Friday, March 9.

SECOND DIVISION.

RITCHIE (KERR'S TRUSTEE) *v.* BUCHAN (YEAMAN'S TRUSTEE).

Property—Completion of Title—Titles to Land Consolidation (Scotland) Act, 1868 (31 *and* 32 *Vict. c.* 101), *secs.* 3 *and* 19—*Trust-Deed—Deed of Nomination—Notarial Instrument.*

In a trust-deed for behoof of creditors the truster conveyed "all and sundry my whole means, estate, and effects, heritable and moveable," to S, "whom failing to such person or persons as I may appoint." Power was given to the trustee to take possession of the whole estate, to complete titles thereto, and to sell the whole or any part thereof. S accepted, and after acting for a few months, he, without having made up a title to the truster's heritable properties, executed a minute of resignation which was endorsed on the trust-deed. The truster, on the narrative of the resignation, nominated B, with full power to manage the trust in terms of the trust-deed. B's agent made up a title in B's name to the properties by notarial instrument in terms of the Titles to Land Consolidation (Scotland) Act 1868, sec. 19. The notarial instrument, which was duly recorded, set out the sasine under which the truster was infeft, the trust-deed in favour of S, and the deed of nomination of B consequent on the resignation of S. B refused payment of the agent's account, on the ground that the notarial instrument did not constitute a valid feudal title in his person, in respect (1) it professed to give him infeftment as disponee in the trust-property conveyed to S, though there was no disposition in his favour by S or by the truster, and though there was a personal fee in S which was not taken up by B by any legal process; (2) that the trust-deed and deed of nomination did not form a sufficient warrant to the notary for completing the title by notarial instrument; (3) that the minute of resignation by S, being an essential link in the progress, was not set forth as one of the warrants of the instrument.

The Court (*diss.* Lord Rutherfurd Clark) *sustained* the validity of the title and the agent's right to payment of his account.

Mr James Yeaman, residing at Dundee, on the narrative that his affairs had become embarrassed, granted a trust-disposition and settlement for behoof of his creditors, dated 8th December 1885, in the following terms—"I do hereby assign, dispone, convey, and make over, to and in favour of John Shields, manufacturer, Perth, and , as trustees, to act in succession as after mentioned, whom failing to such person or persons as I may appoint by any writing under my hand validly executed, as trustees, for behoof of my whole lawful creditors at the date hereof who shall accede hereto or be assumed into the benefit of this trust, and to the assignees of the said trustees or trustee, all and sundry my whole means, estate, and effects, heritable and moveable, real and personal, of whatever kind and wherever situated, presently belonging or which may belong or accrue to me during the subsistence of the trust hereby constituted, with the whole writs, titles, and instructions thereof, . . . declaring hereby that the said John Shields shall in the first place, by himself alone, without the consent or concurrence of the said , have the sole power to manage and execute the trust hereby created, in the same manner as if these presents had been granted in favour of the said John Shields as sole trustee; and that in case of the death, incapacity, non-acceptance, or resignation of the said John Shields, then the said shall have the sole power to manage and execute the said trust; and in case of his death, incapacity, non-acceptance, or resignation, then the management and execution of the trust shall devolve upon the trustee or trustees to be nominated and appointed by me as aforesaid." Power was also given to the trustee under the disposition, *inter alia*, to take possession of the whole trust-estate, to complete titles thereto, and to sell the whole or any part thereof. The blank left in the disposition for the name of the trustee who was to act in succession to John Shields was never filled up.

Shields accepted the trust by holograph minute subscribed by him appended to the trust-disposition, and acted as trustee for some time thereafter. The estate was found by him to be insolvent. On 10th March 1886, finding that it was inexpedient for him to continue to act as trustee on account of his residence being at a distance from Dundee, he intimated to Mr Yeaman his resignation of the trust, and on 6th April 1886 he executed a minute annexed to the trust-disposition whereby he confirmed his resignation as from the 10th of March 1886.

By minute of appointment dated 5th April 1886 Mr Yeaman, upon the narrative of the trust-disposition, and that Shields after accepting the office of trustee found it inexpedient and difficult from his residing at a distance, and other reasons, to continue to act as trustee, and had resigned his trusteeship, nominated and appointed "Thomas Buchan, valuator, Dundee, as trustee under the said trust-deed, with full power, by himself alone, to manage and execute the trust thereby created, in the same manner and as fully and freely in every respect as if the said trust-deed had been granted in favour of him the said Thomas Buchan as sole trustee, and that for the purposes, and with the powers, and subject to the declarations and provisions contained in the said trust-deed." The trust-disposition, with the two annexed minutes by Shields and the minute of appointment, were recorded in the Books of Council and Session on 10th April 1886.

Thomas Buchan accepted the office of trustee under the trust-disposition and minute of appointment, and entered upon the administration of the trust-estate. Mr Yeaman was proprietor of and infeft in certain heritable properities in or about the town of Dundee. No feudal title to any of these properties was made up in the person of Shields, but after the appointment of Buchan as trustee titles to the whole properties were made up in his person as trustee by William Kerr, solicitor, Dundee, who acted as

agent in the trust both for Shields and Buchan. The titles were made up by notarial instruments applicable to the respective properties, proceeding upon the trust-disposition and the minute of appointment, all in terms of the Titles to Land Consolidation (Scotland) Act 1868.

