think he must take the consequences. In short, I agree with the Lord Ordinary's statement of the law that "if a party nominates an arbiter whom he knows to be disqualified he must bear the consequence as regards expense incurred by the other party." In nominating an arbiter he agrees to nominate one who so far as he knows is competent to act. That proposition, I remind your Lordships, was not conceded by the defenders' counsel, but it was not contested. Now that is the very case before us, for the Railway Company of course cannot deny that they had appointed one of their own number to be arbiter. They do not and cannot deny that they knew the fact, for whilst they very pointedly and expressly state that "it had escaped the recollection" of the arbiter that he was a shareholder they do not, and of course cannot, say that they did not know the fact.

On that ground, and on that ground alone, I am for upholding the Lord Ordinary's interlocutor. But I ought to add, as I think Lord Johnston has said in his opinion, that nothing was urged in support of the Lord Ordinary's view that the defenders' liability here depends upon the ease or difficulty of ascertaining that their arbiter was a shareholder, or upon the probability or improbability of his being a shareholder. Obviously that is an unsound view. It would lead to decree against the company wherever it was easy to ascertain, but would protect them where it was difficult to ascertain, that their arbiter was a shareholder.

On the simple ground, then, that this company confessedly knew that they were appointing an arbiter subject to disqualification and did not disclose that fact I hold them to be responsible for the consequences, and am therefore for adhering to the Lord Ordinary's interlocutor.

The Court adhered.

Counsel for the Pursuer—Constable, K.C. —J. S. Mackay. Agents—J. Miller Thomson & Company, W.S.

Counsel for the Defenders — Macphail, K.C. — Millar. Agents — J. K. & W. P. Lindsay, W.S.

Saturday, June 15.

SECOND DIVISION.

[Lord Hunter, Ordinary.

GOFF AND OTHERS (PATERSON'S TRUSTEES) *v.* FINLAY AND OTHERS.

Trust—Faculties and Powers—Discretionary Powers—Delectus Personæ.

A testator, on the narrative that he was not satisfied with a bequest of residue to the directors of the Glasgow Western Infirmary, made by him in an earlier codicil, cancelled it, and provided—"Should I not hereafter execute any writing disposing of the said two hundred thousand parts of the residue of my estate, I appoint two of my trustees—my sister (the said E. S. P.) and J. M. K." who was his law agent—"to reconsider the matter for me and either dispose of these two hundred thousand parts as provided in my said will—that is, by directing that the said legacy hereby cancelled be paid, or allot the said two hundred thousand parts to any other object or objects they may deem more desirable in connection with the said Western Infirmary of Glasgow, or any other charitable object or objects similar to those mentioned in my said will." The testator died without having executed any such writing. The power was exercised but the deed was cancelled. One of the appointees of the power died before the power had of new been exercised. The remaining appointee executed a writing purporting to exercise it.

Held (*dis.* Lord Salvesen) that, on a consideration of the deeds, the power could only be exercised by the two trustees jointly and not by the survivor alone.

William Henry Goff, chartered accountant, Glasgow, and others, trustees of the late James Paterson, Southfield, Midlothian, acting under a trust-disposition and settlement dated 25th January 1905 and various codicils, *pursuers and real raisers*, brought an action of multiplepoinding and exoneration, the *fund in medio* being 200 one-thouandth parts of the residue of the testator's estate, which he had originally in a codicil bequeathed to the directors of the Western Infirmary of Glasgow, but subsequently left subject to a discretionary power given to two of his trustees. This power was exercised, but the deed was cancelled and was not exercised again by the two appointees. After the death of one, however, the other executed a deed, dated 2nd March 1917, purporting to exercise it.

The *clause conferring* the power is quoted from the codicil of 2nd September 1909, *supra in rubric.*

John Finlay, Southfield, Midlothian, *claimant and defender*, lodged a claim as nephew of the testator, averring that he was entitled to the succession to the testator's estate *ab intestato*, and that the deed of 2nd March 1917 above referred to was invalid. The Royal Edinburgh Hospital for Incurables, *claimant and defender*, also lodged a claim, maintaining that the deed of 2nd March 1917 was a valid exercise of the discretionary power conferred by the testator.

On 20th December 1917 the Lord Ordinary (HUNTER) pronounced the following interlocutor:—"Finds that the fund *in medio* has fallen into intestacy of the late James Paterson: Sustains the condescendence and claim for John Finlay, Southfield, Liberton, Midlothian: Ranks and prefers him to the fund *in medio;* and decerns."

