safety of the workmen in their works at times when metal was being broken up by ball and derrick: Therefore sustain the appeal: Recal the interlocutor of the Sheriff and Sheriff-Substitute appealed against: Find the defenders liable to the pursuer in damages, assess the same at £100 sterling," &c.

Counsel for the Appellant—M'Lennan. Agent—L. M'Intosh, S.S.C.

Counsel for the Respondent—C. S. Dickson — Younger. Agents — Drummond & Reid, W.S.

Monday, November 25, 1889.

FIRST DIVISION.

(With Three Consulted Judges.)

[Sheriff of Chancery.

HARE AND ANOTHER, PETITIONERS.

Heritable Security — Heritable or Moveable—Service of Heirs—Titles to Land Consolidation (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 101), *sec.* 117.

This section enacts—"From and after the commencement of this Act no heritable security granted or obtained either before or after that date shall, in whatever terms the same may be conceived, except in the cases hereinafter provided, be heritable as regards the succession of the creditor in such security, and the same, except as hereinafter provided, shall be moveable as regards the succession of such creditor, and shall belong after the death of such creditor to his executors or representatives *in mobilibus* in the same manner and to the same extent and effect as such security would, under the law and practice now in force, have belonged to the heirs of such creditor; provided always that where any heritable security is or shall be conceived expressly in favour of such creditor and his heirs or assignees or successors, excluding executors, the same shall be heritable as regards the succession of such creditor," &c.

Held that an heir of provision under a destination in a heritable bond may complete his title by service—*diss.* Lord Shand, who held that service was incompetent, in respect that by sec. 117 of the Titles to Land Consolidation Act 1868 the creditor's right was moveable *quoad* succession.

Opinions (*per* Lord President, Lord Justice-Clerk, Lords Young, Adam, Lee, and M'Laren) that the 117th section of the Titles to Land Consolidation (Scotland) Act 1868 makes heritable securities moveable only in cases of intestate succession.

Lord Alfred Henry Paget died on 24th August 1888. He was domiciled furth of Scotland. At the date of his death he was sole surviving and acting trustee under an indenture or marriage settlement in the English form, dated 20th August 1845, between the late Lord Macdonald and Lady Macdonald, who still survived. By indenture dated 4th December 1873 certain new trustees had been assumed under the marriage settlement, and by a second indenture dated 17th October 1888 the Hon. Hugh Henry Hare and Mr George Thomas Cavendish Paget were assumed under the powers contained in the settlement, and were thereafter the sole trustees.

At the date of Lord Alfred Paget's death he was infeft, as trustee, in certain heritable securities in virtue (1) of a bond of corroboration and disposition in security dated 11th and 17th July 1883, the debtor in the bond being taken bound "to make payment to the said Lord Alfred Henry Paget, as trustee foresaid, and his successors in office, or his or their assignees whomsoever," and (2) of assignations to eighteen different heritable securities in favour of "Lord Alfred Henry Paget, as trustee foresaid, and his sucessors in office and assignees whomsoever."

Messrs Hare and Paget accordingly presented this petition to the Sheriff of Chancery asking to be served "nearest and lawful heirs of provision in general to the said Lord Alfred Henry Paget, as trustee foresaid," under the bond of corroboration and disposition in security and eighteen several assignations, "but in trust always" for the purposes of the marriage settlement.

The Sheriff of Chancery (BLAIR) on 12th August 1889 pronounced this interlocutor:—"... Finds that the petitioners are not nearest and lawful heirs of provision in general of the late Lord Alfred Henry Paget under and in virtue of the bond of corroboration and disposition in security and assignation set forth in the petition: Therefore refuses the prayer of the petition, and decerns.

"*Note.*— ... The petitioners ask for service as heirs of provision in general to Lord Alfred H. Paget, as trustee under the destination in the bond of corroboration and assignations before mentioned, but in trust for the purposes of the indenture of 20th August 1845. The Sheriff is humbly of opinion that the securities vested in Lord A. H. Paget were moveable as regards succession, and that the procedure to make up a title by service is incompetent. The assignations granted by the prior holders of the securities are in favour 'of the said Honourable Alfred Henry Paget, commonly called Lord Alfred Henry Paget, as trustee foresaid, and his successors in office and assignees whomsoever,' and the bond of corroboration by Lord Macdonald is in favour 'of the said Lord Alfred Henry Paget, as trustee foresaid, and his successors in office, or his and their assignees whomsoever." The 117th section of the Titles to Land Consolidation (Scotland) Act 1868 provides that no heritable security, 'in whatever terms the same may be conceived,' shall be heritable as regards the succession of the creditor unless it has been taken 'expressly' excluding executors, or a minute has been executed by the creditor in the form of the schedule referred to in the section, and re-

