LORD KINNEAR and LORD PEARSON concurred.

The Court adhered.

Counsel for the Pursuer and Reclaimer—M'Lennan, K.C.—Orr Deas. Agent—Alex. Ross, S.S.C.

Counsel for the Defenders and Respondents—Wilson, K.C.—Horne. Agents—Henry & Scott, W.S.

Tuesday, January 15.

SECOND DIVISION.

(Before Seven Judges.)

CAMERON'S TRUSTEES *v.* CAMERON.

Donation—Delivery—Recording in Register of Sasines—Bond and Disposition in Security—Bonds and Dispositions in Security Taken by Father in Favour of Himself as Truster for Children—Is Recording of Bonds by Father Equivalent to Delivery to Children—Co-Trustee.

Held (*diss.* Lord Kyllachy) that the recording in the Register of Sasines by a father of bonds and dispositions in security taken in his own favour as trustee for his children (where the money invested was his own, and where the bonds were kept and occasionally uplifted and reinvested by him), did not operate a delivery of the bonds to the children so as to give them an indefeasible right to the sums for which the bonds were granted, and so as to put it out of his power to revoke the trust.

Held further, in the case of another bond, otherwise in a similar position to the above, that no distinction was caused by the fact that it was taken in favour of another person as well as the father as trustees, the other person having been left in ignorance of the existence of the bond which was recorded at the instance of the father alone.

Gilpin v. *Martin*, May 25, 1869, 7 Macph. 807, 6 S.L.R. 518, *doubted.*

Edmond v. *Magistrates of Aberdeen*, November 16, 1855, 18 D. 47, 3 Macq. 116, *distinguished.*

Donald Cameron, who was twice married, died on 27th February 1905, survived by two of the three children of his first marriage, viz., Christina Campbell Cameron and Donald John Cameron, and by his widow, to whom he was married in 1888. The other child of the first marriage, Alexander, the elder son, died intestate and unmarried on 1st March 1900. There were no children of the second marriage. By a trust-disposition and settlement which was executed on 19th February 1901 he conveyed to trustees his whole means and estate, heritable and moveable, for the trust purposes therein mentioned, and, *inter alia*, after providing an annuity of £100 to his said wife during her widowhood and granting her the liferent use of his household furniture for the same period, he directed his trustees to hold, apply, pay, and convey the residue of his estate equally to and for behoof of his said two surviving children and their respective lawful issue.

Questions having arisen as to certain sums contained in bonds and dispositions in security, a special case was presented to the Court in which the trustees acting under the trust-disposition and settlement were the first parties, the surviving children the second parties, and the widow the third party.

The special case set forth—"The said Donald Cameron at his death was possessed of £3168 of miscellaneous moveable estate, £750 of heritable estate, and £7000 money due under bonds and dispositions in security. In addition there were two sums of £1000 each contained in the two bonds and dispositions in security after mentioned, taken in name of the said Donald Cameron as trustee for behoof of his said daughter. Subsequent to his second marriage the said Donald Cameron on five separate occasions lent money on heritable property and took the bonds and dispositions in security therefor in trust for behoof of certain of his children. Three of these bonds and dispositions in security were repaid to the said Donald Cameron during his life as trustee therein mentioned, and were discharged or assigned by him as such trustee, but the two for £1000 each before mentioned were undischarged and in existence at his death. The circumstances attending the creation of these trusts are as follows:—

"I.—*Bond for* £1200 *over Subjects in Largs.*

"At Martinmas 1889 the said Donald Cameron lent £1200 to William Whitelaw, restaurateur, Glasgow, on the security of a property forming numbers 21 and 23 Bath Street, Largs, and took a bond and disposition in security therefor. The bond bears that the money was borrowed and received from the said Donald Cameron, and that at his request (testified by his subscription thereto) the said William Whitelaw obliged himself to repay the amount borrowed to 'the said Donald Cameron and John Cameron, wine and spirit merchant, London Road, Glasgow' (his brother), 'and the survivor of them, and the heir of the survivor, as trustees and trustee for behoof of the said Donald Cameron in liferent, and Alexander Cameron, Christina Campbell Cameron, and Donald John Cameron, his children, and the survivors and survivor of them jointly, with the issue *per stirpes* of any of them who may decease in fee, and to the assignees of said trustees or trustee,' and disponed the security subjects to 'the said Donald Cameron and John Cameron, and the survivor and the heir of the survivor as trustees and trustee foresaid.' The bond, which contains a clause consenting to registration for preservation and execution, is dated the 12th, and was recorded by the truster's law agent in the appropriate Register of Sasines in terms of the destination therein on 14th November 1889. The

loan was repaid at Martinmas 1900, after the death of the said John Cameron, and the bond was assigned by the said Donald Cameron as surviving trustee to a new lender. The said Donald Cameron lodged the £1200 in his bank account, and at the same term lent £900 on the security of a property in Partick, the bond for which was taken in favour of himself as an individual.

"II.—*Bond for £1150 over Subjects in Westmuir Street, Parkhead.*

"In November 1894 the said Donald Cameron lent £1150 to J. & A. Mitchell, packing-case makers, Glasgow, over a property in Westmuir Street, Parkhead, Glasgow, and took a bond and disposition in security therefor. The bond bears that the money was borrowed and received from the said Donald Cameron, trustee for behoof of the said Alexander Cameron, Christina Campbell Cameron, and Donald John Cameron, out of the trust-funds in his hands for their behoof. The borrowers bound themselves to repay the amount borrowed to 'the said Donald Cameron as trustee for behoof foresaid, his executors or assignees whomsoever,' and disponed the security subjects to him 'as trustee for behoof foresaid and his foresaids.' The bond also contains a declaration that neither the borrowers nor anyone deriving right from them repaying to the said Donald Cameron as trustee foresaid or his foresaids the principal sum, interest, or consequents, should have any right to inquire into the constitution of the trust, or see to the application of the moneys repaid, but should be sufficiently exonered and the security subjects disburdened of the personal obligation, and heritable security thereby created by the receipt acquittance or discharge to be granted in the premises by the said Donald Cameron as trustee foresaid or his foresaids. The bond contains a clause consenting to registration for preservation and execution, is dated 29th, and was recorded in the appropriate Register of Sasines on behalf of the truster 'as trustee for behoof within mentioned,' by his law-agent on 30th November 1894. The bond was retained in the custody of the said Donald Cameron's law-agent until 5th December 1896, when it was discharged, and the proceeds, together with £24, 6s. 10d. of accrued interest, lodged on deposit-receipt in the Clydesdale Bank, Gallowgate, Glasgow, in name of the said Donald Cameron, in trust for the said Alexander Cameron, Christina Campbell Cameron, and Donald John Cameron. On 16th July 1897 this money was uplifted and a sum of £1608, 9s. deposited in said bank in name of the said Donald Cameron in trust for his said three children. On 10th November 1897 the last-mentioned sum was uplifted and £1000 deposited in said bank in name of the said Donald Cameron in trust for his said three children, the difference between said sums having been paid to the said Donald Cameron. On 13th May 1898 the last-mentioned deposit-receipt was cashed and the contents paid to the said Donald Cameron, who on the same day handed £2000 to his law-agent to be lent on the security of the properties Nos. IV and V Alleysbank, Rutherglen, and thereafter on 7th June following the bonds Nos. III and IV for £1000 each were granted. At the date of this bond the said Donald Cameron held no money in trust for behoof of his three children so far as known to the parties hereto. He does not appear to have invested any money in 1896, but at November 1897 he lent a sum of £3200 over a property in Govan Road, Glasgow, and took the bond in his own favour as an individual.

