argument becomes unavailable; but against such a view we have the survivorship clause, which in the view of such a vesting could not have been of any use. If the vesting did not take place till the younger son was twenty-five, the whole might fall into intestacy; that scarcely can have been intended.

The next question is, Whether by the death of Stuart Mackie the whole residue has vested in his brother, not only the half belonging to the younger, but also his own portion of the residue? There is, I think, quite enough in the clause to leave no option on that matter, and taking the testator's own words, I think the residue has all vested, and the trustees have no choice save to pay it over to the pursuer, the surviving brother.

LORD GIFFORD—I concur generally in what your Lordships have said.

The only thing that can prevent vesting in such a case as this is the insertion of a condition, but the moment that condition has been purified, as it has been here, the deed has a simple operation. This trust-deed goes no further; beyond the two sons there is, as regards residue, no ulterior person in view, not even the other children, who, in the other portion of the deed, are carefully substituted for one another.

The Court adhered.

Counsel for Pursuer (Respondent)—Gloag—Blair. Agents—Ronald, Ritchie, & Ellis, W.S.

Counsel for Defenders (Reclaimers)—Dean of Faculty (Watson)—M'Laren. Agents—Hunter, Blair, & Cowan, W.S.

Wednesday, March 15.

FIRST DIVISION.

[Sheriff of Edinburghshire.

AITKEN *v.* KIRK.

Agent and Client—Account—Notary-Public.

A notary-public when employed as conveyancer is entitled to charge *ad valorem* fees, calculated upon a reasonable scale as between agent and client.

This was an action under the Debts Recovery Act 1867, at the instance of Thomas Aitken, accountant and notary-public, Edinburgh, against Jane Kirk, merchant there, for payment of £34, 17s. 3d., being the amount of an account for legal expenses incurred by the defender. The defence of non-employment which was pleaded not having been insisted in, the Sheriff remitted the account to the Auditor of the Court of Session to tax and report. A portion of it, amounting to £26, 1s. 3d., was made up of charges in connection with the completion of the purchase of a villa by the defender, and with the negotiation of a loan upon it.

The Auditor reported as follows:—

"In consequence of a remit by the Sheriff of Edinburgh, the Auditor of the Court of Session has examined the account sued for in presence of the pursuer and the agent for the defender, and certifies that, on the assumption that the pursuer is entitled to charge for the conveyancing business included in the account the fees for such business in the table of fees of the societies of W.S. and S.S.C., the same is correctly charged at the sum of Thirty-four pounds seventeen shillings and threepence (£34, 17s. 3d.) sterling, but reserving for the determination of the Sheriff the question of the right of the pursuer so to charge. Reference is made to the subjoined note.

"*Note.*—The pursuer is designed in the summons "accountant and notary-public," and it is admitted that he holds, and at the date of employment for the defender in the conveyancing business held, the certificate of the Inland Revenue as a "notary-public." None of the business charged in the account is of a notarial character, but it is maintained by the pursuer that, holding a certificate as a notary, he is entitled to perform business of every description except Court business, and to charge therefor in accordance with the table of fees in force for the time regulating the charges for members of the societies of W.S. and S.S.C. The Auditor does not consider it within his province to dispose of this question, which is one of very considerable importance, and he has therefore reserved it for the decision of the Sheriff. The Auditor believes that many persons, even without the qualification of a certificate as notary, act as conveyancers, and charge the conveyancing fees under the table of the societies of W.S. and S.S.C. He is not prepared to hold that persons so acting are entitled to charge the conveyancing fees, and it appears to him questionable how far a notary-public (even though certificated by the Inland Revenue) is entitled to more than a *quantum meruit* for any business transacted by him other than business of a proper notarial character. If the pursuer's contention be well-founded, the expenses attending the professional education, apprenticeship, and entrance of the members of the societies of W.S. and S.S.C., and other chartered or incorporated bodies of legal practitioners, appear to the Auditor to be very much money thrown away, in so far as the matter of professional emolument is concerned.