corded. The petitioners maintained that the assignation or conveyance in favour of a 'trustee and his successors in office' was equivalent to an exclusion of executors, but so far as the Sheriff can ascertain there is no reported judicial opinion or decision upon the 117th section of the Act of 1868, or the similar expression 'secluding executors' in the Act 1661, cap. 32, which favours this suggestion, and in the absence of authority he is not disposed to admit so wide and important an exception against what appears to him to be the reasonable construction of the words of the above-mentioned section of the Act of 1868. The petitioners further contended that as they desired a general service the quality of the estate held by the deceased, whether heritable or moveable, was immaterial, and this is undoubtedly the case when the service asked is 'as nearest and lawful heir in general,' when what is required is proof of relationship, and the deceased's estate is probably never referred to; but the present application is for service as heirs of provision under and in virtue of the deeds specified in the prayer of the petition, which, if the views of the Sheriff before expressed are correct, bear on the face of them to relate only to moveable property so far as the succession of the creditor is concerned, and with which therefore the petitioners cannot connect themselves or acquire the rights over the estate conferred upon heirs of investiture, who have expede a general service by section 31 of the Conveyancing (Scotland) Act 1874."

The petitioners appealed to the Court of Session. After the case had been heard before the First Division it was put out for hearing a second time before their Lordships, with the addition of three Judges of the Second Division.

The petitioners argued—This was a trust asset, to which they desired to make up a title under the deeds referred to above as the successors nominated and appointed to the last trustee. Accordingly, they asked to be served heirs of provision in general under the deed. Section 117 of the Titles to Land Consolidation Act 1868 introduced a change in the succession to heritable bonds when the creditor died intestate, but it did not render it incompetent for an heir of provision to complete his title as formerly. The distinction the Act drew had no application where the bond was specially destined. The petitioners here took *provisione hominis*, and accordingly the Sheriff was not justified in inquiring as to the quality of the succession.

Authorities—Ersk. ii. 2, 11; Bell's Conveyancing (3rd ed.), ii. 1110; Sandford, i. 290; Currie on Executors, pp. 94, 103, and 169; Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 34.

At advising—

LORD PRESIDENT—It may not be a matter of very great consequence, as far as practical conveyancing is concerned, which way the present question is decided. Still, it is of importance that it should be determined according to law.

What we then have to consider is, whether the provisions of section 117 of the Act of 1868 apply to the present case?—[*His Lordship here read the portion of this section of the statute above quoted*].

I think the whole effect of that provision is that where there is a competition between the heir and the executor of a creditor in a heritable security, or, in other words, wherever there is intestate succession, the executor shall take and not the heir, and it appears to me that the provision of the statute goes no further. I am of opinion that the section does not apply to the present case for this reason. The legal right to the trust-estate in the present case forms the subject of a special destination, and I cannot conceive how any question can possibly arise under the section because the parties who are appointed by deed to take this right in succession one to another are named in the deed, and they therefore take *provisione hominis* and not *provisione juris*. I do not think it can be contended that this clause interfered with the creditor disposing of the succession in any way he pleased. That has not been suggested. In the present case the heritable securities stand destined by deed, and there is nothing in the terms of the section which I have read to interfere with the mode of making up a title. There is no question of succession in any proper sense of the term. It may be that the person who takes by destination is an heir, but he is *hæres factus*. He is not an heir-at-law. He is only heir of the destination, and therefore he must take up the succession in terms of the deed by which he is called. The only thing that could be supposed to interfere with the application of the ordinary rule in the present case is the fact that the bonds are held in trust, but I do not think that this affects the question, for it is a matter of no importance whether the person called in the destination takes for his own behoof or for that of some other person. I am therefore of opinion that the judgment should be recalled, and that we should remit to the Sheriff of Chancery to proceed with the service.

LORD JUSTICE-CLERK concurred.

LORD SHAND—After the former argument in this case I was of opinion that the judgment of the Sheriff of Chancery was right. I am still of the same opinion, though I say so with diffidence, as I understand your Lordships all hold a contrary view. I shall state as shortly as I can the grounds upon which I differ from the judgment which your Lordships are about to pronounce.

