Thursday, January 25.

FIRST DIVISION.

[Sheriff Court of Perth.

SIM *v.* DUNCAN AND OTHERS.

Succession—Testament—Liferent or Fee—Bequest of Rents of Heritage—Titles to Land Act 1868 (31 *and* 32 *Vict. c.* 101), *sec.* 20.

A testatrix who died possessed of certain heritable subjects and of a small moveable estate, left a holograph testament which contained no reference to the heritage except in the following passage:—"I can say very little about my property the way it stands, but as long as Mr C. allows it to remain as it is I want my four daughters to draw the rents, and divide them equally between them." C. was a security-holder who was in possession of the titles of the subjects. The testament proceeded—"I have left nothing to my son J., as I do not think he would value anything that belongs to me. . . . J. may say my will is not legally done, but I say I have done it in justice to my daughters, and the goods are all my own."

Held that the words of bequest to the daughters amounted to nothing more than one of income for life, and could not be construed as importing a gift of fee of heritage.

Observed that the words of bequest were not such as would import a gift of capital of moveables, and that the question of the application of the 20th section of the Act of 1868 did not therefore arise.

Sheriff — Jurisdiction — Service of Heirs — Proceedings in Service — Competing Titles—Titles to Land Act 1868, *sec.* 40—*Conveyancing Act* 1874, *sec.* 10.

Opinion (by Lord M'Laren) that a person claiming as disponee of lands is entitled to oppose a petition before the Sheriff under section 10 of the Conveyancing Act 1874 for service as heir of line, and the validity of the competing titles ought to be determined in the process before the Sheriff.

A petition was presented in the Sheriff Court of Perth by Miss Anne Wanlass Sim craving the Court to find that as heir of line she was entitled to procure herself infeft in certain subjects in Stanley and Perth. The petitioner's averments with respect to the properties were stated by the Sheriff-Substitute as the following:—"She avers, in the first place, that as regards the Stanley property Mrs Elizabeth Mitchell or Wanlass, Mrs Agnes Mitchell or Knox, Mrs Ann Mitchell or Pullar, and Jean Mitchell were infeft in it as *pro indiviso* proprietors. She also avers that a part of this property was conveyed to William Pullar, and in regard to the part so conveyed she makes no claim. As regards the Bridgend property, it belonged to the said Mrs Ann Mitchell or Wanlass and Jean Mitchell *pro indiviso*, conform to extract of sasine in their favour registered 14th September 1831. She further avers that Mrs Wanlass conveyed all her rights to both properties to her daughter Mrs Ann Wanlass or Sim, who died in 1873; that Mrs Sim made up no title to these properties, and was succeeded by her eldest son Joseph Sim, who died in 1884; that Joseph Sim had a personal right to the lands in the sense of the Conveyancing Act 1874, sec. 9, and that the petitioner is his only child, The petitioner also claims, in the second place, that she has right to a share of Jean Mitchell's interest in both properties, which right she deduces as follows:—Jean Mitchell died intestate and unmarried. Her heirs in heritage were her sisters Mrs Knox, Mrs Pullar, and Mrs Wanlass. They made up no titles to these subjects as her heirs; Mrs Wanlass had two children Mrs Sim and a Mrs Burray, neither of whom completed a title; that consequently the petitioner, through her father the said Joseph Sim, is entitled to succeed to a share of Jean Mitchell's share of both properties."

Objections to the petition were stated by Mrs Mary Duncan or Sim, Mrs Georgina Sim, and James Malcolm Macintyre, the eldest son of the late Mrs Grace Sim or Macintyre. The objectors were the surviving daughters and the heir of a deceased daughter of Mrs Ann Wanlass or Sim, the petitioner's grandmother, to whom Mrs Wanlass had bequeathed all her property.

The objectors averred that Mrs Sim by a holograph settlement had bequeathed all her heritable property to them, and had expressly excluded the petitioner's father Joseph Sim from her succession. With regard to the reference to Mr Condie contained in the settlement, the objectors averred that large accounts for law business had been incurred to him, and that as delay had taken place in adjusting them, the titles to the various properties remained in his possession, and that Mrs Sim had not any clear idea of the extent to which her properties might be subject to charges in his favour.

The objectors maintained that they were "persons who would under the old practice have been entitled to appear and oppose a service proceeding under a brieve of inquest, and they are accordingly entitled to appear and oppose the present petition in terms of section 40 of the Titles to Land Consolidation (Scotland) Act 1868, and sections 9 and 10 of the Conveyancing (Scotland) Act 1874."

