and he was the proper man to take it. But instead of doing that, he, as arranged with Gilbert, first puts the deed upon record, and then, as he can no longer send the principal deed to Gilbert, he sends him an extract as soon as he can obtain it, and that is done upon 7th April, and it is acknowledged by a letter from Gilbert on 8th April.

Now the question comes to be whether, after all this was done, this could be held to be still an undelivered deed? and the ground, so far as I can understand, upon which this was chiefly contended by the defender was, that something more was contemplated to be done beyond what was actually done, and that was the formal written acceptance of the trustees. Well, I am satisfied that both Mr Hugh Tennent and Mr Campbell, his agent, were anxious that there should be an immediate written acceptance by the trustees,—not a doubt of it; and most naturally, because this was a trust that was intended, as I said before, to come into immediate operation. The granter and his agent wanted to see it in operation. They wanted to see the trustees in possession and administration of the estate for the purposes of the trust; and therefore, second to delivery, there was nothing that they considered of so much importance as the acceptance of the trustees; but second to the delivery undoubtedly, because delivery, as expressed in these letters which I have read, is the thing that is throughout urged by Mr Campbell as absolutely indispensable to prevent an imminent risk of the whole purposes of Mr Tennent being defeated. It appears to me that what was here done was delivery of the deed. The fact of recording the deed is of itself a most significant fact in a question of delivery, particularly when the recording is done at the desire of the granter of the deed. A deed may be recorded without that fact operating delivery. It may be recorded without the authority of the granter. It may be recorded in such circumstances as to leave it matter of doubt and ambiguity whether it was the desire of the granter that it should be recorded or no. It may be done, even without the authority of the granter, for a purpose other than that of delivery, and with such evidence as to show that, although the granter authorised the recording, he had a design and purpose that it should not thereby be an irrevocable delivered deed. I think all these things are possible, but still these possibilities derogate very little from the significance of the fact as recording as a fact in the general case. Why should a granter wish his deed to be recorded, or why should the granter of this deed wish it to be recorded, except for the purpose of operating delivery? I can see no other object he could have. And what is the effect of recording? In the first place, it publishes the contents of the deed to the whole nation. It enables every man, woman, and child who has any curiosity or interest in the subject to go to the record and read it *ad longam*. It enables every party who has any interest to obtain an extract of the deed; and if it be a deed containing obligations, the party in whose favour these obligations are conceived arms himself with an extract, and enforces the obligations. Nothing can more clearly indicate that a deed is delivered than that

it can thus come, in the form of an extract, into the hands of the obligee, and be by him put into execution. No doubt this particular deed was not like a personal bond, where the mere obtaining of an extract would enable the obligee to do diligence; but that makes very little difference. There were obligations in this deed; but there were also things which the grantee of the deed could do as soon as he got possession of it,—either the particular deed or an extract. In the first place, the grantees of the deed, the moment they get it into their possession, were entitled to demand instant delivery of the whole securities and assignations of the debts which were in the hands of the granter. That they could have done; and what answer could the granter have made to them? None whatever. They could have enforced that obligation. They did not require to enforce it in this particular case, because the granter had anticipated that by specific performance of the obligation himself,—handing over the whole of these titles and securities to the grantee Gilbert. But further, they could take infeftment upon this deed. That was another thing they could do, and when they had taken infeftment they were entitled to enter into possession, and to administer the estate as their own for the benefit of the beneficiaries. All that was put within their power by the act of placing the deed upon the record of the books of Council and Session. Now, it is difficult to understand any fact in a case so strongly indicative of the purpose of delivering as that, or so strongly operating the effect of delivery. It is difficult to see how any act of delivery could put a deed more completely within the power of the grantee than is done by recording it in the books of Council and Session.