"The portion of the account covered by the reservation is the branch headed 'Title in Mrs Kirk's favour to Warrick Villa, and loan thereon,' and the amount is £26, 1s. 3d. It is proper to note that the defender in settling with the seller of the property has been allowed deduction from the price of £8, 13s. 6d., being one-half of the items of £9, 9s., £7, 10s., and 8s., and that the sums of £7, 10s. and 8s. are outlays. For the business detailed in the other branches of the account, the charges made and sustained do not amount to more than a *quantum meruit.*"

The Sheriff thereupon pronounced the following interlocutor:—

"The Sheriff having considered the Auditor's report, and heard parties' procurators, Finds that the pursuer is not entitled to charge for the conveyancing business in the account sued for under the table of fees allowed to Writers to the Signet and Solicitors before the Supreme Courts of Scotland; and with regard to the sum which he ought to receive for the said business, remits again to the Auditor of the Court of Session to tax that part of the account in question, on the footing that the pursuer is only entitled to charge *quantum meruit*, and report.

"*Note.*—The pursuer is clearly not entitled to found upon the table of fees made for the societies of W.S. and S.S.C. That table does not apply to any one who is not a member of either. On the other hand, when a person not a member of these societies is employed, he is entitled to due remuneration, and it may happen that in some cases he may be fairly entitled to be paid as highly as the table of fees allows.

"The Sheriff does not know what should be given here, and he requests the opinion of the Auditor."

The Auditor's report was as follows:—

"In consequence of the renewed remit by the Sheriff of Edinburgh, the Auditor of the Court of Session has again considered the branch of the pursuer's account referred to in the remit and note. He has felt, and still feels, much difficulty in forming an opinion as to the remuneration to which the pursuer is entitled on the principle of *quantum meruit;* and in place of taxing the particular items, he thinks it better to state the views which have occurred to him, leaving it to the Sheriff himself to deal with the charges.

"When the renewed remit was made, the Auditor requested the pursuer to give him a detailed note of his time and trouble in connection with the deeds mentioned in the account. This the pursuer declined to give, on the ground that, notwithstanding the judgment of the Sheriff as to the principle of charge, he intended to maintain his right to the full *ad valorem* charges made by conveyancers in Edinburgh, being those specified in the table of fees of the societies of W.S. and S.S.C., and that by giving the details required he might be held as accepting the principle adopted by the Sheriff, and might be prejudiced in the event of an appeal to another Court. The Auditor is of opinion that the grounds of the pursuer's declinature are bad, and that the details ought not to have been withheld.

"In the absence of details other than those given in the account, the Auditor cannot form any accurate estimate of the time during which the pursuer was engaged in the business of the defender; and it has been with some difficulty that he has ascertained the length of the deeds not stated in the account. The purchase of the house appears to have been made by the defender himself, and the pursuer was instructed to prepare the conveyance, and accompanied the defender to the office of the Investment Company to arrange for a loan. The Auditor has no information as to the extent of the progress of titles of the property, or as to the time occupied in their examination. The conveyance was a short one, and its preparation simple. The revisal of the security deeds was also a simple matter. If time alone were to be regarded, the pursuer would, in the opinion of the Auditor, be suitably remunerated by what are known as the regulation fees of the deeds, viz.:—For drawing the conveyance, 28s.; and for revising the other deeds, 20s., 5s., and 26s.—together, £3, 19s. But the element of responsibility is not to be disregarded, and it is in respect of this element that the members of the societies of W.S. and S.S.C., who have tables of fees, state their charges *ad valorem*. The Auditor does not regard the *ad valorem* charges in the account as too high to cover the responsibility of an educated and qualified conveyancer. The question remains—and it is stated without any reference to the status of the pursuer—Is every man who undertakes the responsibility of preparing deeds entitled to the same remuneration as the conveyancer who has had a full professional education, and after examination has been admitted a member of a body recognised as conveyancers? The pursuer, as a notary-public admitted after examination, and holding a certificate from the Inland Revenue as a notary, is undoubtedly in a more favourable position than a person acting as a conveyancer without any recognised qualification whatever; but it may be held that the pursuer's qualification is a limited one, and confines him to proper notarial business. This, however, is a question for the Sheriff. If he shall be of opinion that the pursuer is entitled to be remunerated as a general conveyancer, not by time merely but by *ad valorem* fees, then it seems to the Auditor that the charges in the account may be allowed as the measure of the *quantum meruit*. If, on the other hand, the Sheriff shall be of opinion that the qualification is a limited one, the charges already indicated may be regarded as the proper allowance, but with an addition of £3, 6s. 6d. in so far as the conveyance is concerned, seeing that the defender has been relieved of one-half of the fee of £9, 9s. by the seller of the house. The outlays (£7, 10s., 8s., and 12s. 6d.) will, of course, be sustained; and the Auditor is also of opinion that the charges of £2, 2s. for warrant of registration, and 10s. for recording, should be allowed. The preparation of the warrant is not strictly proper notarial business; but the warrant and recording have come in place of the instrument of sasine, and may thus be held as within the province of the notary. If the latter view shall be adopted by the Sheriff, there will fall to be deducted from the fees of the conveyance £4, 14s. 6d., and from the fee for revisal of the disposition to the Investment Company £2, 18s. 9d., the other charges and outlays being sustained as stated."