In these notarial instruments there were mentioned as having been presented to the notary-public (1) the sasine under which Yeaman was infeft, (2) the trust-deed for behoof of creditors of 8th December 1885, (3) the minute of appointment by Yeaman of Buchan in consequence of Shields' resignation, dated 5th April 1886.

William Kerr died on 12th August 1886, leaving a trust-disposition and settlement, with two codicils annexed thereto, by which he disponed his estate to trustees, who declined to act, and Robert Bower Ritchie was appointed judicial factor on his trust-estate. The estates of William Kerr were afterwards sequestrated, and Robert Bower Ritchie was appointed trustee thereon.

Ritchie had made up the accounts incurred to Kerr in preparing the notarial instruments, and had rendered them to Buchan. The accounts had been taxed by the auditor of the Court of Session at £77, 2s. 5d., but Buchan had refused to pay the sum on the ground that the titles were not made up *habili modo*, and did not constitute a good title in his person. The validity of the titles had been challenged by a purchaser of one of the properties forming part of the trust-estate, and several of them still remained unsold.

This was a special case, in which Ritchie, as Kerr's trustee, was the *first* party, and Buchan, as Yeaman's trustee, the *second* party.

The *first* party maintained that titles to the properties were properly and validly made up in the person of Buchan as trustee by the notarial instruments proceeding upon the trust-disposition and minute of appointment, in respect (1) that by the 19th section of the Titles to Land Consolidation (Scotland) Act 1868 the grantee under a general disposition, whether by conveyance *mortis causa* or *inter vivos*, was empowered to complete his title by notarial instrument; and (2) that under the 3rd section of the Act the word conveyance was defined as extending to and including "deeds of nomination and other writings annexed to or endorsed on deeds or conveyances, or bearing reference to deeds or conveyances separately granted."

The *second* party maintained that the notarial instruments did not form a valid title in his favour, in respect (1) that Mr Shields had a personal right to the properties and never divested himself thereof; (2) that this case did not fall within the provisions of the Act of 1868; (3) that the trust-disposition and minute of appointment did not constitute a valid warrant for completing the title of the second party by notarial instrument; and (4) that even supposing it had been competent to complete Mr Buchan's title by notarial instrument, the notarial instruments were insufficient, inasmuch as the minute of resignation was not set forth as one of the warrants of the instruments, such minute being an essential link in the progress of titles.

The question of law was—"Do the said notarial instruments constitute a valid feudal title to the said properties in the person of the second party; and is the first party entitled to demand payment from the second party of the taxed amount of the accounts incurred in the preparation of the said notarial instruments?"

By the Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101), section 3, it is provided as follows—"The word 'deed' and the word 'conveyance' shall each extend to and include all charters, writs, dispositions whether containing a warrant or precept of sasine or not, and whether *inter vivos* or *mortis causa*, and whether absolute or in trust . . . warrants to judicial factors, trustees, or beneficiaries of a lapsed trust to make up titles to lands . . . and all codicils, deeds of nomination, and other writings annexed to or endorsed on deeds or conveyances, or bearing reference to deeds or conveyances separately granted, and decrees of declarator naming or appointing persons to exercise or enjoy the rights or powers conferred by such deeds or conveyances, shall be deemed and taken for the purposes of this Act to be parts of the deeds or conveyances to which they severally relate, and shall have the same effect in all respects as to the persons so named and appointed as if they had been named and appointed in the deeds or conveyances themselves."

By the 19th section it is enacted—"Where a person shall have granted or shall grant a general disposition of his lands, whether by conveyance *mortis causa* or *inter vivos*, ... it shall be competent to the grantee under such general disposition to expede and record in the appropriate register of sasines a notarial instrument in or as nearly as may be in the form of Schedule (L) hereto annexed; and on such notarial instrument or any similar notarial instrument expede in virtue of any Act of Parliament hereby repealed being so recorded, such grantee shall be in all respects in the same position as if a conveyance of the lands contained in such notarial instrument had been executed in his favour by the granter of the general disposition. . . . Provided always, that where such notarial instrument shall be expede by a person other than the original granter under such general disposition, it shall set forth the title or series of titles by which the person in whose favour it is expede acquired right to such general disposition, and the nature of his right."

