Wednesday, December 17.

FIRST DIVISION.

[Sheriff of Forfarshire.

HOOD *v.* TRAILL AND CLUNIE.

Property — Restrictions on Use of Property — Servitude—Building Restrictions — Interdict—Contingent Right.

By a disposition to certain ground there was constituted in the disponee's favour a "heritable and irredeemable servitude and right and tolerance of, to, and over" a well, and the supply of water therein, and a channel for conducting the same to the ground conveyed, with right of access to the servient tenement to repair the channel, "as also for the purpose of digging other wells, or otherwise searching for water in the said ground in the event of the foresaid well ceasing to exist, or the supply of water failing from any cause whatever, and the making of the same effectual in the manner above mentioned, all on payment of surface damage only." The well continued to exist and yield an ample supply of water, and there was no prospect of it failing. The owner of the dominant tenement sought to interdict the owner of the servient tenement from erecting certain houses which he proposed to build on his ground, alleging that their erection would interfere with his right to search for water if that should require to be exercised. The Court *refused* interdict (1) because there was no absolute restriction against building, and none ought to be implied; (2) because, on the contrary, building appeared to have been contemplated, and the owner of the dominant tenement had no sufficient interest in the circumstances to prevent it; (3) because there was no immediate or impending wrong with which the dominant tenement was threatened.

This was an action in the Sheriff Court of Forfarshire (1) for declarator that the pursuer as proprietor of Westbank Cottage, Arbroath, had under his titles a right of servitude over a well in Millgate Loan, Arbroath, at the south-east corner of the adjoining ground belonging to the defender Traill, and agreed by him to be feued to the other defender, as also over that ground, and to a channel through the ground for conducting the water by a pipe to the pursuer's subjects, as also right of access by the pursuer and his successors to the several tenements for the purpose of inspecting and repairing the pipe and channel, or altering the line thereof; (2) as also for digging wells and searching for water on the said ground if the existing well should fail, making the same effectual on payment of surface damage only; (3) for interdict against the defenders erecting dwelling-houses and other buildings on the ground over which the servitude existed, which should prevent or unduly hinder the pursuer in the exercise of his servitude.

The circumstances under which the action was brought, and the titles of the parties, are fully set out in the opinion of Lord Fraser.

The Sheriff-Substitute (Brown Douglas) found that the pursuer had right to the servitude sought to be declared, and that the proposed buildings would interfere with it. He therefore interdicted the erection of them. On appeal the Sheriff (Trayner) adhered.

The defender appealed to the Court of Session, and argued—There was no implied prohibition against building in the titles, and the erection of buildings would seriously interfere with the right of the dominant tenement. There was no suggestion that the present water supply was likely in any way to fail. The clause in the titles must be construed strictly and exercised with as little inconvenience to the servient tenement as possible. Wells could be sunk under any houses that might be built, the only question in such a case being one of expense. The actings of the pursuer were *in æmulationem vicini*.

Authorities—*Watson*, June 1667, M. 14,529; *Beveridge* v. *Marshall*, Nov. 1808, F.C.; *Blackwood* v. *Bell*, May 20, 1825, 4 Sh. 26; *Cowan* v. *Stewart*, May 24, 1872; 10 Macph. 735; *Russell* v. *Couper*, Feb. 29, 1882, 9 R. 660; *Wilson* v. *Glennie*, 7 Wil. and Sh. 244.

Argued for respondent—Any building of the nature of those contemplated was clearly in contravention of the servitude. Their erection would make its exercise impossible. Having a servitude by grant, the pursuer was entitled to have it preserved to him. The buildings proposed were entirely in contravention of the right of servitude, and would make its exercise impossible.

Authorities—Ersk. ii. 9, 4; *Bennet* v. *Playfair*, Jan. 24, 1877, 4 R. 321; *Allan* v. *Magistrates of Rutherglen*, 4 Pat. Apps. 269; *Greenhill* v. *Allan*, July 8, 1825, 4 Sh. 160; *Hill* v. *M'Laren*, 19th July, 1879, 6 R. 1363; *Goodhart* v. *Hythe*, L.R., 25 Ch. Div. 182; *Whitehead* v. *Cox*, 2 Hurlstone & Norman, 870.

At advising—

Lord Fraser—The pursuer of this action—the owner of property in the town of Arbroath—asks for interdict against buildings being erected upon ground contiguous to his. This claim is founded upon certain clauses in the title-deeds of the parties, and to which reference must therefore be made.

