ways in which notour bankruptcy of an individual may be constituted under section 7, excepting of course such as are appropriate to cases in which imprisonment is competent.

But having regard to the peculiar terms in which the 6th section of the Debtors Act 1880 is expressed, I am of opinion that its operation is confined to those cases in which imprisonment is rendered incompetent by that Act, viz., to the cases of those persons who previously were not privileged debtors.

If the 4th section, by which imprisonment was, with certain exceptions, abolished had stood alone, the effect would have been simply to increase the number of privileged cases; and the modes in which notour bankruptcy might be constituted, both in the case of such persons and of companies, would have been regulated by the 7th and 8th sections of the Bankruptcy Act 1856. But for some reason the Act does not stop there, but introduces by the 6th section a new mode of constituting notour bankruptcy confined apparently to the cases in which, under that Act, imprisonment is rendered incompetent. And the section concludes with the words: "Nothing in this section shall affect the provisions of section 7 of the Bankruptcy (Scotland) Act 1856."

I am therefore of opinion that, although the question is technical, notour bankruptcy has not been constituted in this case, because none of the modes prescribed by the Bankruptcy Act 1856 have been adopted.

I am therefore for answering both questions in the negative.

LORD YOUNG was absent.

The Court answered both questions in the negative.

Counsel for the First Party — M. P. Fraser. Agents — Simpson & Marwick, W.S.

Counsel for the Second Parties—Younger. Agents—J. W. & J. Mackenzie, W.S.

Friday, June 15.

SECOND DIVISION.

MARSHALL *v.* MARSHALL.

Succession — Destination — Conditional Institution or Substitution—Trust—Ultra vires—Effect of Unauthorised Destination in Conveyance by Trustees.

A testator by his trust-disposition and settlement conveyed his whole estates, heritable and moveable, to trustees, and, *inter alia*, directed them at the first term of Whitsunday or Martinmas after his death to convey certain lands "to A, my youngest son, whom failing to his lawful children equally among them."

The testator died survived by A, and the trustees, by disposition, in which they narrated the clause in the trust-disposition, disponed the lands "to A, whom failing to his children equally among them, whom failing to his heirs and assignees whomsoever." This deed was recorded on behalf of A only.

On A's death intestate, survived by two sons, *held* (1) that the provisions of the trust-disposition imported, not a substitution, but a conditional institution; (2) that the insertion of the substitution in favour of A's children in the disposition granted by the trustees was unauthorised by the settlement under which they acted, and did not affect the rights of parties; and (3) that consequently A's elder son as his heir-at-law was entitled to succeed to the whole lands.

James Marshall, of Goodockhill and Sandyford, by his trust-disposition and settlement, dated 1st November 1880, conveyed his whole heritable and moveable estates to trustees, and particularly the several estates in land therein described. With regard to these estates, he directed his trustees, subject to certain special provisions as to the minerals, "to convey and make over, at the first term of Whitsunday or Martinmas that shall occur six months after my decease, my foresaid several lands and others in favour of my after mentioned sons respectively, viz. — . . . *Item*, My trustees shall convey my foresaid lands of Syderig or Newhouse, specially above disponed in the fourth place, with the teinds and all parts and pertinents thereof, to the said Gavin Ballantyne Marshall, my youngest son, whom failing to his lawful children equally among them."

James Marshall died on 5th January 1881, survived by Gavin Ballantyne Marshall. James Marshall's trustees, by disposition dated 18th and 23rd March 1882, and recorded 19th April 1883, in which they narrated the clauses above quoted, disponed and conveyed the lands of Syderig or Newhouse "to the said Gavin Ballantyne Marshall, whom failing to his children equally among them, whom failing to his heirs and assignees whomsoever" under reservation of the minerals. In terms of the special direction with regard to them the minerals so reserved were ultimately also conveyed to Gavin Ballantyne Marshall by a disposition containing a destination in terms practically identical with those above quoted. Both these dispositions were recorded under warrants directing registration on behalf of Gavin Ballantyne Marshall. They were not recorded on behalf of Gavin's children.

Gavin Ballantyne Marshall died intestate on 15th November 1896, survived by his widow, Mrs Isabella Murray or Marshall, and two pupil sons, James Marshall and William Murray Marshall. The deceased never altered the destination in the said dispositions.

In these circumstances questions arose as to the rights of Gavin Ballantyne Marshall's two children in the estate of Syderig or Newhouse. For the decision of these questions a special case was presented to the

Court by (1) Mrs Isabella Murray or Marshall, as tutor and administrator-in-law to her two sons, and (2) James Marshall, and (3) William Murray Marshall, to whom tutors *ad litem* were appointed.