Argued for the first party—Under the 19th section of the Titles to Land Consolidation Act 1868, the grantee under a general disposition such as this, whether by conveyance *mortis causa* or *inter vivos*, was empowered to complete his title by notarial instrument. By the 7th sub-section of section 3—the interpretation clause—a conveyance extended to and included all dispositions, whether absolute or in trust. There was here a general disposition in trust in the sense of section 19, and the title had been completed by notarial instrument. If Shields had died, a notarial instrument in favour of Buchan would have been good. The fact that he resigned made no difference—Bell's Lect. p. 944; *Mackilligin* v. *Mackilligin*, Nov. 23, 1855, 18 D. 83. Section 3, sub-section 7, provided that all codicils, deeds of nomination, and other writings bearing reference to deeds or conveyances separately granted, should be deemed to be parts of the deeds or conveyances to which

they severally related, and should have the same effect in all respects as to the persons so named and appointed as if they had been named and appointed in the deeds and conveyances themselves. Here the notarial instrument bore reference to the trust-deed, and also to the minute of appointment or nomination, which was a different fulfilment of the requirements of the Act. A trust-deed for creditors differed from an ordinary trust-deed in being only a burden on the estate of the proprietor. It did not convey the subjects, and could be discharged without a conveyance. There was no radical right conveyed to the trustee, and when he died there was nothing in him to convey. No doubt here the trustee had power to convey, but that was not in consequence of any title in him to the subjects, but of the power of sale expressed in the deed. It was really a mandate with a power of sale—*Gilmour* v. *Gilmour*, July 3, 1873, 11 Macph. 853; *Magistrates of Huntly* v. *Earl of Fife*, July 20, 1887, 14 R. 1091.

Argued for the second party—The notarial instrument did not form a valid title in his favour, for (1) it did not specially set forth the resignation of the original trustee as one of the documents shown to the notary, and on which the notarial instrument proceeded; and (2) the trust-deed created a fee in the original trustee which was never taken out of him. If a trustee was infeft his mere resignation did not cut down his infeftment but left him still feudally seised. So here the mere resignation of the trustee, though not infeft, did not take out of him the fee vested in him. It was not a case of the return of the fee to the original granter, and a new grant or reconveyance by him to the second trustee. There was no new grant. The second trustee's title depended entirely upon the original grant, and there was no passing of the fee from the first to the second trustee. There was only one person who could make up a title directly under the disposition, and if it were to be passed on it must be by a service on a new disposition or some other equivalent process capable of taking up the estate vested in the original diponee. The object of the Act of 1868 was only to dispense with certain executorial clauses in a conveyance. It made a notarial instrument only a statement of the titles shown to the notary-public. It could not possibly confer rights which the expeding person had not got.

At advising—

Lord Justice-Clerk—This is a special case in which the question directly at issue is, whether the account incurred to Mr Kerr by the trustee acting for the late Mr Yeaman ought to be paid in respect of the business for which it was charged not having been duly or correctly performed? This question involves a short but important point upon the late Conveyancing Act. But it is necessary first to examine the state of the facts on which the question depends.

Mr Yeaman, who was a merchant in Dundee, found his affairs embarrassed, and in December 1885 he executed a trust-disposition in these terms—[*His Lordship here read the terms of the trust-deed*]. Mr Shields accepted of that appointment, and took possession so far of the estate, and proceeded a certain length with the management of it. He made up no title whatever, but after he had held the appointment for a short time he intimated that he did not consider it desirable that he should longer continue in the trust, and accordingly on the back of the same disposition he signed a minute, in which he says—"I, John Shields, within designed, having as at tenth March Eighteen hundred and eighty-six, intimated my resignation of the within trust, do hereby confirm as from the said tenth of March last my resignation of the office of trustee under the foregoing trust-deed." Thereupon Yeaman executed a minute of appointment, in which he narrates what he had done before, and goes on, "and considering that the said John Shields, after accepting the office of trustee conferred on him by the said trust-deed, found it inexpedient and difficult, from his residing at a distance and other reasons, to continue to act as trustee, and has resigned his trusteeship, therefore I, the said James Yeaman, hereby nominate and appoint Thomas Buchan, valuator, Dundee, as trustee under the said trust-deed, with full power by himself alone to manage and execute the trust thereby created, in the same manner and as fully and freely in every respect as if the said trust-deed had been granted in favour of him the said Thomas Buchan as sole trustee, and that for the purposes, and with the powers, and subject to the declarations and provisions contained in the said trust-deed."

Mr Buchan accepted office and proceeded to discharge the duties of the trust, *inter alia*, by granting dispositions to feuars on the title thus acquired. In making up his title he followed, or professed to follow, the directions of the Titles to Land Act, 1868, in expeding the notarial instrument. The question brought up in the case is whether Mr Buchan had a right to expede the notarial instrument, and whether it is in accordance with the prescribed form.