Mr Traill [the defender Traill], a surgeon in Arbroath, was proprietor of the ground now belonging to the pursuer and to the defender, at a time when there were no buildings upon it at all, and when it was occupied as garden ground. Mr Traill determined to turn it to more profitable use than this; and accordingly he disponed the part of it now belonging to the pursuer to James Gavin, writer in Arbroath, by disposition dated 4th February 1869. This deed conveys the ground; and in "the second place" it conveys what is called "the heritable and irredeemable servitude, right, and tolerance of, to and over the well situated in Millgate Loan, at the south-east corner of the ground belonging to me after described, and the supply of water therein . . . and to a conduit or channel through the same for the purpose of conducting the water by means of a pipe or otherwise from the said well to the subjects hereby disponed, and of access to the said James Gavin and his successors to the servient tenement at all times, for the purpose of inspecting and repairing the pipe."

No question arises in regard to the pursuer's right to and possession of the well, nor of the pipe conducting the water therefrom to the pursuer's house, although a suggestion has been made by the defender to change its course a little. In regard to this we are not called upon to offer an opinion in the present action. But there follows another clause (on which the claim for interdict is founded), in the following terms:—"As also for the purpose of digging other wells, or otherwise searching for water on the said ground, in the event of the foresaid well ceasing to exist, or the supply of water therefrom failing from any cause whatever, and the making of the same effectual in manner above-mentioned, all on payment of surface damages only." It is for the protection of this right or privilege that interdict is now asked.

Gavin built a cottage now called Westbank Cottage upon the ground disponed to him; and on 12th May 1874 he disponed the cottage and ground to the pursuer, who has since occupied it. In the disposition to the pursuer there is a conveyance to the "servitude right and tolerance" contained in Traill's disposition to Gavin.

Mr Traill reserved in his own hand the remaining portion of the ground, but in the year 1878 he entered into a feu-contract with Messrs J. & J. Wright, whereby he conveyed to them the whole of the land that had not been conveyed to Gavin, under burden of the "servitude right and tolerance" contained in Traill's disposition to Gavin. In that disposition by Traill to Gavin there was reserved to Traill and his heirs "the power to communicate to our successors in the whole of the ground forming the southern boundary of the subjects hereby disponed an equal right with the said James Gavin and his foresaids to a supply of water from the said well, and to the said well itself." This reservation is embodied in the feu-contract between Traill and the Wrights, but is made more specific as follows:—Declaring always that the said James Wright and John Wright . . . and their foresaids, shall have right by means of a pipe or pipes to draw water from the said well to any of the buildings to be erected by them on the said area or piece of ground hereby disponed." Therefore Traill and the Wrights in the year 1878 had the intention of building upon the ground conveyed to the latter, and this is made more clear by another clause whereby the Wrights are taken bound to erect buildings upon the ground of a value not less than £100. The Wrights did erect buildings which they occupied as premises for their coachbuilding trade, and they divided off the back ground by a brick wall which separated their ground from that of the pursuer.

It appears that the Wrights were not successful in business, and Mr Traill re-acquired the right of feu from them. On the 12th February 1884 he accepted an offer from the defender William Clunie to feu from him the subjects that had been occupied by the Messrs Wright. One of the conditions of the offer was "a three storey tenement to be erected on the ground fronting Millgate Loan having dwelling-houses of three to four apartments as may be found convenient, and a cottage to be erected on the north-west side of the ground fronting Mount Zion brae, which buildings shall be of the value of not less than £1000. No other buildings to be erected except necessary out-houses." The coachbuilding premises that had been erected by the Wrights were to be taken down, and the three storey building was to occupy the space which they had occupied. The last condition in this missive offer was as follows:—"A feu-contract to be entered into in the same terms as Messrs Wrights' except as to the value of the buildings." Therefore according to this last stipulation the "servitude right or tolerance" first inserted in Traill's disposition to Gavin is made binding upon the defender.

The question now arises, What is its legal effect in reference to the dispute that has arisen? The pursuer did not object to the Messrs Wright erecting coachbuilding premises along the Millgate Loan. But he does object to the erection of a three storey building and the cottage proposed by the defender. If he had a legal right to object to all building upon the ground, perhaps his acquiescence in the building by Messrs Wright would not bar him from insisting in his legal rights now. A greater amount of building is now sought to be put upon the ground, and therefore he may be justified in saying that although he tolerated to a small extent an invasion of his rights, he will not tolerate it to the extent to which the defender proposes to carry it.