"III.—*Bond for £1000 over No. V Alleysbank, Rutherglen.*

"In June 1898 the said Donald Cameron lent to Edward Gibbon junior, joiner, Gallowgate, Glasgow, £1000 over his property No. V Alleysbank, Rutherglen. The bond and disposition in security for said sum bears that the money was borrowed and received from the said Donald Cameron out of the funds and estate held by him in trust for the said Alexander Cameron, and the borrower bound himself to repay said borrowed sum to the said Donald Cameron 'as trustee and in trust as aforesaid, his executors or assignees whomsoever,' the security subjects being disponed to the said Donald Cameron 'as trustee and in trust as aforesaid, and his foresaids.' The bond contains a clause to the effect that the receipt or discharge granted by the said Donald Cameron, as trustee and in trust as aforesaid, or his foresaids, should be a sufficient discharge and acquittance to the borrower or his foresaids for all sums paid in virtue of the bond and disposition in security, and that neither he nor they should have any right or claim to inquire into or see to the application of any such sum or sums so paid, but should be completely acquitted and discharged by the receipt or discharge to be granted as aforesaid. The bond contains a clause consenting to registration for preservation and execution, is dated 7th, and was recorded in the appropriate Register of Sasines by the truster's law-agent on the 8th, days of June 1898, on behalf of the said Donald Cameron, as trustee and in trust for the said Alexander Cameron. The said Donald Cameron at the date of this bond did not hold any sum of £1000 as trustee for behoof of his said son Alexander, so far as known to the parties hereto, unless it be held that one-third of (1) the proceeds of said bond No. II for £1150 and the accrued interest of £24, 6s. 10d. thereon, and (2) the sum of £434, 2s. 2d. added on 16th July 1897 to the deposit-receipt by the Clydesdale Bank as before stated, was so held by him. The said Alexander Cameron died on 1st March 1900. The bond remained in force till November of that year, when it was discharged and a new bond in favour of the said Donald Cameron as an individual substituted therefor. The substituted bond is still in force, and forms part of the truster's estate.

"IV.—*Bond for £1000 over No. IV Alleysbank, Rutherglen.*

"This bond for £1000 bears the same date,

was recorded the same day, and is identical in every way with the bond No. III for the like amount before recited, except that (1) it extends over the adjoining property, and (2) the beneficiary in the trust is the truster's daughter, the said Christina Campbell Cameron. The said Donald Cameron at the date of this bond did not hold any sum of £1000 as trustee for behoof of his said daughter so far as known to the parties hereto, unless it be held that one-third of (1) the proceeds of said bond No. II for £1150 and the accrued interest of £24, 6s. 10d. thereon, and (2) the sum of £434, 2s. 2d. added on 16th July 1897 to the deposit-receipt by the Clydesdale Bank as before stated, was so held by him. The bond still exists, and was found in the truster's repositories at his decease.

"V.—*Bond for* £1000 *over Great Eastern Road.*

"In November 1902 the truster lent to Mr and Mrs James Sneddon, Bonnington Road, Kilmarnock, £1000 over subjects No. 21 Mackinfauld Mansions, Great Eastern Road, Glasgow, and the bond and disposition in security therefor bears that the money was borrowed from the said Donald Cameron as trustee for behoof of his daughter, the said Christina Campbell Cameron, out of funds belonging to and held by him in trust for her behoof, and the borrower Sneddon bound himself to repay the amount to the said Donald Cameron 'as trustee foresaid, his executors or assignees whomsoever,' and the security subjects were disponed to the said Donald Cameron 'as trustee foresaid, and his foresaids.' This bond contains a clause similar to that in the bond No. III, before referred to, as to the sufficiency of a receipt or discharge by the said Donald Cameron as trustee. The bond contains a clause consenting to registration for preservation and execution, is dated 22nd and 24th November 1902, and was recorded in the appropriate Register of Sasines on 9th December 1902, on behalf of the said Donald Cameron, as trustee for behoof of the said Christina Campbell Cameron, by his law-agent. This bond is still in existence, and was found at the truster's death in the hands of his law-agent. The said Donald Cameron at the date of this bond did not hold any sums as trustee for behoof of his said daughter, so far as known to the parties hereto, unless it be held that one-third of the proceeds of the said bond No. I for £1200 was so held by him. Between the date when the said bond No. I was paid up and the date when this bond was granted the said Donald Cameron had invested the sum of £1600 in two bonds and dispositions in security, one for £900 at Martinmas 1900, and the other for £700 in April 1901, both of which were taken in favour of himself as an individual.

"The said Donald Cameron collected and appropriated to his own use the interest which accrued from time to time on the said five bonds.

"The two surviving children of the said Donald Cameron were not informed of the existence of the trusts which the bonds purported to create in their favour; no moneys were received by them out of or in respect of the funds contained in said bonds; and no steps were taken by them or by their father on the death of the elder son Alexander to make up a title to or otherwise deal with any portion of the funds contained in said bonds, as forming part of his estate.

"No reference is made to the said trusts by the said Donald Cameron in his said trust-disposition and settlement, which contains the usual clause revoking all previous wills or settlements of a testamentary nature executed by him.