Now, there are four grounds on which it is said that it is not. The first is that Shields had a personal right to the properties, and never divested himself thereof. In regard to that I do not think that Shields had a personal right. He had two things. He had a good title of possession and administration. He had also a right to obtain a title; and if he had chosen, when the deed was executed by Yeaman, to proceed under the Titles to Land Act, he might have made his right available, but he had no personal title to the property, because the right that is given to him is indefinite, to all and sundry lands and heritages. That did not convey a personal right to the property. It gave him a right of action against the party who had granted that indefinite disposition to get him to make it definite by granting a direct disposition to the lands. Prior to the Act of 1868 that would not have conferred a title at all until supplemented by some proceeding on the part of the disponee. Under the Titles to Land Act he did obtain a power to make that a real right, but he never used it, and in my apprehension when he resigned his trusteeship his right to administration of course came to an end, and any right which he had to make up a title to these lands of course perished with it, and therefore I do not think there is any ground for the objection that has been taken. The very object of the 19th section of the Titles to Land Act was to provide a mode of making a general disposition to lands, where lands are not specially

disponed, available to the grantee without any action at law, and the mode is by notarial instrument, which was the mode followed in this case. But if a grantee has only an indefinite right, and takes no step at all to put himself in the position of a special disponee, he acquires no right whatever. I do not think there was anything the original trustee could assign, and there was nothing which was available to assign, but independent of that this is a disposition for a special and specific and temporary purpose. It is very much of the nature of an absolute disposition with a back-bond; it is not as good as that, but the radical right remained with the truster. And I think that, even irrespective of what I have been saying, if the truster chose to nominate a second trustee, and that trustee used the forms of law to complete his title by notarial instrument or infeftment, there was nothing that required to be taken out of the person of the original trustee. These are the views that have occurred to me. I do not think there is any solidity in the objection.

In regard to the others, I did not understand that they were seriously maintained, viz., that the case does not fall under the Act of 1868, and that the trust-disposition and minute of appointment do not constitute a valid warrant for completing the title of the second party by notarial instrument. They fall under the definition clause in the Act of 1868, which is as wide as it well can be, and which includes minutes of appointment and assignation within the term conveyance.

The last objection is, that the minute of resignation is not set forth in the notarial instrument as one of the links in the progress. It would perhaps have been more regular if it had been, but I do not think under the circumstances that it was essential.

Lord Young—These questions are presented to us as indicating the objections which were urged to the late Mr Kerr's account as agent for the trustees in this trust. We indicated at a pretty early stage of the argument that it was inconvenient, to say the least, to try a question of the validity of titles upon an objection to an agent's account, and that the answer to these questions would not necessarily determine that Kerr or those in his right were not entitled to payment. But it was explained to us that the real object of the case was to ascertain whether or not Buchan, the present trustee, was in a position to give a good title to purchasers as the now acting trustee in this trust for creditors. We all sympathise with that object. I, for one at least, am disposed to sympathise with it—it being explained to us that the purchasers, or those who had been communicated with, were quite ready to take a title from Buchan and to pay the price if we are of opinion that he is in a position to give a good one. I considered the case in that view, and my opinion concurs with that of your Lordship, that Buchan is in a position to give a good title. It is of course eminently desirable that he should be, for the only alternative is, that there shall be further conveyancing and further expense in the administration of this insolvent estate. There is no question of justice or equity, or even reasonable safety to any interests whatever involved in this case. It is merely a question as to whether the exigencies of our law permit or even require a more severe taxation of an insolvent estate in the course of its administration in the shape of conveyancing. Nobody is interested except those who make more or less of conveyancing, which the law according to one view renders necessary to the profit of those who are concerned, and which in another view, which is the view I take, may with great propriety be dispensed with.

I have often thought—indeed we are almost daily told now of the very sad state of our conveyancing laws—that they require a multitude of superfluous deeds, and of course superfluous expense, and that they should be revised and remedied so that things may be done more economically than at present. I have often thought that a good deal might be done in that direction by judgment — by judicious consideration as to whether deeds are or are not truly superfluous, and dispensing with them by judgment when unnecessary. The tendency is towards liberal construction where there is any doubt about the matter, and to prevent the incurring of extra cost, especially where an insolvent estate is in liquidation, which of course is a fair feast for a multitude of people. Now, here there is no doubt about the late Mr Yeaman's title to the property. He was the owner of a number of properties in Dundee. Under the old law, somehow or other, it would have been necessary to make each of these the subject of a separate conveyance. Each of them might be a shop, or a flat above a shop, or a cottage and garden—at all events there were a number of properties in and about Dundee, and Yeaman desired to realise them for behoof of his creditors, and he conveyed them together with his whole estate in lump to Mr Shields to be realised and divided amongst his creditors. I should have thought, and so held if the question had depended on me, that any man being the proprietor of an estate might grant authority to another to ingather it, and if heritable estate, to sell it, and with his authority to convey it to purchasers in order to its being divided amongst his creditors. But that simple view has never prevailed. It has always been thought necessary that a feudal title should be made up in the person of the trustee, and where there were a number of properties the party must be made a feudal vassal in each of them, however numerous the titles may be. They may be all identical, with no more thought or intellect required in the preparation of them, than is required in giving out a railway ticket to Dundee or elsewhere, but they are charged as conveyances, and the insolvent estate must go to the creditors so much diminished in consequence. It occurred to me in support of that simple view that a trustee well nominated and appointed, with authority to sell and convey such property to purchasers, and to divide the money amongst the creditors, would be as good as a commissioner to execute deeds who is appointed by people who are too aristocratic to sign their own deeds. There are some people in Scotland who never sign deeds or leases, but grant a commission to somebody else to do it. I think the Duke of Sutherland is one of them. He executes such conveyances through his commissioner. I should have thought it a case of the same simplicity where a party in necessitous

