her husband. There are other general and vague averments that the husband was aware that his wife held herself out as entitled to act on that footing. That is too general an averment as the foundation, or even part of the foundation, of a plea of bar. But suppose we take that in connection with what is said to have been done. We are told that this lady stated to her brother that she was in a position to assign to him without the consent of her husband; and her brother, being an English lawyer, says he took on himself to read and construe for himself the marriage settlement by which her rights were determined, going on her assurance as to the law of Tuscany, and his own judgment as to the meaning of the marriage-contract, and on that footing being satisfied that his sister could assign. That is not a good foundation for a plea in bar. If this lady could not assign without the consent of her husband, it follows that the representations which she made were as incapable of rearing up any obligation against her as the assignation itself.

This case has been likened to that of a minor approaching majority, who represents that he is major, and on that footing induces parties to contract with him. There is no resemblance between the cases, because in the case of a minor there is a plain misapprehension of fact, which must be assumed to be caused for the purpose of deceit, and no man, even though a minor, and therefore in many ways specially under the protection of the law, can take advantage of his own deceit for getting the better of them. But that case is entirely different from the case where the invalidity of a deed arises from the incapacity of a married woman to contract without the consent of her husband, and I arrive without any difficulty at the conclusion that the allegations here are insufficient to sustain the defence.

Lord Deas—I am clearly of the same opinion. This assignation is challenged on the ground that it is invalid without the consent of the husband. Admittedly the question must be governed by the law of Tuscany. That law has been ascertained, and by it the deed is invalid, not having the consent of the husband. All that is stated against that conclusion is the vague averment in the second statement by the defender, that the wife was in the habit of acting as if her husband had no right of administration or otherwise in her estate, and that the husband knew that his wife so acted. There is no averment of that sort with reference to this particular assignation; but that is of no importance, for whether she made these representations or no, or whether she made them in good or bad faith, the result is the same, that these representations are no more binding than the writing which they are said to validate. It is not said that that question depends on the law of Tuscany. If that were maintained, then there must have been an averment of the law of Tuscany on that point. There is no such averment, and we must therefore assume that it is immaterial which law we apply.

Lord Ardmillan—I am of the same opinion. It is said that at the date of this assignation the granter was a married woman residing in Italy; that her husband did not consent to it; and that by the law of Italy his consent was necessary. We have ascertained that that statement of the foreign law is correct. But the defender answers that there is a plea in bar which arises for the determination of the Scotch Court, namely, that in respect of the conduct of the lady and the representation which she made, she cannot maintain her plea against the deed. I agree in the view stated by the reclaimer, that that plea is one for this Court to dispose of, and that it does not fall under the rule which applies to the plea of invalidity of the deed. But the question being one of Scotch law, I agree in holding that the plea of bar is not well founded.

Lord Kinloch—I am of the same opinion. The determination of this case depends on the question whether there is or is not a valid assignation of the annuity. All the parties admit that this question must be determined by the foreign law; and we have the opinion of a foreign lawyer that the deed is invalid for want of the husband's consent.

But it is said that this lady represented that the assignation could be validly made, and is therefore personally barred from maintaining its invalidity. It is not said that she made that representation fraudulently, or in order to take advantage of any one. For anything in the defender's averments, the representation was made *bona fide;* and that consideration might itself go far to exclude the plea of personal bar. But I agree that, in any view, the plea cannot be sustained; for it simply comes to this, that she who could not validly grant an assignation could validly contract that a good assignation should be granted. It appears to me that she was as much excluded from making such a contract without her husband's consent, as she was barred from making the assignation itself. The one proposition seems necessarily involved in the other. I am therefore of opinion that the plea of personal bar cannot be given effect to.

Agent for Pursuer—Wm. Mitchell, S.S.C.
Agent for Defender—Colin Mackenzie, W.S.

Thursday, January 14.

FERGUSON *v.* ROBERTSON AND OTHERS.