"The existence of the alleged trusts contained in the said bonds was intimated by the first parties to the widow and children of the said Donald Cameron on the circumstances coming to the first parties' knowledge."

The following *questions*, among others, were submitted to the Court—"(1) Were effectual trusts created in favour of the beneficiaries therein mentioned by all of the said five bonds and dispositions in security, or by any and which of them? (2) If effectual trusts were created by the said bonds and dispositions in security, or any of them, were the trusts so created revocable, and have they, or any, and which of them, been revoked?"

The second parties *maintained*, in the first place, that the whole of the said five bonds having been constructively delivered by being recorded on the grantee's behalf in the Register of Sasines, constituted effectual and irrevocable trusts, and that the trust funds, so far as uplifted by the truster during his lifetime, were debts due to the beneficiaries in the trusts. They maintained, in the second place, that the two last-mentioned bonds, which were in force at the death of the said Donald Cameron, constituted effectual and irrevocable trusts in favour of the said Christina Campbell Cameron. Further, they maintained that the last-mentioned bond being subsequent in date to the said trust-disposition and settlement, constituted an effectual and irrevocable trust in favour of the said Christina Campbell Cameron. Finally, they maintained that if said trusts were revocable they had not been revoked.

The third party maintained, *inter alia*, that no effectual trusts were created by the said five bonds or any of them in favour of the beneficiaries respectively therein mentioned, but that the funds represented by the said bonds truly remained, and were intended by the said Donald Cameron to remain, *in bonis* of himself and subject to his own control, and that accordingly no *jus crediti* was conferred by the said bonds on any of the beneficiaries mentioned therein. Alternatively, should it be held that effectual trusts were created by the said bonds, the third party contended that the trusts so created were gratuitous and revocable, and were in point of fact revoked by the said Donald Cameron's actings with regard to the sums therein contained, and, at least as regards the first four bonds, by the general clause of revocation in his trust-disposition and settlement. In any case,

in the event of the Court holding that effectual and irrevocable trusts were created by the said bonds and dispositions in security in favour of the beneficiaries therein mentioned, the third party maintained that the beneficiaries under the first and second bonds were only entitled to payment of the sums thereby placed in trust for them in so far as not reinvested for their behoof in the third, fourth, and fifth bonds.

The *argument* of the second parties is fully given by Lord Kyllachy, the argument of the third party by the Lord President and Lord Kinnear.

The following *authorities* were referred to—Erskine Inst., iii, 2, 44; Erskine Prin., iii, 2, 21; Bell's Prin., sec. 23; M'Laren on Wills and Succession, vol. i., 416; *Gilpin* v. *Martin*, May 25, 1869, 7 Macph. 807, 6 S.L.R. 518; *Stewart* v. *Rae*, January 18, 1883, 10 R. 463, Lord Ordinary Kinnear at p. 466, Lord President Inglis at 468, 20 S.L.R. 308; *Tennent* v. *Tennent's Trustees*, July 2, 1869, 7 Macph. 936, at 948 and 955, 6 S.L.R. 629; *Edmond* v. *Magistrates of Aberdeen*, November 16, 1855, 18 D. 47, *affd.* February 26, 1858, 3 Macq. 116; *Hill* v. *Hill*, July 2, 1755, M. 11,580; *Balvaird* v. *Latimer*, December 5, 1816, F.C.; *Bruce* v. *Bruce*, June 23, 1675, M. 11,185; *Burnet* v. *Morrow*, March 19, 1864, 2 Macph. 929, at 934 and 935; *Connell's Trustees* v. *Connell's Trustees*, July 16, 1886, 13 R. 1175, 23 S.L.R. 857; *Maclean* v. *Maclean*, June 5, 1891, 18 R. 874, 28 S.L.R. 656; *Smitton* v. *Tod*, December 12, 1839, 2 D. 225.

At advising—

LORD PRESIDENT — We approach the question in this special case upon facts which are agreed on by the parties, and which therefore we are bound to take as presented. Now, by agreement of parties, the bonds in question were all *de facto*, and notwithstanding statements in their narrative to the contrary, purchased with the father's money.

The sole question therefore is whether a donation of the sums entered in these bonds has been effected by the facts proved. The facts proved are really four in number —(1) that the bonds were conceived in favour of the father as trustee for his children; (2) that the bonds were kept by the father in his own custody; (3) that they were recorded in the Register of Sasines; (4) that they were uplifted and reinvested by the father on more than one occasion, the reinvestment not always corresponding exactly to the sum uplifted.

To make a perfected donation there must be delivery from the donor to the donee. Such delivery is not effected by the mere fact that the donor himself grants a written title to the subject of the gift, or that, where he himself is getting the subject of the gift from some-one else, he orders the written title from that some-one else in terms which convey to the donee. This has been decided whether the subject of the gift is moveable, as for example a debt by a bank evidenced by a deposit-receipt, or heritable, as a piece of land—*Balvaird* v. *Latimer*. Fact No. 1 is therefore not enough. Fact No. 2 is obviously not delivery of the deed to the donee; and fact No. 4 is so far as it goes antagonistic to the idea of completed donation. It is therefore apparent that the whole strength of the case for the second parties rests upon fact No. 3, namely, the registering of these bonds conceived as above stated in the Register of Sasines.

I have come to the conclusion that this registration did not effectuate delivery to the donee of the subject of the gift. If I thought that this decision in any way militated against the settled Scottish doctrine of the faith of the records I should be slow to come to it, but I humbly think that it will have no such effect.

It is, I think, necessary to scrutinise narrowly the precise thing that is done by registration in the Register of Sasines. It does not seem to me that the dictum of Erskine, iii, 2, 44, is to the point. At the time he wrote, the idea of registering a conveyance in the Register of Sasines was unknown. What were there registered were instruments of sasine. The registration accordingly he was alluding to was registration in the Books of Council and Session, where the deed was registered for preservation and publication and execution. The deed itself was registered and passed out of the grantee's hands for ever, only an extract being thereafter available, and it is I think natural to believe that the deed itself must thereafter be held to be in the *quasi* possession of the grantee.

The registration of a deed in the Register of Sasines is quite different. There the deed is not parted with, but a copy of the deed put into the register is by statute made equivalent to what in the old law was effected by three different things, namely, (1) the actual delivery of the sasine by symbol, (2) the passing of the notarial instrument reciting the act of sasine, and (3) the recording of that instrument in the register. Now, if A, infeft in land, dispones gratuitously that land to B, and then registers the disposition in the Register of Sasines, the donation is perfected, not I think because of the publication in the register of A's deed, but because by the constructively effected sasine the land itself, the subject of the gift, has been delivered by A to B in the only way in which land can be delivered.