But we know that, notwithstanding of all this, Mr Tennent, the granter, did afterwards attempt to revoke this deed, and the terms of his deed of revocation are, I think, very important as a piece of evidence upon the question of delivery. But there is another piece of evidence which comes before the deed of revocation; and that is a conversation which passed between himself and a member of his family, who is not directly interested in this question—indeed has a very remote interest in it, Mr Hugh Tennent the younger. That conversation is given in Mr Hugh Tennent's evidence in such a way as to command my entire belief. It is a very graphic description of an interview which he had with his father, and there is obviously much pains taken by the witness to give with as much accuracy—even verbal accuracy—as he possibly can, what passed between them on that occasion. It was in October 1863, about ten months after the execution of the deed. They were both at Dumbarnie at this time, where Mr Hugh Tennent junior was generally resident, and his father, therefore, may be considered to have been there in some respects as his guest. The father expressed himself very anxious about Dumbarnie, and said, —"'There is a deed which I am now anxious to alter.' I expressed my astonishment, and said that I thought that matter had been all settled. I knew that a deed had been executed, and I told him I thought that it was settled; and I said, 'Is that a deed that can be altered now?' He said, 'Oh, we will see;' and he added, 'You know, Hugh, your brother has behaved in that way towards me that I am now desirous of an alteration of that deed so far as his name is concerned.'" Now I think it is quite in vain after that to say that Mr Tennent did not know what the nature of this deed was, or did not know what the effect of delivering it was. It is impossible to suppose that, even if that were possible after Mr Simon Campbell's explanations to him, on which he acted. He is obliged to say, even when he has changed his mind about it, and is desirous of altering it if he can, that he undoubtedly intended it to be irrevocable.

But then we come to the deed of revocation itself, in which the granter expresses himself very strongly,—I think rather too strongly for the purpose in view. He says, "With reference to a gratuitous trust-disposition and assignation dated on or about the 1st day of December in the year 1862, and recorded at Edinburgh in the books of Council and Session on or about the 25th day of March in the year 1863 . . . I declare that if and in so far as the said trust-disposition and assignation is so expressed as to be in its terms and in whole or in part irrevocable, then the same is not my act and deed, it having been my will and intention to make it revocable by me at any time during my life." Now, one is really compelled to ask oneself, Is that true? and upon the evidence one is equally compelled to answer that it is not. I do not mean to ascribe to old Mr Tennent the assertion of a deliberate falsehood in putting his name to the deed in which this narrative is contained, because I daresay he did just what he was advised was legally necessary in the way of executing a deed of revocation to get the better of what he had previously done, and did not trouble himself very much as to what the statements were that were contained in the deed. He took the word of his legal advisers probably for that being all right and proper; but without imputing any actual dishonesty to him, it is impossible to doubt that the statement herein contained is not consistent with the fact. The evidence proves exactly the reverse. It proves that the deed was known to him to the fullest extent, and in the fullest sense, to be in its nature irrevocable, and that he executed it in that knowledge,—not that the knowledge only came to him after the execution, but that when he executed that deed he was in the full knowledge of that fact. But he goes, in the second place, to say—"I do hereby declare that I never delivered or authorised the delivery, and that I never instructed or authorised the intimation of the said trust-disposition and assignation to the said trustees or any of them, or any party on their behalf, or to the parties beneficially interested in the said trust, or any of them, or any party on their behalf; and that, by recording the said trust-disposition and assignation in the said books of Council and Session, I did not intend to deliver the same, or to do more than register for safe preservation." Now, this statement stands alongside of the other one; it is in very bad company. The other one is not true, and I think this is just as inconsistent with the evidence as the first. But as the first is manifestly and beyond all controversy inconsistent with the evidence, it certainly leads one to suspect very strongly that the second is equally so, particularly as, notwithstanding all the ingenuity which has been exercised in the framing of this deed of revocation, the conveyancer has not been able to suggest why the deed was registered, if it was not for the purpose of delivery. Then he goes on to revoke and recal the said trust-disposition and assignation altogether; and, in the fifth place, he provides—(*reads fifth pro-*

vision in the deed of revocation). Here is certainly very strong evidence of his desire to impose his own purpose on everybody concerned, if he can do it; but the very strength of his expression, and the very violence of the penalty that is imposed, indicate to my mind a strong presumption that both the granter and his advisers, in making this deed, felt conscious that, except by such threats and penalties, they could make nothing of it. Now, concurrently with this deed of revocation, Mr Tennent made a new general settlement, and that settlement gives a share of his residue to the two children, the Craigies; but it contains a declaration that, in the event of the deed of 1st December 1862 being found to be irrevocable, then the sums therein conveyed shall, to the extent of £21,898, be deducted from the share of residue to be paid to these children.