Trust—Testamentary Trustees — Guardian—Discretionary Power— Custody of Pupil — Factor loco tutoris*—Expenses.* Where trustees are empowered by the truster to fix what part of the income of the trust-estate shall be appropriated for the maintenance and education of the child or children of the marriage, the Court will not interfere with the exercise of that discretion by the trustees unless they abuse the power vested in them.

The late David Ferguson, by his marriage-contract, and by a subsequent deed, assigned certain funds to trustees, declaring, *inter alia,* that it should be lawful for them, after the death of the survivor of himself and his wife, "to apply any part of the yearly or other income of the share or shares to which my minor or unmarried child or children of the said intended marriage shall be presumptively entitled in the trust-premises for his, her, or their maintenance and education, until such, his, her or their, share or shares shall become vested, or he, she, or they shall die, with power for the said trustees or trustee, in their or his discretion, to pay the monies so intended for maintenance and education to the guardian or guardians of the person or persons for whose maintenance and education the same is intended, for the purpose of being so applied; and the surplus income (if any) shall be invested by the said trustees or trustee, in their or his names or name, in or upon any of the funds,

stocks, or securities hereinbefore mentioned, and be allowed to accumulate by way of compound interest, and shall go in augmentation of the share or shares producing the same, but so that the surplus income of any one or more preceding year or years; and such accumulated fund shall be applicable to any subsequent period to the maintenance and education of the child or children from whose presumptive share or shares the same arose."

There was only one child of the marriage. Fergus David Ferguson, born in 1858. In 1860 Ferguson's wife died. In the following year he married the pursuer. In 1865 he died, leaving a small heritable property yielding about £50 per annum, and moveable property to the amount of about £8000. After Ferguson's death, his son resided with his stepmother, the pursuer. The maternal grandfather of the pupil petitioned the Court for a change of custody, but the petition was refused, with expenses. The pursuer now brought this action against Robertson, the factor *loco tutoris* of the pupil, appointed for the management of the heritable estate, and against the trustees, for the purpose of obtaining an allowance of £100 per annum for the maintenance and education of the pupil, so long as he continued to reside with her. The pursuer stated that hitherto the father had only paid her an allowance at the rate of £60 per annum, he alleging that the funds under his control would not afford a higher allowance, and refusing to take any steps to have the allowance increased by the trustee.

The factor, in his defence, admitted that he had only paid the pursuer the allowance of £60 per annum, together with some extra sums for medical attendance, but contended that that rate of allowance was sufficient. So far from having any funds in his hands, he was considerably in advance on the pupil's account.

The trustees alleged that—"The pursuer never made any arrangement or agreement with the present defenders regarding the board and education of the pupil, or regarding any allowance to be made therefor. The present defenders never agreed to pay the pursuer any sum whatever for the board and maintenance of the pupil, and until the present action was raised she never made any demand upon the defenders. The pursuer has not maintained the pupil under any agreement, expressed or implied, with the present defenders, that they would recompense her or pay her board. After the appointment of Mr Robertson as factor *loco tutoris* to the pupil, some communings took place between Mr Robertson and the present defenders, in the course of which Mr Robertson requested the present defenders to pay over to him, to be applied for behoof of the pupil, a portion of the annual revenue accruing on the funds in the defenders' hands. This request the defenders thought reasonable; and, after full consideration of the whole circumstances, taking into account the revenue available to the defenders, the separate estate and revenue in the hands of the factor *loco tutoris*, and the age and position of the pupil, the defenders agreed to pay the factor £70 per annum, to be applied by the factor for the pupil's behoof. This agreement was come to in the exercise of the discretionary powers vested in the defenders by the marriage-contract, and was a fair and sound exercise of that discretion. The said sum of £70 per annum was accepted by the factor, and the agreement has been acted upon down to the present time. The payments have been regularly made quarterly in advance, from the date of Mr Ferguson's death down to the present time, the last payment by the defenders to the factor being on 30th April 1868. These payments are in full of all that the factor or any one else can claim from the defenders, until the defenders, in the exercise of their discretion, see cause to enlarge the allowance."