But in this case if we call the father A and the second parties B, there has been no delivery of the land by A to B. What has been delivered is the land by C, the borrower, in security to A. No doubt A is there designated as trustee for B, but then that circumstance by itself, as we have already seen, is not enough. In other words, A's sasine regarded as a delivery is delivery between him and C, and not delivery between him and B; and therefore unless we have the doctrine that over and above there is publication to the whole world, and *inter alios* to B, and that A having by taking a security as trustee made a donation to B, the registration as between A and B effected nothing. For the reasons already stated I think this registration is no such publication. I had at first some

hesitation as to the first bond, where there was another trustee. But on consideration I have come to the conclusion that the other trustee was not in a position to defend the trust infeftment adversely to the donor. Had he, *i.e.*, the other trustee, been sole trustee, the point would, I think, have been different.

As regards the authorities, I believe nothing I have said is in any way inconsistent with the older authorities of *Hill*, *Balvaird*, and *Bruce*. The case of *Martin* v. *Gilpin*, I confess, is different. The circumstances are not the same, but I do not think I could honestly say that if I fully agreed with the majority in *Martin* v. *Gilpin* I would not think *Martin* v. *Gilpin* ruled this case. I am not, however, sitting in a Seven Judges' case, bound by the judgment in that case, and I frankly say that I prefer Lord Manor's judgment. I also find that Lord Kinloch gives a very half-hearted acquiescence to the judgment of the majority. As regards *Edmond* v. *The Magistrates of Aberdeen*, which is authoritative, I conceive that the point there is completely different. There was no question of donation—onerosity was admitted, and delivery was admitted, and the whole point turned on whether an infeftment did or did not intimate to the superior (still under obligation to grant a feu-charter) the assignation of writs, which was contained in the dispositive clause of the disposition, which was the warrant for the infeftment. On the whole matter I am of opinion that the first question ought to be answered in the negative, which makes it unnecessary to answer the other questions.

LORD JUSTICE-CLERK—My view of this case was, when it was heard before the Division, the same as that now expressed by your Lordship, but the fact that Lord Kyllachy held a strong opinion to the contrary was, in the view of his colleagues, a sufficient ground for the case being considered by a fuller Bench, particularly as there were cases in the books which gave an appearance of support to the view which Lord Kyllachy thought to be right.

But after the further debate I am still of opinion that the case should be disposed of as your Lordship proposes, and I entirely concur in the grounds which your Lordship has given for the judgment which you have indicated as the right one to be pronounced.

LORD KYLLACHY—I am of opinion that all of the five bonds in question when recorded in the Register of Sasines constituted valid and effectual trusts *inter vivos* in favour of the beneficiaries therein mentioned. There can be no doubt that *ex facie* of the deeds that was their purpose and import, and I am of opinion that no good reason has been assigned why that purpose and import should be denied effect. In particular, I am of opinion that the validity and effect of the said trusts is not affected either (1) by the particular form of the trust title; or (2) by the fact that the trusts were with one exception created by the truster in his own person as sole trustee, and that as such trustee he had express power to uplift the sums in the bonds when paid and to grant effectual discharges to the debtors; or (3) by the fact that the existence of the trusts in their favour was not intimated to the beneficiaries otherwise than by registration of the several bonds in the Register of Sasines; or (4) by the circumstance that the subjects of the trust consisted of bonds and dispositions in security granted in favour of the trustee for money lent, and that (contrary to the statement in each of the bonds except the first) the money lent belonged to the trustee himself, or at least did not—so far as known to the parties—belong to the beneficiaries.

On the contrary, my view of the matter is shortly this. To begin with, it does not appear to me that, as concerns the constitution of the trusts, anything really turns on the circumstance that the trusts are in each case expressed *in gremio* of the bonds themselves and not in separate writings recorded at the same time or afterwards. For all practical purposes the position is I conceive just the same as if the truster had taken the bonds to himself as an individual and had then executed either (1) a declaration of trust in favour of the beneficiaries, or (2) an assignation by himself as an individual to himself *qua* trustee for the beneficiaries. It is true that the trusts being expressed *in gremio* of the original title the trustee was in the position of being unable to complete his title to the security subjects without publishing to the world the trust under which he held; whereas if the trust had been constituted by separate writing he might have kept it latent so long as he pleased. In either case, however, the trust was quite validly constituted, and the deed or deeds being once recorded there could be no difference in the result.

Again, that being so, I know of no principle of trust law which prevents the constitution or bars the subsistence of a trust in which the truster is (or becomes) himself the *sole* trustee, nor is it in my opinion material in that connection that—the trust property consisting of bonds personal or heritable—it is a term of the trust that the debtors under the bonds when they pay up shall have no concern with the application of the money but shall be sufficiently discharged by the receipt and discharge of the trustee. It has never I think been doubted that an owner either of an estate in land or of a heritable security may either by a separate declaration of trust, or by a declaration of trust inserted *in gremio* of his title, create a trust in his own person quite as effectual as if he had executed a disposition and assignation in favour of independent trustees. He has equally in the one case as in the other set up an adverse title—adverse not perhaps as regards the legal estate, but certainly adverse as regards the beneficial estate. Nor does it strike me as at all anomalous that even a sole trustee should possess the power (quite usually conferred on all trustees) of granting effectual discharges to the trust debtors without such debtors being

concerned with the application of the money paid.

In the next place, however, I quite acknowledge that in the case of a sole trustee—as in the case of a body of trustees—the trust until it is accepted is only inchoate; and also that in the case of a sole trustee who is himself the truster, the acceptance may require to be signified by something more than the mere possession of the deeds creating the trust, or even the execution by the trustee of a minute or other writ of acceptance which he keeps in his own hands. In that case it may well be that there is required in addition some overt extraneous and ostensible act which involves acceptance of the trust and marks definitely the character of the trustee's possession. On the other hand (1) it was not, as I understood, disputed that intimation to the beneficiaries of the existence and terms of the trust deed would suffice for that purpose; nor (2) did it seem to be disputed that it would also suffice if the trustee proceeded to do acts *qua* trustee which he could only do *qua* trustee, and those acts were not private but overt and public, and consistent only with full acceptance of the trust character.