Now that seems to me to be the whole case; and upon the evidence, as I have gone over it, I confess it leaves no doubt at all upon my mind, however much Mr Tennent may have altered his intentions in the course of the year 1863, that at the time that deed was placed upon record, and the extract obtained by his agent Mr Campbell, and that extract sent to the leading trustee or grantee under the deed, it was intended to operate and did operate a complete delivery of the deed to the trustees for the benefit of those who were called to the succession or to the enjoyment of the estate thereby conveyed. I therefore entirely agree with the conclusion which the Lord Ordinary has adopted, in repelling the defences and finding in terms of the declaratory conclusions of the summons.

Lord Deas—The deed here in question was executed upon the 1st of December 1862. The deed of revocation was executed upon 16th January 1864. The deed of 1862 was an entirely gratuitous deed, which the granter had power to revoke if it was not delivered, and the question is, whether it had been delivered so far as to be beyond his power to execute that revocation? That appears to me to be a very difficult and to some extent a novel question. That the deed in its terms was irrevocable, there can be no doubt. It bears to be so in so many words, and the same construction would have been put upon it although it had not contained these words, if the terms of it indicated that it was a deed meant to take immediate effect, but that that is the construction of the deed upon the face of it there can be here no doubt, because it expressly says so. That, however, did not make the gratuitous deed irrevocable. It showed the intention of the granter at the time when he executed the deed that it should be so, but it did not make the deed irrevocable; that is quite clear; because if the deed had remained in his own custody there can be no doubt that he might have revoked it at any time he pleased. He was advised by his agent, Mr Campbell, that if he died with that deed in his own custody, although unrevoked, it would not take effect. It is not necessary to decide here whether Mr Campbell was right or wrong in that opinion. Notwithstanding what seemed to be the admission of my friend Mr Webster, I am not satisfied that if the deed had been found in the granter's repositories without any revocation, it would not have taken effect. What is supposed to be wanting in that view is, I presume, a clause dispensing with delivery, but it is not every deed in a *de presenti* and irrevocable form that requires a clause dispensing with delivery in order to make it take effect at the granter's death; and one exception is, when the granter himself has an interest in the deed. The granter here had himself a most material interest in the deed, because he reserved his own liferent of everything, subject simply to this, that two small annuities, of I think £100 each, were to be paid to his two grandchildren, and that the expenses of management and so on were to be deducted; subject to these burdens, the whole annual income of the estate was expressly reserved to himself. But more than that, this was a deed not in favour of strangers, but a deed in favour of his grandchildren, the issue of his own body, and I am not prepared to hold that when a man executes a deed in a *de presenti* and irrevocable form, which is found in his repositories at his death, in favour of his children or grandchildren, it is not to take effect because it does not contain a clause dispensing with delivery. Mr Erskine says the very reverse, iii. 2. 44—(*reads*). Now I know no distinction between a man's children and his grandchildren with regard to such deeds, but all I say about that matter, which we have not at present to decide, is, that if it were before us for decision I am not prepared at present to agree with the law that was stated by Mr Campbell to Mr Hugh Tennent. But that does not much affect this case, because, so far as it has any bearing at all, we have probably to look more to the advice that was given to Mr Hugh Tennent than to the actual law, for it is to be presumed that Mr Hugh Tennent took for granted that the law as stated to him was correct, and I have no doubt he thought, in consequence of that advice, that if he left this deed in his repositories undelivered it would not take effect. Nor can there be any room to doubt not merely that this deed is irrevocable in its terms, but that at the time it was executed, and for a considerable time before, and a considerable time after, it was the desire of the granter that it should be made irrevocable by delivery, or by doing whatever was necessary to make it irrevocable. I can have no doubt about that at all. The purpose he had in view with reference to this Dumbarnie estate seemed to have been formed as early as the year 1859, and from that time forward he is contemplating carrying into effect that purpose in some way or other. It does not appear to have been intended at first that it should be done by an irrevocable deed; on the contrary, it appears that it had been intended to be done by a revocable deed, and up to a period not very long before the actual execution of this deed that was the intention. But then it was suggested by Mr Gilbert Tennent in, I think, February 1862, that it ought to be and would be better by a *de presenti*, meaning, I have no doubt, an irrevocable deed; and it is quite plain that the old gentleman adopted that view, and was most anxious to carry it into effect. After the beginning of 1862 there was a deed actually prepared, and I think signed; but then it required to be altered in consequence of the death of the granter's daughter, Mrs Craigie. It is somewhat remarkable that as early as 10th June 1862 Mr Gilbert Tennent intimated his objection to what was proposed; that is to say, he intimated his objection to being either a trustee or a beneficiary under the proposed deed; and I do not see that to the end of the chapter during his father's lifetime he ever gave up that objection, or rather perhaps I should say up to the time of the deed of revocation, he does

