Counsel for Town and County Bank—D.-F. Mackintosh, Q.C.—Graham Murray. Agents—J. & F. Anderson, W.S.

Counsel for Commissioners of Taxes—Sol.-Gen. Robertson, Q.C.—Young. Agent — D. Crole, Solicitor for the Inland Revenue.

Saturday, March 5.

SECOND DIVISION.

GLASS, PETITIONER.

Property—Burgh—Dean of Guild—Glasgow Police Act 1866 (29 *and* 30 *Vict. c. celxxiii.*) *sec.* 370.

Where the plans of a petitioner for warrant to erect buildings in a street in Glasgow showed an attempt to evade the provisions of the Glasgow Police Act for the existence of a certain free space for light and air in front of windows in buildings to be erected, the Court *affirmed* the decision of the Dean of Guild refusing to pass the plans and to grant warrant to erect the proposed buildings.

The Glasgow Police Act 1866, sec. 370, enacts—"Except as after mentioned, it shall not be lawful for any proprietor to let, or for any person to take in lease, or to use or suffer to be used for the purpose of sleeping in, any apartment . . . unless there be in front of at least one-third of every window in such apartment, including any turnpike road or public or private street or court, a free space equal to at least three-fourths of the height of the wall in which it is placed, measuring such space in a straight line from and at right angles to the plane of the window, and measuring such wall from the floor of the apartment to where the roof of the building rests upon such wall."

Peter Glass, proprietor of certain subjects on the west side of North Street, Springburn, Glasgow, presented a petition in the Glasgow Dean of Guild Court craving a warrant to erect certain buildings thereon. The ground plan produced showed two kitchens on the ground flat to the back, which the petitioner proposed to use as sleeping apartments, and each of which had a window. A line drawn in terms of the Act from these windows, if placed normally in the line of the back wall, would not pass through the free space required by the Act, but would be interrupted by buildings belonging to another property. To obviate this the petitioner broke up the back-wall into three parts, the centre being withdrawn several feet from the main wall, and placed the two windows at the angles thereby formed at the corners of the rooms, so that a line drawn from them would pass through the requisite amount of free space.

No appearance was made for the conterminous proprietors.

The Dean of Guild pronounced this interlocutor:—"Finds that the petitioner's plans do not show in front of the windows of the sleeping apartments on the ground flat to the back of the proposed tenement the amount of free space required by section 370 of the Glasgow Police Act 1866, and therefore refuses to grant the lining craved until said objection has been removed, either by an amended plan giving the said required free space in front of said apartments, or by the petitioner undertaking that the same shall not be used as sleeping apartments, and decerns.

"*Note.*—The angling or placing of the windows in the corner of the two kitchens (to be occupied as sleeping apartments) on the plan of the ground floor, instead of normally in the line of the back wall, is clearly an attempt to evade the provision of section 370 of the Police Act, and as the free space in front of one of said kitchens is about a fifth less than that which the Act provides for, while in front of the other of said kitchens the free space is much less, the Court cannot consent to pass the plans in their present state."

The petitioner appealed, and argued—He was entitled to build to the very verge of his property as long as he did not evade the Act. All he had done here was to adopt an effective mode of utilising the light.

Authorities—*Blakeney* v. *Rattray's Trustees*, July 10, 1886, 13 R. 1157; *Smellie and Another* v. *Struthers*, May 12, 1803, M. 7588.

The Court affirmed the judgment of the Dean of Guild.

Counsel for Appellant — Galbraith Miller. Agents—F. J. Martin, W.S.

Wednesday, March 9.

SECOND DIVISION.

MUNRO'S TRUSTEES *v.* MUNRO AND OTHERS.

Trust—Assumption of New Trustees—Trusts Act 1861 (24 *and* 25 *Vict. cap.* 84), *sec.* 1—*Marriage-Contract.*

The Trusts Act 1861, sec. 1, confers upon gratuitous trustees, "unless the contrary be expressed" in the trust-deed, power to assume new trustees. In a marriage-contract executed prior to 1861 the spouses (1) reserved to themselves power, by any joint-deed, or to the survivor of them, to appoint new trustees in the place of those dying, resigning, or becoming incapacitated, and (2) they gave power to their trustees, "after the death of the survivor of them" to assume new trustees in similar circumstances. In 1886, during the lifetime of the survivor, the original trustees, with a view to the resignation of two of their number, assumed two additional trustees.

Held that the assumption was invalid, the exercise of the power which the Act conferred being excluded by the marriage-contract as long as one of the spouses survived.