The question accordingly, I think, really is whether we have in the present case either or both of those elements. I am of opinion that we have both—that is to say, both the element of intimation to the beneficiaries and the element of acceptance of the trusts by the trustee's acts. Indeed here, as perhaps generally, the one thing really involved the other. For what did the trustee here do? So soon as he obtained delivery of the bonds constituting the trusts, he at once proceeded, *qua* trustee, to make up his title *qua* trustee, and did so by recording the several deeds, with warrants granted by him *qua* trustee, in the Register of Sasines. Now what was the effect of that proceeding? It of course, in the first place, gave the trustee infeftment *qua* trustee in the security subjects; but apart from that—unless I wholly misconceive the position—it did something more. In the first place it unequivocally, and in the most overt and public manner, manifested the trustee's acceptance of the trust; and in the next place it, with equal publicity, intimated the constitution and terms of the trust to all concerned, including, so far as that was necessary, the debtor in the bonds on the one hand and the beneficiaries interested on the other. The result of course was that the beneficiaries became constructively—if not actually—cognisant of their rights; and also—what is important—became possessed of the means of enforcing those rights by obtaining extracts of the recorded deeds, extracts which, as we all know, are in law equivalent to the originals. That the Register of Sasines is concerned merely with the legal estate, and that the registration of deeds therein has no effect except as regards the legal estate, is a proposition which so far as I know is quite novel. In point of fact, as the case of *Edmond*, 18 D. 47, *affd.* 3 Macq. 116, and the earlier cases there cited, plainly, I think, show, it has been from an early date recognised that, with respect to all deeds registrable in the Register of Sasines, registration therein operates not only as completing by infeftment all rights of property in land which may be conveyed, but also as completing by intimation all rights connected with land which for any reason require intimation. It could hardly, I think, be doubted that if the trusts here had been constituted by bonds and dispositions in security taken to Mr Cameron as an individual, and by separate declarations of trust or assignations to himself as trustee afterwards executed by him, the recording of those writings simultaneously or successively would have operated all intimations necessary in connection with either of them. And if that be so, I am unable, as I have said, to see how it makes any difference that in place of two writings the trust is, as here, constituted by a single and composite writing, which as a whole is duly recorded in the appropriate register.

It therefore seems to me (1) that the trusts here were well constituted; (2) that the acceptance of the trusts by the trustee was well and sufficiently manifested; and (3) that if anything more was necessary the publication of the several deeds by registration in the Register of Sasines operated intimation to the beneficiaries to the same effect as if the deeds had been formally and directly intimated to them.

It is perhaps, however, proper before passing from the general question to add a word or two upon certain points which came up in the argument, and which seemed to be thought to introduce specialties favourable to the case of the third party.

I do not, I think, require to do more than notice the point that the beneficiaries here are the children of the trustee. That that fact made any essential difference was not, I think, ultimately contended. But there were two other points which seemed to be pressed as of more importance.

The first was that the subjects of the trust here were heritable securities and not houses or land. It seemed to be urged that this in some way made a difference. I confess, however, that the only difference which I have myself been able to see goes no further than this, that the heritable securities being taken directly to the trustee, the latter had a sufficiently completed right to the debts, as distinguished from the securities, without either intimation, infeftment, or registration. I think that is true. But being so, what is the relevancy of the circumstance? The fact always remains that the trustee did complete and required to complete his right to the securities; and if in order to do so he required to take and did take proceedings which involved acceptance of the trust, and also publication of the trust to all concerned, I fail to see how the motive which influenced him can affect the legal significance of his acts.

The other point was this—that the trust was, according to the statement in the case, gratuitous, the moneys lent on the heritable securities being in fact the property of the

trustee. Now, of course, the ownership of the moneys might in possible circumstances be important. It might be so, for instance, if we had to deal with an ambiguous or equivocal position; such a position, for example, as presented itself in the case of *Gilpin* v *Martin*, 7 Macq. 807, after referred to, where a father having purchased property with his own funds, and taken the disposition to himself as trustee for his children, he did nothing further—nothing to manifest his assumption or acceptance of the trust, or to indicate in which of his two characters he held the unrecorded disposition. In such a case the source of the purchase money would of course be a material point. It would also be a point—and indeed a conclusive point—*contra* if (the facts otherwise being the same) it appeared that the money by which the subjects of the trust were acquired belonged to the children and the father had therefore acted in the matter simply as the children's agent. But where—as here—the trusts (if I am right) were accepted and acted upon, and intimation (so far as necessary) made to the beneficiaries, and where on the other hand the beneficiaries do not allege (except to the limited extent after mentioned) that the money invested was theirs, I do not at this moment see how the source of the money, or the gratuitousness or onerosity of the trusts, can be of any importance.

There is one view, however, in which even here the source of the money may have a bearing. All the bonds it will be observed (except the first) bear expressly that the moneys represented by the trust securities belonged to the trustee's children, and were held for them in trust by their father. Now that is said in the special case not to be true—at least not to be true so far as the parties to the case have knowledge. But if so the question arises—What was the object of the untrue statement expressed thus? So far as appears it can have been only this—that the father desired to secure beyond controversy that the deeds should be read, and should operate as deeds of divestiture. If therefore intention had to be considered—an idea which seemed to underly a good deal of the third party's argument—it seems difficult to resist the conclusion that whatever the deceased Mr Cameron really effected, he desired and intended to make, as against himself and everybody concerned, an irrevocable and effective divestiture.

If I am right in the views which I have so far expressed, it is of course unnecessary to consider the special position of the *first* bond. The second parties, however, maintain alternatively that at all events that bond constituted an effectual trust *inter vivos*, inasmuch as in that instance there was an independent trustee conjoined with the late Mr Cameron, and the deed was duly recorded in the Register of Sasines on behalf of both the trustees, and presumably therefore with the concurrence of both of them. As to this part of the case—if I rightly understood the third party's argument—there was no attempt to dispute that if the deed in question was, on its just construction, a deed *inter vivos*, the existence of the second trustee was fatal to their general argument. But their contention was that the trust expressed in the first bond was, on its just construction, merely testamentary.

