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-

less, and the Glasgow Society for the Prevention of Cruelty to Animals."

Mrs Matheson on 18th September 1886 married William Bertram, Esq. of Kersewell, in the county of Lanark. By their antenuptial contract of marriage Mr Bertram disponed to his wife for her liferent use only, in case she should survive him, the mansion-house of Kersewell, with the furniture, &c., or in lieu thereof an annuity of £300. Mrs Bertram disponed to the marriage-contract trustees "All and sundry the whole estate, heritable and moveable, real and personal, of whatever nature or description, or wherever situated, now belonging to her, or to which she may hereafter have right or succeed or which she may acquire in any manner of way during the subsistence of the said intended marriage, which estate shall be held and applied by the said trustees for the ends, uses, and purposes following, viz., in the first place, in payment of the expenses of the trust hereby created; in the second place, the trustees shall hold the said estate for behoof of the second party in liferent for her liferent alimentary use allenarly, during all the days and years of her life; and in the third place, the trustees shall hold the capital of the said estate for behoof of such person or persons and on such terms and payable at such periods as the second party may appoint by any writing under her hand, however informally executed, and failing such appointment the trustees shall hold the said capital for behoof of the second party's nearest heirs *in mobilibus* whomsoever."

Mr Bertram renounced all right of courtesy and legal share of moveables which he or his representatives could claim on the death of his wife.

Mrs Bertram died on 10th June 1887, survived by her husband. At her death her property consisted of securities of the value of £13,125. Besides this sum the deceased had in bank, or otherwise under her own immediate control at the date of her death, sums amounting to £1212 or thereby, representing accumulations of income from her estate which had been paid to her partly prior and partly subsequently to her marriage with Mr Bertram, and there had accrued certain income on her first husband's estate, the whole of which was liferented by her, for the period from Whitsunday 1887, when the last payment was made, to the date of her death. There was also due to her a sum of £1600 or thereby, being interest accrued between June 1879 and the date of her death on the sum of £4000, part of the estate of her first husband, advanced by his trustees to Sir Donald Matheson or on his account, which had not been paid to her. The deceased was also at her death possessed of a large amount of household furniture and some jewellery of considerable value.

This was a special case to which A. B. M'Grigor and others, the marriage-contract trustees of Mr and Mrs Bertram were the *first parties;* A. B. M'Grigor, the surviving executor under the settlement executed by Mrs Bertram on 5th November 1879, was the *second party;* the *special* legatees under Mrs Bertram's settlement were the *third parties;* the *residuary* legatees under Mrs Bertram's settlement were the *fourth parties;* and Mrs Bertram's heirs *in mobilibus* were the *fifth parties.*

The parties of the second, third, and fourth parts maintained (1) that the settlement of 5th November 1879 was effectual and subsisting notwithstanding the terms of the subsequently executed contract of marriage, or alternatively (2) that a distinction fell to be made between the £13,125 of capital and the income (or at least so much thereof as was paid to the deceased subsequently to her marriage with Mr Bertram) and accumulations of income, the sum due in name of interest on the sum of £4000 (or at least so much thereof as had become due since the marriage), and the rest of Mrs Bertram's property, and that the conveyance in the contract of marriage only extended to and included the capital sum of £13,125, and did not extend to nor include the other property above mentioned; that the settlement was effectual and subsisting *quoad* the other property, or at least *quoad* so much thereof as was acquired or became due to the deceased subsequently to her marriage, and also *quoad* the nomination of executors therein contained. The parties of the fifth part maintained that the marriage-contract entirely superseded and revoked the previously executed settlement, and that they, either under the marriage-contract or as heirs *in mobilibus ab intestato* of the deceased, were entitled to her whole estate, including the accumulations of interest in the bank and elsewhere.

The questions of law were these—"(1) Has the settlement of 1879 been revoked by the said marriage-contract, or is the said settlement subsisting and effectual to any, and if so, to what extent? (2) Do the accumulations of Mrs Bertram's income, or at least so much thereof as has been paid to her subsequently to her said marriage, and the income due to her for the period from the last term of payment to the date of her death, or any part thereof, and the household furniture and jewellery referred to, fall under the marriage-contract, and if not, who is entitled thereto? (3) Does the interest which has accrued on the sum of £4000, above referred to, or at least the interest which has accrued since the said marriage, but which was not paid during the lifetime of Mrs Bertram, fall under the marriage contract, and if not, who is entitled to the same?"