circumstances authorises an individual to ingather his estate and to dispose of it to purchasers, Mr Yeaman gave such authority to Mr Shields. There is authority to Shields, whoever else may be nominated to act under the deed as trustee, to sell the property in such lots as he shall think expedient, and to receive the price and grant dispositions and other conveyances to purchasers. Mr Shields found it inconvenient to act, because he was not on the spot. After trying it for a short period he thought proper to resign. It had been contemplated that he would not always act, and the deed provided that if Shields failed by death or resignation, then the truster would nominate somebody else. Upon Shields' failure Yeaman appointed Buchan as trustee under the deed, with all the powers, &c., which Shields had. Mr Kerr was then applied to to make up the title, and I think with great judgment he made it up by notarial instrument. There may be a number of properties, as I have stated, and the notarial instrument, identifying various properties, shops, flats, cottage and garden, and requiring no more thought or intelligence than so many railway tickets, involves an account of £77. It is thought that that is not enough, but that there should be a conveyance or something else —I do not know what—by Shields.

I am of opinion, however, that this instrument is sufficient under clause 19 of the Act of Parliament. It is certainly eminently desirable that it should be so. Where is the risk of it? It is all recorded—all upon the records for the information of everybody—that Yeaman first appointed Shields, and then upon his resignation nominated Buchan in his place, and that under a general conveyance to them there were comprehended these properties which were all enumerated in the notarial instrument, and that he was the trustee administering these properties with a power of sale, and a power to grant dispositions to purchasers. Is it not eminently desirable, upon every reasonable and rational consideration, that this should be so done? I really cannot doubt it for a moment, and that there is no risk of fraud, or error—no risk of the interest of anybody being prejudicially affected in any way in holding this to be sufficient. According to my construction of section 19 of the Act of 1868 it is sufficient. One may be driven by a cross criticism on the language of an Act of Parliament or subtle reasoning to another conclusion, but one would deplore it, and would rather exercise minute criticism and subtle consideration to avoid more conveyancing and more expense. I therefore think that Buchan's title has been well and sufficiently made up. I regret that it was not more economically made up, but there is no question about that, and I may be wandering into regions of future reform, which I am not warranted in trespassing upon on the present occasion, in alluding to anything else than the instrument. At all events, I think Buchan is in a position to grant a good title to any purchaser.

Lord Craighill—The circumstances of this case do not here require recapitulation, because they are fully set forth in the special case upon which the opinion and judgment of the Court has been asked. One or two of these, however, must be mentioned in order that the views that I am about to express may be realised.

The late Mr Yeaman in December 1885 granted a trust-deed for behoof of his creditors. The estate which was conveyed in trust was not any specific property or properties. No individual subject was named or described. What was conveyed, quoting from the dispositive clause of the deed, was "all and sundry my (the truster's) whole means, estate, and effects, heritable and moveable, real and personal, of whatever kind, and wheresoever situated, presently belonging or which may belong or accrue to me during the subsistence of the trust hereby constituted." Some of the properties might be in Dundee, and others might be elsewhere, but whatever their locality their individuality remained undisclosed. The result necessarily was that, so far as the effect of the conveyance was concerned, there was no relation established between those to whom the conveyance was granted in trust, and the properties which were to be put under their administration.

The conveyance was given to and in favour of "John Shields, manufacturer, Perth, and as trustees, to act in succession as after-mentioned, whom failing to such person or persons as I may appoint by any writing under my hand validly executed." This constitution of the trust, however, was followed by a declaration that "in case of the death, incapacity, non-acceptance, or resignation of the said John Shields, then the said shall have the same power to manage and execute the said trust, and in case of his death, incapacity, non-acceptance, or resignation, then the management and execution of the trust shall devolve upon the trustee or trustees to be nominated and appointed by me as aforesaid." The blank in the trust-deed for the name of the second trustee never was filled up, and so Mr Shields was the only trustee named in the trust-deed. Mr Shields by holograph minute accepted the trust, and for some time acted as trustee. But on 10th March 1886, three months after his appointment, he intimated to Mr Yeaman his resignation of the trust, and on 6th April he executed a minute which is annexed to the trust-disposition, whereby he confirmed his resignation as from the 10th of March.

On 5th April 1886 Mr Yeaman, on the narrative of the trust-disposition, and that Mr Shields, after accepting the office of trustee, had resigned, nominated and appointed Thomas Buchan, valuator, Dundee, as trustee under the said trust-deed, with full power by himself alone to manage and execute the trust thereby created, in the same manner and as fully and as freely in every respect as if the trust-deed had been granted in favour of him, the said Thomas Buchan, as sole trustee, and that for the purposes and with the powers, and subject to the declarations and provisions contained in the trust-deed.