William Prince Munro died at Edinburgh on 8th June 1885, survived by his widow. No children were born of the marriage. By an antenuptial contract of marriage which was entered into between him and his wife, Ann Gray or Munro, on 30th October 1860, he provided that in the event, which happened, of no children being born of the marriage, his estate was, at the death or second marriage of his wife, who was

to enjoy the annual income, to descend to his next-of-kin or to such other party to whom he might bequeath the same, and that his trustees should be bound to reconvey his said estates accordingly. The marriage-contract contained the following provision for the appointment and assumption of new trustees, viz.—"And in the case of the death or resignation or legal incapacity of the said trustees, it shall be competent to the said William Munro and Ann Gray, by any joint-deed, or to the survivor of them, to nominate and appoint new trustees in the place of those dying, resigning, or becoming incapacitated;" it also gave "power to the trustees before named and appointed, after the death of the survivor of the said William Prince Munro and Ann Gray, to assume other trustees in the place of such of their number as shall die or resign or become incapacitated, who shall have the same powers as the original trustees."

Of the five original trustees appointed by the deed one predeceased Munro, and another resigned before Munro died. In December 1885 the remaining trustees were requested by the widow to assume George Young and James Flett as trustees, and they did so by deed of assumption dated 11th February 1886, assuming also by the same deed at the same time John Thomson and John Munro to act as trustees. John Munro was the eldest nephew of the late Mr Munro, and he and Thomson were assumed with a view to the early resignation of two of the original trustees, and also to preserve the interests of the fiars. The assumption bore to be made in respect of the request of Mrs Munro as to Young and Flett, and also in respect of the powers conferred by the Trusts (Scotland) Act 1861 (24 and 25 Vict. cap. 84), which provides, sec. 1—"All trusts constituted by virtue of any deed or local Act of Parliament, under which gratuitous trustees are nominated, shall be held to include the following provisions, unless the contrary be expressed; that is to say, power to any trustee so nominated to resign the office of trustee; power to such trustee, if there be only one, or to the trustees so nominated, or a quorum of them, to assume new trustees." . . .

Mrs Munro and the trustees who had been nominated by her, viz., Young and Flett, objected to the assumption of Thomson and John Munro without Mrs Munro's consent, on the ground that the terms of the antenuptial contract of marriage precluded the trustees availing themselves of the statutory power of assumption. The trustees on the other hand, and Thomson and John Munro, maintained that on a sound construction of the marriage-contract (which being dated in 1860 was before the Trusts Act 1861) the assumption of Thompson and John Munro, in virtue of the powers conferred by it, was good.

This Special Case was accordingly presented to settle the question. The surviving original trustees along with Thomson and John Munro were first parties. Mrs Munro, Young, and Flett were second parties.

The question submitted to the Court was as follows:—"Do the terms of the said antenuptial contract of marriage exclude the statutory power of assumption vested in gratuitous trustees, so as to invalidate the assumption of the said Messrs John Thomson and John Munro?"

Argued for the first parties—The deed of assumption was within the powers which the Trusts Act of 1861 conferred on gratuitous trustees. It was true that in the antenuptial contract of marriage there was power given to the trustees of that deed to assume others after the death of the survivor of the spouses, but that limitation could not finally prevent the application of the subsequent enactment which conferred an unlimited power of assumption. Supposing Mrs Munro became insane, there was no provision for assumption unless resort was made to the statute. Was "the contrary expressed" (as ran the statute) in the marriage-contract? It was not; and in testing this it must be borne in mind that implication and guessing at the truster's intention would not do, and unless the truster in clear and express words prohibited it the deed must not be held as excluding the statute, for the granting of a limited power would not exclude the possession of a larger one. The statute proceeded on views of general policy and expediency and gave gratuitous trustees such powers as it was in general desirable they should possess. The case was ruled by the cases of *Allan's Trustees* v. *Hairstens*, January 23, 1878, 5 R. 576, and *Maxwell's Trustees* v. *Maxwell*, November 4, 1874, 2 R. 71. In *Thomson* v. *Miller's Trustees*, December 22, 1883, 11 R. 401, the point raised was of a different kind. Though there were no express words of prohibition, there was in the opinion of the Judges the exact equivalent of them.

The second parties replied—The scope of the statute was to supplement the otherwise imperfect powers of trustees—to meet in fact a *casus improvisus* in the deed under which they acted. Was there any such here? There was here a perfectly clear and unambiguous scheme for the administration of the trust which admitted of and required no addition from the statute. The marriage-contract had carefully provided that no assumption of trustees was to be made during the widow's lifetime without her consent. That then being the true meaning of the deed and the expressed intention of the trust, the statute did not operate in a contrary direction. In the construction of such a clause as "after the death of A or his survivor" it was always held as equivalent to "*only* after the death of A," &c. A privilege to keep up the trust was given to the widow—*Chorlton* v. *Laings*, November 9, 1868, L.R., 4 C.P. 374.