The Lord Ordinary (JERVISWOODE) pronounced this interlocutor:—"Finds that the facts stated on the part of the pursuer, or which appear from those productions in process which have relation to the amount of the estate in the hands of the defenders, the trustees, under the indenture or contract of marriage referred to in summons and record, are not relevant or sufficient in point of law to support the allegations made by the pursuer, to the effect that an allowance at the rate of £100 per annum ought to be paid to her for the maintenance, clothing, and education of the pupil, Fegus David Ferguson, or are such as to warrant the interference of the Court with the exercise by the defenders, the trustees, of the discretion with which they must be held to be invested under the deed of indenture above referred to: Finds that the defenders, the trustees, are not bound to place in hands of the judicial factor, nor is the latter bound to pay to the pursuer, additional funds towards the maintenance of the pupil, as sought under the conclusions of the action; and with reference to the preceding findings, sustains the defences, dismisses the action," &c.

The pursuer reclaimed.

FRASER and MACLEAN for reclaimer.

GIFFORD and GEBBIE for trustees.

PATTISON and MACDONALD for factor.

At advising—

LORD PRESIDENT—The important circumstance in this case is that the claim by this lady is against a trust-estate, and trustees, who are by the deed of the truster invested with considerable discretion. It is by that deed declared to be lawful for them (*reads* from trust-deed *ut supra*). It is very clear that it is left in the discretion of the trustees by this clause of the deed to fix what part of the income of the estate ought to appropriated for the maintenance and education of the child or children of the marriage. That discretion being vested in the trustees, the Court must not interfere with the exercise of that discretion, unless there be something like an abuse of the power vested in the trustees. Nothing short of that will justify such interference, because, when a truster gives discretion to his trustees, the management is vested in them independent of the ordinary control of the Court. Assuming, therefore, that the trustees have come to be of opinion that £70 *per annum* is the proper portion of the income of the trust-estate to pay to pursuer for the maintenance and education of this child, I am not prepared to interfere with that arrangement. The estate may be quite capable of yielding more, and perhaps if we were exercising our discretion we might be prepared to make a larger allowance, but that would be taking on ourselves the very office committed by the truster to these gentlemen. But clear I am of this, that while the truster left it to the discretion of the trustees to pay the allowance to the guardians, that is not done by paying it over to the factor *loco tutoris*. That is an anomalous and absurd arrangement, which ought never to have been entered into. Having made up their minds that £70 was the proper allowance, they should have paid it to the pursuer, and that they must do now, and they must pay it quarterly and in advance. The factor,

who was appointed merely for the administration of a piece of heritable property not within the trust, and which required a separate administration, has nothing to do with any question between this lady and the trustees as to the allowance.

The only other matter is the expense of these proceedings. Both the trustees and the factor have got estate in their hands out of which they can pay their own expenses; but this lady, who is compelled to ask these trustees for an allowance to maintain and educate the child, has nothing of the kind. If therefore she does not get her expenses, they must be deducted from the first year's allowance, and so deprive her of the assistance which it is the object of the Court and of the trustees to give her. I am therefore disposed to think that she must have her expenses. She has gained something very material by coming into Court, for she has got rid of this interposed person who has caused all this trouble. But I am not disposed to award expenses against the factor, for I think the fault was rather on the part of the trustees; and therefore I am inclined to give expenses against them, for they have maintained pleas which they ought not to have maintained.

The other Judges concurred.

Agent for Pursuer—Wm Miller, S.S.C.

Agent for Factor—T. Ranken, S.S.C.

Agents for Trustees — Macgregor & Barclay, S.S.C.

Thursday, January 14.

COURT OF LORDS ORDINARY.

PAUL & THAIN *v.* ROYAL BANK OF SCOTLAND.

