from the said Lindsay, Meldrum, & Oatts an assignation of their right to recover the sum from the pursuer and respondent); and also sist the said minuters Lindsay, Meldrum, & Oatts, and Erskine Dods & Rhind, to the effect and extent of finding the said minuters entitled to the expenses of the minute of sist No. 56 of process and procedure thereon in this Court: Find the said minuters entitled to these expenses accordingly," &c.

Counsel for the Minuters—Lippe—King Murray. Agents—Erskine Dods & Rhind, S.S.C.

Counsel for Defender (Appellant)--Horne, K.C.—Hon W. Watson. Agents—Dove, Lockhart, & Smart, S.S.C.

Friday, December 22.

SECOND DIVISION.

BROWN AND OTHERS *v.* HASTIE.

Trust — Trustee — Conveyance to Trustee, whom Failing to his Heir-Male—Title of Heir-Male to Administer Trust Estate.

A truster conveyed his estate to H., whom failing to "the nearest heir-male who may be resident in Great Britain and *sui juris*" of the said H.

Held that such heir-male was entitled to act as trustee in succession to H. for the purpose of administering the trust estate.

Miss Sophia Brown and others, *first parties*, William Brown and others, *second parties*, Mrs Stewart and another, *third parties*, Mrs Wood and others, *fourth parties*, and John Gill Hastie, solicitor, Edinburgh, *fifth party*, brought a Special Case for the determination of certain questions arising under the trust-disposition and settlement, dated 18th January 1893, of Charles Wood of Infield, Shetland, who died in 1903. The first, second, and third parties were the next-of-kin of the testator and their representatives. The fourth parties were the testator's widow and annuitants under the settlement. The fifth party was the nearest heir-male resident in Great Britain of John Hastie, the sole trustee nominated under the settlement.

The following *narrative* is taken from the opinion of Lord Salvesen—"The questions in this Special Case arise out of a trust conveyance by the late Mr Charles Wood. By this deed he conveyed to John Hastie, "or such other person or persons as shall be named by me or assumed into the trust hereinafter constituted, whom failing the nearest heir-male who may be resident in Great Britain and *sui juris* at the time of the said John Hastie, or such other person or persons, as trustee," for the purposes therein mentioned, and his or their assignees, all and sundry his whole estate. The purposes of the trust so far as material were, after providing for certain annuities and legacies, (1) a direction to the trustee to manage the residue of his estate and to pay over to his wife the free yearly proceeds and interest therefrom; and (2) on the death of his said wife a direction to his trustee to realise the residue of his estate and to pay and divide the same amongst his nearest-of-kin in moveables. Mr Hastie accepted the office of trustee and executor on the testator's death, and administered the estate as sole trustee until his own death on 28th September 1910. His nearest heir-male is Mr John Gill Hastie, who is resident in Great Britain and who is of full age. He is the party of the fifth part."

The following *questions of law* were, *inter alia*, submitted to the Court—"3. Whether the said John Gill Hastie, the fifth party, is entitled to act as trustee on the testator's trust estate for the purpose of administering the same? or, 4. Whether the trust administration created by the testator has lapsed by the death of the said deceased John Hastie?"

Argued for the first, fourth, and fifth parties—The trust had not lapsed by Mr Hastie's death. His heir-male was plainly included in the conveyance to trustees in the settlement. It was very important to note that the heir-male was called as a trustee in the conveying clause. There was no suggestion whatever that he was there merely to preserve a link in the title. The clause here was in practically the same form as that in the Styles—Juridical Styles (5th ed.), vol. i, 288. It was very well recognised that where the destination in a trust-disposition included the heir of a last-surviving trustee, such heir could administer the trust—Menzies' Lectures on Conveyancing (new ed.), 682; Wood's Lectures on Conveyancing, 419, 421. In *White* v. *Anderson*, November 30, 1904, 12 S.L.T. 493, it was decided by Lord Pearson, on the special terms of the deed then under consideration, that the heir of a trustee had merely a formal title, but his Lordship expressly declined to give an opinion on the point raised here. Lord M'Laren no doubt stated (Wills and Succession, vol. ii (3rd ed.), 913 and 914, sec. 1686) that a trustee by succession could not in general exercise the discretionary powers of the trust. This view, however, was unsupported by authority.

Argued for the third parties—The trust administration had lapsed, and Mr Hastie's heir-male was not entitled to administer the trust. The meaning of the clause was simply that the testator had made provision for the legal title being carried on. The heir's title was merely formal. The law was correctly stated by Lord M'Laren in the passage above quoted—Wills and Successions, vol. ii (*cit. sup.*).