Argued for the *second, third,* and *fourth* parties—Mrs Bertram in her marriage-contract had not made any general settlement revoking the settlement of her affairs made in 1879. The whole of her property therefore fell to be disposed of under that settlement. Further, the settlement of 1879 was an appointment in the sense of the marriage-contract. There was no inconsistency between the two deeds. The primary object of the contract was to protect Mrs Bertram's property from her husband, and when she died her directions for the final disposition of her property were to be found in the settlement of 1879—*Grant* v. *Stoddart, &c.*, Feb. 27, 1849, 11 D. 872, *revd.* 1 Macq. 163; *Weir* v. *Steill*, M. 11,359; *Dove* v. *Smith*, May 31, 1827, 5 S. 734; *Fleming*, M. Implied Will, App. No. 1; *Hislop and Others* v. *Maxwell's Trustees*, Feb. 11, 1834, 12 S. 413; *Boyd's Trustees* v. *Boyd*, July 13, 1877, 4 R. 1082; *Young's Trustees, &c.*, May 22, 1885, 12 R. 968; *Baird* v *Jaap*, July 15, 1856, 18 D. 1246; *Allans* v. *Sinclair*, Nov. 13, 1776, 2 Paton's App. 403. Alternatively, only the capital of the estate passed to the trustees under the marriage-contract, and the accumulations of income fell under the settlement.

The *fifth* parties argued—In the marriage-contract there was a general conveyance of all the property which this lady had in her possession at the time of her death to certain trustees. The trustees were ordered to hold all these sums for certain purposes during her life, and when these purposes failed at her death, the estate was to go to her heirs *in mobilibus*. That was a perfectly good settlement although it occurred in a marriage-contract. The settlement of 1879 could not be regarded as an appointment under her hand, such as was spoken of in the marriage-contract, as that had been executed prior to the contract, while the words showed that what she had in her mind was some appointment to be made after the contract. What was disponed to the trustees under the contract was the "capital of the said estate." There the word "capital" was opposed to "interest," and simply meant all the property that she possessed at her death.

At advising—

Lord Justice-Clerk—This case raises some questions which are not without interest, but the substantial question which we have here to consider is, whether a settlement executed by the late Mrs Bertram when she was a widow, still subsists notwithstanding the provisions of a marriage-contract subsequently executed? In 1879 Mrs Bertram, or as she then was, Mrs Matheson, executed a settlement purporting to be a universal settlement of her estate. By this deed she conveyed the *universitas* of her estate to trustees named in the deed for the purposes of the settlement. These were to pay certain legacies detailed in the deed, and then to divide the residue of the estate among four charities in Glasgow which were named. But afterwards she became engaged to be married, and on that occasion she executed an antenuptial marriage-contract, dated 18th September 1886. That also purported to be a universal settlement, and to convey the *universitas* of her estate to trustees for the purposes therein mentioned. These purposes, shortly stated, were, first, to secure her own liferent of the estate, and secondly, on her death, and failing any appointment in writing under her own hand, the trustees were directed to pay over the residue to her next-of-kin. The lady died shortly after the marriage, and the question now is whether the settlement of her estate made in the marriage-contract does supersede or revoke the settlement made in 1879. My opinion is that the settlement in the marriage-contract does supersede entirely the settlement of her affairs made in 1879.

It has been contended for the parties interested, *first*, that there is no express revocation in the marriage-contract of the previous settlement, and also that the disposition in the previous settlement, being a disposition of a special subject, cannot presumably be revoked by a general disposition in a later deed; and *secondly*, it is said that the clause in the marriage-contract by which Mrs Bertram reserved to herself a power of appointment contains certain words which by their construction read into it the residuary clause in the settlement of 1879.