not appear ever to have departed from that objection. But notwithstanding his objection, the deed was executed upon the 1st of December 1862, and it contained a clause which is very important, authorising registration in the books of Council and Session, and authorising registration in the Record of Sasines. The authority to register in the books of Council and Session is important. That is an authority by the granter to do a thing which, as your Lordship has said, may be very important, may sometimes be held to be conclusive of the delivery of the deed; so that the registration of the deed undoubtedly must be held to have had an important effect. It also contained authority to register in a different register, which I wish had been followed out, in the Register of Sasines; for if it had been recorded in the Register of Sasines, I do not very well see how there could have been any contention that the deed was an undelivered deed, and revocable. It seems to have been the expense of recording it in the Register of Sasines which alone prevented Mr Campbell from taking that course. It is to be regretted, I think, that so small an objection was allowed to stand in the way of so important an object. But although Mr Campbell did not record it in the Register of Sasines, it is plain enough that, at that time at all events, he was just as anxious as Mr Hugh Tennent, the granter, that the deed should be a delivered and irrevocable deed. Why he did not take the other course I do not know, unless, as I have already said, it was for the expense; but the course he had in view evidently was to get it accepted by the trustees named in the deed. Now unfortunately that never was done. Mr Gilbert Tennent, although he is now the pursuer of this action, insisting that the deed shall be held to be irrevocable, was the party who stood in the way more than anybody else, of that which both Mr Campbell and the granter of the deed thought would complete the delivery, and which they were consequently anxious to have done. He declined at all events to accept the trust, and the other trustees likewise declined, and consequently the trust never was accepted. Whether the acceptance of the trust would in this case have been sufficient may not be altogether clear. In the ordinary case of a gratuitous deed in favour of grantees, the acceptance of the trust in the lifetime of the granter would, I think, be undoubted evidence of the delivery of the deed. Suppose it were a bond for a sum of money without any consideration in return, which nobody in their senses would dream of refusing to accept of, the acceptance by the trustees, although the beneficiaries were pupils or minors, and although they knew nothing about it, would I think most clearly and undoubtedly be delivery of the deed, and make it irrevocable. But there is a great peculiarity here in the nature of this deed. It is not a deed of that kind at all. It is not a deed which it is quite clear the beneficiaries would at once accept. It is a conditional deed. It is a deed in favour of two ladies, who I rather suppose at the date of the deed were pupils, and of course incapable of accepting in their own persons. The deed was granted conveying all these heritable securities upon a condition that, when these ladies attained the age of twenty-one, which they might or might not attain, a deed of entail should be executed of these lands that belonged to them in favour of a variety of parties. If the one died without executing the deed, or if the one refused to execute the deed, then the other was to have the option of executing it; and if the deed of entail was not executed by either of them, or authorised by either of them, then the whole sums and subjects conveyed by the deed of December 1862 were to go in certain other ways, which are mentioned in that deed. Now, it is not by any means so clear that the acceptance of that trust would have operated delivery of that deed, as if it had been such a deed as I was formerly supposing, with no counter condition at all, or affording such a clear and undoubted benefit that nobody could be supposed to refuse to accept it.

But even if there had been that acceptance, would it have been conclusive? I am disposed to think it would. That, however, is an opinion that cannot be said to be without doubt or difficulty; but unfortunately, whatever would have been the effect of the acceptance, it was not done. With reference to the nature of the deed that I have just mentioned, and the necessity for the acceptance of it, Mr Erskine's doctrine, iii. 2. 45, is important—(*reads*). Now, if this deed had been accepted by the trustees, an important question might have arisen under that, Whether that was delivery? But we have not here the acceptance of the trustees; and therefore that question does not arise.

