

reasoning in previous cases and by general principles of law, but in which we are not concluded by authority." It was argued that the law as regards assumed trustees in England was statutory, and we were referred to the Act 56 and 57 Vict. cap. 53, sec. 37. This, however, only applies to trustees appointed by the Court.

I am therefore of opinion that question 2 (a) should be answered in the affirmative and the other questions as proposed by your Lordship.

LORD SKERRINGTON—I concur for the reasons explained by your Lordship in the chair.

The Court answered branch (a) of the second question of law in the affirmative, and branch (b) in the negative.

Counsel for the First Party—Anderson, K.C.—Aitchison. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Second Party—Constable, K.C.—C. H. Brown. Agents—E. A. & F. Hunter & Company, W.S.

Counsel for the Third Parties—Cooper, K.C.—Alexander Brown. Agents—Martin, Milligan, & Macdonald, W.S.

Friday, December 5.

## SECOND DIVISION.

[Lord Skerrington, Ordinary.]

### PROVIDENT ASSOCIATION OF LONDON v. COWAN AND OTHERS.

#### *Contract—Ground Annual.*

*Held* that a deed which purported to be a contract of ground annual between a party of the first part and the same party of the second part was void, on the ground that a man cannot by any deed constitute a debt by him to himself.

#### *Right in Security—Real Burden—Constitution of Real Burden—Ground Annual.*

A party attempted to create a ground annual by a deed which purported to be a contract between himself of the first part and himself of the second part. By a second deed he sold, assigned, and disposed to certain trustees the ground annual "to be uplifted and taken . . . in virtue of" the first deed, furth of subjects which by the second deed he thereafter disposed in real security to the trustees. The second deed contained no personal obligation by the disposer. In an action by the trustees against singular successors of the disposer for declarator that under the first and second deeds a ground annual was validly constituted a real burden on the subjects, or alternatively that under the second deed they were infeft in the subjects in real security for payment of a yearly sum of the amount of the ground annual, the pursuers admitted that the first deed was void.

*Held* that the pursuers were entitled to decree in terms of either declaratory

conclusion, on the ground that (1) a ground annual might be constituted a real burden although the deed creating it contained no personal obligation by the granter, and (2) that by the second deed the disposer had warranted the debt he professed to assign, and had also homologated the personal obligation undertaken by the first deed, and had not only disposed the obligation to the pursuers, but had also disposed to them in security thereof the subjects therein mentioned.

Henry Cowan and others, trustees for the time being of the Committee of the General Assembly of the Church of Scotland for the Endowment of Chapels of Ease, *pursuers*, brought an action against the Provident Association of London, Limited, and also against David Livingston Dryburgh and William Gray, both of Edinburgh, being the parties interested in certain heritable subjects in Gilmore Place, Edinburgh, to which they acquired rights at a date subsequent to the date of the recording of the deeds hereafter mentioned, *defenders*, in which the conclusions were for declarator "that under and in terms of (1) contract of ground annual between Peter Simpson, S.S.C., Edinburgh, heritable proprietor as therein mentioned, of the one part, and the said Peter Simpson of the other part, dated 3rd, and recorded in the Division of the General Register of Sasines applicable to the county of Edinburgh 6th, both days of December 1883, and (2) disposition and assignation by the said Peter Simpson in favour of . . . the said Committee of the General Assembly of the Church of Scotland . . . dated 8th, and recorded in said Division of the General Register of Sasines 11th, both days of December 1883, . . . or otherwise and *alternatively* under and in terms of the said disposition and assignation, a ground annual of £4, 5s. 11d., to be uplifted and taken furth of and from all and whole that piece of ground on the south side of Gilmore Place, Edinburgh, . . . being the subjects disposed in the third place in the above-mentioned disposition and assignation, was validly and effectually constituted a real burden on the said subjects, and that the pursuers as trustees foresaid are now in right thereof; or otherwise and *alternatively* . . . that under and in virtue of the said disposition and assignation the pursuers and their successors in office as trustees for behoof of said committee are validly and effectually infeft, as from the date of recording the said disposition and assignation, in the said piece of ground, and that in real security for the payment by the said Peter Simpson and his heirs and executors and personal representatives whomsoever to the pursuers and their successors in office as trustees foresaid of the yearly sum of £4, 5s. 11d. payable half-yearly in perpetuity, commencing the first term's payment at the term of Whitsunday 1884 for the half-year preceding, and the next term's payment at Martinmas thereafter, and so forth at the said two terms in all time coming." [The italicised words were added by way of amendment.]