At advising—

LORD SALVESEN delivered the judgment of the Court (LORD JUSTICE-CLERK, LORD SALVESEN, and LORD GUTHRIE)—[*After the narrative above quoted*]—The first question in the case is whether Mr John Gill Hastie is entitled to administer the trust, or whether his sole duty is to make up titles

to the trust estate and convey the same to a judicial factor or new trustees who may be appointed by the Court. In either case a certain amount of expense would have to be incurred which some of the parties desire to avoid. The point is a new one and has not been made the subject of express decision in Scotland. Lord M'Laren in his book on Wills and Succession indicates what appears at first sight to be an opinion adverse to the view that the heir of a surviving trustee is entitled to administer the trust. He says (section 1686)—"The heir of a last surviving trustee might indeed make up titles to the trust estate and convey it to a factor or to beneficiaries; but it has been considered that a trustee by succession could not in general execute the discretionary powers of the trust; and it is certain that he is liable to be superseded in the administration of the trust by the appointment of a judicial factor." This opinion, except perhaps the latter part, is not supported by authority and is opposed to the views of other writers on conveyancing. Much necessarily depends on the terms of the particular trust deed, and here these seem to be in favour of the view that the nearest heir-male of the nominated trustee was intended by the truster to act as trustee for all purposes. Indeed there seems no good reason for holding that he can make up titles to the trust estate and convey to a factor and yet be debarred from administering the trust if none of the beneficiaries apply for a factor. In the case of *White* v. *Anderson*, 12 S.L.T. 493, Lord Pearson had occasion to consider a similar question, but he decided it upon the terms of the trust conveyance, which differed from those which we have here. He expresses no opinion on the point raised in this case, while admitting that the recent conveyancing treatises affirm that a clause framed as the clause in Mr Wood's trust conveyance would have the effect of carrying not merely the bare trust title but also the office of trustee to the heir of the last trustee. That this was presumably the intention of the testator in the present case may further be gathered from the fact that the heir-male of John Hastie, who was constituted trustee on his failure, was to be resident in Great Britain and *sui juris* at the time of John Hastie's death. I am accordingly of opinion that we should answer the third question in the affirmative and the fourth in the negative. [*His Lordship then dealt with other questions on which the case is not reported.*]

LORD DUNDAS was sitting in the Extra Division.

The Court answered the third question of law in the affirmative and the fourth in the negative.

Counsel for the First, Fourth, and Fifth Parties—Mercer. Agents—J. & A. Hastie, Solicitors.

Counsel for the Second and Third Parties—Wilton. Agent—Robert Stewart, Solicitor.

Friday, December 22.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

COATS *v.* BANNOCHIE'S TRUSTEES.

Husband and Wife—Capacity of Married Woman to Contract—Mandate by Married Woman to her Father's Trustees to Retain her Share of his Estate—Assignation by Married Woman of Spes successionis.

A daughter executed and delivered to her father a holograph writing whereby she undertook that in the event of her husband being indebted to him at the time of his death "the amount of said indebtedness shall . . . form a debt due by me, and a deduction from my share of your means and estate."

Held that the writing was a mandate by the daughter to her father's trustees to retain her share of his estate in liquidation of her husband's indebtedness to him, and that she could validly convey her right in her father's estate though merely a *spes successionis*.

Mrs Mary Bannochie or Coats, wife of Thomas Archibald Coats, brought an action against George Mitchell and others, the trustees of her father James Bannochie, to have it found and declared that as one of his children she was entitled to legitim out of his estate, for payment of the amount thereof, and for reduction of a holograph writing granted by her to her father.

The defenders averred—"(Stat. 1) On 10th June 1902 the pursuer executed and delivered to the truster a holograph writing in the following terms:—'I, Mary Bannochie or Coats, wife of and residing with Thomas Archibald Coats, S.S.C., Aberdeen, do hereby undertake and agree that in the event of my said husband being indebted to you, James Bannochie above designed, to any extent at the time of your death, whether by way of obligation to any bank or bill or otherwise on any document held by you, the amount of said indebtedness shall, unless and until liquidated by the said Thomas Archibald Coats, form a debt due by me, and a deduction from my share of your means and estate.

'Adopted as holograph.

'MARY COATS.'

Said writing was executed by the pursuer with the consent of her husband, who appended thereto the following docquet:—'I approve and confirm the above.

'THOMAS A. COATS.'

(Stat. 2) At the date of the truster's death the said Thomas Archibald Coats was due the truster, *inter alia*, the sum of £1194, 18s. 5d., conform to I O U dated 17th May 1904 herewith produced, together with £253, 16s. 6d. of interest thereon, conform to statement also herewith produced. Said sum has not been paid by the said Thomas Archibald Coats, who became bankrupt on or about 16th December 1907, and is irrecoverable out of his estate. In terms