Section 40 of the Act of 1868 provides—"No person shall be entitled to appear and oppose a service proceeding before the sheriff in terms of this Act who could not competently appear and oppose such service if the same were proceeding under the brieve of inquest according to the law and practice existing prior to the 15th day of November 1847; and all objections shall be presented in writing, and shall forthwith be disposed of in a summary manner by

the sheriff, but without prejudice to the sheriff, if he see cause, allowing parties to be heard *vivâ voce* thereon."

The respondents accordingly objected to the prayer of the petition being granted so far as it referred to the property derived by Mrs Sim from her mother.

The holograph settlement so far as in question was in the following terms:—

"*Stanley, 20th Novr.* 1868.

"I leave and bequeathe to my granddaughter Ann Wanliss Duncan the chest of drawers in the closet, with the press on the top, as a small legacy in memory of her grandmother. I leave my tea caddie, my own work, to my daughter Mary Sim or Duncan, as she has daughters to give it to at her death. I leave my mahogany table to my daughter Grace Sim or MacIntyre. The rest of the articles of furniture in my house are of little value, and you may do with them what you please; they will not be much thought of. You can give the large picture of her four aunts to Ann W. Sim if she chooses to accept of it. The bank receipt upon the Bank of Scotland for £50 to be equally divided between my four daughters after paying my funeral expenses. I can say very little about my property the way it stands, but as long as Mr Condie allows it to remain as it is I want my four daughters to draw the rents and divide them equally between them. I have here stated in these two papers my last wish and desire concerning the furniture and effects left by me at my death. I have left nothing to my son Joseph Sim, as I do not think he would value anything that belongs to me, and likewise he got his share at his father's death, and had it not been for the kindness of my dear mother I would have been poorly attended to for any kindness I have received from him since his father's death. I therefore warn him not to interfere with what I have left to his sisters either by word or deed. Joseph Sim may say my will is not legally done, but I say I have done it in justice to my daughters and my own conscience, and the goods are all my own. Written by my own hand the 20th day of November 1868 years.

"Ann Wanliss or Sim."

Section 20 of the Titles to Land Act of 1868 provides that where a *mortis causa* deed "shall not be expressed in the terms required by the existing law or practice for the conveyance of lands, but shall contain, with reference to such lands, any word or words which would, if used in a will or testament with reference to moveables, be sufficient to confer upon the executor of the granter or upon the grantee or legatee of such moveables a right to receive the same, such deed . . . shall be deemed to be equivalent to a general disposition of such lands."

The interim Sheriff-Substitute (Napier) on 10th November 1899 pronounced the following interlocutor:—"Repels the objections: Finds the facts stated in the petition proved, and that the petitioner is entitled to procure herself infeft as craved, and decerns: Further, finds the objectors liable to the petitioner in expenses."

Note—". . . In this state of matters I am of opinion that the petitioner is entitled to have the prayer of the petition granted. I am not entitled to decide whether her right to succeed has been extinguished by Mrs Sim's holograph settlement, but this much is clear, that the petitioner intends to dispute that it carries heritage, and the objectors are also well aware that it is not beyond dispute. In addition, the petitioner explained that until she is served, she is unable to raise the action of accounting for the past rents which she says she intends to raise. These reasons show that there is a question between the parties, and to refuse the service will or may prevent the petitioner from being able to vindicate her rights. Finally, under the Titles to Land Consolidation Act 1868, section 40, the Sheriff is to dispose in a summary manner of all objections to a service. Accordingly, for the reasons above given, I repel the objections. Besides asking that the service should be refused, the objectors also asked me to sist this case until the determination of the main question in an action in the Court of Session. If such an action were pending, a sist would seem very appropriate, but none is pending. In addition, *Maitland* v. *Maitland* (March 20, 1885, 12 R. 899) is to a certain extent an authority against sisting. On the whole, it does not appear to me that the case ought to be sisted."

The objectors appealed to the First Division, and argued—If the disposition had been one of shares or stock, the gift of rents, an unqualified gift, subject only to the interference of a security-holder coupled with the exclusion of Joseph Sim, would have been sufficient to carry the capital—Roper on Legacies, p. 1475. The words of limitation in no way altered the character of the gift, but meant nothing more than "so long as no creditor comes in." If the disposition would be one of capital if applied to moveables, then section 20 of the Act of 1868 applied, and the gift carried the fee of the heritage. Accordingly, as the Sheriff had not taken this disposition into account, he was wrong in granting the petition.

