should say the child of Alexander's second marriage is absolutely excluded; but various expressions in this clause, and the scope of the deed itself, show that this cannot have been the meaning of the parties.

These were two brothers, proprietors *pro indiviso* of certain subjects, who evidently meant that if both of them had a family, each of their families was to take one-half of the subjects *pro indiviso* in fee, but they cannot have meant that because one of them never had children, one of the children of the other should have no interest in his father's half of the estate.

Therefore I come to the conclusion, not without difficulty, that it was their intention that if Alexander had an additional child, although Andrew had no children, that child should have an interest in the half of the estate belonging to his father.

The other question is much more easily answered. The claim of the second party depends upon whether he can take as heir-at-law of his brothers and sisters, they having predeceased both their father and Andrew, and unless their shares of the estate vested in them before their deaths, of course this second party can take nothing as their heir. We have it stated that the trustees took infeftment on the 22d December 1862, and that there is no evidence to show that the disposition was delivered at an earlier date. Now, it is clear that there could be no interest under the deed till it was delivered, but it was said in argument that the deed must be held as delivered at the date of execution, because being a mutual contract it must be held as in fact delivered. But that rule in my opinion does not apply to a case like this. It may be that neither of the parties could revoke the deed without the leave of the other, but it by no means follows that both of them together could not have revoked it at any time. Therefore nothing could vest in the children, or in the trustees for them, till the deed was *de facto* delivered.

I am accordingly against the claim of the second party, and hold that he is entitled only to one-fourth of Alexander's share of the estate, and to one-third of Andrew's share. The effect of this opinion will therefore be, as regards the half belonging to Alexander, that it will be divided equally among the children, including the fourth party, and as regards Andrew's half, that it will be divided equally among the rest of the children of Alexander other than the fourth party.

Lord Mure—I agree with your Lordship in thinking this deed difficult of construction according to the ordinary rules, and I have come to the same conclusion as to the rights of the fourth party, which is the most difficult question before us. I think it was the intention of the parties that if there were more children of Alexander, whether by the same or a subsequent marriage, they should share with the other children in one-half of the fee. There is a clear and distinct provision to the child of the second marriage of a *pro indiviso* share of one-half, but then the awkward words come in, "and in the event of me the said Andrew M'Crae becoming married," &c. If "or" had been used instead of "and" all difficulty would have been removed, but it is so clear that the child of the second marriage was meant to participate, that I concur with your Lordship in holding that he is entitled to a share of the first half of the fee of the estate, but there are no words used sufficient to bring him in for a share in the second half. As to the rights of the second party and the question of vesting, I agree with your Lordship.

Lord Shand—This deed is as much of the nature of a puzzle as anything else, but although it is difficult to get at the true meaning, I agree with your Lordship as to how it is to be construed.

Lord Deas was absent.

The Court pronounced this interlocutor :—

"Find and declare that the fourth party is entitled to participate in the division of the proceeds of sale of the subjects referred to, to the extent of one-fourth of one-half thereof: Find and declare further that the second and third parties are entitled to have the remainder of said proceeds divided among them equally," &c.

Counsel for First and Second Parties—Mackintosh—Ure. Agents—Ronald & Ritchie, S.S.C.

Counsel for Third Parties — Gloag — Low. Agents—Ronald & Ritchie, S.S.C.

Counsel for Fourth Party — Trayner — Shaw. Agent—John Gill, S.S.C.

---

*Friday, July* 18.

## FIRST DIVISION.

[Lord Kinnear, Ordinary.

## THE GLASGOW CITY AND DISTRICT RAILWAY COMPANY *v.* MAGISTRATES OF GLASGOW.

(See *ante*, p. 527, 20th March 1884.)

*Railway—Railway beneath Streets of City—Limitation of Statutory Powers—Glasgow City and District Railway Act* 1882 (45 *and* 46 *Vict. c. ccxvi.*), *secs.* 34, 37, 39.