The pursuers averred, *inter alia*—“(Cond. 1) By the contract of ground annual referred to in the summons the said Peter Simpson, S.S.C., as heritable proprietor of the areas of ground therein referred to, disposed to himself said areas of ground, and, *inter alia*, in the third place, ‘all and whole that piece of ground on the south side of Gilmore Place upon which the self-contained dwelling-house forming No. 55 thereof is built, with the plot in front thereof and the garden ground behind,’ and bounded as therein stated. Said disposition was granted under the declaration that the said pieces of ground were disposed under the real and preferable lien and burden of the payment by the said Peter Simpson of the second part, and his heirs and assignees, to the said Peter Simpson of the first part, and his heirs and assignees whomsoever, of the ground annuals therein mentioned, and, *inter alia*, of a ground annual of £4, 5s. 11d. sterling to be uplifted and taken by the said Peter Simpson of the first part and his foresaids furth of and from the said subjects disposed in the third place. Further, the said Peter Simpson of the second part took himself and his foresaids personally bound for payment of said ground annuals, and for further security to the said Peter Simpson of the first part and his foresaids of the payment of the ground annuals, assigned and disposed to and in favour of the said Peter Simpson of the first part and his foresaids, not only the said ground annuals, but also the said pieces of ground and the buildings erected or to be erected thereon in real security of the payment of the said yearly ground annuals, all as more fully set forth in said contract of ground annual. . . . (Cond. 2) By the disposition and assignation referred to in the summons, the said Peter Simpson disposed to the predecessors in office of the pursuers, as trustees for behoof of the said Committee of the General Assembly of the Church of Scotland for the Endowment of Chapels of Ease, the said ground annuals created by the foresaid contract of ground annual, and, *inter alia*, the ground annual of £4, 5s. 11d. over the subjects at 55 Gilmore Place, and thereby assigned to the pursuers’ said predecessors all right and interest competent to him under the said contract of ground annual.”

The pursuers pleaded—“In respect that under and by virtue of the deeds libelled, or otherwise and alternatively under the deed second libelled, a ground annual of £4, 5s. 11d. to be uplifted from said subjects at 55 Gilmore Place, Edinburgh, was validly and effectually constituted a real burden on the said subjects, and that the pursuers, as trustees foresaid, are now in right thereof, the pursuers are entitled to decree of declarator as craved.”

The *disposition and assignation* was as follows:—“I, Peter Simpson, Solicitor before the Supreme Courts, Edinburgh, in consideration of the sum of £702, 3s. 1d. sterling, now paid to me by the General Assembly of the Church of Scotland’s Committee for the endowment of Chapels of Ease, by the hands of George Baillie Wilson, their treasurer, of which sum I hereby

acknowledge\* the receipt, and discharge the said committee, do hereby, sell, assign, and dispose to and in favour of Thomas Graham Murray, Writer to the Signet, convener, the Reverend Henry Cowan, minister of New Greyfriars, Edinburgh, vice-convener, and the said George Baillie Wilson, treasurer of the said committee, and to their respective successors in office, any two of them being a quorum, as trustee for behoof of said committee, and to their assignees whomsoever, heritably and irredeemably, not only the yearly ground annuals following, *videlicet*, of £4, 5s. 11d. sterling, to be uplifted and taken by the said Thomas Graham Murray, the Reverend Henry Cowan, and George Baillie Wilson, and their respective successors in office, as trustees foresaid, and their assignees and disponees, in virtue of a contract of ground annual entered into between me, the said Peter Simpson, on the one part, and me, the said Peter Simpson, on the other part, dated the 3rd, and recorded in the Division of the General Register of Sasines applicable to the county of Edinburgh the 6th, both days of December 1883, furth of and from each of the pieces of ground after disposed in the first, second, third, and fourth places, and whole houses and buildings erected or to be erected thereon, or furth of any part or portion thereof, and readiest rents, maills, and duties of the same; . . . commencing the first term’s uplifting of said respective ground annuals at the term of Whitsunday 1884 for the half-year preceding, and the next term’s uplifting at Martinmas thereafter, and so forth at the said two terms in all time coming, and with penalty, interest and consequents, all as specified in the said contract of ground annual, and herein held as repeated *brevitatis causa*, with the said contract itself and whole clauses and obligations therein contained, and all action, diligence, and execution competent; but also . . . In the third place, all and whole that piece of ground on the south side of Gilmore Place upon which the self-contained dwelling-house forming No. 55 thereof is built, with the plot in front thereof and the garden ground behind. . . . which subjects above disposed lie within the parish of St Cuthberts and county of Edinburgh, and form part of all and whole the lands and others specified and contained in [*Here followed an enumeration of certain deeds recorded in the General Register of Sasines*], with the pertinents of the said several pieces of ground hereby disposed, and my whole right, title, and interest, present and future, therein; but always with and under the real liens, burdens, declarations, conditions, obligations, provisions, and limitations specified in the said contract of ground annual dated and recorded as aforesaid; and that in real security to the said Thomas Graham Murray, the Reverend Henry Cowan, and George Baillie Wilson, as trustees foresaid, and their foresaids, of the payment of the said yearly ground annuals, half-yearly payments thereof, interest and penalties before specified or referred to, and of the performance of the obligations and prestations incumbent on the