Opinion.—[*After dealing with questions which are not reported*]—"The second alternative of the contentions for these claimants" (*i.e.*, The Royal Edinburgh Hospital for Incurables) "deserves more consideration. In *Shedden's Trustee* v. *Dykes*, 1914

S.C. 106, 51 S.L.R. 115, a testator by her settlement appointed two persons to be her trustees and executors (the appointment of one of them being recalled by codicil) and conveyed to them her whole estates. The trustees were, *inter alia*, directed to divide the residue of the estate among such charitable institutions in Glasgow and in such proportions as her trustees in their absolute and uncontrolled discretion should decide. A new trustee was assumed and the Court held that the discretionary power given to the trustees as to the disposal of the residue might be exercised by him. This case affords a good example of the rule that where a power of disposal is conferred upon the holders of an office in virtue of their official position the power may be exercised by those who in fact hold the office whether they are survivors of the original holders or are assumed.

"It appears, however, to be settled both in England and Scotland that where a power is vested in two or more persons *nominatim*, without any reference to an office that enures to the survivor, as in the case of executors or trustees, the power cannot be exercised by the survivor. In the present case the testator has given the power of allocation not to his trustees but to two of that body. They hold the power not in virtue of their being trustees or as part of their duty as trustees but because they have been selected as individuals to make the allocation. I do not think, therefore, that Mr Mackechnie had any right after Miss Paterson's death to exercise the power of allocation given to him and her jointly.

"The two English cases of *Toovey* v. *Turner*, [1907] 1 Ch. 475, and *Crawford* v. *Forshaw*, [1891] 2 Ch. 261, to which I was referred by the claimants, do not appear to me to be inconsistent with the view which I have indicated. In the former of these cases it was held that where a power of sale is given to trustees by name or under the description 'my trustees,' to whom the legal estate is devised, the power can be exercised by the surviving trustees or the sole surviving trustee. Mr Justice Swinfen Eady quoted with approval the following passage from Lewin on Trusts, 11th ed., p. 748. 'It seems to be now decided that even where the trust is reposed in the trustees by name, the survivor who takes the estate with a duty annexed to it can execute the trust, and the rule of survivorship applies not only to trusts or powers imperative which are construed as trusts but also to such discretionary powers as are annexed to the office of trustee and are meant to form an integral part of it.' In *Crawford's* case it was held that a power attached by the will to the office of executors could be exercised by the executors for the time being. The principle given effect to in these cases, which appears to me to be in entire accordance with Scots law, would only favour the claimant's contention if I held as a matter of construction that the power of allocation was attached to the office of trustee."

The claimants the Royal Edinburgh Hospital for Incurables reclaimed, and argued —The power to recal certain provisions of the will having been given to the testator's sister and Mr Mackechnie, as trustees, it could be exercised by the survivor. If weight was to be given to this power to recal its terms had to be given effect to strictly. Once the power of allocation had been carried out it was final and not revocable. The power was exercised in the most deliberate and conclusive manner possible, and once exercised could only be revoked without creating a breach of trust by substituting an equally good power. The effect of the charitable provision was to create a trust within a trust, two of the original trustees having been particularly chosen to see to the carrying out of that provision. The codicil containing their appointment distinctly described them as "two of my trustees." Accordingly the power dealing with the charitable provision could be exercised by the survivor of the two, and if the prior allocation were effectually displaced the allocation by the survivor held good. The question to be considered was what was the testator's intention in the deed—Farwell on Powers, p. 511. The following cases were cited—*In re Bacon*, [1907] 1 Ch. 475; *Shedden's Trustee* v. *Dykes*, 1914 S.C. 106, 51 S.L.R. 115; *Dick's Trustees* v. *Cameron*, 1907 S.C. 1018, 44 S.L.R. 753; *Pocock* v. *Attorney-General*, (1876) 3 Ch. D. 342; *Hill's Trustees* v. *Thomson*, (1874) 2 R. 68, 12 S.L.R. 20.

Argued for the claimant John Finlay—There was *delectus personæ* in the present case. A bare power given to two persons by name could not be exercised by the survivor when, as was the case here, the words "to the survivor" had been omitted. Although the word "joint" had not been used it had been implied. Mr Mackechnie could not by himself make a valid allocation. The two persons appointed trustees were unable to assume other trustees to act with them in exercising the discretionary power. Counsel referred to Farwell on Powers, p. 514, and *in re Somes*, [1896] 1 Ch. 250, *per* Chitty, J., at p. 255.