It is to be observed that all the securities to which it is sought to complete a title in the present case are taken in favour of "Lord Alfred Paget, as trustee foresaid, and his successors in office, and assignees whomsoever." The bond of corroboration by Lord Macdonald is in similar terms, being executed in favour of Lord Alfred, "as trustee foresaid, and his successors in office, or his or their assignees whomsoever."

The question to be decided is, whether on the death of Lord Alfred Paget, which has occurred, his successors in the trust must

complete a title to the securities as being heritable or as moveable property in his person? He was the creditor in the bonds. If the right he held as creditor was a heritable right *quoad* succession, then it must be taken up by service; if it was moveable, a service and infeftment will not serve the object, but will be ineffectual. If moveable, the right of his successors in the trust must be completed in the same way as the right to any other moveable estate belonging to the trust, as, *e.g.*, to personal bonds taken in the precise terms above quoted, or to shares of any joint-stock company which does not exclude the notice of trusts on its register. There is this difference only, that the writing or decree which gives the right to take up the moveable estate vested in Lord Alfred must either by itself, or by means of a notarial instrument, be made to appear on the records on the Register of Sasines—a step which is necessary because of the peculiarity that the security is one affecting land, and which is now taken as a matter of common practice by an executor-nominate, or in the case of intestacy by the legal representatives *in mobilibus*.

The question is not one of form merely, but of substance, for if the title be made up by an heir as a title to heritage, while the securities are not heritage and do not go to the heir, the title so made up will not give a good right to grant a discharge or assignation of the securities. The successors in the trust may have a right to grant such discharges or assignations, but this will not be by virtue of a service which cannot take up moveable estate, but by their right to the moveable estate of the trust, to which, however, their title must be completed in another and different way than by service.

The inquiry to be made accordingly is, what was the nature of the right in the person of Lord Alfred Paget? It is of course clear that his right was affected by a trust. He held his right to the property, both heritable and moveable, for certain trust purposes. But the trust property, all the same, in each of its items or particulars was either heritable or moveable. In my opinion the securities in question were by statutory enactment moveable property vested in him as trustee—that is, moveable as regards succession to him.

The decision of the question depends, as I think, on section 117 of the Act of 1868 (31 and 32 Vict. c. 101), taken with the interpretation of the words "heritable security" and "creditor" given in section 3 of the statute, and section 7 of the Amendment Act of 1869 (32 and 33 Vict. c. 116), which supersedes and comes in place of section 119 of the Act of 1868. But the various clauses of the former of these statutes which prescribe the mode in which an executor-nominate or other representative *in mobilibus* of a person deceased shall make up a title to securities in land, made moveable as regards succession, viz., section 125 and following sections, as altered by the Conveyancing Act 1874, are also important as recognising the effectual completion of the title to the land in a way excluding the idea of service, which is only applicable to an heir's right of succession to heritable estate.

The Statute of 1868 introduced, among other important changes, a number of provisions in the law relating to heritable securities, and particularly in regard to the succession to such securities, which prior to that Act had been regulated by the law of succession to land.

Your Lordship has read the opening part of section 117, and I shall not again read that part of it. I shall only say that no terms more comprehensive could, I think, have been used to express this as the result of the language of the enactment, that, "except in the cases hereinafter provided," every heritable security should be moveable as regards the succession of the creditor in the security, and should belong to his executors or representatives *in mobilibus* in place of his heir as formerly. The words are, "no heritable security shall, in whatever terms the same may be conceived, be heritable," &c., and the section then proceeds to enact affirmatively, in the terms I have just stated, that such securities shall be moveable. Unless, then, the securities in question fall under the exception thereinafter provided they are declared to be moveable *quoad* the succession of the creditor. The exception, so far as regards the present question, is thus stated—"Provided always, that when any heritable security is or shall be conceived expressly in favour of such creditor and his heirs or assignees or successors, excluding executors, the same shall be heritable as regards the succession of such creditor, and shall, after the death of such creditor, belong to his heirs in the same manner and to the same extent and effect as is the case under the existing law and practice in regard to heritable securities." The words of the section in my opinion include all classes of heritable bonds; they apply to all heritable securities, in whatever terms the same may be conceived, and make such securities moveable estate, except where they are conceived in favour of heirs, with an express exclusion of executors.

There is nothing in the language used which excepts from its operation and effect securities which the creditor holds subject to trust purposes. By section 3 of the Act the words "heritable security" are interpreted to include all heritable bonds and dispositions in security, and all deeds used for the purpose of constituting a security over lands, and it was provided that the word "creditor" "should extend to and include the party in whose favour an heritable security is granted, and his successors in right thereof." Lord Alfred Paget was unquestionably the creditor in the securities, and the enactments of the statute where the term "creditor" is used therefore applied to him and his successors in the securities.