said second party to the said contract of ground annual: With entry as at the term of Martinmas 1883 notwithstanding the date hereof: And I have herewith delivered to my said disponees an extract of the said contract of ground annual: And I bind and oblige myself, and my heirs, executors, and representatives whomsoever, and the party or parties to whom I may ultimately deliver the same, to make the prior writs of the said piece of ground forthcoming to my said disponees and their fore-saids on all necessary occasions upon a receipt and obligation for redelivery of the same within a reasonable time. In witness whereof." . . .

On 12th November the Lord Ordinary (SKERRINGTON) pronounced an interlocutor in which he allowed the pursuers to amend the summons *ut supra*, and having considered the cause, found and declared in terms of the second alternative conclusions of the summons, and *quoad ultra* dismissed the conclusions of the summons.

*Opinion.*—"The pursers ask for declarator that a ground annual of £4, 5s. 11d. has been validly and effectually constituted a real burden over certain heritable subjects now belonging to the defenders, and that the pursuers are now in right thereof. They found primarily upon a so-called contract of ground annual, dated 3rd, and duly recorded in the Register of Sasines 6th, December 1883. This deed professes to create a number of ground annuals affecting various properties, but the present action is concerned only with one ground annual, which was intended to form a burden upon the subjects disposed in *the third place*. The so-called contract is in the elaborate and artificial form usually adopted in transactions of this kind. The owner of the heritable subjects sells them to a purchaser in consideration of the ground annual and other prestations undertaken by the purchaser, and he disposes the subjects to the purchaser under the real burden of the payment of a yearly ground annual and also of the maintenance and insurance of the buildings, &c. On his part the purchaser binds himself personally to pay the ground annual and to perform the other prestations. In security for these personal obligations he disposes to the seller not only a yearly ground annual of the same amount as that already reserved, but also the heritable subjects themselves. In the present case, however, it is apparent upon the face of the deed that the transaction which it professes to record was imaginary and non-existent, because the so-called seller and the so-called purchaser were one and the same person, viz., Peter Simpson, S.S.C., Edinburgh, heritable proprietor of the areas of ground hereinafter disposed, *of the first part*, and the said Peter Simpson *of the second part*. It follows that the so-called contract is null and void in all its clauses. In particular, the new infestment in favour of Mr Simpson and the qualification of that infestment by the real burden of a ground annual in his own favour are nullities. Even if the deed had not taken the form of a meaningless contract, the practical result so far as

regards the present question would have been the same. Mr Simpson could competently dispose his property to himself as institute, and he could, I assume, qualify this new infestment by reserving what Mr Duff calls a 'real lien' in favour of a third party—Feudal Rights, sec. 136 (2)—but he could not effectually create a real burden in his own favour either by reservation or by constitution so as to affect a heritable subject of which he was absolute owner, any more than he could create a servitude in his own favour. It is, of course, a different question whether a ground annual which has once been effectually created is extinguished, or, on the other hand, is only suspended in the event of the person vested in the minor right or burden acquiring the higher right of property. See *Murray v. Parlane's Trustee*, December 18, 1890, 18 R. 287, 28 S.L.R. 223; *King v. Johnston*, 1908 S.C. 684, 45 S.L.R. 533.