As regards the first point, I do not think that the doctrine of law contended for is at all applicable here. This is a case where both the settlements are universal settlements, and unless we are shown something to the contrary it is plain that these two universal settlements cannot stand together. The second point is, whether that provision in the marriage-contract as to the effect of any writing under her own hand can import into the marriage-contract the provisions of the settlement of 1879. I am strongly of opinion that it cannot, and on these grounds—The settlement in the marriage-contract being a universal settlement the result of it must be to recal the settlement she had made in 1879 of her affairs. The two deeds cannot stand together, and it is plain that when this lady reserved to herself the right to dispose of the estate to such "person or persons, and on such terms and payable at such periods as she may appoint by any writing under her hand (however informally executed)" she could not intend to import into her deed the very settlement she had altered. It is a question of intention, and if I were asked what was this lady's intention I should certainly think that the plain answer was that she intended to hand over her estate to her next-of-kin, unless in the future she should make some other settlement of her affairs. In addition to what we may infer from the words of the deed, we have the facts in connection with the case to help us, and these in my opinion show that it is impossible to imagine that this lady intended to repeat the provisions of her former will. It is plain that in 1879 the claims of the charities she intended to favour were principally in her mind, but when afterwards she came to be engaged to be married all her interests were altered, and it is not to be supposed that she intended to tie up her own hands as regarded any provisions she might in future make for her husband out of her estate.

It is said no doubt that the date of her testament must be taken as at the date of her death. That is quite true, but it is a statement that must be taken in a general way. It would be very singular if a settlement which was executed six years before her death should be taken as later in date than the contract she entered into on the occasion of her intended marriage.

Secondly, the provision in the marriage-contract reserving to the lady the right to alter her settlement by any writing under her own hand in my opinion referred solely to any writing that she might make subsequent to her marriage, and cannot be construed to mean that a settlement she had made previously was to be regarded as such a writing. I think that the trustees took everything that belonged to her at the date of her death.

Lord Young—I am of the same opinion. The question is in regard to the succession of the late Mrs Bertram, and the result depends upon the consideration of two deeds. One of these is a proper will executed in 1879 when she was a widow, and the other is an antenuptial marriage-contract executed in 1886 on the eve of her second marriage. The deed which I have called the proper will appointed certain trustees named therein, and explained the manner in which they were to execute their office. The first question is this—Is the marriage-contract to any extent, and if so, to what extent, also a will or testamentary instrument? If it is not a will or testamentary instrument at all, then it does not interfere with the deed of 1879. If it is a will to any extent, then to that extent it must supersede the provisions of the former deed.

It is rather a singular marriage-contract taken as a whole. The provision made by the husband in favour of his intended wife is the liferent after his death of his mansion-house of Kersewell in Lanarkshire, and its equipments, including a liferent use of the cellar of wine. There is also an option to her, to take, instead of that, an annuity of £300. That part of the deed never came into operation as Mrs Bertram died a few months after the marriage, survived by her husband. The only other part of the deed was that by which the wife on her part conveyed to certain trustees "All and sundry the whole estate, heritable and moveable, real and personal, of whatever nature or description, or wherever situated, now belonging to her, or to which she may hereafter have right or succeed or which she may acquire in any manner of way during the subsistence of the said intended marriage, which estate shall be held and applied by the said trustees for the ends, uses, and purposes following." We had an argument as to what part of her estate this clause included, whether the whole, or if not the whole, then what part of the whole, but it was admitted, and indeed was clear, that at least it included her property to the value of £13,125. This sum at least, invested and secured, was put into the hands of the trustees. Now, what were the trustees to do with it. The clause goes on—"In the first place, in payment of the expenses of the trust hereby created; in the second place, the trustees shall hold the said estate for behoof of the second party in liferent for her liferent alimentary use allenarly, during all the days and years of her life; and in the third place, the trustees shall hold the capital of the said estate for behoof of such person or persons and on such terms and payable at such periods as the second party may appoint by any writing under her hand, however informally executed, and failing such appointment the trustees shall hold the said capital for behoof of the second party's nearest heirs *in mobilibus* whomsoever." It is a startling thing to hear that a deed containing such a clause is anything but a will or testamentary instrument. What it applies to is another question, but that it applies to all property put into the hands of the trustees is certain. It was put into their hands to dispose of according to the purposes directed in the deed. Suppose there was no direction to the trustees to hold it for any person "who may be named in any writing under the second party's hand," but that merely they were to hold it for the second party's heirs whomsoever; suppose she gave her estate to trustees directing them to pay her the liferent, and on her death to hold it for her heirs whomsoever. Is that not a testament? No doubt it is a marriage-contract in this respect, that her husband contracts that her estate shall not pass to him, but remain her property to be dealt with as she pleases, but I think that is a testamentary direction as to the disposal of her property after her death. I see nothing in the objection that the beneficiaries are not a more selected party than her heirs *in mobilibus*. If the direction had been to pay to A B, or to one of the charities mentioned in the deed of 1879, would that not have been a testamentary direction? At this time I am not considering anything but the application of the £13,000. If I had to define what was a testamentary direction I do not think that I could give a better definition than that it was a direction as to the disposal of the testator's property after his death.