The Glasgow City and District Railway Company were empowered by their Special Act, for the purpose of making their railway under the streets of the city, to appropriate and use the subsoil of streets, and during the construction of the railway to stop up the streets for traffic. Their works were carried on, where the streets were level, by opening up the whole width of the street and forming the railway in tunnel, and then relaying the street, but it was necessary where there were steep gradients to form shafts for the purpose of driving the tunnel, and these occupied part of the street, leaving a space for traffic, and were surrounded with a barricade. The Act provided that where the works were being performed on the surface of the ground, not more than 150 yards of the street should be occupied, and (section 39) that "in con-

structing the railways the company shall restore the portions of the carriageway of any street, to be from time to time closed by them for traffic for the purposes of their works, within three months from the day upon which such portions shall respectively be so closed," under a penalty for every day after such three months during which the street should not be restored. The company having kept the shafts and barricades in existence for more than three months, and proceedings having been taken against them for penalties, raised this action for declarator that section 39 did not apply to the shafts and barricades, and that they were not obliged to remove them and to restore the street till their occasion to use them was completed. *Held* that section 39 applied to the portions of the streets interfered with by the shafts and barricades, and that the street so interfered with must be restored within the three months.

*Railway—Statutory Powers—Declarator.*

A railway company having, on the complaint of certain proprietors to whom their Special Act gave a title to sue for penalties in respect of the company's works having caused obstruction and annoyance for a longer period than the Act permitted, been convicted and found liable in a penalty, raised an action of declarator to have it found that they were acting within their statutory powers, and were not liable in any penalty. *Held* that the action was competent.

The Glasgow City and District Railway Act 1882 (45 and 46 Vict. cap. ccxvi.), by which the Glasgow City and District Railway Company was incorporated, and of which the Railway Clauses Act 1845 was declared to form part, except so far as expressly varied or as inconsistent with it, gave power to the company to construct certain railways passing under the streets of Glasgow. The statutory powers were limited to five years from the passing of the Act.

The Act by section 34 provided that the company "may appropriate and use the sub-soil of the streets, roads, roadways, lanes, footpaths, and places shown on the deposited plans, and described in the deposited books of reference, and may break up, remove, alter or interfere with all drains or sewers, and all water, gas, and other pipes therein or thereunder; and the company may, during the construction of the railways, cross, alter, stop-up, or divert the said streets, roads, roadways, lanes, footpaths, and places, or any of them, and use and appropriate any of them so stopped up."

Among the streets which the company were thus empowered to interfere with were Holland Street, West Regent Street, Blythswood Square, and Kent Road.

The company were not under the Act to be obliged to purchase and pay for the surface or subsoil of the street so appropriated and used, but the Act (secs. 48, 53, and 56) provided for compensation, in the event of damage, to individual proprietors.

By section 37 it was provided—"For the farther protection of the Lord Provost, Magistrates, and Council of the city of Glasgow, as a municipal corporation, and as trustees or commissioners acting in execution of the several public and local and personal Acts, by which any powers, jurisdiction, or authorities are conferred on them (in this section called the corporation) the following provisions . . . . shall have effect and be binding on the company: That is to say,—(*a*) At least twenty-one days before the company commence any works, the execution of which would in any way interfere with or affect any of the roads or streets in the city and royal burgh of Glasgow, or which would interfere with or affect the sewers and drains belonging to the corporation, the company shall give to the corporation notice thereof in writing, accompanied by plans, sections, working drawings, and specifications, showing the manner in which the proposed railways and works are to be executed, and also the means to be employed for protecting the said roads, streets, sewers, and drains during the operations of the company, and also the means to be employed for making good any injury or damage done to or interference with the said roads, streets, sewers and drains; which plans, sections, working drawings, and specifications shall be subject to the approval of the corporation previously to the works of the company affecting the said roads, streets, sewers, or drains being commenced. Where the railways and works and operations of the company are carried on upon the surface of the ground, the company shall not at any one time, without the consent of the corporation, interfere with or occupy, for the purposes of the said railways and works and operations, a greater extent of road or street surface than 150 lineal yards. In every case in which the company interfere with the said roads or streets, the company shall, to the satisfaction of the corporation—(1) restore the road or street so interfered with to its original level; (2) cause the formation of the road or street to be properly consolidated; (3) make good the paving and metalling of the road or street; (4) provide and maintain all requisite communications and accesses for foot-passengers to and from the houses and other buildings in the streets or roads so interfered with."

By section 39 it was provided—"In constructing the railways the company shall restore the portions of the carriageway of any street, to be from time to time closed by them for traffic for the purposes of their works, within three months from the day upon which such portions shall respectively be so closed; and they shall be liable to a penalty not exceeding twenty pounds for every day after the expiration of the said period during which such portions respectively shall not be so restored; and such penalty shall be recoverable, with costs, in the Court of the Sheriff of the county of Lanark on summary application by all or any of the proprietors or tenants in that part of the street which is opposite the respective portions which shall not be restored."