"For the foregoing reasons, I am of opinion that the so-called contract of ground annual did not effectually create any real burden over the subjects now belonging to the defenders. Accordingly Mr Simpson remained absolute owner of the heritable subjects under his original title until his death in 1906.

"It now remains to consider the effect of the disposition and assignation, dated 8th, and recorded in the General Register of Sasines 11th December 1883, which he granted in favour of the pursuers in consideration of the payment of £702, 3s. 1d. It is obvious that when this deed was granted and accepted both parties had in view nothing more than a transfer to the pursuers of the rights which they assumed to be vested in Mr Simpson as the first party to the contract of ground annual already referred to. It does not, however, follow that a disposition of heritage may not operate in a manner different from that which the parties had in view provided it contains words *habile* to effect some other operation. Thus a bond and disposition in security which was granted by a person who was believed to have a feudal title to the subjects, and which was intended to create an ordinary heritable security, was held to operate as an assignation of a *jus crediti*, which was all that the granter had to convey, and the recording of the bond was held to operate as intimation of the assignation.—*Edmond v. Gordon*, November 16, 1885, 18 D. 47; *aff.* February 26, 1888, 20 D. (H.L.) 5, 3 Macq. 116.

"By the disposition and assignation in the present case Mr Simpson sold, assigned, and disposed to the pursuers, 'heritably and irredeemably, not only the yearly ground annuals following, *videlicet*, of £4, 5s. 11d. sterling, to be uplifted and taken by the said Thomas Graham Murray, the Reverend Henry Cowan, and George Baillie Wilson and their respective successors in office, as trustees foresaid, and their assignees and disponees, in virtue of a contract of ground annual entered into between me the said Peter Simpson on the one part and me the said Peter Simpson on the other

part, dated the 3rd, and recorded in the Division of the General Register of Sasines applicable to the county of Edinburgh the 6th, both days of December 1883, furth of and from each of the pieces of ground after disposed in the first, second, third, and fourth places, and whole houses and buildings erected or to be erected thereon or furth of any part or portion thereof, and readiest rents, maills, and duties of the same. . . . Commencing the first term's uplifting of said respective ground annuals at the term of Whitsunday 1884 for the half year preceding, and the next term's uplifting at Martinmas thereafter, and so forth at the said two terms in all time coming, and with penalty, interest, and consequents, all as specified in the said contract of ground annual, and herein held as repeated *brevitatis causa* with the said contract itself, and whole clauses and obligations therein contained, and all action, diligence, and execution competent, but also. . . . In the Third Place, All and whole' the subjects now belonging to the defenders. . . . 'with the pertinents of the said several pieces of ground hereby disposed, and my whole right, title, and interest, present and future, therein, but always with and under the real liens, burdens, declarations, conditions, obligations, provisions, and limitations specified in the said contract of ground annual, dated and recorded as aforesaid: And that in real security to the said Thomas Graham Murray, the Reverend Henry Cowan, and George Baillie Wilson, as trustees foresaid, and their foresaids, of the payment of the said yearly ground annuals, half-yearly payments thereof, interest and penalties before specified or referred to, and of the performance of the obligations and prestations incumbent on the said second party to the said contract of ground annual: With entry as at the term of Martinmas 1883 notwithstanding the date hereof.'

"I do not think that it is possible to construe the foregoing conveyance of a ground annual as constituting and creating a new ground annual, or as anything more than an assignation to the pursuers of the ground annual (by reservation) which Mr Simpson had attempted to create by the contract of 3rd December 1883, and of the relative personal obligations, and of the ground annual which he had attempted to constitute by way of security. These supposed rights being non-existent, the disposition and assignation was to that extent inoperative. I am, however, of opinion that the disposition and assignation, being an onerous deed, contained not expressly but by implication an unqualified acknowledgment on the part of Mr Simpson to the effect that he stood from its date debtor to the pursuers for payment of the ground annuals and performance of the various prestations undertaken by him as the second party to the so-called contract in his own favour as the first party. Mr Simpson could not, in my opinion, have successfully disputed his personal liability for the ground annual and prestations in a question with the pursuers. It is true