The direction here is in different terms, and to the extent of these terms must supersede the direction in the settlement of 1879. But then we have the words in the marriage-contract that her property is to go to anyone to whom she may have made an appointment under her hand, and we are asked to construe these words so that the deed of 1879 should be taken as such an appointment by a writing under her hand. In the event of no such appointment being made the direction is to pay to her nearest heirs, but the argument is that if there is no future appointment, then the trustees are to pay over the residue to those named in the settlement of 1879 as that is an appointment made under her hand. I cannot read the deed so. I think that that construction is strained and unnatural. In my opinion the plain meaning of the clause is this—My mind at present is to give the residue of my property to certain persons on my death, but I may change my mind, and if I do, I wish my trustees to pay attention to the alteration, and deal with it according to any settlement I may make. The conclusion I come to is that the deed of 1879 is not an appointment, and cannot be regarded as such under the terms of the marriage-contract, which we must bear in mind is also a settlement of Mrs Bertram's estate.

We must now proceed to consider if this clause applies to the whole of her estate or only to a part. In my opinion it applies to the whole. In terms it does literally so apply, and in this case there is no room, as in some other cases, for the consideration of partial alienation. Here there is no alienation. The parties to whom her estate was to go were the parties to whom it would have gone by operation of law after her death if she had died intestate, her heirs *in mobilibus*. I see no inducement to the Court to limit the operation of this clause of the marriage-contract. Let us refer to the words of the deed again. "All and sundry the whole estate, heritable and moveable, real and personal, and of whatever nature or description, or wherever situated, now belonging to her," &c. The word "now" means at the date of the deed in 1886. That includes everything she had at her death; it is a conveyance for the purposes of her will of all the property she then possessed. Now, the clause goes on that all this property is left to the trustees for the purposes that she afterwards describes. Now, everything she died possessed of must have been her property at the date of the deed in 1886, or must have come to her before her death. Her own will in regard to that, unless altered by some writing under her own hand, however informal, was that the trustees were to pay it over to her heirs *in mobilibus*. I think that this applies not only to the £13,000, but that it applies to her whole property at the time of her death. That it is a subsequent will later in date, and conceived under different circumstances, and signifies that she now prefers other persons to those she intended to favour under the deed of 1879. Then she preferred the societies mentioned in the settlement, but now her mind is changed. On the whole matter I am of opinion that the will of 1879 is altogether super-

seded by the will of 1886, and I call it so, because I think that it is none the less a will because the clauses composing it are included in an antenuptial marriage-contract.

Lord Craighill concurred.

Lord Rutherfurd Clark—The question is whether Mrs Bertram's settlement of 1879 was revoked by her marriage-contract in 1886.

I may notice, though in my view it is not very material, that the marriage-contract is not a universal settlement. It only conveyed the estate which belonged to Mrs Bertram at the time of her marriage, or which she might acquire during its subsistence. It is only by the accident of her having predeceased her husband that it can in any sense be regarded as a universal settlement, and it is a question whether in any case it can include the savings from accruing income.