The only other thing that is said to have operated delivery is the registration. Now, I do not doubt any more than your Lordship that registration, even in the books of Council and Session, may in some instances operate as delivery. I do not think it is necessarily delivery. It may be in a certain sense publication, as your Lordship says. Anybody may go and look at it, though they may have nothing to do with it. I suppose an extract would not be refused to anybody who chose to pay for it. But the object of that registration is not publication. The object of it is that which the clause itself bears here, and all these clauses do, —for preservation and for execution,—execution when it comes into operation and preservation, which may be very necessary for *mortis causa* deeds as well as *inter vivos* deeds; and we all know that the great mass of deeds recorded in that register are *mortis causa* deeds, although not recorded in the lifetime of the party, but recorded there after his death. But although that is not a register for publication, I quite agree with your Lordship in thinking that it is a most important act; and it becomes a very narrow and difficult question in many cases, and is so here, whether it does or does not operate delivery. It is a material element in that question, whether the granter meant and intended that it should operate delivery. Now, the narrowness of the question here lies in this, that the granter did intend and wish that the deed should be delivered; but he did not think or suppose at the time that registering it in the books of Council and Session was delivery. Neither he nor his agent thought that; and that makes it very difficult to hold in this case that the registration did operate delivery. There are just two things on which the delivery can rest,—the registration, and the sending of the extract to Gilbert Tennent. Unless one or other of these two things, or both of them together, operate delivery, I do not think there can be said to have been delivery. Now, it is perfectly true that during a great part of the intervening period after the execution of this deed, —I mean the intermediate period intervening between the execution of this deed and the death of the granter,—for a great part of that period at all events, he was most desirous that it should be de-

livered, and had no wish whatever to revoke it; on the contrary, that all his wishes were that it should be irrevocable. But then it was a gratuitous deed; and if it was not delivered, he was entitled to change his mind. It is plain enough he did not think at one time that he would change his mind. I suppose people seldom think that. When they are bent upon a thing at the time, they seldom have any idea of a change taking place; but then the question is, whether, when he did change his mind, he was still in time? If he could have got it done in the intervening period,—if he could have got the delivery completed,—he would have done it; but when a man changes his mind, if the thing is not done, however much he may have wished to do it, however much he may have attempted to do it, if he finds it is not done in point of law, I think he is entitled to execute a deed of revocation; and my difficulty here, which is very great indeed, is just whether he did not repent in time. It very often happens that people are bent on doing a thing, and there is something that they cannot control that prevents it being done. Their desire to overcome that obstacle is not to prevent their taking advantage of its not being done when they come to take a different view. Now, the question here just is, whether that was so or not? There is a great deal here in favour of a delivery. Payment of the stamp-duty, as an *inter vivos* deed, is a very important fact to show that the deed might be considered a delivered and irrevocable deed. The question whether it shall be a *mortis causa* deed or an irrevocable deed seems to have turned a good deal in the minds of these gentlemen upon which of these two ways would save most from the Government. The great leading object of making it in an irrevocable form, obviously from the correspondence, was to save the legacy-duty or rather the succession-duty. The question came to be between paying the succession-duty upon a revocable *mortis causa* deed, which he thought he would never think of altering, and paying the stamp-duty upon an *inter vivos* deed; and the balance preponderated in favour of the latter, because it was a great deal less in point of amount. Still, getting it stamped as an *inter vivos* deed, and all that took place, indicated strongly a desire to make it irrevocable. Now, I confess I think I never was in any greater difficulty about any case than I have been here about the question whether this is an irrevocable deed—a delivered deed or not. There is a great deal in the reasons that your Lordship has given in favour of that view. All I can say about it is, that after balancing the views on the one side, and the views on the other, and looking at it as a question of law, I rather lean to the opinion that he repented in time, and that he was entitled to revoke the deed, although I certainly regret that that was done by a deed of revocation which contains the expressions I find here, and which, if we were in a question as to the reduction of that deed, should be made more important than they are in the present question. The bearing of my opinion on the whole—although with the greatest doubt and deference to the views of your Lordship, and admitting that the result to which your Lordship has arrived may perhaps be the more reasonable of the two—is, that this deed was not delivered.