The interdict which is demanded by him is a very wide and general one. It is against the defenders "erecting dwelling-houses or other buildings on the said piece of ground over which the pursuer's said right of servitude exists, which will prevent the pursuer and his successors from the exercise of the foresaid heritable and irredeemable servitude, right, and tolerance over the said piece of ground, or from impeding the exercise thereof unduly." So far as regards the right to enter upon the defenders' ground and to search for water there on payment of surface damages, it is incorrectly described as a servitude. It is a special agreement of a very peculiar character, which is to become operative only upon an event occurring which may never happen. It comes under the class of building restrictions, the construction of which has occupied during recent years so frequently the attention of the Court. The agreement is here sought to be enforced to a very serious extent indeed. The ground which the defender has feued and upon which he intends to build, must according to the pursuer's contention be left waste, or at all events be cultivated as a market garden, or be used as a mason's shed, provided a market gardener can be found to take it in lease or a mason be in want of a shed in the locality. It is at a part of the town of Arbroath eligible for feuing, and a handsome return can be obtained for it in the shape of feu-duty, seeing that buildings suited for trade or dwelling-houses can be erected thereon.

Now, what are the rights that are said to be invaded, and what are the interests that are now sought to be protected? The pursuer has got right to a well which is situated in a public thoroughfare, and is entitled to pump the water therefrom through a pipe leading over the ground of the defender. No one wishes to deprive him of his right to have a pipe in the direction stipulated for, but he says that if buildings were erected as proposed by the defender his field of search for water in the ground feued to the latter would be taken away from him, or at all events be limited

(to his injury) when such search is rendered necessary by the failure of the water in the well. The pursuer states in his evidence that the well has been in existence for eighteen to twenty years. All the evidence that has been adduced on the subject is to the effect that the supply of water will be permanent so far as any human prognostication can be made. The supply is according to the pursuer sufficient for his wants, and the only other person who can claim an interest in the well is the defender, who, being examined as a witness, says that he intends to supply the houses he means to erect from the public water supply of Arbroath. If the pursuer were deprived of the well to-morrow, he has still at hand that public water supply; and Mr Pow, foreman of the working staff of the police establishment, says—"If Mr Hood wished to use the public water supply we would connect the pipe for it, which would cost about £5, and it would cost about 10s. per annum to supply a cottage such as Westbank with water from the public supply." But the pursuer will not have the public supply. He prefers the water of this well, even although he has to pump it into his house by a force-pump. No doubt he is entitled to insist upon his legal rights, although they may be of small pecuniary value, and his insistence upon them now is for no other reason than because he likes the one water better than the other. As to this it must be observed that the water in the well does not arise from a spring, but is the result of percolation of rain-water through strata to a low part of the ground. The pursuer disclaims altogether the statement made upon the record that his present proceedings are taken, not on account of any terror for the loss of water, but because of apprehension that the three-storey house would interfere with his prospect from Westbank Cottage. He says that there is no prospect from the cottage except at a garret window, and as Mrs Hood concurs with him in this statement, it must be taken that the real motive for action in this case is the protection of the contingent right to search for water.

Now, the demand for interdict against the reasonable and natural use of property is one that requires to be supported by the very plainest expressions of contract and obligation. The deed between Traill and Gavin, which was drawn by the latter, a writer, without, as Traill depones, ever having been revised by any professional man on his behalf, certainly contains very unusual stipulations, and which, I think, judging from the deed itself (and no extraneous evidence is allowable upon this matter), never were intended to be pushed to the extent now sought in this action. Traill and Wright, at all events in 1878, did not think so, when Wright obtained the privilege of bringing in the water to the houses that he was to erect. Of course their understanding of the agreement will not control the right of the pursuer, who has all the rights that Gavin obtained. But I cannot read that deed without coming to the conclusion that the parties did intend, or at all events did not effectually bar, the erection of buildings; and if one cannot gather from what is stated an express prohibition against building, the law will not imply it.