The questions of law were—"(1) Is the second party entitled to succeed to the said heritable estates as heir-at-law? Or (2) Are the second and third parties entitled to succeed thereto in equal shares as heirs of provision?"

Argued for second party — The provisions of the trust-disposition did not import a substitution but a conditional institution. The trustees were directed to make the conveyance to Gavin, whom failing to his lawful children. Where trustees were directed so to convey they were bound to make a simple conveyance to the son if he were alive, and had no right to insert a substitution in the deed—*Allan* v. *Fleming*, June 20, 1845, 7 D. 908. The trustees in inserting a substitution in the dispositions had acted *ultra vires*, and their action could not alter the rights of parties — *M'Nicol's Executrix* v. *M'Nicol*, February 18, 1893, 20 R. 386. There was no evidence that Gavin Ballantyne Marshall had asked for a conveyance in these terms, and the deed had been recorded for himself only. The second party as his heir-at-law was entitled to succeed to his heritable estate.

Argued for third party—The provisions in the trust-deed imported a substitution, and the dispositions and the destinations therein were in accordance with the directions contained in the trust-disposition. The trust-deed contained a destination, and the trustees were bound to convey in terms thereof. This destination had never been evacuated by Gavin Ballantyne Marshall and therefore still remained effectual—Ersk. iii. 8, 44; *Gray* v. *Gray's Trustees*, May 24, 1878, 5 R. 820. Besides, the trustees granted dispositions to Gavin Ballantyne Marshall with this destination inserted, and if a man held property without objection on a title which contained a destination, that destination ruled the succession to the property unless it was effectually evacuated by him before his death—*Connell's Trustees* v. *Connell's Trustees*, July 16, 1886, 13 R. 1175. Gavin Ballantyne Marshall had accepted the destination, and as he had never evacuated it the property descended to the second and third parties as heirs of provision.

At advising—

LORD JUSTICE-CLERK—In the settlement to which this special case relates the testator directed his trustees to convey his lands of Syderig or Newhouse to his youngest son Gavin Ballantyne Marshall, "whom failing to his lawful children equally among them." The first and principal question is, whether Gavin having survived the testator, and the lands having been conveyed to him, the destination being taken in the same words as I have quoted, the ulterior destination was evacuated by his having taken. That it was the intention of the testator that his son Gavin should take, and that it was only in the event of his failing to survive the testator, and so failing to take, that the estate was to go to his children equally among them, appears to me to be clear. The words of the deed are the words appropriate to express a conditional institution and not a substitution. And what I think the trustees should have done was to convey to Gavin, he not having failed. It would, in my opinion, be to defeat the testator's intention to answer the questions according to the contention of the third party. Gavin took in accordance with the direction of the testator, and he having died intestate I hold that his heir-at-law is entitled to succeed to the heritable estate which he so took. That is his right, and I cannot hold that it was in the power of the trustees by inserting in the conveyance words which according to a sound view of the settlement should not have been inserted to defeat a right in Gavin which he had by the expression of the testator's will, and prevent his heir-at-law from succeeding to it by right as such.

Gavin took infeftment in his own name, and thus in no way placed himself in the position of himself taking the property on an ultimate destination which might be held to be his. It is of course clear that where a legatee desires to do so he may take a title in such a form as to amount to a disposal of the property after his death. But nothing was done here which could in my opinion amount to that.

I therefore think that the first question should be answered in the affirmative, and the second in the negative.

LORD YOUNG—What we have to construe in this case is a direction to trustees in a testamentary trust. [*His Lordship read the direction.*] I am of opinion that this imports a conditional institution. As I interpret the direction, it is that the trustees are to convey the estate to Gavin Ballantyne Marshall, and failing Gavin Ballantyne Marshall they are to convey it to his lawful children equally among them.

It is further suggested that although to convey the estate to Gavin Ballantyne Marshall personally might have been the proper course for the trustees to take, yet they by interpreting the destination as a substitution or entail and inserting it in the dispositions have fixed the rule by which Gavin Ballantyne Marshall's succession must be regulated. I see no ground for holding that such a result can follow on the action of the trustees. I am therefore of opinion that the first question should be answered in the affirmative, and the second in the negative.

