I have given careful consideration to the point raised by Mr. Roscoe that the instrument in this case is a testamentary instrument and not a deed. There are many authorities bearing on this point, and on the face of them they seem to be slightly conflicting, but carefully read they are not really so, since the distinction between an instrument made inter vivos and purporting to be a deed, and a testamentary instrument, depends so much upon the surrounding circumstances that sometimes Courts have held instruments to be testamentary when given under one set of conditions and to be deeds when given under other circumstances.

If I should attempt to epitomize the decisions on this point it would be that the character of the instrument is to be deduced by the Court from a variety of circumstances; its intrinsic character; the nearness to death when made; the incident of irrevocability; the effect upon execution; the recording; the relation of the parties; whether anything immediately passes, &c., &c. No one of these things is conclusive, but all the circumstances taken together have a determining effect.

In Habergham v. Vincent, 2 Ves. Jr. 230, Buller, J., says: "It was argued for the plaintiff that testator did not intend to make a will when he executed this deed; and therefore it cannot operate as a will. Whether the testator would have called this a deed or a will is one question; whether it shall operate as a deed or a will is a distinct question, and is that now to be considered. That is to be governed by the provisions of the instrument. A deed must take place upon its execution or not at all. It is not necessary for a deed to convey an immediate interest in possession, but it must take place as passing that interest to be conveyed at the execution; but a will is quite the reverse. It can only operate after death."

Another authority is found in Marjoribanks v. Hovenden, Drury R. 29. Lord Chancellor Sugden says: "If I could see upon the face of this instrument a testamentary intention I would take advantage of it to sustain it as an execution of a power notwithstanding its form. . . P. 27:—It has all the characteristics of a deed; it has a seal; it is stamped; it is in the form of a deed; it has the attestation clause which is to be found in all deeds; it does not contain one word having a direct bearing on the supposed intention that it