The leading case upon this subject is the case of *Heriot's Hospital* v. *Ferguson*, July 30, 1773, M. 12,817, affirmed by the House of Lords, 3 Pat. App. 674. This was a case between superior and vassal, but in this matter this circumstance is immaterial. A superior gives off his land for payment of feu-duty, and under conditions of importance to him with reference to the property he retains. The disponer sells his land in a similar way, with conditions that will enable him to obtain the highest price that he can. The only question is, what is the bargain that they have entered into? Now, Heriot's Hospital feued off a portion of their ground in Edinburgh under this condition—"That it shall not be leisom to the said John Cleland and his foresaids to dig for stones, coal, sand, or any other thing within the said ground, nor to use the samen in any other way than by the ordinary labour of plough and spade, without the express consent and liberty of the Governors of the said Hospital had and obtained thereto for that effect." Cleland was a market-gardener, and for thirty years after the original feu-charter was granted he occupied the ground as a market-garden. He sold the ground to Walter Ferguson, who, in consequence of the increasing value of the ground as feuing ground determined to feu it out. The Governors of Heriot's Hospital brought their action to have it declared that the ground could not in virtue of the charter be built upon, and maintained that it could only be used for the purposes of husbandry and gardening. On the other hand, it was insisted that there was no express prohibition against building, that restrictions upon the beneficial use of property were subject to the most strict interpretation, and as building was the most beneficial use to which this property could be put, the Court could not imply a restriction against it. The Court of Session found that the defender was entitled to carry on his buildings, and the House of Lords affirmed their judgment. The opinions of the Court of Session and House of Lords have not been reported, but I see it noted upon Lord Pitfour's session-papers that at the last hearing in the Court of Session the whole Court was unanimous. The doctrine established by this case has been ever since enforced. The argument for the superior was apparently irresistible. If the feuar could not use the ground except for husbandry and gardening, it is to be implied that the erection of buildings was prohibited. But this implication was met by the stronger rule, that building not being expressly prohibited it was allowed; and that the true implication was that the ground was to be applied to husbandry and gardening only till it was required for the more profitable purpose. The law regards restrictions on the free use of property with as much jealousy as restraints on personal liberty. All restrictions which have the effect of preventing the owner from extracting from it all its beneficial products are against public policy and the interest of the community, and hence are styled odious by our text writers, and are subjected to rigid criticism by the Courts.

Lord Deas, referring to the decision in the case of *Heriot's Hospital* in support of the doctrine that a man is entitled to use his property as he thinks best unless expressly laid under restriction not to do so, mentions that the ground to which the feu referred was that on which St James' Square and St Andrew Square are now built. "This Court held that all such restrictions upon property must be strictly construed,

and although the feu-disposition bore that no use whatever should be made of the ground except for ordinary labour by the plough or spade, the feuar was found entitled to build upon it, and accordingly we all know that it is covered with houses, forming two of the important squares of this city,"—*Gould* v. *M'Corquodale*, 24th Nov. 1869, 8 Macph. 171.

Now, this case of *Heriot's Hospital* has given the rule of construction which has guided the Court for more than a century. One of the last of the cases which followed it was *Russell* v. *Coupar*, 24th February 1882, 9 R. 660, which was determined in this Division of the Court. A person there had obtained right to a piece of ground, with the restriction that he "shall not be allowed to erect any buildings on any part of the said yard so as in any way to prejudice the lights of the other storeys of the said fore-tenement, but to use the same for a garden only." He having proposed to erect buildings upon the yard, it was objected that this was inconsistent with the condition of using it for a garden only, but the Court held that there was no absolute restriction against building, and as the lights that were sought to be protected would not be prejudiced by building, the right to do so existed. One of your Lordships said—"I think we must apply the principle of the well-known rule of law laid down in many previous cases, that a restriction on a right of property cannot be implied but must be clearly and unequivocally expressed." And the same doctrine was stated in other words by Lord Deas, who said, "That where there are two constructions open, either of which may fairly be put upon the clause which is said to restrict the rights of the proprietor, the construction is to be preferred which lays the least restriction, or no restriction at all, upon these rights."

But further, such clauses, besides being subject to strict construction, will not be enforced by a court of law if there be no substantial interest to protect by their enforcement. In that very case of *Gould* v. *M'Corquodale*, the Lord President stated this doctrine in the following terms:—"I am inclined to think that in the case of a servitude *altius non tollendi*, if the owner of the dominant tenement had no interest to enforce it the Court would not be disposed to sustain it if nimiously sought to be enforced *in æmulationem vicini*."