Argued for respondent—The disposition dealt almost entirely with moveables, and Joseph Sim was disinherited only as regarded furniture, &c. But even if there was a complete disinherison of him there was no conveyance of the heritage to a third person coupled with that disinherison. The sentence upon which the appellants founded clearly did not import a conveyance of fee.

Lord President—It has been explained to us that although this appeal raises various questions of more or less difficulty the appellants can only prevail if they establish that the holograph settlement of 20th November 1868 operated a conveyance of heritable estate.

That is a very short and simple question, and giving the fullest effect to section 20 of

the Conveyancing Act of 1868 it appears to me to be impossible to hold that heritable estate was conveyed by that settlement. The sentence relied on is as follows:—"I can say very little about my property the way it stands, but as long as Mr Condie allows it to remain as it is I want my four daughters to draw the rents and divide them equally between them." These words do not purport to deal with anything except rents; they make no reference to the *corpus* of the property. It was, however, argued that a rule has been established in England that where there is a gift of the income of moveable estate and no disposition of the capital of that estate, this implies a conveyance of the capital. We have not been referred to any authority to that effect in Scotland, and I do not understand that there is any such rule in the law of Scotland even as regards moveables. It may be that, without express words of conveyance, or gift of capital, it may appear that the intention of the testator was to bequeath it, but there is no technical rule to that effect. If there is no such rule as to moveables in Scotland, section 20 of the Act of 1868 would not avail the appellants as regards the heritage, and apart from any such rule I do not think that the language of the clause of the settlement in question would convey the capital of moveable estate in Scotland, and if so, it would not by force of section 20 convey heritage either. The whole tenor of the sentence seems to me to indicate an intermediate and defeasible provision of income only.

Something was said as to there being in the settlement words of disinherison of Joseph Sim. I do not see that even if these had clearly referred to heritable estate they would have availed the appellants, as they do not purport to give any right to them or to anyone else. But further, it appears to me that the words only relate to moveable estate, the summing-up being "the goods are all my own," and the words "the goods" being inapplicable to heritage.

LORD M'LAREN—According to the judgment of the Sheriff-Substitute the warrant of infeftment granted is only a decree having the effect of giving the petitioner power to make up a title, the question whether her right to succeed had been extinguished by the holograph settlement being reserved for decision in a separate action. It appears to me, however, that this is the proper action in which to determine the substance of the question between the parties, because the new procedure created by statute is to be conducted in the same manner as a petition for service. Now, if in a petition for service a disposition in favour of an objector would be a good answer, entitling the disponee to have the petition dismissed, I cannot see why the same principle should not be applied under the new procedure and the real question disposed of.

The present application was not disputed on any ground personal to the applicant, who has proved her propinquity to and connected herself with the person last infeft. The answer made is that she has not established her right in competition with the disponee of this person, who by the holograph writings in question has disponed the property otherwise.

This disposition is said to depend upon the principle that where there is a gift of income, and nothing is said as to the capital, that is sufficient to pass the capital of an estate. I agree with your Lordship that even if this rule were universally true as to moveable estate, that is no criterion by which to judge its efficacy when dealing with a conveyance of heritage. In one of the cases upon the construction of section 20 of the Act of 1868—*Edmond* v. *Edmond*, January 30, 1873, 11 Macph. 348—the Lord President laid down as a criterion that there must be a "gift of the lands." At common law heritage could not be conveyed by words of gift, there must be a *de præsenti* conveyance at least in form, and accordingly a testamentary gift had no effect. This is the point to which remedial legislation was directed, and I am not disposed to extend the operation of the Act of 1868. It may be said that effect should be given to these writings if they amount to a gift of moveables. It by no means follows that language which when applied to moveable estate would establish in a liferenter the rights of a fiar will necessarily have the same effect as to heritage. But it is unnecessary to elaborate this point, because in my opinion the words used here would not amount to a gift of the capital of anything. I venture to think that the question is entirely one of intention, as to whether words imparting an absolute unqualified gift of the income of moveables do or do not carry the capital. A typical illustration would be the case of moveable property consisting of Consols. These do not imply an obligation on Government to repay a capital sum, but are merely annuities guaranteed in perpetuity. Accordingly, an unqualified gift of all income from Consols would be equivalent to a gift of the invested capital. In the greater number of cases with which we have to deal the gift is assumed to be nothing more than one of income for life, especially when there is an obligation to maintain the donee during lifetime. In the present case the right conferred is evidently nothing more than a right to the income of the testator's heritable property for life or so long as the arrangements with Mrs Sim's agent would admit of it being paid, and there is no ground for holding that it imported a gift of the estate.