The Sheriff thereafter pronounced an interlocutor in terms of the above report, and decerned against the defender for £27, 4s.

The pursuer appealed to the First Division of the Court of Session.

Authorities cited—*Galloway* v. *Ranken*, June 11, 1864, 2 Macph. 1199; *Gibson* v. *Dods*, Jan. 15, 1829, 7 S. 254; *Taylor* v. *Forbes*, Jan. 13, 1853, 24 D. 19; *Cooke* v. *Falconer's Reps.*, Nov. 26, 1850, 13 D. 157; Begg on Law Agents, 64; *Winton* v. *Airth*, July 17, 1868, 6 Macph. 258, 40 Jur. 146.

At advising—

Lord President—There is no doubt of the general proposition that there was no set of men in this country who ever enjoyed a monopoly of conveyancing, and that a person wanting to make up a title to an estate was entitled to employ any person he liked. If the employer had confidence in the ability of the man he employed, that recommended him in the eyes of his client.

There was no limitation of this rule until the passing of the Stamp Act of 1870, and then for merely revenue purposes the classes of persons who were allowed to practice conveyancing were reduced to certain grades of the legal pro-

fession, who were required to take out licenses annually. Section 60 of that Act provided that nobody but individuals belonging to those specified classes should be allowed to draw or prepare any instrument relating to real or personal estate, or any proceedings in law or equity, under a penalty of £50. The pursuer escapes from the operation of that section, because he belongs to one of the classes excepted, being a notary-public.

It was quite lawful therefore for this gentleman to accept the employment from Mr Kirk, and it was lawful for Mr Kirk to employ him. If Mr Kirk was not well assured of the skill of Mr Aitken as a conveyancer he was very foolish to do so. But being satisfied of Mr Aitken's skill, and having employed him, it is rather a singular thing for the defender to come forward and say that he was uneducated and ignorant, and to refuse to pay him the usual fees. If a man who was entitled to practice in conveyancing is employed to do conveyancing, and charges the usual fees for that business, are we to inquire whether or not he is a well educated man, so as to judge of the alternative views in the Auditor's second report? What the Auditor says is this,—"If the pursuer is entitled to be remunerated as a general conveyancer, not by time merely, but by *ad valorem* fees, then it seems to the Auditor that the charges in the account may be allowed as the measure of the *quantum meruit*." On the other hand, he further says, if the qualification is a limited one, then the pursuer ought to be remunerated according to a lower scale. How are we to ascertain that the pursuer is qualified and thoroughly educated? It does not follow that because he is not a member of any other body except that of notaries-public that he is an uneducated man, nor does it follow of necessity that because a man belongs to the societies of Writers to the Signet or Solicitors before the Supreme Courts he is therefore highly educated. It may be generally presumed that when a man belongs to either of these professions he is well educated; but that fact is not to be taken as a standard of good or bad education. Unless, therefore, we were really to conduct an inquiry as to the skill of the pursuer, we cannot uphold the views of the Auditor and of the Sheriff. It seems to me this gentlemen is as much entitled to make the charges sued for, which are calculated upon a reasonable scale as between agent and client, as it is the business of the client to see that he employs a properly qualified person. I am for altering the interlocutor of the Sheriff.