Now, so far from there being an express prohibition against building in the present case, I think the contrary is implied. When Traill in the disposition to Gavin reserved a power to communicate the privilege of the well to persons occupying the ground not sold to Gavin, the plain meaning of it was to communicate it to persons living in dwelling-houses, who needed water. Further, I think it very questionable whether the privilege of searching for water was intended to be continued if houses were erected upon the ground. A good deal of evidence has been led to show that although houses be erected water may be dug for in the rooms and cellars, and wells may be sunk in the middle of a house. As at present advised, I do not think that this was the meaning of the contract. I am, on the contrary, disposed to think that after houses are built the privilege is at an end, and I deduce that from the fact that it is stipulated that "surface damages" only shall be paid by the searchers. These words "surface damages" are totally inapplicable to the digging in a paved court-yard, or in the inside of a house, and are applicable only to the position of the land as it was when Traill's disposition to Gavin was granted. The sinking of the well where it now is was, then, an experiment that might or might not be successful, and Mr Kinnear, to whom Mr Traill had disponed the property before disponing it to Gavin, had sunk fifty feet and had failed to find water. The happy idea then occurred to Traill to apply to the police commissioners to be allowed to sink a well at the lowest part of the ground on the public thoroughfare, and he there found it. But looking to the failure of Kinnear's attempt, it was only natural that the agreement should be come to, that if that well failed Gavin should have a right to go upon the unsold garden ground of Traill and endeavour to find a well there. This, however, was a privilege not intended to be perpetual, and which became of no moment by the success of the well, and which was never intended to prevent building upon the ground.

Lastly, I hold that the application for interdict cannot be granted, because that is a remedy totally unsuited to the case. Interdict is granted to prevent immediate and impending wrong. It cannot be asked for the protection of such a contingent right as we have in the present case. All the probabilities—at all events, all the evidence in the case—are to the effect that the water in the well, which has been constant for twenty years, will permanently continue. To prevent the defender in the meantime from using his property in the manner dictated by common sense and by legitimate interest merely because in some remote future the well might fail, is a step in the way of vindication of contingent rights that I know no precedent for. If the defender shall cover the ground with houses, and if the well should fail, I do not doubt that our successors would find a remedy without authorising the pulling down or endangering of any of the houses in order to enable a search to be made or a well to be sunk. The solvent for such a wrong would simply be damages, —in other words, the Court would (if they held that the right to search for water still subsisted) ordain the successor of the defender to bring into Westbank Cottage a supply of the public water given to the other people of Arbroath, and to pay the 10s. a-year for the supply,—minus the expense of the labour to which the pursuer is now put for pumping. I would therefore propose to your Lordships to recal the interlocutor of the Sheriff, to find it unnecessary to pronounce judgment in terms of the declaratory part of the prayer of the petition, to refuse the prayer for interdict, reserving to the pursuer all remedy competent to him under his titles against the defender and his successors in the event of their erecting buildings upon the ground which shall have the effect of preventing the pursuer from obtaining water from the ground built on in the event of the water in the present well ceasing to exist.

Lord Shand—I agree with Lord Fraser in thinking that we ought to recal the interlocutors appealed against, and refuse the interdict; and while I think that there are ample grounds for refusing the note without making any reservation,

still if your Lordships think that some such reservation as that proposed should be inserted, I am quite willing to concur.

The facts of the case have been so fully stated by Lord Fraser that it is quite unnecessary for me to refer to them at any length.

Traill, at the time when he disponed the ground, retained a small portion in his own hands. The then purchaser, James Gavin, had by the terms of his disposition conveyed to him along with the ground a well, a pipe for conducting the water, and also a right of access to dig for water, provided the existing supply should from any cause fail.

No question is raised regarding the first two of these subjects, namely the well and the pipe, so that the present case relates entirely to the third, that is, the right of search for water if the well failed, and it is in respect of the clause in the deed relating to the right of search for water that the present claim for interdict is founded. The claim is in these terms—[*His Lordship here read the clause quoted by Lord Fraser*].

Now, the right here reserved is exceedingly limited in its terms, and really comes to this, that the respondent having right only to one-half of the water, seeks to interdict Clunie, who has a much larger piece of ground, from deriving any benefit from building upon his ground.