At advising—

LORD JUSTICE-CLERK — The deceased James Paterson, the truster, left several testamentary writings, some of them holograph and apparently prepared by himself, others tested and prepared by his solicitor. The two on which the present controversy mainly depends are of the latter class, being the codicil of 28th August 1909 and the codicil of 2nd September 1909. The trust-disposition and settlement itself is dated 25th January 1905. It is really just an appointment of trustees and a conveyance to them of his whole means and estate. It is holograph but is tested, and apparently must have been prepared by his law agent. Four trustees were appointed by it, and the conveyance is to four named trustees (who had previously been appointed trustees by the codicil of 19th January 1902, which is apparently holograph) and to "the survivors and acceptors and survivor and acceptor . . . and to the heir of the survivor as trustees and trustee." In some of these writings there was a residuary bequest, but in the codicil of 28th August 1909 I think the then

only effective residuary clause was revoked and the residue was dealt with thus—"And in lieu of the provision in my testamentary writing dated 19th January 1902 directing my trustees to set aside and reserve and retain a sum of £100,000 for the purpose there mentioned I hereby direct, when on the death of my sister Elizabeth Stenhouse Paterson and the lapse of her liferent use of it, the whole remainder and residue of my estate is realised, that the proceeds of it are to be divided into 1000 parts and I direct my trustees to apply, pay, and convey these thousand parts as follows namely." The truster then disposes of 900 of these 1000 parts by various bequests, including one of 200 parts to the directors of the Glasgow Western Infirmary—which is the fund *in medio* in the present action. It seems to me that the truster failed to dispose of the other 100 parts required to complete the said 1000 parts, and that he thus died intestate *quoad* these 100 parts, with which however this action is not concerned. By the codicil of 2nd September 1909 the truster, on the narrative that he was "not quite satisfied" with the said bequest of 200 parts to the said Western Infirmary, revoked the same, and provided as follows—"And should I not hereafter execute any writing disposing of the said 200,000 parts of the residue of my estate I appoint two of my trustees—my sister and John Maclellan Mackechnie—to reconsider the matter for me and either dispose of these 200,000 parts as provided in my said will, that is, by directing that the said legacy hereby cancelled be paid, or allot the said 200,000 parts to any other object or objects they may deem more desirable in connection with the said Western Infirmary of Glasgow or any other charitable object or objects similar to those mentioned in my said will." He executed no further testamentary writing. His sister and Mr Mackechnie executed a deed of allocation dealing with said 200 parts on 9th and 10th February 1910. That deed contained the following clauses—"And we reserve power to cancel and recall in whole or in part the allotments of the said 200 parts of the said residue hereby made and to re-allot the same in whole or in part: and we dispense with delivery hereof." It was left in the possession of Mr Mackechnie's firm, was never intimated to any of the allotees, and it was subsequently agreed between the granters thereof that it should be revoked, and this was done by burning it on 11th June 1914. Thereafter Miss Paterson and Mr Mackechnie failed to agree on a further allocation of the said 200 parts. But after Miss Paterson's death Mr Mackechnie executed a deed of allocation on 2nd March 1917.

It is argued that this latter deed is valid and effectual. I agree with the Lord Ordinary in thinking it is not.

In my opinion the codicil of 2nd September 1909 imports a selection of the two persons named—the truster's sister and his law agent—as joint-recipients of the power of selection among the several beneficiaries in such a way as to infer a *delectus personæ* of these two named individuals. The truster does not give the power to his trustees—who were four in number—but he selects two out of these four as the persons who are to execute the power. The two persons named could not by themselves act in the trust—they did not constitute a *quorum*. Moreover, while the trust-disposition and settlement appoints as trustees the survivor and acceptors of the persons named and the heir of the last survivor, there is no similar provision in the codicil of 2nd September 1909. In my opinion therefore the power was divorced from the trust and was given to two persons who could only act jointly, and did not transmit to the survivor in the event of the death of one of the nominees. The result in my opinion therefore is that the deed of allocation executed by Mr Mackechnie is invalid. I do not think we are entitled to assume that the survivor of the trustee's sister and his law agent was to have the power which the truster only expressly gave to them jointly. [*His Lordship dealt with questions which are not reported.*]

LORD DUNDAS — In this peculiar and rather interesting case I think we ought to adhere to the interlocutor reclaimed against. No appearance was made at our bar for the claimants the Western Infirmary of Glasgow, and though counsel appeared for the pursuers and real raisers and Mr Mackechnie they submitted no argument.