Mr Yeaman was proprietor of a number of heritable properties in and about Dundee, but no feudal title to any of these properties was made up in the person of Mr Shields. After the appointment of Mr Buchan, however, titles to the whole of these were made up in his person as trustee by the now deceased William Kerr, solicitor, Dundee, who acted as agent in the trust both for Mr Shields and Mr Buchan. Those titles were made up by notarial instru-

ments applicable to the respective properties, proceeding on the said trust-disposition and the said minute of appointment. The account incurred to Mr Kerr, who is now dead, and the trustee in whose sequestration is the first party to this special case, is the subject-matter here in dispute. The second party is Mr Buchan, the trustee in whose person the titles had been completed. What the Court are asked to determine is, whether the notarial instruments referred to constitute a valid feudal title to the properties referred to in the person of the second party.

There appear to me to be two questions involved in this inquiry. The first is the right of Mr Yeaman, the truster, to convey his means and estate to Mr Buchan, and the second is, whether, if he was entitled to convey, the course which he followed for this purpose was legally sufficient to effect the end desired.

In judging of the first of these questions the material consideration is that the conveyance was a general conveyance by which there was established no connection between the trustee and the property conveyed in trust. The trust-deed was a title to administer, but when he ceased to be trustee his connection with the property ceased. His trusteeship was the only bond by which they were united. Part of the property was moveables and part heritage, and when he resigned he left behind him the one as much as the other. The difficulty suggested by the second party is that there had been a conveyance to Mr Shields, and that to divest him it was necessary to re-convey. That appears to me to be a proceeding that was unnecessary, and indeed inappropriate. He had himself received no title to any particular subject, and he could give no title to any particular subject. There was never an investiture. He could have made up a title, and had he done so, then it may be that, nowithstanding his resignation, a re-conveyance from him would have been necessary. Even that, however, appears to me to be doubtful, but on that matter I express no opinion. It is sufficient for me to say that when he resigned he left the trust-estate as he found it. If Mr Yeaman's right to convey to Mr Buchan could be held to be derived from him, a re-conveyance would of course be necessary, but Mr Yeaman had all along the radical right, and that was the title upon which, after Mr Shields resigned, the nomination in favour of Mr Buchan was granted.

Mr Yeaman therefore having a right, the next thing for consideration is whether the course he followed was apt for the purpose which was to be accomplished. What was executed was not a conveyance in the ordinary sense of the term, but was a writing by which Mr Yeaman nominated and appointed Mr Buchan as trustee under the said trust-deed, with full powers of administration, for the ends and purposes for which the trust had been created. If the conveyance had been in the ordinary form, Mr Yeaman having the power, there can be no doubt that it would have been a valid and effectual disposition of the trust property, but a nomination was all that was given, and hence the difficulty—or one of the difficulties—which have to be solved on the present occasion. Section 19 of the Titles to Land (Consolidation) (Scotland) Act (31 and 32 Vict. c. 101) enacts that "where a person shall have granted or shall grant a general disposition of his lands, whether by conveyance *mortis causa* or *inter vivos*, or by a testamentary deed or writing, within the sense and meaning of the 20th and 21st sections of this Act, and whether such general disposition shall extend to the whole lands belonging to the granter, or be limited to particular lands belonging to him, with or without full description of such lands . . . it shall be competent to the grantee under such general disposition to expede and record in the appropriate register of sasines a notarial instrument in, or as nearly as may be in, the form of Schedule L hereunto annexed." Thus, if there has been a disposition, the title of Mr Buchan may be completed by notarial instrument in the form of Schedule L. Now, section 3, which is the interpretation clause, enacts that the word "deed" and the word "conveyance" shall each extend to and include (sub-sec. 7) "all codicils, deeds of nomination, and other writings annexed to or endorsed on deeds or conveyances, or bearing reference to deeds or conveyances separately granted." The nomination in question appears to me to answer those conditions. We have a trust-deed, we have a nomination endorsed on the trust-deed, we have reference made in the nomination to the trust-deed; and consequently, in the sense of the Act, and for the purposes of the Act, the reasonable, indeed the only result, seems to be that the materials presented to the notary were all that were required as warrants for him to expede the notarial instrument, the validity of which is now the subject for determination.

On the whole matter I am of opinion that the question put to the Court ought to be answered in the affirmative.

Lord Rutherfurd Clark—In December 1885 James Yeaman granted a trust-disposition in favour of creditors. By that deed he disponed his whole estate in general terms to John Shields, "whom failing to such person or persons as I may appoint by any writing under my hand." It is hardly necessary to say that any person so nominated is not a disponee. He can only take in succession to Shields, as coming within the destination contained in the disposition.

Shields accepted and acted under the trust, but he was not infeft. Thereafter he resigned, and Yeaman, by a writing under his hand, nominated Mr Buchan to be trustee in his room. In order to make up Mr Buchan's title to the trust property a notarial instrument was expede. It set out the sasine under which Yeaman was infeft, the general trust-disposition in favour of Shields, and the nomination of Mr Buchan consequent on the resignation of the former.

The question is, whether a good feudal title was thereby completed in the person of Mr Buchan?