Lord Ardmillan — After repeated and very careful consideration of both the evidence and productions in this case, I concur so entirely in the observations which your Lordship in the Chair has made with regard to the facts of the case that I shall not add a single word upon that point of it. I think your Lordship has favoured us with an analysis of the facts of infinite value for the right consideration of the law of the case; and I have nothing to add with respect to them. But the question of law which Lord Deas has put before us is certainly a matter of great importance; and on that subject I have had some doubts. I think it is impossible that it can now be held that the registration of a deed in the books of Council and Session will necessarily, and in all cases, make it a delivered deed. I think that the observations of Mr Erskine on that subject may be held to be wide enough, and, in the light of more recent law, may not to their full extent stand unquestioned; but I think it is the undoubted law that, taking it as a general rule, the fact of recording a deed in the books of Council and Session is equivalent to delivery of the deed. If the deed that is recorded is in its nature revocable—and such cases have been suggested to-day—if the nature of the deed be revocable, then recording it will not alter its character. It will remain revocable, but if a deed bearing to be irrevocable is, with its irrevocable character inscribed upon its face, recorded in a public register by the direction or authority of the granter, then I think that that is ordinarily equivalent to delivery; and that some circumstances must be instructed in order to take away that effect and character from the act of registration. Now I am quite unable to find anything in the facts of this case that take away from it the ordinary effect of registration. This old gentlemen knew that this deed was irrevocable in its terms, and he himself stated that he meant it to be irrevocable, he so stated, not only in the deed itself, but to his son Hugh Tennent. He also knew that if it was found undelivered in his repositories it might be considered as ineffectual. I am not going to touch the question which Lord Deas adverted to,—of whether it would really in law have been ineffectual in such circumstances. I incline to think it would not have been effectual if so found, but it is not necessary to solve that question. It is enough for the present case that Mr Hugh Tennent had been told by his law-agent that it would be ineffectual if so found; and not merely that it would be ineffectual if found in his own repositories, but he was told distinctly and repeatedly that it would be ineffectual if found in the hands of his agent; and therefore when he sent it to Mr Simon Campbell in order that it might be delivered—for clearly that was his intention—he did not mean Mr Simon Campbell to keep it, because it was in as much danger, according to Mr Simon Campbell's opinion, if found in his hands as if found in Mr Hugh Tennent's hands, but he meant Mr Simon Campbell to remove the peril of its being found an undelivered deed, and Mr Campbell ordered it to be registered. Now, that being the state of the fact in regard to the intent of registration, it would amount to a confirmation of the general rule; and it will be enough for this case that there was no derogation from the general rule, because to my mind nothing can be clearer than that the act of registration, with nothing to detract from its effect, is sufficient to operate delivery. I do not think it necessary to trouble your Lordships with any observations on the other point of the case. I think that the two parts of this case may be considered in combination. When the deed was re-

corded an extract was taken out; and nothing else could be used after that but the extract, for the deed was left in the Register Office. The cancelling of the deed was out of the question the moment it was used and recorded, and therefore that was a deliberate putting out of his power of one of the two ways by which he could have revoked the deed. But the extract was obtained, and was sent to Mr Gilbert Tennent for acceptance. Now I am of opinion that there is in this deed so great a benefit conferred upon these young ladies, who were the proper beneficiaries, that a trustee for them could not, by rejecting it, destroy their rights under this deed. If Gilbert Tennent had written a letter to say "I won't act," that could not, I think, in law or in justice, have destroyed the rights of these young ladies. Had the deed been sent to Mr Moncrieff, or any other of the trustees, and accepted, confessedly the acceptance of that trustee would have of itself been sufficient; and it cannot be held reasonable that, because the deed was sent for acceptance to a gentleman, whose difficulties did not arise at all upon that part of the case, but with regard to the substitutions of the Craigies, the delay caused by his doubts and difficulties should be held to have prevented the delivery of the deed. Mr Gilbert Tennent accepted the trust in July 1863, when he writes to his father,—"Having now received—(*reads to*)—accept of the trusteeship." That was before the deed of revocation. Therefore the trusteeship was, in point of fact, accepted before the date of any deed of revocation, which was not executed until January 1864. Mr Tennent had not revoked it by any former deed. Now I quite agree with the remarks of Lord Deas, that acceptance may sometimes be held in suspense, and that the mere receiving of a deed may in some supposable cases not imply acceptance. There may be deeds in which there are counter obligations or burdens, which it might be very far from the interest of the party to whom the deed is sent to accept, and the mere receiving of it will not be acceptance. But Lord Deas read, in illustration of his remarks, the passage from Erskine, in which he says that when the party receiving the deed puts it in the public register, that makes it an accepted deed from the act of registration by him or his acceptance, and that, I think, is very sound and very correct; but surely it must be equally sound and correct, that if a party grants a deed which bears to be and is known to be irrevocable, and puts it in the same register in order to prevent its being found undelivered, that constitutes delivery. I do not think it is possible to maintain that a party who puts a deed on record is barred from saying that he would not accept, and yet that a granter of a deed who puts a deed on record bearing to be irrevocable is not barred from afterwards writing a deed, in which, contrary to the fact, he declares that he never meant it to be irrevocable and professes to recall it, on the ground that he never authorised delivery, I think that, all these circumstances taken together—for I view it as a composite question of evidence—tend to confirm the general rule, that registration of this deed was equivalent to delivery; and in that I view I have come to be clearly of opinion that old Mr Tennent had not the power of revoking this deed in January 1864.

