ing that upon both grounds a new trial ought to be granted; but it is sufficient for the disposal of the case that a new trial should be granted upon the ground that there was no evidence from which the jury could infer that the relationship of master and servant existed between the pursuer and the defenders.

The Court made the rule absolute and ordered a new trial.

Counsel for Pursuer—Crabb Watt, K.C. —J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for Defenders—G. Watt, K.C.—Munro. Agents—Cuthbert & Marchbank, S.S.C.

Saturday, November 7.

SECOND DIVISION.

MIDDLETON'S TRUSTEES *v.* MIDDLETON.

Trust—Revocability—Parent and Child—Jus quæsitum — Trust Conveyance in Contemplation of Marriage — Delivered Trust—Beneficiaries in Existence.

The day before her marriage, and in contemplation thereof, a lady conveyed her whole estate and *acquirenda* to trustees for payment of the income to herself during her life and thereafter for behoof of her future children until the youngest should reach majority, and for payment of the fee thereupon to the children, whom failing, and in the event of her leaving no settlement, to her next-of-kin. There were five children of the marriage, and after her husband's death she sought to revoke the trust and called upon the trustees to denude.

Held that the trust deed and estate having been delivered, and there being now children in existence, these beneficiaries had a *jus quæsitum* and the trust was not revocable.

Per Lord Ardwall—"Where a person has granted a trust deed by which the granter is divested of certain estate in favour of trustees, and where the deed has been delivered, such deed is irrevocable if it confers a beneficial interest on persons in existence, or on persons who come into existence before the trust deed is revoked, and who are entitled to a beneficial interest under the deed."

James Hadden junior, painter, Leith, and others, the trustees under a trust conveyance executed by Miss Jane Somerville (afterwards Middleton), dated 24th February and registered 18th March 1887, *first parties;* the said Mrs Jane Somerville or Middleton, *second party;* and William Henderson Middleton and others, the children of Mrs Middleton, *third parties,* presented a special case dealing with the said trust conveyance.

By the said trust conveyance Miss Jane Somerville, "having in contemplation my approaching marriage to John Middleton," assigned and conveyed to trustees named, and their successors in office, "all and sundry my whole means and estate, heritable and moveable, real and personal, at present belonging or which may belong to me at any time during the subsistence of the said approaching marriage" (and, in particular, a sum of £400 then lying on deposit-receipt) "in trust always for the following purposes:—*First,* For the expense of carrying this trust into effect: *Second,* For payment of the whole free annual produce or income to me of the estate under their charge during my lifetime: *Third,* I direct my said trustees to hold the whole residue of my said means and estate after my death for behoof of the children of the said approaching marriage or any other marriage I may enter into, and to expend the whole free annual produce or income for their maintenance and support until the youngest shall reach the age of twenty-one years complete: *Fourth,* On my youngest child attaining the age of twenty-one years, as aforesaid, I direct my said trustees to make payment to my said children of the residue of the estate under their charge in such proportions as I may direct in any writing under my hand, and failing such writing, then equally among them, share and share alike: *Fifth,* Failing issue of my body, and in event of my not leaving a settlement, I direct my said trustees to convey the said residue of the estate under their charge to my own next-of-kin."

Immediately after its execution, the trust conveyance and the sum of £400, being the whole estate then belonging to the truster, were delivered to the trustees, who on 18th March 1887 accepted office. On 25th February 1887 Miss Somerville was married to Mr Middleton. No marriage contract was entered into between the spouses, and no obligation was granted by Mr Middleton in respect of the said trust conveyance. Mr Middleton died on 30th November 1902 leaving five children of the marriage. Thereafter Mrs Middleton desired to bring the trust to an end and to realise the capital, which consisted of the said sum of £400, but the trustees refused to denude.

The second party *maintained* that she was entitled to revoke the trust conveyance at will. The first parties and the third parties concurred in maintaining that the second party was not entitled to revoke, and that the third parties had acquired a *jus quæsitum* under the trust which barred revocation.

The *question of law* submitted was — Is the second party entitled to revoke the said trust conveyance, and to call upon the first parties to denude in her favour?

Argued for the second party—The trust conveyance was for administrative and testamentary purposes only. It was not a marriage contract, and there were no reciprocal obligations as in *Lyon* v. *Lyon's Trustees,* March 12, 1901, 3 F. 653, 38 S.L.R. 568. The provisions were of a testamentary nature. Such trusts were revocable—*Watt*

v. *Watson*, January 16, 1897, 24 R. 330, 34 S.L.R. 267—unless the deed were declared irrevocable—*Murray* v. *Macfarlane's Trustees*, July 17, 1895, 22 R. 927, 32 S.L.R. 715—or unless a *jus quæsitum* were created at the date of the deed—*Byres' Trustees* v. *Gemmell*, December 20, 1895, 23 R. 332, 33 S.L.R. 236. No *jus quæsitum* was here conferred upon the children—*Mackenzie* v. *Mackenzie's Trustees*, July 10, 1878, 5 R. 1027, 15 S.L.R. 690,—and the children obtained only a *spes successionis*—*Watt* v. *Watson*, *cit.*, *per* Lord Trayner, at 24 R. p. 341. Here there was an *acquirenda* clause, which distinguished the case from *Smitton* v. *Tod*, December 12, 1839, 2 D. 225. Reference was also made to *Somerville* v. *Somerville*, May 18, 1819, F.C.