Again, by the Amendment Act of 1869, by section 7, it is provided that in any bond and disposition in security the clause obliging the granter to pay the amount due under the bond to the creditor, his heirs, executors, or assignees is to be held "to import an obligation to pay the same to

the creditor and his representatives *in mobilibus* and his assignees" unless where executors are excluded. Taking, then, the clear and very general provisions of the two Acts together, I am of opinion that the securities in question are moveable as regards the succession of the creditor Lord Alfred Paget. In none of these securities were the executors of the creditor excluded. The circumstance that they were held in trust by Lord Alfred Paget does not in my view affect the question. It only stamps the estate with the character of being trust property, which can be vindicated by the beneficiaries or by new trustees nominated by the original trustees since Lord Alfred's death, as in the present case—persons who can equally vindicate a right to such trust property, whether it be heritable or moveable in its nature, in the person of the deceased trustee.

The circumstance that property is vested in a person as trustee, who is the sole trustee or sole surviving trustee, does not in my opinion prevent its forming part of his succession, though the property is affected by the trust. This principle is illustrated and receives effect in constant practice, for in the case of the death of a last surviving trustee a title is frequently made up by the persons having the beneficial right or the right of administration of the property, through his heir where the estate is heritable, or through his executor where the estate is moveable. A title so made up of course depends on the circumstance that the estate, heritable or moveable, as the case may be, is succession of the deceased trustee in whom it was vested. If it were not such succession the title made up by an heir would be useless. It may be true that the practice is not so fully recognised in the case of moveable as in that of heritable estate, but it is difficult to see any principle for holding that heritable trust-estate will descend to the heir-at-law of the last trustee, while moveable trust-estate will not descend to his executor. I confess I can see no ground for any difference in principle in the two cases.

It was argued that the whole effect of clause 117 of the Statute of 1868 was to provide for the case of intestacy of the creditor—to enact that in the case of the creditor dying intestate his securities should descend to his representatives *in mobilibus*—but that the clause had no application to a case of testate succession. This cannot in my opinion be correct. The enactment in its effect goes much deeper. The statute determines the nature of the right, and makes it moveable unless executors are expressly excluded. This is I think clear, for if a creditor in such heritable securities dies, leaving his moveable estate to A, and his heritable estate to B, there can, I think, be no possible doubt that securities not bearing an exclusion of executors would go to the legatee in moveables; and this because the statute declares them to be moveable estate. The case supposed would not be one of intestacy. Indeed, it is a case specially contemplated by section 127 (now section 64 of the Conveyancing Act of 1874), which deals with the mode of making up the title of the representative *in mobilibus* in a case of testate succession. The succession to a beneficiary who has right to property held for him in trust—in a question between his heir and executor—often depends on the quality of the right of the trustee as being heritable or moveable as regards succession. So, prior to the Statute of 1868, in the case of funds secured by heritable bonds held by a trustee, as the creditor therein specially for certain beneficiaries, the succession to these beneficiaries was heritable because the bonds were heritable as regards the succession of the trustee, the creditor therein. This is no longer so. Heritable bonds, being now by force of section 117 of the statute of 1868 moveable as regards the succession of the trustee, as creditor therein, go to the executor of the beneficiary, being moveable estate as regards succession.

On these grounds I am humbly of opinion that the judgment of the Sheriff in Chancery is right. The securities in question being part of the moveable succession of the deceased cannot be taken up by service as heritable estate.

By section 43 of the Conveyancing Act of 1874, read along with the interpretation of the words "estate in land" in section 3 of the Act, it is no doubt now competent to have a title made up to securities such as those now in question through the heir-at-law of the last trustee. This, however, does not affect the common law. The procedure there authorised is entirely dependent on the statutory provision for its effect.

In coming to the conclusion that service is not the proper mode of completing a title to the securities in question, I am quite sensible that a question of difficulty may arise as to the proper mode in which the title should be made up. On that point I have come to no conclusion beyond this, that the title should be completed as to moveable and not to heritable succession. The nomination of the new trustees certainly gives them the power to vindicate the right to the moveable estate of the trust, and might of itself entitle the appellants to sue for payment of personal bonds or debentures, and to procure themselves registered as shareholders of joint-stock companies in which the deceased held shares without the necessity for the intervention of the executor. There seems to be little, if any, doubt that a debtor or a company in such circumstances might safely act on the view that it is clear the trustees have the true right in the debt or shares in the case supposed. It may be that by notarial instrument, reciting their title as trustees recorded in the Register of Sasines, they might effectually complete a title under one of the schedules in the Act of 1868, but this I have not considered, and the point involves a very careful consideration of the detailed provisions of the statute.