that he did not of new bind and oblige himself to pay the ground annuals and to perform the prestations, but an acknowledgment of indebtedness is sufficient to constitute a debt and to give validity to a conveyance of heritable subjects in security thereof. If the true construction of the disposition and assignation is what I have stated, then it is immaterial that the present question arises with singular successors, because the deed was duly recorded in the Register of Sasines, and it was their duty to make up their minds as to its meaning and effect. The granter had the full and unrestricted right of property in the subjects now belonging to the defenders, and he conveyed them to the pursuers in security for certain pecuniary and other obligations incumbent on him as 'the second party to the said contract of ground annual.' The disposition and assignation itself sets forth plainly and fully the amount of the ground annuals for which Mr Simpson acknowledged liability, the terms of payment, and the lands affected. It is, however, doubtful whether apart from statute the intended security is not ineffectual so far as regards the interest and penalties, and the various obligations *ad factum prestandum*, as regards all of which the disposition and assignation is insufficient in detail when taken by itself, and in regard to which it must be supplemented by a reference to the recorded contract of ground annual. Probably the defect (if any) is cured by section 32 of the Conveyancing (Scotland) Act 1874, but the question was not fully argued, and it hardly arises under the conclusions as framed.

"I am prepared to affirm that the ground annual mentioned in the summons is in a certain sense a real burden over the defenders' property, but I prefer to pronounce a decree declaring that under and in virtue of the disposition and assignation mentioned in the summons the pursuers, as trustees, and their successors in office and their assignees whomsoever, hold a valid and effectual conveyance of the heritable subjects described in the summons in real security for the payment by the late Peter Simpson, S.S.C., Edinburgh, of the yearly ground annual of £4, 5s. 11d., payable half-yearly, commencing the first term's payment at the term of Whitsunday 1884 for the half year preceding, and the next term's payment at Martinmas thereafter, and so forth at the said two terms in all time coming."

The defenders reclaimed, and argued—The first deed was admittedly inept to constitute a ground annual, because the so-called seller and the so-called purchaser were one and the same person. Accordingly the second deed could not operate an assignation of a ground annual, because it assigned something which had never been constituted, and the disposition in security was a disposition of something which did not exist. Nor did the second deed itself constitute a ground annual. It did not purport to do so, and it contained no personal obligation, and a personal obligation could not be implied—*Magistrates of*

*Arbroath v. Dickson*, March 19, 1872, 10 Macph. 630; *Ballachullish Slate Quarries v. Menzies and Others*, May 14, 1908, 45 S.L.R. 667; *Magistrates of Perth v. Stewart*, December 18, 1830, 9 S. 225; *Magistrates of Perth v. Stewart*, July 11, 1835, 13 S. 1100. *Edmond v. Gordon*, November 16, 1855, 13 D. 47, February 26, 1858, 20 D. (H.L.) 5, 3 Macq. 116, and the Scots cases founded thereon, were different, because in them the transactions dealt with were real transactions. *Glasgow Feuing Company, Limited v. Watson's Trustees*, March 11, 1887, 14 R. 610, 24 S.L.R. 429, was also different, because in that case the Court did not constitute a real burden by setting up a defective deed; it merely corrected an error which had slipped into a plan. The English cases cited *infra* by the respondents only went to show that as between parties the Court would give effect to what was substantially the contract between them. When the respondents took the disposition and assignation they knew that the first deed was void. Accordingly so far as regards equity they could not claim to be in a more favoured position than the reclaimers.

Argued for the respondents—The respondents had paid a full price for the ground annual. Accordingly on grounds of equity the Court would be slow to hold the ground annual to be invalid. Moreover, even if the constitution of the ground annual were defective, the reclaimers' previous knowledge barred them from founding on their title to the effect of repudiating the ground annual—*Stodart v. Dalzell*, December 16, 1876, 4 R. 236, 14 S.L.R. 164. The intention of the parties appearing on the face of the deed was that a valid right should be created to uplift a ground annual which should be constituted a real burden on the land, and the deed should be so construed as to give effect to the intention of the parties as nearly as the circumstances permitted—Norton on Deeds, p. 46; *Edmond v. Gordon* (*cit. sup.*); *M'Cutcheon v. M'William*, March 8, 1876, 3 R. 565, 13 S.L.R. 358; *Glen v. Scales' Trustee*, December 15, 1881, 9 R. 317, 19 S.L.R. 201; *Cattanach's Trustee v. Jamieson*, June 25, 1884, 11 R. 972, 21 S.L.R. 661; *Glasgow Feuing and Building Company, Limited v. Watson's Trustees* (*cit. sup.*); *Glen's Trustees v. Lancashire and Yorkshire Accident Insurance Company, Limited*, June 14, 1906, 8 F. 915, 43 S.L.R. 684; *Goodtitle v. Bailey*, May 2, 1777, 2 Cowper 597, *per* Lord Mansfield at 600; *Monypenny v. Monypenny*, January 31, 1859, 3 De G. & J. 572, *per* L. Ch. Chelmsford at 589; *Gwyn v. Neath Canal Navigation Company*, May 23, 1868, L.R., 3 Ex. 209; *Johnston Foreign Patents Company, Limited, in re J. P. Trust, Limited v. The Same*, [1904] 2 Ch. 234, *per* Vaughan Williams, L.J., at 246. *Magistrates of Arbroath v. Dickson* (*cit. sup.*) was different, because in that case there were no words clearly implying that the payments were real burdens. (1) The disposition and assignation of itself validly constituted a ground annual by a direct grant. A ground annual could be so constituted. The normal method of constituting a bond of annual rent used to be by a