At advising—

Lord Justice-Clerk—The question here arises out of the marriage-contract of Mr and Mrs Munro, the former of whom predeceased the latter. The question arises as to the assumption of certain new trustees to fill vacancies to be caused by apprehended resignations. On the one hand, Mrs Munro, exercising the power reserved to her by the marriage-contract, nominated two trustees, and the other trustees also made nominations, acting under the powers given them by the Trusts (Scotland) Act of 1861. The terms of this Act have more than once been the subject of judicial determination. It gives gratuitous trustees power to resign and power to such trustees, if only one, or to the trustees so nominated or a quorum, to assume new trustees &c., unless the contrary be expressed. The question then is whether the assumption of the new trustees by the old trustees is sanctioned by the Act, or

whether it is contrary to the provisions and powers contained in the marriage-contract. I think it is desirable to resume in a sentence or two what has been decided in regard to the somewhat curt phraseology of the Act. The question has arisen for decision under two of the powers prescribed by the Act, viz., the power to resign and the power to assume new trustees. In both the cases, one being in the First Division, and the other being in this Division, it was held that the power was not expressly contrary to the deed constituting the trust, and that it was necessary to have a distinct intimation of contrary intention in order to exclude the Act. The first case was that of *Maxwell's Trustees* v. *Maxwell*, November 4, 1874, 2 R. 71. In that case it was contended that a marriage-contract contained expressions of intention contrary to the terms of, and therefore derogating from the Act. The First Division however unanimously refused to listen to the contention. The Lord President said—"Any hypothetical inference as to the intention of the truster can never prevent the application of the statute. It is clearly a case in which the statute was intended to apply." And Lord Deas said—"I am very clear that there is nothing in the objection. The fact that a limited power of resignation was conferred by the trust-deed could not possibly prevent the application of the subsequent enactment which conferred an unlimited power of resignation." In the case of *Allan's Trustees* v. *Hairstens*, January 23, 1878, 5 R. 576, we in this Division proceeded on exactly the same lines, and Lord Gifford delivered an important opinion on the question, taking the same views as the Lord President.

I have glanced at these cases not to point an analogy but to draw a contrast—I regard the present case as of a totally different nature, and outside the Act altogether. There is no power given by the marriage-contract to the trustees during the life of the survivor. The power is mutually reserved in the marriage-contract by the spouses to the survivor of them to nominate new trustees, and I am clear that such cannot stand along with a power in the trustees to do the same.

I am clearly of opinion, then, that we must answer the question in the affirmative.

Lord Young—I am of substantially the same opinion. It is very necessary to attend to the facts of this particular case, and it is not necessary to pronounce a general decision on the meaning and intention of the Act of Parliament beyond the exigencies of the case. The trust now in question is a marriage-contract trust, and in it the parties who made it made the stipulation which we are called upon to consider, as they were perfectly at liberty to do. One of the parties, the husband, predeceased, and the other, the wife, is still alive. Two of the trustees have failed, one of them by death, the other by resignation. That is the very case for the widow as survivor to exercise the power of the marriage-contract if she thinks fit – to appoint new trustees in place of those dying or becoming incapacitated—and if she choose she can do it without any other formality than simply writing on a sheet of note-paper and saying that she appoints A and B trustees in place of C dead and D resigned. Instead of that the surviving three trustees who are parties here, hearing of her desire to nominate two gentlemen in room of the two who had failed, executed a deed of assumption by themselves giving effect to her desire by assuming the two she had appointed, but along with them, two of their own choosing. That I regard as altogether inappropriate and useless. They had no right whatever to assume. The body of trustees is complete in the contract, and they may not double it, the widow alone having right in virtue of the deed. On the whole matter, then, I agree with your Lordship.

Lord Craighill—The question of law put to the Court, Mrs Munro being still alive, ought I think to be answered in the affirmative. The clauses of the marriage-contract quoted in the Special Case make it plain that while both spouses were alive, or while the survivor was alive, the exclusive power of nominating new trustees was vested in them, and that the trustees named by them were to have the power of assumption only upon the death of both. This seems to me to bring the case under the operation of the condition set forth in the clause of the Trusts (Scotland) Act 1861 (24 and 25 Vict. c. 84), also quoted in the Special Case, by which it is provided that the power of assumption thereby conferred is not to come into operation if the contrary be expressed. I think that the contrary has been expressed, for were the power claimed by the trustees to assume new trustees in the lifetime of Mrs Munro to be recognised, that would be in the contrary of the power of nomination conferred on Mrs Munro. The question which we have to decide is not in any way affected by the decision in the case of *Allan's Trustees*, 5 R. 576, because in that case there was no power of nomination in Mrs Allan after the trust came into operation, the only parties entitled to nominate at any time being the trustees named in the deed, and the survivor of those trustees. The facts being as they are, I have no difficulty in coming to the conclusion that the exercise of the power conferred by the Act while Mrs Munro is in life is plainly excluded.

Lord Rutherfurd Clark—I agree, and all the more because although I was held wrong in *Allan's Trustees* I still think my decision was right.

The Court answered the question in the affirmative.

Counsel for First Parties—Comrie Thomson—Jameson. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for Second Parties—D.-F. Mackintosh, Q.C.—Ure. Agent—George Andrew, S.S.C.