Argued for first and third parties—This was a delivered trust for behoof of beneficiaries who were now in existence. The ground of decision in *Watt* v. *Watson* (*cit.*) was that no beneficiaries existed, *per* Lord M'Laren at 24 R. p. 339. *Lyon* v. *Lyon's Trustees*, *cit. sup.*; *Stevenson* v. *Stevenson's Trustees*, October 31, 1905, 13 S.L.T. 457; *M'Gregor* v. *Sohn*, February 1, 1908, 15 S.L.T. 926. All the purposes of this trust were marriage-contract purposes, and there was an ordinary *acquirenda* clause. In *Mackenzie* and *Byres' Trustees*, *cit.*, the trusts were not in contemplation of marriage, and there were no beneficiaries existing at the time of revocation. This case fell under the main rule that delivered trusts are irrevocable *quoad* existing beneficiaries. *Smitton* v. *Tod*, *cit. sup.*; *Shedden* v. *Shedden's Trustees*, November 29, 1895, 23 R. 228, 33 S.L.R. 154.

LORD ARDWALL—I have come without much difficulty to the conclusion that this case is decided by authority, and in particular by the case of *Lyon* v. *Lyon's Trustees*, 3 F. 653, as contrasted with the cases of *Watt* v. *Watson*, 24 R. 330, and *Mackenzie* v. *Mackenzie's Trustees*, 5 R. 1027, and as supported by the earlier case of *Smitton* v. *Tod*, 2 D. 255. I think that the result of the decisions in these cases is, that where a person has granted a trust deed by which the granter is divested of certain estate in favour of trustees, and where the deed has been delivered, such deed is irrevocable if it confers a beneficial interest on persons in existence, or on persons who come into existence before the trust deed is revoked and who are entitled to a beneficial interest under the deed. In the present case if the deed had been revoked before the children came into existence the question would have been very different. But here the deed has stood unrevoked and the estate has been administered under it until now, and in the meantime no less than five children have come into existence who have a *jus quæsitum* under the deed. It is true that in *Lyon's* case there was the element of mutuality, but that element was specially put aside as a ground of decision. The ground of judgment was that a child of the marriage in contemplation of which the deed had been executed had acquired a *jus quæsitum* which could not be defeated by the act of the truster. I am therefore of opinion that the question of law must be answered in the negative.

LORD LOW—I concur. I think that by the deed in question there was a *jus quæsitum* conferred on the children of the marriage when they came into existence, which prevents the grantor of the deed from revoking it.

LORD JUSTICE-CLERK—That is my opinion also.

The Court answered the question of law in the negative.

Counsel for First and Third Parties—Constable, K.C.—T. A. Menzies. Agents—Wallace & Pennell, W.S.

Counsel for Second Party—Thomson—Macdonald. Agent—Alexander F. Fraser.

Tuesday, November 3.

EXTRA DIVISION.

[Lord Johnston, Ordinary.

BUCHANAN AND SPOUSE *v.* GLASGOW UNIVERSITY COURT AND OTHERS.

Trust—Power to Borrow—Duty of Lender to Inquire into Application of Money—Exercise of Power—Ultra vires—Misapplication of Money—Liability of Lender.

A truster by his settlement provided—"And to enable my trustees to carry out the purposes of this settlement . . . I empower them . . . to borrow money on the security of the trust estate or any part of it: Declaring that parties paying monies to my trustees . . . shall not be entitled to inquire into or see to the application of the same." The settlement provided an annuity to one child, and directed the trustees to convey the whole estate under burden of the annuity to another child. This direction was never carried out. The trustees, to permit of payment of a sum exceeding the whole moveable estate, which they had agreed to pay to other children of the truster in consideration of their not challenging the validity of the settlement and discharging their claims for legitim, borrowed money from a corporation incorporated under Act of Parliament, and granted a bond and disposition in security over part of the heritable estate of the trust. The remainder of the estate was insufficient to pay the annuity. The annuitant raised action against the trustees and the bondholders concluding for (1) declarator that the bond should be postponed to the annuity, (2) reduction of the bond *pro tanto*. The pursuer averred that the payment to the other children and the granting of the bond were *ultra vires*; that it was the duty of lenders to examine the