I must acknowledge to being somewhat startled by the suggestion that the trust constituted by the first bond was—unlike the other trusts—testamentary. *Prima facie* it very plainly constituted a trust which was to take effect at once, and to be administered, if not fully executed, during Mr Cameron's life. He is in fact himself one of the trustees. And neither in form nor substance does the deed bear any resemblance to the deeds as to which questions of this kind have been sometimes raised. I have looked into the leading cases—particularly *Spalding's Trustees*, 2 R. 237; *Forrest*, 4 R. 22; *Robertson*, 19 R. 49, and the earlier cases of *Leckie*, M. 11,581, *Turnbull*, 1 W. & S. 80, and *Smitton*, 2 D. 225, which have been so often commented upon. But I have failed to find any support for the suggested construction. The only argument offered at the discussion rested on this—(1) that Mr Cameron (the supposed testator) was himself to receive the trust income during his life; and (2) that the fee given to the three children jointly was given to them with accretion to the survivors in default of issue. This it was said suspended the gift of the fee (although in terms immediate) until Mr Cameron's death, and thus implicitly made the trust irrevocable.

I am afraid, however, that there are two answers to that contention. The first is that it is by no means clear that the vesting of the fee was at all suspended. Personally I am disposed to think that it vested at once in the three children jointly subject to increase or diminution of their respective shares in events which might happen, and also subject to a devolution of their shares to their issue if they happened to die before their father leaving issue. But further and supposing that to be otherwise, there is, I apprehend, no ground for the assumption that contingent rights are always testamentary, or that trusts *inter vivos* may not quite well exist for the protection of contingent rights, or even contingent rights to persons unborn. There are various authorities on that subject, and I think they will be found sufficiently noted in the case of *Robertson*, 19 R. 49, where a question of this kind was considered.

I am therefore of opinion that in any event the first of the five bonds constituted an effective and indefeasible trust in favour of the second parties and their deceased brother, and it is hardly necessary to point out that that being so the sums received by Mr Cameron as surviving trustee when that bond was paid up in 1900, formed a trust fund in his hands belonging to his children at all events as from that date. I am bound, however, to say that if the decision of the case were to turn on the special position of the first bond and its relation to the other bonds the result in

figures would in my opinion require some further elucidation.

It remains (reverting to the general question) to say a word upon the authorities. With one exception the cases cited at the discussion were all of a single class. That is to say, they were all cases where the question was, whether rights taken by persons deceased in favour of children or other relatives, and contained in deeds which they kept in their own hands, without delivery or infeftment, or registration, did by the mere force of the title operate irrevocable gifts to the grantees named in the deeds. The cases of *Hill*, *Balvaird*, and *Stewart* are all cases of that class, and as to each of them, all I need to say is, that while in each the decision was against irrevocability, it was always I think implied and sometimes expressed that the decision would and must have been different if there had been either infeftment or registration, or anything tantamount to delivery, actual or constructive. Implicitly therefore the decisions in these cases are entirely favourable to the second parties. As regards the actual points decided their importance is only negative.

The exceptional case, however, is the case of *Gilpin*, 7 Macph. 807, and that was a case where as here the title was taken by a father to himself in trust for his children. There was therefore as here no room for any question of delivery. Delivery as pointed out in the judgments was duly made to the only grantee under the deed—that is to say to the father *qua* trustee. And *prima facie* that was enough. The difficulty, however, was that the trustee had neither accepted the trust nor done anything *qua* trustee except to receive and keep the deed in his own custody. And that difficulty led the Lord Ordinary to decide that the deed was revocable by the father, and led the Judges in the Inner House, while reversing the Lord Ordinary, to reserve the question whether the father might not by declarator during his life have obliterated the trust on which nothing had followed. It is not, however, I think, possible to read the judgments without being satisfied that neither in the Outer nor in the Inner House would there have been any difficulty if the deed there in question had, as here, been recorded in the Register of Sasines. Indeed, that is expressly indicated by the Lord Ordinary in the first paragraph of his note.

On the whole therefore I am of opinion that the several questions put to us should be answered as the second parties propose.

LORD KINNEAR—I agree with your Lordship in the chair. I have the misfortune to differ at the outset from the opinion of Lord Kyllachy—from which I venture to say none of us ever differ without hesitation—but I think that the one determining fact which must be kept in view throughout the whole discussion is that whatever benefit the bonds in question purport to confer on the children is an entirely gratuitous benefit, given or intended to be given by their father. That is the result of the statement of facts contained in the special case, and I entirely agree with what I understood to be your Lordship's opinion, that we are absolutely bound by the statement of facts in this form of process; and we must take that statement not only as correct as far as it goes, but as exhaustive, because by the contract of parties the facts upon which they have agreed are put before us in order to form the basis of judgment on the question of law on which alone the parties differ. If there had been any question at all as to whether these bonds were gratuitous bonds by the father to the children, or whether the money advanced on the bonds belonged to the children in the first instance, that would have been a question which could not have been raised in this form of process. It would have been a mere question of fact. For that reason I am not embarrassed by a good deal of the argument which I think has weight with Lord Kyllachy upon the construction of the bonds themselves as indicating an antecedent right in the children. They purport to be bonds for money advanced by the father as trustee for his children, but we must nevertheless take it to be the fact that the money was the father's and not the children's.

For the same reason I do not feel much perplexed by the decision in *Gilpin* v. *Martin* (1869, 7 Macph. 807). We are sitting in a Court where it is open to us to reconsider *Gilpin* v. *Martin*, and I agree with your Lordship in preferring the judgment of Lord Manor to the judgment of the learned Judges in the Inner House, because I think Lord Manor expressed exactly the proposition in law on which that case ought to have turned, but then what I find to be the view which is at the foundation of the judgment by Lord Deas and by Lord Kinloch in the Inner House is this, that there was no evidence upon which the Court was entitled to rely that the money invested in that case was not the money of the children. What was really decided was a question of fact. The reasoning of both Judges proceeds upon the effect and import of the bonds; and then Lord Deas comes to consider whether, notwithstanding the terms of the bonds, the fund must not be held to have been the father's. He says that that might have been ascertained, but that it would be very dangerous to assume that the children could have had no funds which might have been invested in the way in which the fund in question was; and Lord Kinloch says—"I do not intend to decide that a case may not occur in which a deed taken by a father to himself as trustee for his children will be revocable or capable of being discharged by him notwithstanding delivery to him in that capacity"—that is, as trustee for his children. "It would be a strong thing to affirm that a father intending a gratuitous benefit to his children, embodied in this form, was in all circumstances debarred from changing his mind and destroying and discharging the deed." But looking to certain circumstances which his Lordship explained, Lord Kinloch continued—"I cannot safely hold that in a

question between the father and his children this was in the position of a mere gratuitous deed, revocable at any time." The case of *Gilpin* therefore appears to me to be inapplicable, because it is a decision on different facts; and the facts are decided for us in the present case by the agreement of parties that the bonds as between father and children were purely gratuitous.