The primary purpose of the marriage-contract is to protect the estate of the wife during the subsistence of the marriage. But for this it would never have come into existence. It is, however, also a will in as much as in a certain event Mrs Bertram gives the estate thereby conveyed to heirs *in mobilibus*. But the direction in their favour is only to take effect if she does not otherwise appoint by a writing under her hand. I regard that as meaning that they are to take if she does not leave a will. I cannot hold that it indicates any intention of revoking a subsisting settlement.

If the marriage-contract had not contained any direction in favour of heirs, I do not think that it was disputed that the settlement of 1879 would have regulated Mrs Bertram's succession. I fail to see how by reason of the existence of the direction the marriage-contract can be held to have any revoking power, when the gift to heirs is expressly postponed to any appointment which she may make, or, as I construe these words, to any will which she may leave.

It was argued that the only appointment which could have legal efficacy was an appointment made after the date of the marriage-contract. I do not think that this view is sound. The words are, as she "may appoint by any writing under her hand." I think that these words apply to and include any writing which she may leave at her death expressive of her will, whatever the date may be. All testamentary writings operate as at death, and unless the words of the marriage-contract necessarily exclude prior writings, which I think they do not, I am of opinion that the settlement of 1879 is the unrevoked will of Mrs Bertram, and that it must receive effect, either apart from the marriage-contract altogether, or as an appointment which takes precedence of the direction in favour of heirs *in mobilibus*.

The Court pronounced this interlocutor:—

"Find (1) that the settlement of 1879 has been revoked by the said marriage-contract between William Bertram, Esq., and Mrs Jessie Merry Forrester or Matheson, dated 18th September 1886; (2) that the accumulations of Mrs Bertram's income and the household furniture and jewellery referred to in the special case fall under the marriage-contract; and (3) that the interest which has accrued on the sum of £4000 referred to in the special case falls under the marriage-contract: Find it unnecessary to dispose of the fourth question in the case," &c.

Counsel for the First Parties — Gillespie. Agents—Mackenzie & Kermack, W.S.

Counsel for the Second and Third Parties—Fleming. Agents—J. A. Peddie & Ivory, W.S.

Counsel for the Fourth Parties—Asher, Q.C.—Napier. Agents—Mackenzie & Black, W.S.

Counsel for the Fifth Parties—Balfour, Q.C.—Low. Agent—Donald Mackenzie, W.S.

Saturday, March 10.

FIRST DIVISION.

CLARKE *v.* M'NAB AND OTHERS.

Inhibition—Recall—Misdescription in Letters of Inhibition—General Mandate by Creditor.

In a bond and disposition in security the grantees were designed as trustees for each other, and as individuals. They assigned their beneficial interests under the bond, and the borrower granted a corroborative disposition in security to the assignee. The grantees then raised letters of inhibition, as trustees under the bond and disposition in security, against the granter, who presented a petition for their recall, on the ground that the true creditor under the bond was the assignee, and that the inhibition was used without her knowledge or consent. *Held* (1) that the respondents, in designing themselves as trustees under the bond had correctly set forth their title, and that it was not necessary for them to set forth the subsequent transmission of the beneficial interest; and (2) that although the assignee had given no special mandate the diligence was not therefore unauthorised, as she had given general instructions to her agent to act in the matter, and was represented by counsel.

This was a petition for recal of inhibitions used against the petitioner by the respondents.

By bond and disposition in security, dated and recorded 13th and 14th October 1876, David Wilkie Clarke, the petitioner, and David Crabb, as trustees and also as individuals, borrowed from the respondents Mrs Jane Jack or M'Nab, Martha M'Nab, and John M'Nab, £1600, and from the respondent James Cuthbert £400, which two sums they bound themselves to repay to the respondents and their assignees, both as trustees for the said Mrs Jane Jack or M'Nab, Martha M'Nab, and John M'Nab, and James Cuthbert, and as individuals, as the lenders of the said sums. In security the borrowers, as trustees for themselves and as individuals, disponed to the respondents certain heritable subjects in Dundee.

On 13th November 1877 Mrs Margaret Scott or Bell acquired right to the bond and disposition in security, and lands and others thereby disponed, and the sums of money thereby due, conform to assignations in her favour by James Cuthbert, and by Mrs Jane M'Nab, Martha M'Nab, and John M'Nab.