It was urged that the instrument was defective, inasmuch as it did not recite the writing by which Shields resigned the trust. To say the least, it would in my opinion have been better had it done so, so as to show that the notary had before him evidence of Shields' resignation under his own hand. But I do not dwell on this point, because there is a much more formidable objection.

The objection is this—The instrument gives infeftment to Mr Buchan as a disponee, though he does not possess that character. It professes

to give him infeftment in the trust property conveyed to Shields, though there is no disposition in his favour either by Shields or by the truster, and though the personal fee in Shields was not taken up by Mr Buchan by any legal process whatever. In my opinion it is very plain that the objection is well founded, and that it is fatal to the title.

Before I proceed to notice the statute law under which this instrument was expede, it may be well to consider how the title of Mr Buchan could have been made up at common law, the other circumstances being the same. To avoid any difficulty arising from a general conveyance, and from the fact that the nomination of Mr Buchan is contained in a separate deed, I shall suppose that the trust-disposition granted by Yeaman specifically disponed the property belonging to him to Shields, whom failing to Buchan, and that it contained all the usual clauses. In such a case Mr Buchan could not expede an infeftment under the disposition, because he had neither obtained a disposition from Shields nor had he an assignation to the precept of sasine. So far as I see there were only two ways of completing his title in such circumstances. Disregarding the unfeudalised disposition in favour of Shields he might have obtained a new disposition from Yeaman as still vested with the radical right, or as the successor of Shields, and as such coming within the destination contained in the disposition he might have raised a declaratory adjudication under which the property would be adjudged to him. In each case he would have had a conveyance to the lands.

This may be more clear if the disposition had been feudalised in the person of Shields, although in substance there is no difference. In that case the precept would have been exhausted, and there could have been no pretence for saying that it could be again used by Buchan. As the mere successor of Shields he could not have made up any title except by taking the estate out of the person of Shields. Whether the original deed be feudalised or not the principle is identical. For it is trite law that there cannot be two disponees in succession. One person, and one only, can make up a title directly under the disposition, and in order to pass on the estate to a successor there must be service or a new disposition or some other equivalent capable of taking up the estate of the original disponee.

I have taken as an example a title in its simplest form, so as to show that Mr Buchan was under the legal necessity of obtaining a disposition from Yeaman or Shields, or of taking up by some legal process the right which was vested in Shields. Assuredly he cannot be in a better position in the case which has actually occurred. That the trust-deed contained a general disposition only, and that he was nominated as the successor of Shields by a separate deed, would occasion more difficulties in the completion of his title, but could not relieve him of those other necessities to which I have adverted.

It must be kept in view that the estate which by reason of the notarial instrument is said to be vested in Mr Buchan is the trust-fee which was vested in Shields. That trust-fee was created by the conveyance of the subjects to the latter, and it must remain in his person until it is taken out of it either by conveyance or by some legal process. Conveyance there was none, and we shall have to consider whether a notarial instrument is a legal process for the transferance of an estate.

The Act of 1868 made many changes in the law relating to the transmission of heritable property. But in this case we are only concerned with the provision which makes it possible to make up a title directly under a general disposition, and without the aid of the feudal executorial clauses. By the 19th section the grantee under such a disposition may expede a notarial instrument in a certain prescribed form, and that instrument, when duly recorded in the register of sasines, will be sufficient to confer on him a feudal title to the subjects of the grant. But it is provided that "where such notarial instrument shall be expede by a person other than the original grantee under such general disposition, it shall set forth the title or series of titles by which the person in whose favour it is expede acquired right to such general disposition, and the nature of his right."

It is to me obvious that such a notarial instrument does not in any sense operate as a conveyance or service or other legal method of transmitting lands. The Act assumes that the right is in the person who expedes the instrument. The instrument in itself is no more than a statement of the titles which confer the right, and on being recorded it will operate as an infeftment. If the right does not otherwise exist it will do nothing. Where the disposition is general it furnishes the means of making it special by setting out the sasine of the granter. It supplies the executorial clauses, or rather it enables the grantee to dispense with them. But as it is a mere statement of the existing titles which are exhibited to the notary, it cannot operate either as a conveyance or as a service or other legal process for transmitting or taking up heritable rights, unless the statute so declares. The statute is silent on this subject. It does not declare that the notarial instrument has any force in conveying or transmitting heritable rights. The instrument therefore remains a mere statement or exhibition of the titles alleged to create a right in the person in whose favour it is expede, having no operation unless the right is vested in that person.

We were referred to the interpretation clause as aiding the argument of the first party. It shows very clearly that the trust-deed granted by Yeaman is a conveyance under which the disponee could have made up his title by expeding a notarial instrument in terms of the 19th section. But it shows nothing more. And observe what is said of deeds of nomination. They "shall be deemed and taken for the purposes of this Act to be parts of the deeds or conveyances to which they severally relate, and shall have the same effect in all respects as to the persons so named and appointed as if they had been named and appointed in the deeds and conveyances themselves." What effect, then, shall we give to the deed of nomination in favour of Mr Buchan? We shall incorporate it in the trust-disposition of Yeaman, which will then run as a disposition to Shields, whom failing to Buchan. But we can give it no other or further effect. And so we are brought back again to the question whether the titles of a successor can be made up by

means of the notarial instrument alone. I have already given my reasons for holding that a notarial instrument has no disponing or transmitting power.