Lord Kinloch—I am of opinion that the deed in question was a delivered deed. I rest my conclusion to this effect mainly on the fact of its registration in the books of Council and Session, considered in combination with the prior views and instructions of the granter. Nothing could be more clearly proved than the intention of Mr Tennent, anterior to the date of the registration, to place the deed in a position of undoubted efficacy in the event of his being suddenly cut off; and, even if he continued to live, to place it beyond his power of recall. The deed is in this view declared *in gremio* to be absolute and irrevocable; and, whilst this would not by itself suffice, so long as the deed remained in Mr Tennent's own custody, the circumstance affords a strong presumption in favour of his performance of any act by which his declared object would be accomplished. His instructions to his law-agent, Mr Simon Campbell, can be construed into nothing else than a general mandate to do whatever the law required to make the deed a delivered deed. With these instructions given him, Mr Campbell gets the deed recorded in the books of Council and Session in the usual form. It may not be possible to lay down, absolutely and unqualifiedly, that such registration is in all cases whatever equivalent to delivery; for special instances may occur in which it is shown that it was not intended so to operate. But I conceive that, according to our law, the act of registration is delivery, unless in such exceptional cases. It is not unreasonable to hold that such an act implies a fully completed purpose; and that publication to the world at large, including the grantee of the deed, who may obtain from the record a copy of the deed, having all the authenticity of the original, is in all its essence delivery. In the present case I think all difficulty is removed by the fact of the granter's prior instructions, which makes the registration delivery not merely in legal presumption, but in special and expressed purpose.

I do not think this conclusion would be varied, even though it should appear that the law-agent had speculative doubts as to the sufficiency of the registration to have effected delivery; or, as is more nearly the truth in the present case, thought it would be advisable to add the still further proceeding of obtaining the acceptance of one or more of the trustees named in the deed. It would still remain not the less true that a legal act had been done, fully effective of the granter's purpose. If the granter, intending delivery, went through an act legally constituting delivery, it would not affect the validity of the act that he had afterwards doubted of its efficacy. The act would none the less retain its legal value. There might possibly be doubt left on the proceeding, if there was not evidence of the granter's prior intention to make the deed a delivered deed. But such intention being clearly established, the act which the law holds to be delivery will fully complete that purpose and render it irrevocable, whatever may be the granter's after views as to its legal character or efficiency.

I by no means leave out of consideration the after transmission of the deed to the trustees named in it for their acceptance of the trust. For it is undoubtedly true that it is not indispensably necessary that a trust-disposition should be accepted by the trustee named in it, in order to make it a delivered deed to the beneficiaries. Cases may conceivably occur in which the transmission of the trust-deed to the trustee named in it will be full delivery to the beneficiaries, though formal accept-

ance of the trust may not have occurred—may have been precluded by accidental circumstances, or prevented by the hand of death. But every case of the kind must depend on a special (and it may often be a delicate) inquiry into its own details; and, if nothing had appeared in the present case except the transmission of the deed to the trustees for their acceptance of the trust, I would have had more difficulty in reaching my conclusion. It is obvious, however, to remark that, exactly as in the case of the registration, this transmission to the trustees was a part of one general design in the mind of the granter, of giving the deed complete efficacy; and the law will readily presume the accomplishment of his purpose from anything to which the legal character of delivery can be fairly attributed. And, on this point, it must be always remembered that delivery and acceptance are two entirely different things. There may be delivery full and complete, so far as the granter is concerned; leaving the acceptance still in the option of the grantee. Delivery and contract are essentially different matters. The transmission to the trustees does not, to say the least, derogate from, on the contrary confirms, the legal inference, otherwise deducible from the registration.