It has not been suggested that there is any probability of the present supply coming to an end. It has been in existence for many years, and as far as can be reasonally foreseen, it will continue to exist for many years yet to come. There is also the public water supply by means of which, at a very small cost, the respondents' wants could be fully met. Such being the real state of matters, it would seem that the present action is not one so much to secure water rights as to prevent buildings being erected upon this piece of open ground, and indeed the respondent says as much as this in the course of the proof. In his evidence he says—"I inquired particularly the nature of the servitude at the late Mr Warden, solicitor, Arbroath, and he thoroughly explained the nature of it to me. I would not have bought the property had the servitude not been there. Mr Warden explained to me that nobody could or would build there with such a servitude over it, and that I might probably get the ground at a reasonable price, as it was only suitable for a mason's yard, or shed, or market-garden, or other similar purpose. . . . . He mentioned that Mr Clunie was to erect three-storey buildings fronting Millgate Loan, and a cottage fronting Mount Zion Brae, in front of Westbank Cottage. I said I could say nothing about it, but if such buildings were erected, it would take at least £200 off the value of Westbank, and that, if I had thought such buildings could be erected I would not have purchased Westbank at any price." And this shows, I think, that the object the respondent had in view was not so much to secure his right to search for water as to preserve the amenity of his property.

I do not think it necessary for the immediate decision of this case to consider the wide and varied questions which have been raised in the course of the argument. I think it sufficient to say that the clause of the deed upon which interdict is now craved will not in my opinion bear the construction contended for by the respondent. I consider that the interdict would in the circumstances be extravagant, and would prevent the appellant enjoying the legitimate use of his ground.

Such a claim as that now made must in all cases be most strictly construed, and that building was in the contemplation of the parties here is amply shown by the various provisions in the deed relating to the erecting of boundary walls and to the apportioning of the cost thereof. If, however, the contention of the respondent is to be given effect to, no buildings of any kind are to be allowed to be erected upon this ground, and I think it was admitted at the discussion that the contention of the respondent went that length. Such a reading of this deed is in my opinion unreasonable; its fair construction is, that a right to search for and open wells is to be preserved to the respondent, so far as this can be done consistently with the right of the owner of the ground to get the full use of it by building.

Lord Mure—I agree in the result at which your Lordships have arrived in this case. It is a process of interdict, and it is brought in somewhat peculiar circumstances. In 1869 the present appellant conveyed a portion of his lands to James Gavin, writer in Arbroath, and with the ground there was also given the right to a well, and also to a pipe to conduct the water from the well to the lands disponed, through the appellant's land. A right of search for water was also given in the event of the supply from the well failing.

In these circumstances, the appellant feued a further portion of his ground to a third party, who proposes to build upon it, and the respondent thinks that if this building is allowed to go on it will materially interfefe with his right of search for water if the well supply fails. It is in these circumstances that he seeks to have the proposed buildings interdicted.

It is of importance in this case to notice that there is no allegation that the existing well is in any danger of failing; all that is said is that the proposed buildings will interfere with the right of searching for water and render the process more difficult. I cannot in these circumstances see that there is any ground for granting this interdict. There is no prohibition in the titles against building upon this ground, and therefore no such prohibition is to be presumed—all the more, as the land from its position is undoubtedly feuing ground. It is not necessary for us at present to consider how this right of search is to be exercised in the event of the water supply failing, as the reservation proposed by Lord Fraser seems to me to preserve to the respondent all competent remedies; while at the same time it enables the appellants to get the full benefit of their ground for building purposes.

The Lord President and Lord Deas were absent.

The Court recalled the interlocutor of the Sheriff, pronounced no judgment on the declaratory part of the prayer of the petition, and refused the prayer for interdict, reserving to the pursuer all remedy competent to him under his titles in the event of the well failing and the defenders having erected buildings on the ground by which the pursuer should be prevented from obtaining water.

Counsel for Pursuer (Respondent)—J. P. B. Robertson—Dickson. Agent—T. F. Weir, S.S.C.

Counsel for Defender (Appellant)—Pearson—Gardner. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, December 17.

FIRST DIVISION.

ROSS'S TRUSTEE *v.* ROSS AND OTHERS.

Succession — Vesting — Annuity to Widow — Residue—Power to Advance Shares of Residue on Provision being made for Annuity.