Lord Deas—I do not entertain the least doubt that any man in Scotland is entitled to write a disposition if he is employed to do it by the proper party; and if so, he is justified in asking payment at some rate or another. I know no principle whereby his fees are to be estimated by the quality of his education. I know nothing to prevent any man employing whom he chooses except the regulation of the Stamp Act of 1870. If the conveyancer does not belong to one of certain classes enumerated there, he is liable in a penalty. Apart from that, a certificate is required, and no one is entitled to write a legal document and charge for it without a license. It is not said that anything of that kind is awanting here. The same license is paid by an N.-P. as by a W.S. or S.S.C. before he can be entitled to charge.

I doubt, therefore, if anything turns upon the education and knowledge of a person who writes a deed. I do not see how it can. It is very expedient not to employ persons to write deeds who cannot do so. But if we were to go into questions of expediency, I do not see anything to satisfy me that a notary-public is not to be presumed to be qualified to write a disposition. His examination before admission embraces conveyancing. The examiners ought to ask questions which, if answered rightly, would imply a knowledge of conveyancing. A notary-public is responsible for the accuracy of a notarial instrument or any other deed he prepares. If he took a sasine before the passing of the recent Acts, he would have been responsible if he did not go to the ground. He was the only man at that time who could give sasine, and there is no doubt whatever that the notary-public who drew and signed the sasine was the party liable in damages if he had not that sufficient skill to know what he was required to do, even although a third party wrote the deed.

But although I think it right to make that explanation in reference to the pursuer, I do not see how it enters into the question. I think it enough if he has a license. Still, after all, it comes to be a case of *quantum meruit*. If the Auditor had not said what he does say, I would have been for remitting to him still, but he reports as a man of skill that, assuming the pursuer was in right to make the charges, he was entitled to found upon the usual *ad valorem* fees.

Lord Ardmillan—I agree with your Lordships. There is only one point on which I have any doubt. A man may at his own risk employ a person not specially qualified. There is no monopoly of conveyancing. Were it not for the Act of 1870, that person might charge for his services. But that Act has the effect of limiting the number of persons who, being so employed, are entitled to charge. The pursuer is among the number of those who can so charge, and he holds a certificate. He is entitled to remuneration on the footing of *quantum meruit*. But to allow him to charge *ad valorem* fees is to permit him to adopt as the measure of his charges a table of fees framed by and for a different class of practitioners. It is here that I have a little doubt. I am not sure that a person who is not one of the class to which the table of fees applies is entitled to adopt the table of fees. I observe that a remark is made by the Auditor to the effect that if the pursuer is entitled to be remunerated as a general conveyancer, not by time merely, but by *ad valorem* fees, then it seems to the Auditor that the charges in the account may be allowed as the measure of *quantum meruit*. This remark appears to me important; and assuming the correctness of this opinion by the Auditor, it does not matter whether you reach the result by *ad valorem* fees or by the rule *quantum meruit*. The only thing I doubt is whether this gentleman can use the table of fees as the rule of his charges, but as the two modes of charging would in this case lead to the same result, I think that the Auditor's report gets us out of the difficulty.

Lord Deas—A table of fees is not necessary.

Lord Mure concurred.

The Sheriff's interlocutor was recalled, and decree given in terms of the conclusions of the summons, with expenses in both Courts.

Counsel for Pursuer—Fraser—Lang. Agent—David Turner, S.L.

Counsel for Defender—J. P. B. Robertson. Agents—Keegan and Welsh, S.S.C.

Wednesday, March 15.

FIRST DIVISION.

[Lord Rutherfurd Clark.

HOME *v.* HOME.

Entail—Fetters—Disentail—Denuding—Election.

Held that where an heir in possession of one entailed estate succeeds to another, the fetters in the entail of which prevent him from holding both, and oblige him either to forfeit and denude of the one or to relinquish the other, he is bound to elect upon the opening of the succession, and before making his election he cannot make up a title nor proceed to disentail.