I entertain, on the whole matter, no doubt in point of law, that the granter's purpose to render this a delivered and effectual deed was fully accomplished; and that the deed had passed beyond his power of revocation before his change of view on the subject of the arrangement took place.

Agent for Pursuer—A. Morrison, S.S.C.

Agents for Defenders—Wilson, Burn, & Gloag, W.S.

Tuesday, July 6.

LANG *v.* HALLY.

Bankruptcy—Trustee—Removal. In an application for removal of a trustee, the competency of which was objected to, the Court, without deciding the question of competency, directed the proceedings to be laid before the Accountant in Bankruptcy.

This was a petition and complaint against George Hally, Glasgow, trustee on the sequestrated estate of the late George Lang. The petitioner was the bankrupt's son, whose interest consisted in the fact that, after paying all his father's debts there would be a reversion to which he had right. The application was made under section 64 of the Bankruptcy Act, 2 and 3 Vict., c. 41, and section 86 of the Bankruptcy Act 1856, and it was rested on the following pleas in law:

"1. The petitioner being a party interested, in the sense of the sections of the Bankruptcy Statutes founded on, had a title to present this petition, and has likewise a title at common law.

"2. The respondent ought to be removed from office as trustee, because—(1) He is an undischarged bankrupt. (2) The caution found by him is inadequate. (3) He has failed for years to comply with the requirements of the Bankruptcy Statute, in regard to reports to the Accountant in Bankruptcy, and annual returns. (4) He is a mere tool in the hands of his employer, Mr Charles Reddie, who is his cautioner, as well as a commissioner and law-agent in the sequestration, and who, as his employer, is in a position to control him, and involve the estate for his own benefit, in useless and extravagant law expenses. (5) There is danger, from the subordinate position which he occupies, that effect will be given to unfounded claims made by creditors who have influence over him. (6) He has mismanaged the estate, and the manner in which he proposes to realise it is certain to injure the reversionary rights of the petitioner.

"3. The petitioner, as eldest son and heir-at-law of his father, is entitled to his father's estate on paying, or finding caution for payment of, his father's debts and expenses.

"4. The petitioner is entitled to have the management of the respondent as trustee controlled by the Court in such a way as will prevent injustice being done to him."

The respondent pleaded *inter alia* that the petition was incompetent. He founded on *Bell* v. *Gow*, 28th Nov. 1862, 1 Macph. 84.

The Lord Ordinary (MANOR) repelled this plea, and remitted to the Accountant in Bankruptcy to inquire into the allegations in the petition, and to report.

The respondent reclaimed.

MACLEAN for the respondent.

SCOTT and BURNET for the petitioner.

The Court, without deciding the question of competency, directed the proceedings to be laid before the Accountant in Bankruptcy, that he might, if he found cause for doing so, bring the truster's conduct under the notice of the Court.

Agent for Petitioner—John Walls, S.S.C.

Agents for Respondent—Lindsay & Paterson, W.S.

Wednesday, July 7.

CRAIG *v.* SIMPSON.

Husband and Wife—Cohabitation, habit and repute—Poor. In a question of settlement, *held*, on a proof, that a marriage by cohabitation, habit and repute, had not been proved.

This was a question as to the liability for relieving a pauper, Jane Duncan, between the parishes of St Cuthberts, represented by Craig, and South Leith, represented by Simpson. The question depended on whether the pauper was married to a man named Whitelaw. After a proof, in the course of which the pauper herself and sundry relatives were examined, the Lord Ordinary (BARCAPLE) pronounced this interlocutor:—"The Lord Ordinary finds it is not proved that the pauper Jane Duncan was ever married to John Whitelaw, as averred by the defender: Finds that the settlement of the said Jane Duncan as a single woman, and of her illegitimate children, is in the parish of South Leith: Therefore repels the defences, and finds, declares, and decerns in terms of the conclusions of the libel: Finds the defender liable in expenses, &c.

"*Note.*—The conduct of Whitelaw and Jane Duncan was calculated to create, and did create, a general understanding among their friends and neighbours that they were married. But the Lord Ordinary thinks it is proved that they did not consider themselves to be married, and did not uniformly hold themselves out to others to be so; and also that some of their relatives and others were expressly told by one or other of themselves that they were not married, and in consequence believed them to be living in concubinage. In this view of