In the case of an absolute disposition to A, whom failing to B, it would be impossible to dispute—at least as the law stood prior to 1874—that B could not make up a title by notarial instrument or otherwise without expeding a service to A so as to take up the fee which was vested in him. I do not pause to consider whether the Act of 1874 makes any difference on the ground that it vests a fee in B by mere survivance. For whatever may be the effect of that Act, it is plain that it has no application to the present case.

But an argument was founded on the fact that the right conferred on Shields and his successors is a trust-fee, and that the radical right remained in Yeaman. I cannot see how this is material. The trust-fee is created only by a disposition of the lands, and can only be taken up by taking up the lands which are the subject of the trust. Therefore the question is, whether a good title has been made up to the lands, and that can only be decided by the law which regulates the transmission of heritable rights. Mr Buchan is not less a successor than an heir of provision though he is a successor in a trust-fee. The only difference is in the legal processes which would be available for the transmission of the respective fees. That the radical right remained with Yeaman is of no consequence. It only shows that Yeaman might have granted a disposition in favour of Mr Buchan. But he did not. He did nothing more than name him as the successor of Shields, and so place him within the destination contained in the trust-disposition.

In my opinion the title is utterly bad, and I do not think the agent has a right to be paid for it.

The Court answered the question in the affirmative.

Counsel for the First Party—Gloag. Agents—Drummond & Reid, S.S.C.

Counsel for the Second Party—C. N. Johnston. Agents—J. A. Campbell & Lamond, C.S.

Friday, March 9.

SECOND DIVISION.

M'GRIGOR AND OTHERS (BERTRAM'S MARRIAGE-CONTRACT TRUSTEES) *v.* M'GRIGOR AND OTHERS.

Succession—Will — Marriage-Contract — Revocation—Appointment.

Under an antenuptial contract of marriage the wife conveyed to trustees the whole estate, heritable and moveable, then belonging to her, or to which she might acquire right during the subsistence of the marriage. The trustees were directed to hold the estate for behoof of herself in liferent, and to hold the capital of the estate for behoof of such person or persons as she "may appoint by any writing under her hand (however informally executed or defective)," and failing such appointment for behoof of her nearest heirs *in mobilibus* whomsoever. She had previous to her marriage made a will disposing of her whole estate, which contained clauses bequeathing special legacies, and also disposing of the residue. Shortly after her marriage she died leaving only these two deeds. At the date of her death her property consisted of a sum of capital, accumulations of income from her own estate paid to her partly before and partly after her marriage, income accrued upon her first husband's estate, which she had liferented, and household furniture and jewellery.

In a competition between the heirs *in mobilibus* of the deceased, and the special and residuary legatees under her will, *held—diss.* Lord Rutherfurd Clark—(1) that the will had been revoked by the marriage-contract; (2) that it could not be taken as a valid exercise of the power of appointment contained in the latter deed; and (3) that the whole property of the deceased went to her heirs *in mobilibus*.

On 5th November 1879 Mrs Jessie Merry Forrester or Matheson, the widow of John Matheson junior, Glasgow, executed a testamentary settlement, by which she appointed A. B. M'Grigor and C. D. Donald, both writers in Glasgow, to be her executors.

The purposes of the settlement were, *first*, for payment of debts; "*second*, for payment and fulfilment of such further legacies or bequests, instructions or directions, as I may leave, bequeath, or give, by any codicil hereto, or by any writing under my hand (however informally executed or defective) showing my wishes and intentions; *third*, I direct my said executors to deliver to my sister Mrs Margaret Forrester or Robson my diamond earrings and my gold bracelet with three diamonds, and to deliver to my other sister Mrs Catherine Creelman Forrester or Vaughan my diamond brooch and my gold bracelet with the moveable diamond centre; *fourth*, I direct my said executors to pay the following legacies, viz. (first), a legacy of £100 sterling to the minister and kirk-session for the time being of the *quoad sacra* parish of Renton, Dumbartonshire, to be by them distributed among the deserving poor of said parish, including the village of Renton, and that in such way and manner as they, the said minister and kirk-session, may in their discretion think proper; (second), a legacy of £100 sterling to the Mechanics' Institution at Alexandria, Dumbartonshire, of which my said late husband was for some time honorary president; (third) a legacy of £100 sterling to my godson and nephew Edward James Forrester Vaughan; and (fourth) a legacy of £100 sterling to my nephew and the godson of my said husband John Matheson Forrester, declaring that the foresaid pecuniary legacies are to be paid (free of legacy duty) at the first term of Whitsunday or Martinmas that shall occur after my decease, or as soon thereafter as my said executors may find it convenient, and be in funds to do so; and (fifth), I direct my said executors to pay over the residue and remainder of my said estate, in equal portions, to and among the Glasgow Western Infirmary, the Glasgow Night Asylum for the House-