It would rather appear to me that at least under section 65 of the Act of 1874 a title might be completed by decree of declaratory adjudication duly recorded, in the view

that the securities were moveable succession of the deceased, and that adjudication is the only way of completing the title where the executor of the deceased will give no assistance; but in that case I should think the representative *in mobilibus* of the deceased must be called as a party against whom the decree should be obtained. At all events, it appears to me that a title obtained by the executor of the deceased, followed by a recorded assignation, or at least an assignation and recorded notarial instrument would effectually complete the title.

LORD YOUNG—I agree with your Lordship in the chair, and concur in everything which your Lordship has said. The question, as it appears to me, is simply this, Whether the present petitioners, who claim to be served as "nearest and lawful heirs of provision in general" to Lord Alfred Paget, are entitled to succeed to an estate in land in which he died infeft. They must have their names entered upon the Register of Sasines—the estate being an estate in land—and accordingly the whole matter resolves itself into one of formal procedure in making up a title.

The mode in which such a title is to be made up cannot involve any serious principle of law, seeing that the right of the petitioners to the succession is not disputed, and no one has any interest in the present question except the person who has to pay the costs, and who naturally desires to have what is necessary done as cheaply as possible.

In regard to the interpretation to be put upon the 117th section of the Conveyancing Act of 1868, I desire to say that in my opinion it does not deal with the question of the making up of titles, but solely and entirely with beneficial interests, and the rights of the heir and executor respectively, in a case of intestate succession. Here the persons who are to succeed Lord Alfred Paget as trustees are to be determined not by the law of succession, but by the terms of the deed, and by these alone. If a failure occurred under the deed, the defect would be remedied, not by an appeal to the law of succession, but by an application to the Court for the appointment of a judicial factor.

Accordingly, I think that the petitioners' title should be made up by service, by which course it will be formally established that the persons served are the persons named by the deed, and being of this opinion, I can see nothing to support the view adopted by the Sheriff of Chancery.

LORD ADAM—I also entirely concur in the opinion expressed by your Lordship in the chair. I concur with Lord Young that section 117 of the Conveyancing Act of 1878 does not deal with questions of title, but with questions of right. But the form of the title necessarily depends upon the nature of the right, and therefore that section necessarily involves the question of the proper form of title.

LORD LEE concurred.

LORD M'LAREN—I concur in your Lordship's opinion entirely, and I only add in a single sentence that I should desire to emphasise the proposition that the Act of Parliament makes no change in the law of heritable securities except in relation to intestate succession. It introduces a different class of heirs from those which the common law recognises in relation to heritable securities, but in my view it makes no change in the quality of the creditor's right in these securities. Of course if the quality of the right were changed the right could no longer be taken up by service; but it is equally clear that if the estate of the creditor is to remain heritable in quality, then for all purposes of the transmission or extinction of the right the mode of the conveyance must be the same as it was before, except in so far as the statute authorises a different form. The statute has given a form of transmission to meet the special case of intestate succession with which it is dealing. This is not a case of intestate succession, but a case of transmission from a deceased trustee to a *nominatim* substitute. It is to my mind strictly analogous to the making up of a title by a *nominatim* substitute in an entail, and the proper mode of making up such a title in my opinion is by service as heir of provision.

The Court accordingly recalled the interlocutor appealed against, and remitted to the Sheriff of Chancery to proceed.

Counsel for the Petitioners—Sir C. Pearson—Guthrie. Agents—John C. Brodie & Sons, W.S.

Saturday February 8, 1890.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

PEEBLES AND ANOTHER *v.* KINNELL.

Partnership—Proof by Facts and Circumstances—Business Carried on by Two Sisters.

Two sisters began business in 1880 on borrowed capital which the lender deponed had been advanced to them jointly.

In an action of declarator of partnership at the instance of the younger against the elder sister, *held*, especially in view of the real evidence, that in spite of the source of the business, it had been conducted in such a way as to show that it belonged to the defender, and that the pursuer had only occupied the position of assistant.

Diss. Lord M'Laren, who regarded the case as a conflict of testimony on a question of fact, in which the opinion of the Lord Ordinary, who was in favour of the pursuer, ought to prevail.

Observations (*per* the Lord President and Lord Shand) on the position in which the Court is placed in reviewing questions of evidence led in the Outer House.