LORD TRAYNER—Although it is true that in dealing with destinations of heritage such as we have before us, the presumption is in favour of substitution rather than conditional institution, that presumption must give way before evidence of a contrary intention. I am satisfied from a consideration of the late James Marshall's settlement that he intended the lands of Syderig or Newhouse to go to his son Gavin absolutely

if Gavin survived him, and that Gavin's children were introduced into the destination only to provide for the case of Gavin's failure before taking; they were not substituted but named as institutes conditionally on their father's failure. I think the trustees of James Marshall should have conveyed the lands to Gavin without any mention being made or regard paid to his children. But as Gavin accepted the conveyance from his father's trustees in the terms in which it was expressed, the question has been raised whether that destination is not to be regarded as equivalent to a destination made by Gavin himself. I think it cannot be so regarded. We have no information as to what, if anything, took place in reference to the destination at the time when the conveyance was granted to Gavin by his father's trustees. But it may reasonably be inferred that the trustees in granting the conveyance thought it safest for them to repeat the exact terms of the trust-deed under which they were acting without considering what effect that might have on the ultimate succession, and that Gavin accepted the conveyance offered to him merely as vesting the property in himself. It is not readily to be presumed that he took that mode of settling the succession to himself in the event of his decease, and the fact that he recorded the conveyance and took infeftment only in favour of himself, without reference to any right conferred (or thought to be conferred) on his children militates against the view that he did.

I agree that the questions should be answered, the first in the affirmative and the second in the negative.

LORD MONCREIFF was absent.

The Court answered the first question in the affirmative and the second in the negative.

Counsel for First and Second Parties—Younger. Agents—Macpherson & Mackay, S.S.C.

Counsel for Third Party—Clyde. Agent—L. M'Intosh, S.S.C.

Saturday, June 16.

SECOND DIVISION.

GEORGE MORTON, LIMITED, PETITIONERS.

Company — Reduction of Capital — Capital Lost or Unrepresented by Available Assets — Apparent Surplus in Balance-Sheet — Companies Act 1877 (40 *and* 41 *Vict. c.* 26), *sec.* 3.

A company with a paid-up capital of £50,000 in £1 shares, half preference and half ordinary, lost a sum of £13,500 as the result of a bad debt, and the chairman came forward and surrendered 12,500 ordinary shares in order to meet the loss. The company thereupon resolved to reduce the ordinary capital by 12,500 shares, and presented a petition to the Court to confirm the reduction.

The reporter to whom the Court remitted the petition, reported that a sum of £13,500 had been lost, but that the last balance-sheet of the company, if effect was given to the proposed reduction, showed an apparent surplus of £1811, 1s. 1d. which could be immediately used for payment of dividend. He was therefore of opinion that the capital lost or unrepresented by available assets was £12,500, less £1811, 1s. 1d., or £10,688, 18s. 11d. He also reported that the interests of creditors were not affected.

The Court (*dub.* Lord Moncreiff) *confirmed* the proposed reduction of capital and dispensed with the addition of the words "and reduced" to the company's name.

George Morton, Limited, presented a petition to the Court to confirm a reduction of capital.

There being no opposition to the petition, the Court on 31st May 1900 remitted to Mr C. E. Loudon, W.S., to report as to the regularity of the proceedings, and the reasons for the proposed reduction of capital. From his report it appeared that the petitioners George Morton, Limited, were incorporated on 12th May 1898 under the Companies Acts 1862 to 1890. The company was formed to acquire and carry on the business of George Morton, wine and spirit merchant and bonded warehouse proprietor, Dundee. By the fifth article of the memorandum of association the capital of the company was fixed at £65,000 divided into 35,000 ordinary shares of £1 each and 30,000 preference shares of £1 each. The preference shares conferred the right to a fixed cumulative dividend at the rate of 5 per centum per annum, and were likewise preferential as to capital. Of the said shares, 25,000 ordinary shares and 25,000 preference shares had been issued and fully paid up. The remaining 10,000 ordinary shares and 5000 preference shares were unissued. The Court was asked to confirm a special resolution passed at an extraordinary general meeting of shareholders held on 22nd March 1900, and confirmed at an extraordinary general meeting of shareholders held on 21st April 1900, by which it was resolved "that the company accept a transfer or surrender of the 12,500 ordinary shares of £1 each (fully paid), Nos. 1 to 12,500 both inclusive, standing registered in the name of James Morton, and thereby reduce the capital from £65,000 to £52,500 divided into 30,000 preference shares of £1 each, and 22,500 ordinary shares of £1 each, and that the capital is and shall be reduced accordingly." The company had power to reduce its capital by article 49 of the articles of association. The effect of the reduction proposed was to reduce the paid-up capital from £50,000 to £37,500, and the total capital from £65,000 to £52,500. The reason for reduction of capital was that the company had sustained losses amounting to £12,500, and Mr James Morton, the chairman of the company, resolved to transfer