I do not doubt at all that a father may confer a gift on his children by taking a deed in this form, that is to say, in the form of a bond by a debtor, granted to him for behoof of his children, and if he chooses to take a deed in favour of his children he may make an effective gift to them in that way, but to make it effectual the gift must be carried out to completion according to the ordinary rules of law. Now, I take it to be elementary that gratuitous obligations of any kind cannot be made perfect and effectual without delivery. That is the doctrine uniformly applicable to donations of all kinds. If the subject of a gift is a corporeal moveable, the thing itself must be put into the hands of the donee; if it is an incorporeal right the document of title which enables the donee to make the right effectual to himself must be delivered either to him or to some third person for him. I think it will be found that that principle is laid down in very numerous cases in which questions of this kind have arisen, both in cases where the gift has been found to be irrevocable and where it has been found to be incomplete and revocable by the donor. The question to be put in all these cases is stated by Lord President M'Neill thus—"The question in issue is whether the deed was delivered with the intention of being put absolutely beyond the control of the granter." That is the fundamental fact which must be established in the proof of delivery. Something must have been done effectually to take the subject out of the control of the donor and to put it into the control of the donee or of somebody else for him. Now, it is clear to my mind, on the face of the statements in this special case, that the father never put these instruments, or the rights which they established, beyond his own control, and never intended to do so, because he retained so absolute a control over the money that he uplifted it and made use of it at his own pleasure. He uplifted the first bond and made reinvestments in similar terms, but the sums which he reinvested were not the same sums that he uplifted, and he also uplifted and appropriated the interest—in short, treated the bonds as his own, held by him in his own right and for his own interest. They remained subject to his own control throughout. The only fact therefore that can be put forward as constituting an irrevocable gift by the father to his children—and the only point that was really pressed on this part of the case—was that the bonds were recorded in the Register of Sasines. That was said to be equivalent to delivery. I think that there was a good deal of fallacy running through the argument at this point due to the ambiguous use of the word "delivery" in the vague, without specification of the thing supposed to be delivered, or of the person to whom delivery is to be made, and observations were cited both from the institutional authorities and from the opinions of Judges which appeared to me to be entirely misapplied because of that ambiguity. It was said that infeftment is equivalent to delivery. If that means that infeftment constitutes delivery of the land it is perfectly correct. If it means that it is delivery of a written instrument, I think all that is sound in the proposition is more correctly stated, in several of the cases to which we were referred in support of it, by the Judges who said that infeftment "inferred" delivery, because infeftment in the old form could not be obtained until the instrument which constituted its warrant, had been delivered to the grantee who desired to be infeft. The meaning and force of the observation becomes perfectly clear when we remember what infeftment was at the time when these learned Judges were speaking.

The same inference may probably be drawn under the present law, when a deed has been registered on the warrant of the grantee. But it is possible that it may be registered by the granter; and in that case, it cannot be inferred that the grantee has accepted delivery of a deed of which he may know nothing. Therefore I should be slow to accept the general proposition that mere registration of the deed in the register of sasines is necessarily equivalent to delivery of the deed to the grantee.

But then that is really not the question. There is no doubt at all that there was delivery of these bonds by the debtor to the creditor in order that the creditor might obtain infeftment. But that was delivery to the doner and not to the donees. It is said that it has the further effect of involving delivery to the donees, since their father is their trustee. But that assumes by a *petitio principii* that delivery to the father as trustee is in the circumstances of this case delivery to the children.

I agree that registration by a trustee, of a bond granted to him in that character, will indicate acceptance of the trust. But the question is whether mere registration of a bond in which he has chosen to call himself a trustee, will finally determine the creditor's right of property in his own money in favour of gratuitous donees to whom he has given no active title. I think the father has done nothing equivalent to delivery as between himself and the children, because he has done nothing to take the deed out of his own control and put it into his children's control. The father still remained the creditor in the bond; he had the only title to uplift the money. No person could have uplifted it without his aid or without a decree against him if he had refused his aid. I do not think it is necessary to decide whether delivery would be effected, as the argument assumes, by handing over the bonds to the supposed beneficiaries, although it seems to me that the more obviously effective method would be to assign the right and deliver the

assignation. But even on that assumption the bonds were not delivered. But then it is said that the registration of the bond and the publication of it which was thereby made was intimation to the children. I think that the question is one of substance, not of form; and it is not alleged that there was any intimation in fact to the children, who knew nothing about the bonds or their registration. Intimation may amount to intimation—if such intimation were necessary, which in this case it was not—of a personal right to the subject conveyed, but that would be intimation only to the owner of the subjects who was debtor in the personal obligation to convey. It is no intimation whatever to persons in the situation of the children, who knew nothing about the subject of the security, and had no reason to search the register for burdens affecting it. It was said they had constructive knowledge by reason of the registration. I must say, with great deference, that the legal conception of constructive knowledge of a simple matter of fact which is not actually known is not to my mind intelligible. I can understand it being pleaded as against a person pleading ignorance, that if he did not know he ought to have known, and that he is barred from pleading his ignorance. But that is not constructive knowledge, and has no application to a case like the present, where the argument is that a person is to be presumed to know of the existence of a right in his favour when he is in fact ignorant of it. It must be observed that the whole force of the argument about intimation depends upon the proof of knowledge, because we have nothing to do with the legal doctrine of intimation to the debtor as the proper completion of an assignation of a *jus crediti*. But I think that if the children in point of fact had known of the registration of these bonds that would not have concluded the case in their favour. They would still have had no active title to control the father's exercise of his legal right. The bonds would have been merely items of evidence in support of an action by the children for declarator of trust against their father. But if such an action had been based on the averments embodied in this special case, that the money was not the children's but their father's, that he intended to give it to them, that he had nevertheless refused or delayed to deliver a title, and that the action had thus become necessary, I am afraid that it would have been self destructive. The question must be always whether anything was done to put the fund, the money that was invested in the father's name, within the control and at the disposal of the children, or whether it still remained under the control and at the disposal of the father himself.