[*His Lordship dealt with questions which are not reported.*]

The last of the arguments submitted for the reclaimers was to the effect that, assuming that the deed of allocation executed by the two donees of the power was effectually revoked, the deed of allocation, dated 2nd March 1917, executed by Mr Mackechnie after Miss Paterson's death, is valid and effectual. I agree with the Lord Ordinary in thinking that this argument deserves more serious consideration than those already dealt with. I have found the question difficult, but having considered it carefully I have come to the same conclusion as the Lord Ordinary. The testator says in his codicil—"I appoint two of my trustees—my sister and John Maclellan Mackechnie—to reconsider the matter for me" and to dispose of the fund in question. He does not use the word "jointly," nor on the other hand does he introduce the words "or the survivor of them." I think with the Lord Ordinary that the choice of these two persons by the testator to "reconsider" this very confidential matter for him involved distinctly a *delectus personarum*—a nomination of them as individuals unassociated with the fact that they were two of his trustees. It follows that in my judgment they could not have assumed any other person or persons who should exercise the power. But the question remains whether, one of the two donees of the power having died, the survivor could competently exercise it? I am not prepared to affirm that in every case and in all circumstances the nomination of two individuals to exercise a power of appointment must necessarily fail if one of them should die before an appointment is actually made. I think

there might be cases in which a contrary decision would be reached. But the present case is not, in my judgment, one of these, if such there may be. The donees of the power did endeavour to "reconsider the matter" for the testator; they actually made an allocation but they destroyed it, and in the end, in spite of *bona fide* attempts to agree, they disagreed and failed to make any joint exercise of the power. If Miss Paterson had not died when she did it is matter for conjecture whether they would ever have come to an agreement; they seem to have adopted mutually irreconcilable attitudes. Now I think the testator here intended and contemplated that the persons he had chosen should together exercise the power; that he deliberately elected to rely upon the result of the joint wisdom of his sister and of his legal friend —upon the combination of woman's wit and lawyer's lore. The two persons selected were unable to agree, and therefore in my judgment the unexercised power failed on the death of the predeceaser, and could not be exercised after her death by the survivor. I have considered the various authorities cited to us, and some others, but I do not think it necessary to refer to them. I regard the matter as depending upon the construction of this particular codicil in the circumstances of this particular case; and therefore the authorities, though one may derive useful hints for guidance from them, cannot in my judgment be prayed in aid as decisive of the matter.

LORD SALVESEN—[*After dealing with questions which are not reported*]—The reclaimers contended that the deed executed by Mr Mackechnie after Miss Paterson's death was a valid exercise of the power. The decision of this question turns entirely on the construction of the codicil of 2nd September 1909. If the testator's intention as expressed in that codicil was that the power of allocation was to be jointly entrusted to his sister and her law agent, and was not to be exercised by the survivor in the event of one of the appointees having died, it would follow, as the Lord Ordinary has held, that Mr Mackechnie's deed is inept. On the other hand, if the testator chose to vest the power in the two persons named as trustees for the purpose of executing it then I think the power could be exercised by the survivor. The codicil is I think consistent with either view. The power is expressly given to "two of my trustees—my sister and John Maclellan Mackechnie." It is therefore not the case to which the Lord Ordinary refers of a power being vested in two persons *nominatim* without any reference to an office. The two are selected because they are trustees under the settlement. If they had been the only trustees then the case of *Shedden* v. *Dykes*, 1914 S.C. 106, would have in terms applied. Does it make any difference that two of the trustees are selected to make the allocation? If this had been intended it would have been easy for the testator to have inserted the word "jointly" in this codicil, as on the other hand he might have put in the words "or the survivor." But if the testator's intention is to rule I cannot but think that it would have been more in accordance with his intention that the survivor of the two persons whom he named should carry out his wishes rather than that he should die intestate *quoad* this part of his estate. Either of the persons whom he named would I think have had no difficulty in making an allocation in terms of his directions, and I see no reason to suppose that he must be presumed to have contemplated only a joint-deed because he did not provide for the contingency that happened. I should therefore have been prepared to sustain Mr Mackechnie's deed of allocation as a valid exercise of the power.

LORD GUTHRIE—[*After dealing with questions which are not reported*]—The testator did not follow the usual course and delegate his powers of selection to all his trustees. He selected two out of the number for reasons personal to them, which as it happens are obvious. The one was his "beloved sister" as he calls her in the holograph settlement of 1st December 1891, and in the codicil of 19th January 1902, and the other was his law agent. A clearer case of joint confidence, and the reasons for it, could not be conceived. The agent was the natural complement of the sister. The sister knew the testator's charitable interests as the agent could not, and the agent was able, as Miss Paterson could not, to arrange for these being given effect to in proper form and under suitable conditions in view of the actual needs of the institutions selected. In appointing these two persons it was I think natural, and in accordance with probability, that the testator did not add the words "or the survivor." I therefore think Mr Mackechnie's deed of allocation is invalid.

The Court (*dis.* Lord Salvesen) adhered.

Counsel for the Pursuers and Real Raisers —Chree, K.C.—Greenhill. Agents—Drummond & Reid, W.S.

Counsel for Claimants the Royal Edinburgh Hospital for Incurables—Christie, K.C.—Leadbetter. Agents—Mackenzie & Black, W.S.

Counsel for Claimant John Finlay—Sandeman, K.C.—Wilton. Agents—Davidson & Syme, W.S.