LORD JUSTICE-CLERK—The case here differs from those quoted to us, where the period of division had not arrived and there was no actual division. Here the trustees have it in their discretion to fix the period of payment and of vesting. The payment of one share proves that the convenient period of payment had come, and when the widow and daughter agreed as to the shares, and it was paid over, the shares vested. I think the facts here show that the period of vesting had arrived, and the period of payment was not postponed as in the cases cited.

LORD NEAVES—I concur. It would have been unjust to have postponed the division in the circumstances.

LORD ORMIDALE concurred.

The first question was answered in the affirmative. On the second question the answer of the Court was, that one-third was to be given to each of the third and fourth parties.

Counsel for the Trustees—Black. Agent—D. Curror, S.S.C.

Counsel for Mr and Mrs Clarkson—J. A. Reid. Agents—Philip, Laing & Monro, W.S.

Counsel for George Sutherland—M'Kechnie. Agent—H. W. Cornillon, S.S.C.

Friday, October 30.

SECOND DIVISION.

SPECIAL CASE—HILL AND OTHERS.

Succession—Trust-Settlement—Construction.

Where a trust-settlement devolved large discretionary powers as to division and apportionment of a share of residue on a trustee, who accepted, and after assuming another trustee, became insane—*held* that on the insanity of the original trustee the discretionary power came to an end, and the assumed trustee was entitled to divide the share equally amongst the beneficiaries.

This Special Case was presented for the opinion and judgment of the Court in the following circumstances:—

The deceased Mrs Flora Hill, widow of William Hill of Hillwood, by her trust disposition and settlement, dated 25th March 1865, conveyed her whole moveable property to her daughter Mrs Finnie, as her sole executrix and trustee.

The purposes of the trust were as follows, viz., (1) to defray the expenses of the trust and paying the deathbed and funeral expenses of the truster; (2) for payment of certain special bequests of certain articles of plate and furniture, and of certain funds therein mentioned; (3) for payment to the truster's sister Margaret Pretsell of a free yearly annuity of £50 sterling, and to Mrs Helen Hill or Veitch a free yearly annuity of £40 sterling, which last-mentioned annuity was by the codicil to her said trust-settlement increased to £50 per annum; (4) for payment of certain pecuniary legacies to relatives of the truster and charitable institutions.

The last purpose of the trust is expressed as follows:—"Lastly, to the end and intent that after the special and primary provisions and purposes of this trust as before specified, and any other provisions and purposes which I may hereafter direct and appoint shall have been fully paid, implemented, or provided for, my said trustee may divide the whole residue and remainder of my said moveable estate and effects into three equal parts or shares, and that she shall retain in her own hands one of the said parts or shares, and apply the same for the use and behoof of the surviving children of the marriage between the Rev. William Thomson, my son-in-law, and Catherine Hill or Thomson, my daughter, now deceased, and that at such time or times, and in such way and manner as my said trustee, in whose judgment and discretion I have perfect confidence, may think most conducive to the welfare of the said children, with full power to her to divide and apportion the said provision among the said children, or to apply the same for their behoof, in such shares and proportions as she may think proper, without the interference or control of any one or more of the said children, who shall have no vested interest therein; and the other two third parts or shares of the residue of my said moveable estate and effects shall belong to my said trustee herself, and be retained by her as her own absolute property: and I hereby revoke all former settlements or testamentary deeds executed by me at any time prior to the date hereof; reserving always to myself full power and liberty at any time of my life, and even on deathbed, to alter, innovate, or revoke these presents, either in whole or in part, and either onerously or gratuitously, at pleasure. But declaring that the same, in so far as not altered or revoked, shall be a good and valid deed, though found in my custody, or in the custody of any other person for my behoof, undelivered at the date of my death; dispensing with the delivery hereof." The trust-deed contained no power of assumption of new trustees. The said Mrs Flora Pretsell or Hill died on 12th April 1868, and her daughter Mrs Finnie accepted of the offices of trustee and executrix under the said settlement, and entered on the possession and management of the trust-estate, which consisted entirely of moveable property, which was duly realized, and she paid such of the debts and legacies as were immediately payable.

After payment of these there remained a sum of £6827, 2s. 10d. to be applied to the purposes of the trust; and after setting apart a sum of £2500, to be invested for the purpose of yielding a yearly interest sufficient to provide for the two annuities of £50 each bequeathed to Margaret Pretsell and Mrs Veitch, there remained a free residue of £4327, 2s. 10d., which was divisible between Mrs Finnie herself and the surviving children of Mr and Mrs Thomson, in the proportion of two-thirds to Mrs Finnie, amounting to . £2884 15 2
and one-third to the children of Mr and Mrs Thomson, . . . 1442 7 8

£4327 2 10

At the death of Mrs Hill there were in life five children of Mr and Mrs Thomson, viz., William, John, Mary, Catherine, and Margaret.

Under the discretionary power conferred upon her by the trust-settlement Mrs Finnie paid to the children of Mr and Mrs Thomson sums amounting in all to £1042, 7s. 6d. There was then left in Mrs Finnie's hands a balance of £400, 0s. 2d., with the reversion of one-third of the sum of £2500 on the falling in of the annuities to Miss Pretsell and Mrs Veitch, divisible amongst the

children at the sole discretion of Mrs Finnie. In February 1873 Mrs Hill executed a deed of assumption in favour of John Hill, farmer in Carlowrie, by which he was to act along with herself in the execution of the trust.

