value of the annuity, and no terminus from which the times for payment of the instalments are to be calculated. It is not, in my opinion, intended that a devolution by law of a beneficial interest in expectancy, where the expectancy is never realised, and where possession or beneficial enjoyment is never attained, should be considered a succession within the meaning of the Act. I cannot say that I think the present case correctly answers the description of a beneficial interest accruing either in possession or in expectancy. On the contrary, it appears to me that if we are to construe the Act strictly, this is *casus improvisus*, which in a taxing Act would be sufficient for a judgment of absolvitor. But I am rather disposed to construe the Act according to its fair meaning and intention, comparing and combining the language and form of expression throughout the various sections. The Act is framed on the principle of using popular and not technical language, selecting with great discrimination and care words and phrases of comprehensive meaning equally applicable to the several parts of the United Kingdom. It is probably inevitable that such a statute should give rise to difficult questions of construction. But in the present case I am able to reconcile the language with what I conceive to be the principle and general scope of the statute. I do not think that any interest was intended to be taxed as a succession which never came into the actual beneficial possession of the successor; and such was certainly the case with Williamina Finlay, so-called successor to her sister. It was utterly barren, not because the property itself was unfruitful, but because she did not survive long enough to have a legal title to its fruits, or to the smallest part of them. On these grounds I answer the first question stated as arising on the special case in the negative. This also leads me to answer the second question in the negative, and the first alternative or counter-question in the affirmative. The defender Stevenson, is at common law, by virtue of his service and infeftment, the successor of Janet Finlay, Williamina having been heir-apparent only, without possession, for about three months; and this state of the title at common law is conformable to my construction of the Succession Duty Act 1854; because there is no beneficial interest vested in Williamina as a successor interposed between Janet and the defender. I am on these grounds prepared to pronounce judgment of absolvitor in so far as regards the first count of the information, and do not find it necessary to answer the second alternative or counter-question.

Wednesday, Jan. 24.

FIRST DIVISION.

KERR *v.* JAMES AND OTHERS.

Competent and Omitted. Suspension of a final decree *in foro*, on grounds which might have been urged before the decree was pronounced (aff. Lord Mure), *refused.*

Counsel for Suspender—Mr Gordon and Mr Webster. Agents—Messrs Maclachlan, Ivory, & Rodger, W.S.

Counsel for Chargers—The Lord Advocate and Mr Balfour. Agents—Messrs Gibson-Craig, Dalziel, & Brodies, W.S.

This was a suspension of a charge upon a decree *in foro* pronounced by Lord Barcaple in favour of the respondents for payment of a sum of £6000 out of a fund *in medio* in a process of multiplepoinding. The grounds of suspension were—(1), that the decree was pronounced in favour of, and the charge was given by, parties resident in England without a mandatory having been sisted; (2), that the respondents had no sufficient title to grant a discharge to the complainer; (3), that the decree was disconform to, and went beyond the terms of, the judgment which it was intended to carry out; and (4) that the money being in bank, the complainer was not in safety, and had not the power to make the payment without a special warrant to uplift, which the chargers had failed to obtain.

The Lord Ordinary (Mure) refused the suspension, holding that the objections stated were competent but omitted before the Lord Ordinary when he heard parties on the motion for interim payment; and further, that they could not be pleaded by way of suspension to a charge upon a final decree *in foro*, which the complainer should have reclaimed against (Lumsdaine *v.* Australian Company, 18th December 1834, 13 S. 215). His Lordship also thought that the objections were ill founded on the merits.

The Court to-day, after hearing Mr Webster for the suspender, adhered.

Thursday, Jan. 25.

FIRST DIVISION.

LAING *v.* NIXON.

Proof—Examination of Aged Witness—A. S. July 11, 1828, *sect.* 117. Petition by a pursuer for the examination of the defender as an aged witness allowed after the record was closed, on the pursuer waiving his right of reference to oath.