A truster directed that his widow should have the liferent of the residue of his estate so long as she did not marry again, and that on her death or second marriage the residue should be divided among his sons, the issue of any predeceasing son taking the parent's share. He gave power to the trustees to convey to any of the sons their shares or part of their shares during the widow's survivance on security being given for her receiving the income of the share so conveyed. *Held* that the vesting of the sons' shares was not postponed till the widow's death, but that they vested a *morte testatoris* and were therefore carried by the settlements of sons who predeceased the widow.

William Ross senior, of Greenside, in the county of Fife, died on 15th January 1859. He was survived by his widow, three sons, and three daughters.

He left a trust-disposition and settlement, dated 22d February 1853, and codicil dated 28th December 1858. By the second purpose of the trust-settlement he provided for his widow, in addition to the liferent of his household furniture, an annuity of £150. By the third purpose he divided the residue of his estate among his children in such proportions as he should appoint.

By the codicil, which was executed within three weeks of his death, he first made an alteration in the trustees; second, he revoked the third purpose of his trust-disposition and settlement disposing of the residue of his estate, and directed his trustees to settle a sum of £3000 on each of his daughters in liferent and their children in fee, and to pay to each of them a certain further sum. By the sixth purpose he provided as follows—"*Sixth*, with regard to the free residue of my estate, I hereby direct and appoint my said trustees to make payment to the said Mrs Jean Ross, my wife, if she shall survive me, of the annual income during all the days of her lifetime while she remains my widow, and that at the same terms as set forth in the second purpose of the trust created by me in my said deed of settlement; and declaring that in case the said Mrs Jean Ross shall again marry, then the said liferent of the residue of my estate shall from the date of such marriage cease and for ever determine, and at the term of Whitsunday or Martinmas after the death or marriage of the said Mrs Jean Ross, if she shall survive me, and in the event of her predecease, at the first term of Whitsunday or Martinmas after my death, I hereby appoint and direct my said trustees to divide equally among my sons the said free residue and remainder of my said estate, the children of such as may have predeceased the term of payment taking their parent's share; declaring always that in the event of my wife surviving me, it shall be competent to and in the power of my said trustees, at any time after the first term of Whitsunday or Martinmas that shall happen after my death, to pay or convey to each or any of my said sons their shares, or a part of their shares, of the free residue of my said estate, but that upon due security only for the regular payment to the said Mrs Jean Ross, during all the days of her lifetime while she remains my widow, of the annual income of each share, or part of a share, so paid or conveyed; and my said trustees before denuding of the trust shall be bound not only to secure the annuities provided to the said Mrs Jean Ross, and to my said brother-in-law, but also to securely settle, as before directed, the provisions conceived in favour of each of my daughters, and of the children of their bodies; and likewise to secure in the most satisfactory manner that the annual income of the free residue of my said estate shall be regularly paid to the said Mrs Jean Ross during all the days of her lifetime while she remains my widow." The codicil also provided to the brother-in-law of Mr Ross an annuity of £20 and the liferent of a house.

Mr Ross left heritable and moveable estate amounting to £54,000. The sums provided to his daughters and their families were secured as he directed.

After the decease of Mr Ross, his widow, on 16th May 1859, granted a renunciation and discharge, by which, on the narrative of her provision given by the trust-disposition and settlement as above narrated, and that shortly before his death he executed the codicil, in terms of which she might claim provisions much larger than by his trust-disposition were conceived in her favour, and greater than she believed he intended her to enjoy, and that she was perfectly satisfied with the provision in her favour before narrated of an annuity of £150, and the liferent use of the whole furniture, as given her by the settlement, and that the trustees had secured her annuity by making over to her in liferent debentures of the Edinburgh, Perth, and Dundee Railway Company, to the extent of £5000 sterling, in security of her said annuity of £150 sterling, she renounced all right competent to her under and in virtue of the said codicil, and discharged the trustees and the trust-estate of all claim or demand against the trustees or against the estate of her late husband, either under the said codicil or in any other way.

The trustees thereafter proceeded to realise and pay over to the testator's three sons, who were his residuary legatees, the bulk of the estate, saving that portion only which was set aside to meet the annuity to Mrs Ross, and which consisted of preference stock of the North British and Caledonian Railways.

Mrs Ross died in 1883, and these stocks fell to be realised and paid in terms of the settlement of her husband. Two of the testator's sons, James Ross and William Ross junior, had predeceased