disposition—Jur. Styles (3rd ed.), vol. i, 216 and 218. Later on, after the old form of infeftment had disappeared, the method of constituting a ground annual continued to be by a direct disposition—Jur. Styles (4th ed.), vol. i, pp. 631, 634, and 660. Duff's Feudal Conveyancing, pp. 262 and 273, was also referred to. It was not essential to the valid constitution of a ground annual that it should contain a personal obligation. Originally ground annuals did not contain personal obligations—Mont. Bell's Conveyancing (3rd ed.), vol. ii, p. 1155. The fact that the disposition and assignation referred back to a deed which was void did not prevent the disposition and assignation from being itself a good deed. (2) By the latter part of the second deed there was a good conveyance of a debt acknowledged by the second deed to be due, and it was competent to refer back to the first deed to ascertain the details of the burdens constituted by the disposition and assignation—the Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 32. The words "to be uplifted and taken . . . in virtue of a contract of ground annual," occurring in the disposition and assignation, were merely a *falsa demonstratio* and did not affect its validity. An assignation implied a warranty that the debt assigned was properly constituted—Bell's Prin., sec. 1469; Bell's Comm., vol. i, p. 689. Accordingly the assignation adopted the original contract contained in the first deed. (3) In any event the disposition and assignation contained a conveyance in security of a debt stated by the document itself to be a ground annual due furth of the lands. The document contained, apart altogether from the first deed, the essential elements of a ground annual, viz., (a) a statement as to the amount, (b) a statement as to the party to whom the sum should be paid, (c) words clearly implying that the lands were to be affected by the real burden, (d) a full description of the lands, and (e) the due entering of these particulars in the records. No other elements were required—Bell's Prin., sec. 861.

At advising—

LORD DUNDAS—The question here raised is whether the pursuers have a good real security upon the property of the defenders for a ground annual of £4, 5s. 11d. per annum. The case, however, involves a larger pecuniary amount than would thus appear; because there are other ground annuals, the validity of which will stand or fall according to our decision.

It is quite clear that the attempt made by Mr Simpson to create these ground annuals by means of a so-called contract with himself was ineffectual. A man cannot by any deed constitute a debt by himself to himself with or without security. The so-called contract—a piece of conveyancing which I confess I do not appreciate at all—is plainly inept and void as an operative instrument. The real question arises upon the second deed, whereby Mr Simpson for onerous causes sold, assigned, and disposed to the pursuers not only (*inter alia*) the ground annual in question—which he and they

appear to have thought he had created by his former deed—but also the lands of which (upon the assumption that the first deed was invalid) he was unrestricted owner, in real security of the ground annual so conveyed.

It was very forcibly argued for the defenders that inasmuch as the first deed was admittedly inept, and had not constituted any ground annual at all, it follows that there was no ground annual to be transmitted by the second deed, which accordingly carried nothing whatever to the pursuers. The pursuers, on the other hand, while not attempting to support the validity of the first deed as creating a ground annual, or anything at all, maintained (1) that a ground annual may quite well be constituted a real burden on land without any personal obligation; and that, disregarding the first deed altogether, the second deed did by its own effect create a valid real burden, by way of ground annual or perpetual rentcharge, in their favour; and alternatively (2) that, although the first deed was inept as a contract between Mr Simpson and the pursuers, yet by the second deed Mr Simpson did by plain implication adopt and re-enact the personal obligation ineptly undertaken by the first deed to the effect of binding himself and his heirs for payment of the ground annual to the pursuers, and did further dispose to them, in security of the obligation, the lands which, on the assumption that the first deed was ineffectual, belonged absolutely to himself. The Lord Ordinary's interlocutor gives effect only to the second of the pursuers' alternative contentions. I think they would be entitled to succeed upon either of them.