I only desire to add that, with much respect, I am unable to see that the case of *Edmond* v. *The Magistrates of Aberdeen*, 3 Macq. 116, has really any bearing on this question, In that case lands were feued in implement of a contract of sale, and the superior granted an original charter in favour of the purchaser. The lands were acquired by a disponee, who executed over them a bond and disposition in security, which was recorded in the Register of Sasines. It was afterwards discovered that owing to defects in the original charter no valid feudal right had ever been constituted, and the Court held that the superior was still under obligation to give an effectual title to the purchaser or his assignee; that this personal right had been well assigned and that registration in the Register of Sasines was sufficient intimation of the assignation to the superior. That has no bearing on the question in hand, because there is no right in this case created in favour of the children which can be completed by intimation to them, and I cannot assent to the proposition that the decision is an authority for saying that registration is public intimation to people who have no interest in the land affected by a registered title, and no inducement to search the records in order to learn whether a recorded title contains any statement which they may probably have an interest in knowing. In the case of *Edmond* the registration was held to be intimation to the superior of a claim to lands held under his own titles, and the assignation was held to be preferable to a later personal right, because of the prior completion by intimation. Nobody therefore was affected by the decision who was not bound to search the records if he desired to know the state of the title. The ground of judgment is put in a sentence by Lord Corehouse in the previous case of *Paul* v. *Boyd* (1835, 13 S. 818, at p. 822), which was followed in that of *Edmond*, where he says that the registered "infeftment on the bond as an instrument of possession may be held as equivalent to intimation." It can hardly be suggested that the bonds in question were instruments of possession to the children adversely to the father.

The remaining question—and this in some respects I think more troublesome—is whether there is any distinction between the first bond and the others, and I have come to the same conclusion with your Lordship that there is none. I agree with Lord Kyllachy that the argument maintained by the second parties, that this was a pure testamentary instrument, was unsound. I think on the face of it it appears to be a deed intended to have present effect, and the right under that bond appears to me exactly the same as under the others. But then the difference is that in this case there is a second trustee, and therefore if it had been admitted that the bond had been communicated to this second trustee, and that he had accepted the trust, there would in my opinion have been a very material difference in the case. In that case there would have been the strongest possible ground for saying that the granter had put it out of his own control and put it into the power of a third person, the second trustee, who had therefore a duty to carry it out.

But then on the statement of facts before us there is no averment that it was so

accepted. The statement is that the instrument was recorded, not by the trustee, the second trustee, but by the truster himself, or, what is the same thing, by the truster's law-agent, and it is not said that Alexander Cameron, the second trustee, ever knew anything about it at all or accepted the trust.

I am therefore of opinion that there is no substantial difficulty on the one point which seems to be the essential point in the case, and that is the question of delivery between the one trustee and others.

LORD STORMONTH DARLING — I concur with your Lordship in the chair.

LORD LOW — The question in this case appears to me to be whether the deceased Donald Cameron, by recording in the Register of Sasines bonds and dispositions in security which he had taken in his own favour as trustee for his children, although the money invested was his own, operated delivery, so as to give the children right to the sums for which the bonds were granted, and to put it out of his power to revoke the trust which he had thereby created.

Generally the question whether the granter of a deed conferring a gratuitous benefit upon another has delivered it so as to put it beyond his power to alter or revoke, is one of intention. Thus he may hand over the deed to a third party, or even to the grantee, but if it appears that he did so only for safe keeping there will be no delivery.

No doubt the act of the granter may be so unequivocal that there is no room for arguing as to his intention. For example, if the gift took the form of a disposition of landed property to the grantee, and the granter recorded it in the Register of Sasines, I think that delivery would be thereby operated. But that is because registration of a disposition is equivalent to infeftment, and under the older law infeftment involved not only the giving of sasine, which was actual, although symbolical, delivery of the land itself, but delivery of the disposition which the granter was bound to produce as his title to demand sasine.

In this case I think that it must be taken as certain that Cameron did not intend that registration of the bond should operate delivery so as to put the money lent beyond his control, because he dealt both with interest and capital (to some extent) as if the sums in the bonds were his own, which he could not have done without committing breach of trust and a fraud upon his children if the bonds had been delivered.

And from Cameron's point of view registration of the bonds did not necessarily involve delivery, because it was required for an entirely different purpose, namely, to complete the security.

It is said, however, that whatever may have been Cameron's intention the registration of the bonds published to all the world that the sums of money for which they were granted belonged to his children, for whom he was trustee. That being so, it was argued, it would be inconsistent with the reliance which the public are entitled to place upon all entries in the public registers to hold that Cameron was entitled to repudiate the trust and claim the trust funds as his own.

At first sight that appeared to me to be a formidable argument, but I think that a sufficient answer is this—the Register of Sasines is a register of lands rights, and its object is to enable anyone interested in a particular property to ascertain what is the state of the title of that property and what are the burdens upon it. Therefore when each of the bonds and their dispositions in security in question was recorded, it seems to me that the fact which was thereby published, and upon which the public were entitled to rely, was, not that Cameron had as trustee for his children lent a certain sum of money to the borrower, but that the property of the latter, which he had disponed to Cameron in security of the debt, was validly burdened with the debt. No doubt an examination of the register would disclose that the bonds were granted to Cameron as trustee for his children, but that is not a matter which falls within the scope and purpose of the register, and therefore, in my judgment, it is not a matter in regard to which the public are entitled to rely upon the faith of the records.

LORD PEARSON — I agree with your Lordship in the chair.

The Court answered the first question of law in the negative and found that that answer superseded the necessity of answering the other questions.

Counsel for the First and Second Parties —G. Watt, K.C.—A. M. Anderson. Agents —Paterson & Salmon, Solicitors.

Counsel for Third Party—Clyde, K.C.—Chree — Macmillan. Agents — Graham, Johnston, & Fleming, W.S.

Tuesday, January 22.

FIRST DIVISION.

(SINGLE BILLS.)

LOCHGELLY IRON AND COAL COMPANY, LIMITED *v.* SINCLAIR.

(*Ante*, 1907, S.C. 3, 44 S.L.R. 2.)

Expenses—Decree in Name of Agent-Disburser—Compensation—Expenses of an Action for Reparation and of an Application for Order to State a Case under Workmen's Compensation Act Arising out of Same Accident—Pars Ejusdem Negotii.

In an action of damages at common law at the instance of a workman against his employers, the defenders were, on 8th July 1905, assoilzied with expenses, on the ground that the workman had already agreed to accept com-