Retention—Bank — Bill — Vergens ad inopiam — *Bankrupt.* In the absence of a special agreement, bankers are not entitled to retain money lying deposited with them by a customer, in order to meet a current bill drawn by the customer and discounted by them, they not alleging that the parties to the bill were either bankrupt or *vergentes ad inopiam.*

On 2d April 1866 the Royal Bank of Scotland, through their agent, Mackenzie, at Dundee, discounted for Peter Luke a bill for £41, 10s. 9d., dated 30th March 1866, and drawn at three months after date by Luke upon, and accepted by, Low Brothers, and the proceeds, amounting to £40, 18s. 1d., were placed to his credit with the Bank, his account then amounting to £85, 18s. 1d. Thereafter, Luke being arrested on a criminal charge, the sum at his credit was arrested by Low Brothers, on the ground that the bill was an accommodation bill. These arrestments were withdrawn on 17th April, and on the same day the Bank paid, on a cheque by Luke, a sum of £44, 7s. 4d., leaving a balance still standing at his credit of £41, 10s. 9d. On the same day Luke gave to Paul & Thain, agents for conducting his defence, a cheque on the Bank for £41, 10s. 9d., being the amount at his credit in the Bank. Paul & Thain presented the cheque for payment, but payment was refused. This action was then raised for the purpose of trying the question whether the Bank were bound to pay the money in question to Paul & Thain, or were entitled to retain it in security of Luke's bill discounted by them on 2d April.

The Bank relied (1) on an alleged agreement by the parties that they should so retain the money, and (2) on a common law right of retention.

The Sheriff-Substitute (J. G. SMITH), after a proof, found that no agreement such as was averred by the Bank was proved, but found in point of law "that the said Peter Luke being liable to the Bank in the amount of the said bill on the failure of the acceptors, and the said George Mackenzie having good reason to doubt the sufficiency of the latter, the claimants, the Royal Bank, were entitled to retain out of the monies of Peter Luke then in their possession a sum sufficient to cover the said bill of exchange till the same was paid or otherwise provided for, and that the bill not having been paid, they are now entitled to payment out of the fund *in medio* preferably to Luke or any person in his right," and therefore sustained the claim of the Bank.

The Sheriff (HERIOT) adhered:

Paul & Thain advocated.

GIFFORD and GEBBIE for advocators.

YOUNG and SHAND for respondents.

At advising—

LORD ORMIDALE—Although one of the questions discussed in this case depends upon principles of great importance and extensive operation, the circumstances in which that question has been raised are neither complicated nor, I think, attended with any serious doubt.

On the 17th of April 1865, a balance of £85, 18s. 1d. was due to Peter Luke in his deposit account with the Dundee branch of the Royal Bank of Scotland. The bank at the same time held a bill, which they had previously discounted on 2d April, for £41, 10s. 9d., drawn by Luke, accepted by Low Brothers, and payable 3d of July 1865.

In this state of matters as between Luke and the bank, a draft or cheque for £41, 10s. 9d was, on the 17th of April, given by Luke to the advocators Paul & Thain, and the same day presented by them to the bank at Dundee for payment, which was refused, on the ground that Low Brothers had arrested the balance owing to Luke in his deposit account. That such an arrestment had been used in the name of Low Brothers at the instigation of the bank has been proved; and it has also been proved that, in the course of the 17th of April, the arrestment was withdrawn by Low Brothers, by a writing indorsed by them on the letters of arrestment, and also by a writing subscribed by them added to the letter, No. 42 of process, addressed by the advocators to the bank, remonstrating against their refusal to honour Luke's draft. But the bank still refused to honour Luke's cheque by paying the amount, £41, 10s. 9d., to the holders thereof, the advocators Paul & Thain, on the ground then put forward by them that they, the bank, were themselves entitled to retain that sum, being the balance which remained at Luke's credit after some previous payments, in security of the bill which had been discounted by them on the 2d of April, and on which he (Luke) was an obligant as drawer, although that bill was not payable till the 3d day of July thereafter, and although the liability of Luke in payment even then of that bill depended on the contingency of its being dishonoured by the primary debtors therein, Low Brothers, failing duly to retire the same, and of notice of such dishonour being timeously made to Luke.

The present process of multiplepoinding was then brought in the Sheriff-Court at Dundee, for the purpose of having it determined whether the