A ground annual is a right of very ancient origin. It appears to have been resorted to only where subfeu rights were not available, either because the lands were held on burgage tenure or because the titles expressly prohibited subinfeudation. But "ground annual" is not a *vox signata*; I think it simply means a perpetual rentcharge secured in some effectual fashion as a real burden on land. That the second deed was designed to transfer, not to create, the charge, is clear; but none the less, I think (differing in this from the Lord Ordinary) that it is by its own terms sufficient to create such a charge. It is not doubtful that charges for money, either for principal sums or by way of annuity, may be secured upon land without any personal obligation at all. Bonds of annuity under the Aberdeen Act afford a familiar example of this; and indeed, as regards ground annuals themselves, the practice of introducing a personal obligation and disposition in security is, I apprehend, of comparatively recent origin—(see, e.g., *Mont. Bell Conv.* (3rd ed.) pp. 1156-7). If, then, an owner of land shall, by deed and for a price, sell and dispose to another a ground annual of a definite sum per annum to be uplifted and taken from the land at specified terms in each year in all time coming, I think that such a deed would constitute a valid real burden for the said amount. The present case is not precisely that which I have figured; because the second deed does

throughout refer to the ground annual as to be uplifted and taken "in virtue of" and "as specified in" the former (admittedly inept) deed. But I do not think the mere fact of such reference,—manifestly introduced because the parties thought they were transferring a right already created,—is sufficient to render void and ineffectual the second deed, the terms of which are otherwise quite sufficient to constitute as well as to transfer the charge. The question is not what was intended to be effected by the deed, but what was legally effected by it. The Lord Chancellor (Chelmsford) in *Monypenny v. Monypenny*, (1859) 3 De G. & J. 572, said—"It is undoubted law that a deed that is intended and made to one purpose may enure to another, for if it will not take effect that way it is intended it may take effect another way"; and there are numerous decisions, Scots and English, to that effect. I should be prepared, therefore, to hold that the pursuers are entitled to decree in terms of the alternative branch of the first conclusion of their summons.

But I think that the second conclusion introduced by amendment as alternative to the whole of the first conclusion, is also well founded. The Lord Ordinary has given effect to it, and I agree with him. Mr Simpson professed by the second deed to assign to the pursuers for value certain obligations undertaken by himself to himself. One who professes to assign a debt to another for value is held to warrant *debitum subesse*, and the cedent is thus himself personally liable to the assignee for the amount of the debt, even if in fact there was no debt due to the cedent. That seems to be the case here. I think that, upon a fair reading of the second deed, Mr Simpson did by it render himself and his heirs debtors to the pursuers in the personal obligation contained in the so-called contract which he purported to assign; and that, in a question with himself, the pursuers were entitled to hold him and his heirs to performance of that obligation. I consider further that the second deed amounts to an adoption and homologation by Mr Simpson of the personal obligation contained in the first deed; and he disposed not only this obligation but also the lands in real security thereof. It seems to me, therefore, that the lands are validly charged with the real burden of this annual payment to the pursuers, although they have passed into the hands of the defenders as singular successors.

For these reasons, I am for adhering to the interlocutor reclaimed against. The pursuers' counsel were careful to explain that they were content with that interlocutor, and did not reclaim against it, though they argued that if the Court were not prepared to sustain the Lord Ordinary's basis of judgment they were entitled, in that event, as I think they would be, to decree in terms of the alternative branch of the first conclusion of their summons.

The LORD JUSTICE-CLERK and LORD GUTHRIE concurred.

LORD SALVESEN was not present.

The Court adhered.

Counsel for the Respondents (Pursuers)—  
Constable, K.C.—D. M. Wilson. Agents—  
Menzies & Thomson, W.S.

Counsel for the Reclaimers (Defenders)  
The Provident Association of London, Limited—  
Chree, K.C.—Lippe—Dykes. Agents  
—Mackenzie & Fortune, S.S.C.