Reference to Oath. Is it competent to refer to a defender's oath when his examination as a witness has been taken on commission to lie *in retentis*, but is not afterwards used as evidence?

Practice. Observation (per Lord Deas) as to proof taken to lie *in retentis.*

Counsel for Petitioner—The Solicitor-General, Mr Gordon, and Mr M'Kie. Agents—Messrs Webster & Sprott, S.S.C.

Counsel for Defender—The Lord Advocate, Mr Clark, and Mr Watson. Agents—Messrs Paterson & Romanes, W.S.

The petitioner, who is a manufacturer in Hawick, raised an action of damages on 20th December 1865 against the defender, also a manufacturer there. Before the time had arrived for lodging defences, the petitioner presented an application to the Court for a commission to take Mr Nixon's deposition as a witness on commission to lie *in retentis* in regard to the matters set forth in the condescendence. The application was founded upon section 117 of the Act of Sederunt of 11th July 1828, which makes it competent for the Court to grant commission for the examination of witnesses whose evidence, owing to great age (not under seventy years), is in danger of being lost.

The petition was opposed by the defender, on the ground that the action was founded on allegations that he had been guilty of a series of frauds upon the petitioner extending over a period of fourteen years, and that the summons contained no specification of the time or place when the alleged acts of fraud were committed, but merely set forth that the pursuer had suffered damages to the extent of the random sum of £10,000. He also objected that the present application was a mere pretext for obtaining a precognition from him for the petitioner's guidance in the future conduct of the case against him.

The matter was discussed some days ago, when the Court could not see their way to granting the prayer of the petition [in the present state of the record, defences not being yet due. It came up again to-day, the record having been since closed.

An objection was suggested by Lord DEAS, founded on the right of the pursuer to refer his case to the defender's oath, his Lordship observing that if the evidence taken suited his purpose, he might at once refer to the defender's oath. This objection was obviated by the pursuer agreeing to put in a minute waiving his right to refer to oath, but doubts were

expressed as to whether a reference to oath would be competent after an examination of the defender in the way proposed.

The defender now objected that before the commission was granted the petitioner should be made to minute a waiver of the right which he had to abandon his action. The Court refused to accede to this request, and granted the prayer of the petition. The most serious objection was the want of specification; but there was a reason for that to be found in the nature of the case. There was a risk of the privilege which the Act of Sederunt had in view being abused, but there was the same risk in the granting of diligences, which was done every day. To refuse such an application as this would be attended with greater danger, and the Court had therefore a choice of difficulties before them. In regard to the objection that the result of allowing the commission might be to enable the petitioner to make out his case, the defender could not fairly complain of this, as it was to be assumed that he intended only to speak the truth, and it was not for the Court to protect him against the consequences of his doing so.

Lord DEAS observed that as the only legitimate use which could be made of this commission was to preserve evidence, any other use was wrong, though, it might be, it was impossible to prevent it. He thought the pursuer had no right to have a clerk present to take down the evidence as it was given, but it should be sealed up without any copy being kept. He knew that it was a common practice to have a clerk present to take down such evidence, but it was wrong. If it was consented to by both parties it might be allowed, but if objected to it should not.

The LORD PRESIDENT said he would reserve his opinion on this point; and Lord ARDMILLAN said that if the practice was to be altered it should be done by a general order applicable to all cases.

Friday, Jan. 26.

FIRST DIVISION.

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

Trust-Deed—Construction—Power to Sell. Terms of a trust-deed which held neither to express or imply a power to sell an heritable estate.

Counsel for Pursuers—Mr Clark and Mr John Hunter. Agents—Messrs Morton, Whitehead, & Greig, W.S.

Counsel for Defender Duncan—Mr Pattison and Mr Macdonald. Agent—Mr Thomas Ranken, S.S.C.

Counsel for Mr Farquharson of Whitehouse—Mr Patton and Mr Gloag. Agent—Mr John Robertson, S.S.C.