Observed (*per* Lord President) that, although the denuding does not require to be done in an unreasonably short time, the heir is not entitled to interfere with the estate except in so far as is necessary for purposes of administration.

This was a petition by George John Ninian Home, sometime George John Ninian Logan, heir of entail in possession of Broomhouse, Berwickshire, for disentail of that estate. The petitioner was twenty-one years of age, and no consents were therefore necessary to the application.

Answers to the petition were lodged for Ferdinand Cospatrick Logan Home, the petitioner's younger brother, and the next heir-substitute, with consent of his curator, he being under age.

The deed of entail of the estate of Broomhouse, which was dated 16th February 1830, contained the following clause:—"With and under the condition, as it is hereby expressly provided, that the heirs-male of my body, and the whole other heirs of tailzie above mentioned, shall be obliged constantly to use, bear, and retain the surname of Home and arms and designation of Home of Broomhouse, and none other, in all time after their succession or attaining possession of the said estate; but with power to the heirs-male of my own body, and the other heirs-male of tailzie above mentioned, to conjoin any other arms therewith, but no other surname; and in case any of my heirs-male of tailzie have already succeeded or shall succeed to another estate where they shall be obliged by the entail thereof to assume another name and designation than 'Home of Broomhouse,' then and in that case he or they shall forfeit, amit, and lose all right, title, and interest which they can have to my lands and estate, and shall be holden and obliged immediately thereupon to denude themselves of my said lands and estate hereby disponed, and to convey and dispone the same *habili modo* to the next heir-male called to the succession of the said lands and estate by these presents, unless they choose to relinquish the said other estate and continue 'Home of Broomhouse,' which they are at liberty to do in their option: Excepting always in the cases of titles of honour conferred by the King's Majesty on any of my said heirs-male of tailzie, which they shall be at liberty to use and conjoin with the said name and designation of Home of Broomhouse; and with and under this further condition, that in case any of the heirs-male of my body, or of the other heirs-male of tailzie above mentioned, have already succeeded or shall succeed as heirs to any other heritable estate than the lands and others above disponed, of the annual value of three hundred pounds sterling or upwards, then, and so often as the same shall happen, such heir-male of tailzie so succeeding shall forfeit, amit, and lose all right, title, and interest in and to my said lands and estate above described; and the same shall fall, accresce, and devolve to the next heir-male hereby called to the succession thereof, in the same manner as if the heir-male succeeding as aforesaid to such other estate had been naturally dead: Declaring, nevertheless, that this irritancy shall not be incurred if the heir-male who has already succeeded or so succeeding to another heritable estate, of the value above mentioned, shall renounce and relinquish the same within a year and a day after his succession to and possession of the same jointly with my foresaid lands and estate hereby disponed."

The entailer General Home died in 1850, and was succeeded in the estate by his nephew Colonel George Logan of Edrom, who thereupon assumed the additional surname of Home; and in accordance with a relaxation in his favour of the provisions of the entail, contained in a deed of revocation and alteration dated in 1846, held the two estates of Broomhouse and Edrom till 1870. Upon his death his eldest son William succeeded as heir of entail in both estates, but as the conditions of the Broomhouse entail prevented him from holding both, he conveyed Edrom to his younger brother George, the petitioner, by a disposition in favour of him and the other heirs of entail called under the Edrom entail. On this disposition the petitioner was infeft.

In the Edrom entail there was, *inter alia*, the following condition:—"*First*, That the said George Logan, my eldest son, and the whole heirs of taillie and heirs whomsoever succeeding to the said lands and barony of Edrom, shall be bound and obliged to use, bear, and constantly retain in all time after their succession thereto the surname of Logan, and arms and designation of Logan of Edrom, with power, nevertheless, to conjoin any other surnames, arms, or designations therewith if they shall think fit."

William, therefore, retaining Broomhouse, dropped the surname of Logan; and George, dropping that of Home, thereafter bore the surname of Logan, in compliance with the deeds of entail.

William James Home of Broomhouse died unmarried on 29th September 1875, the succession to the estate of Broomhouse thereby devolving upon the petitioner, then George John Ninian Logan of Edrom. It was stated in the answers that he had adopted the surname "Home" in this petition for the first time.