Counsel for the Reclaimers (Defenders)  
David Livingstone Dryburgh and William  
Gray—Chree, K.C.—Lippe—Dykes. Agent  
—James P. Niven, Solicitor.

Saturday, December 6.

SECOND DIVISION.

[Lord Dewar, Ordinary.]

COUPER v. LORD BALFOUR OF  
BURLEIGH.

(See also *ante*, 50 S.L.R. 320; 1913 S.C. 492.)

*Reparation—Slander—Privilege—Malice—  
Deliberate Falsehood and Fabrication  
of Charges—Recklessness—Repetition—  
Refusal to Apologise.*

In an action of damages for slander, A, the matron of a county hospital, averred that B, a local ratepayer, had transmitted to the county clerk certain charges of professional misconduct against her by letter, in which he further expressed the opinion that if the charges were true A was guilty of criminal conduct. She further averred that these charges, having been held groundless after two inquiries instituted by the Hospital Committee and the Local Government Board at B's request, B transmitted by a second letter further charges against her to the Local Government Board and obtained a third inquiry, which also exonerated her with regard to the first letter. She further averred that the defender had made certain statements, therein contained, without any information, hearsay or otherwise, as to them and without regard to whether they were true or false, and that, when he moved for the second inquiry he had received information which showed that they were false. With regard to the second letter she further averred that the defender made the statements in it recklessly and in the knowledge that they were false and to gratify his resentment and ill-will, that he "deliberately invented" certain of the statements, and that from the information in his possession he knew the statements made in the letter were untrue. She averred further that, notwithstanding the result of the inquiries, the defender refused to withdraw the charges or to apologise. It being admitted that the occasion was privileged, held that the averments were relevant to infer malice on the part of B, and issues allowed.

*Reparation—Slander—Issue—Innuendo.*

B, a local ratepayer, brought certain charges against A, the matron of a county hospital, in connection with the management of the hospital, and in acknowledging the receipt of the report of an inquiry which had exonerated A he wrote—"I wish to say that, so far as I am concerned, I have but a languid interest in the question of which members of the staff lied the most." A having brought an action of damages for slander against B, in which she sought to innuendo these words as representing that she had lied in giving evidence in the inquiry, held (*rev. judgment of Lord Dewar, Ordinary*) that the words could not bear the innuendo sought to be put on them.

Elizabeth Birnie Couper, matron, Clackmannan Combination Infectious Diseases Hospital, Alloa, *pursuer*, brought an action against the Right Honourable Alexander Hugh Bruce, Baron Balfour of Burleigh, residing at Kennet, Alloa, *defender*, in which she claimed £2000 damages for slander.

The pursuer averred, *inter alia*—" (Cond. 1) The pursuer is matron of the Clackmannan Combination Infectious Diseases Hospital, Alloa. She has occupied that position for seven years to the entire satisfaction of the Hospital Committee, her employers. The hospital is administered by a committee of management who are nominated by the County Council of Clackmannan and the burghs of Alloa, Alva, Tillicoultry, and Dollar. (Cond. 2) On 15th July 1911 two children, Rose and Carlos Forbes, aged respectively six and three years, were admitted to the hospital, being notified by Dr James Robertson, Clackmannan, their family medical attendant, as suffering from scarlet fever, and were placed in the scarlet fever ward. On 31st July a Mrs Comrie was admitted to the hospital suffering from scarlet fever and died next day in the hospital. Carlos Forbes died in the hospital on 21st August 1911. (Cond. 3) On or about 1st September 1911 the defender, without communicating in any way with the said Hospital Committee, addressed the following letter to James Whitehead Moir, Solicitor, Alloa, Clerk to the County Council of Clackmannanshire, namely:—'Kennet, Alloa, Sept. 1, 1911.—Dear Mr Moir,—I desire to lay before you the following statement of facts, and beg the favour that a stringent inquiry will be made into the whole circumstances, which seem to me to reflect very seriously on the management of the County-Fever Hospital. On Saturday, July 15th, two children of my overseer, Mr R. Forbes (Rose and Carlos being the Christian names), were taken to the hospital. They were both suffering from scarlet fever of a very mild type. Both were out of bed and progressing to a favourable recovery when seen by their parents on August 5. On August 11th Rose was sent home said to be cured, but on the following day or on the 13th she developed serious fever and had to be again taken to the hospital. This