In May 1873, Mrs Finnie having fallen into a state of mental incapacity, Mr A. T. Niven, C.A., Edinburgh, was appointed her *curator bonis*.

In consequence of Mrs Finnie's continued incapacity, Mr Hill became sole trustee, and he, in March 1874, assumed Mr Adam Curror to be his co-trustee, under the 11th section of the Trusts (Scotland) Act.

By the death of one of the annuitants the sum of £1250 was set free, of which one-third became available for distribution amongst the children of Mr and Mrs Thomson. The whole sum so available at the presentation of the case was thus £816, 12s. 6d.

The beneficiaries having applied to the trustees for payment of their share of this residue, a difficulty arose as to the proportion each beneficiary should take, the power of determining which was reposed in Mrs Finnie alone.

In these circumstances, it was agreed that the present case should be presented to the Court by the various parties, viz., John Hill and Adam Curror, of the first part; Alexander Niven, of the second part; and William Hill Thomson and others, of the third part.

The questions submitted for opinion and judgment were two:—"(1) Whether the parties of the first part, as the acting trustees and executors under the trust-disposition and settlement of Mrs Hill, are, during the incapacity of Mrs Finnie, entitled to distribute among the parties hereto of the third part the whole or any part of the one-third share of the residue which the truster directed Mrs Finnie to retain and apply for behoof of the children of Mr and Mrs Thomson? (2) Whether the sums presently available for division are to be distributed equally among the parties hereto of the third part, or in such proportions as, when added to the payments to account previously made, will make the payments to all the five children of equal amount?"

At advising—

LORD JUSTICE-CLERK—This is not an application for special powers from the Court. In so far as these powers were communicable, they have been exercised by the assumption of a new trustee. Where there is a manifest *delectus personæ*, and large discretionary powers are left with a trustee, who becomes incapable of exercising these powers, I doubt if it is clear that the Court could grant power to another party to exercise the discretion; but, on the other hand, though there may be discretionary powers vested in a trustee, if they do not imply a *delectus personæ* in the trustee, the Court perhaps might interfere, and transfer the powers to another party. But this question does not arise here. My view is, that on the words of the settlement there is a valid bequest to the children of Mr and Mrs Thomson, as a class, of the whole one-third, and that the discretionary power given to the trustee is simply a burden, which flies off on insanity supervening, and leaves the bequest unlimited, and that no question of the power of the new trustee arises. The trustee is entitled to divide the whole free fund, and the rest as it may emerge. As there is no longer a possibility of the discretionary power being exercised, owing to the insanity of the trustee Mrs Finnie, the result is equal division.

LORD NEAVES—I concur. We are not here in an application for the interposition of our discretionary power. We are asked only to interpret the law on the terms of the writing, and that takes away our *nobile officium*. This is our mere judicial decision on the import of the settlement, and I think the discretionary power is at an end, and that the fund should be divided as if the natural term of division had arrived.

LORD ORMIDALE—I concur. It is unnecessary to consider how far the Court can interpose to exercise a discretion as to division left to a trustee now incapable. If it were necessary we would require fuller statements of facts and circumstances.

The first question was answered in the affirmative. The answer to the second question was, that the distribution was to be made so as to produce ultimate equality amongst the children.

Counsel for Parties of First and Second Parts—Marshall and Hall. Agent—W. Kennedy, W.S.

Counsel for Parties of the Third Part—M'Kie. Agent—J. N. Forman, W.S.

Friday, October 30.

FIRST DIVISION.

[Lord Young, Ordinary.

MAGISTRATES OF INVERKEITHING *v.* ROSS.

Superior and Vassal—Singular Successor—Assignee—Entry—Composition—Novodamus.

In a charter of confirmation and *novodamus* the clause of confirmation set forth that the lands were conveyed to A and "his heirs and assignees (excluding assignees before infeftment)." The clause of *novodamus* was expressed in similar terms. The reddendo stipulated that the vassal's "heirs and assignees" should pay double feu duty the first year of their entry. By no former charter had the entry of singular successors been taxed. *Held* that the superior's right to composition for the entry of singular successors was intact.

This was an action of declarator of non-entry, brought by the Magistrates of Inverkeithing against Alexander Ross. The subjects were described in the summons in the following terms:—"First, All and Whole these eight sixteenth parts of Crooks or Cruicks Easter, excepting and reserving a piece of ground of said lands on which a tomb was built, consisting of one acre and one eighth part of an acre Scots: Second, All and Whole one sixteenth part of the lands of Crooks or Cruicks Wester, called Foul Briggs, as sometime possessed by John Davie: Third, All and Whole that piece of ground at the old toll, consisting of twenty falls and one-half Scots measure: Fourth, All and Whole these five sixteenth parts of land lying in Easter Cruicks, sometime possessed by John Lindsay, tenant thereof, excepting therefrom a piece of ground at West Ness, consisting of