LORD ADAM and LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"Affirm the interlocutor of the Sheriff-Substitute dated 10th November 1899: Refuse the appeal and decern: Find the appellants liable in additional expenses since the date of said interlocutor, and remit," &c.

Counsel for Appellants—C. K. Mackenzie—Christie. Agent—Robert Reid, Solicitor.

Counsel for Respondent—Craigie—A. M. Anderson. Agents — Miller & Murray, S.S.C.

Thursday, January 25.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

SHEPHERD *v.* MENZIES.

Trespass — Interdict — Police Constable — Entering Lands to Investigate Crime — Cruelty to Animals (Scotland) Act (13 *and* 14 *Vict. cap.* 92), *sec.* 6.

By section 6 of the Cruelty to Animals (Scotland) Act 1850 it is enacted—"When and so often as any of the offences against the provisions of this Act shall be committed, it shall be lawful for any constable, upon his own view thereof, or on the complaint and information of any other person who shall declare his name and place of abode to such constable, to seize and secure by the authority of this Act any offender, and forthwith, and without any other authority or warrant, to convey such offender before a magistrate, to be dealt with for such offence according to law."

A farmer presented a note of suspension and interdict against the chairman, directors, and secretary of the Scottish Society for the Prevention of Cruelty to Animals, and against one of their inspectors, to have the respondents and others acting on their instructions interdicted from trespassing on his farms.

The admitted facts showed that the reason of the raising of the action was that the Society's inspector had gone to the farm accompanied by a police constable, and they had examined the horses used on the farm in consequence of information received of an alleged offence under the above statute, with the result that one of the complainer's ploughmen was tried for cruelty to animals and convicted.

Held that the visit in question was authorised by the Act, and interdict *refused.*

Thomson Chiene Shepherd, tenant of the farms of Gleghornie and Blackdykes, North Berwick, presented a note of suspension and interdict against Fletcher Norton Menzies, chairman, William Traquair and others, directors, Archibald Langwill, secretary of the Scottish Society for Prevention of Cruelty to Animals, and David Proudfoot, inspector, in the employment of the Society. The complainer asked the Court to interdict the defenders in their official capacity and as individuals, and all others acting by their authority or on their instructions, from entering or trespassing on his said farms.

The complainer averred that his farms extended to 729 acres, and that he employed twenty to thirty horses at a time. "(Stat. 2) In the spring of 1896 two officers of the Scottish Society for the Prevention of Cruelty to Animals, acting on the instructions of the respondents, or of one or more of them, illegally and unwarrantably entered upon the complainer's said farms and examined every horse then on the complainer's farms, some twenty-six in number. The horses were then in the stable, it being the dinner hour. The matter was reported to the complainer, but he allowed it to pass for the time. (Stat. 3) On the 31st of March last 1898, the respondent Proudfoot, acting on the instructions of the other respondents, or of one or more of them, or on his own initiative, came to the complainer's said farms accompanied by a police constable. They entered every field on the farms in which horses were working, and insisted on stopping the horses and examining each one, as had been done on the previous occasion, and this without any warrant or authority whatever. In reference to the statements in the answer, it is explained that the charge made against the complainer's said servant was one of cruelty to one horse, in respect that he drove it in yoke with another horse while it was suffering from a raw wound in the shoulder under the collar. The only evidence adduced in support of the charge was that of the respondent Proudfoot and a police constable. A veterinary surgeon was examined for the defence, and he deponed that he had examined a horse which he understood was the horse in question, and found that the wound referred to was merely a small abrasion, which caused no pain to the horse in working. In respect that no evidence was adduced to identify the horse examined by the veterinary surgeon with that referred to in the complaint, the magistrates convicted the servant and fined him five shillings with ten shillings expenses. As matter of fact it was the same horse, and had evidence of this been forthcoming the magistrates would have found that no cruelty had been committed. The complainer had not this evidence ready for the trial, because, having previously called upon the Procurator-Fiscal in reference to the matter he understood from him that the charge was to be departed from. An excerpt from the local newspaper containing a report of the case is produced herewith and referred to. Explained further that in their answers to the note in this case lodged by the respondents in the Bill Chamber they stated that they maintained their right to authorise their inspectors, who are constables, to enter upon the complainer's lands for the purpose of preventing cruelty to animals if they have good reason to suspect that such cruelty is being committed. (Stat. 4) The complainer thereupon wrote to the respondent's Society complaining of said illegal actings, and requested from the Society an assurance that they would not be repeated in future. The Society and the respondents refuse to give such an assurance, and intimate that they intend to continue the same illegal conduct in the future. This application has accordingly been rendered necessary."