This action was originally raised by the late Robert Farquharson of Allargue and Breda, and is now insisted in by his brother, General Francis Farquharson, as his heir-male, and the trustees under his settlement, against John Duncan, advocate in Aberdeen, sole surviving trustee under the settlement of the deceased Andrew Farquharson of Breda and others. The object of the action is to have it declared that, on a sound construction of Andrew Farquharson's settlement, executed in 1823, his trustees had a power, in the circumstances which have occurred since his death, to burden the fee of the estate of Breda with the debts, legacies, and provisions left by the truster, or to pay off these debts, legacies, and provisions from the proceeds of a portion of the estate to be sold for that purpose. The question has been argued both orally and in writing. To-day the Court gave judgment against the pursuers.

The LORD PRESIDENT—The question before us arises under a trust-deed executed by Andrew Farquharson in 1823. By it he vested his property in trustees for various purposes—the payment of his debts, and of certain legacies, and the paying of the free liferent of his estate of Breda to his widow—and then comes the last purpose, which was in these terms — viz. — "I hereby desire . . . my said trustees . . . as soon after my decease as they possibly can, after payment of all my debts, the foresaid legacies, and such others as I may appoint, and without prejudice to the right of liferent before granted to the said Mrs Ann Farquharson, but subsidiary thereto, to make and execute a valid and formal deed of entail of my whole lands and estate of Breda, particularly before described, . . . settling my said estate upon Robert Farquharson" and a certain series of heirs. The truster died in 1831, and his widow lived till 1856, when she died. He left very considerable debt, looking to the amount of his property; and as the widow enjoyed a liferent, it became pretty clear that little could be done towards extinguishing it during her life. After her death there was, according to the view of the pursuers, little chance of the debts being paid for a long time. The other parties, however, say that they have been already very materially diminished. The parties do not concur on this point. This action was then raised; and it concludes in substance that Mr Duncan, the sole surviving trustee, is bound to make over the estate to the pursuer as first heir of entail, subject to the debts, and alternatively that he is bound to sell so much of the estate as will pay the debts, and make over the remainder. It is maintained by the pursuers that we must grant one or other of these conclusions; and it is said that unless we do so there is no prospect of any heir of entail enjoying the estate for at least fifty or sixty years. The sole surviving trustee resists the action, and so does Mr Farquharson of Whitehouse, a representative of another trustee, now dead. They say that the debts will be extinguished in a few years. But they further say that the trust-deed gives no authority or power to sell. That is the main question. It is pretty plain there is no express power to sell. Is there an implied one? There may be another question — namely, whether the exigencies of the trust are such that a sale is absolutely necessary for their extrication. That is a separate question, but it cannot now be decided in favour of the pursuers, for the parties are at variance as to the facts which raise it. On the first aspect of the matter it is very clear that the maker of this trust expected that his debts would be paid from the rents without the necessity of any sale. But it is said that he miscalculated the state of his finances, and that a sale is now necessary in order that his leading object, which was the payment of his debts, might be accomplished. Cases are referred to in order to prove that the Court have the power asked. I have no doubt of that, if it be possible to gather an implication of it from the trust-deed. I do not discover that in the deed before us. I think the whole scope of the deed is, on the contrary, adverse to such a thing. The truster says the estate is to be entailed when the debts are paid, and when the widow's liferent ceases. That of itself implies that the rents are to be applied to the extinction of debts. Then he authorises certain house property to be sold, but gives not a hint as to the sale of Breda. Again, he contemplates a state of matters under which his heir of entail is to be in possession of a certain portion of the estate but not of the estate itself. He contemplates that the heir is to possess the mansion-house and the farm of Mains. I read that clause as meaning that no rent is to be paid for that possession by the heir of entail. That being so, it is demonstrated that the rest of the rents were meant to be applied in payment of the debts. I think that this putting of the heir of entail in possession of a certain portion of the estate was equivalent to saying that he was to get a portion of the rents, and that the other surplus rents were to go to pay debts. If that had been said in so many words, could we for a moment have listened to the