The railway was for the most part in tunnel under various streets in the city, and where the streets were level the company was in use to open them up entirely for the space of 150 yards in length at a time, form the railway in tunnel, and restore the street. In some parts of the city, including those in which are the streets to which this action referred, it was necessary, owing to the steep gradients, to sink shafts for

the purpose of driving the tunnel, and in such cases the portion of the carriageway which surrounded the shaft was enclosed by a barricade and stopped up for traffic, leaving the rest of the street open. One of these openings with barricade round it was in West Regent street, and was about 37 yards in length, and occupied a large part of the carriageway; another was in Holland Street, another in Blythswood Square. There was also for a time, and at the date of this action was expected again to be, a similar opening and barricade in Kent Road.

All the three first openings had remained for much more than three months prior to the raising of this action. The other had also existed from June to October 1883.

Before making these openings, plans, sections, &c., as required by section 37, had been sent in to the corporation by the company, and these plans had been approved.

In January 1884, after the opening and barricade in Holland Street had remained for more than three months (it having been made in June 1883), proceedings were taken by Mrs Hutchison and others (trustees of the late Robert Hutchison), proprietors of property in Holland Street opposite to the part of the carriageway closed for traffic, to recover penalties under section 39 of the Act, in respect of the street not having been restored within three months from the time of its having been closed for traffic. In these proceedings the Sheriff convicted the company, and decerned against them in a modified penalty. On appeal to the High Court of Justiciary this judgment was affirmed *(ante,* p. 527).

Other similar complaints were raised before the Sheriff by various proprietors and tenants of property opposite the obstructions caused by the openings and barricades, certain of which were in dependence at the date when this action was raised.

In these circumstances the company raised this action against the Magistrates of Glasgow as representing the community, and against Hutchison's trustees and the other proprietors and tenants of property opposite the openings, concluding for declarator that the openings or shafts and barricades made by them on the sides, or other part and portions of the carriageway of West Regent Street, Holland Street, Blythswood Square, and Kent Road, as these openings were shown on their plans, were within the statutory powers given by their Act, "and that the pursuers are entitled to use, in the construction of their said railway, such portions of the carriageway of the said streets and the subsoil thereunder as are occupied by the said openings or shafts and barricades, conform to the said plans, free from any molestation or disturbance by the defenders, or any of them, so long as the said openings or shafts and barricades or any of them are necessary for the construction of the pursuers' said railway; and that the pursuers are not under any statutory or other duty or obligation to restore for traffic such portions of the carriageway of the said streets and the subsoil thereunder as are occupied by the said openings or shafts and barricades, conform to the said plans, within three months from the day or days on which the said openings or shafts and barricades were respectively begun or made by the pursuers, nor until the construction of the pursuers' said railway, in so far as effected by means of the said openings or shafts and barricades, or any of them, shall be completed; and it ought and should be found and declared, by decree foresaid, that the individual defenders are not entitled to molest, disturb, or in any way interfere with the pursuers in their possession and use of the said openings or shafts and barricades, conform to the said plans, for and during the construction of the pursuers' said railway."

The pursuers alleged in their condescendence that they had made all necessary accesses for foot-passengers during the continuance of their interference with the streets, and were willing, when the purposes of the openings should be completed, to restore the streets to the satisfaction of the corporation; that their works would soon be completed; that the defenders wrongfully insisted that the openings should be at once closed and the streets restored, and that without waiting for the completion of the works; that the "defenders were erroneously founding and proceeding upon the 39th section of the Special Act" (above quoted); that there was left a sufficient carriageway for carriages and carts, and that the traffic had not been interrupted; and that the "said 39th section has no application, nor have the individual defenders any title thereunder. The individual defenders nevertheless wrongfully, and contrary to the pursuers' statutory rights, threaten, and are taking action, to molest, disturb, and interfere with the pursuers in their necessary possession and use of the said openings or shafts and barricades, for the construction of the railway; and accordingly the present action has become necessary for the protection of the pursuers' rights, and in order to secure the due progress of their works.

The pursuers pleaded—"(1) The pursuers, under their statutory powers, are entitled to the use of the openings or shafts and barricades now in question for the construction of their railway, and until the completion of their works. (2) The restoration of the portions of carriageway, occupied by the said openings or shafts and barricades, is, under the statutory provisions thereto applicable, to be effected to the satisfaction of the Corporation of Glasgow exclusively, and is a matter with which none of the individual defenders have any right to interfere. (3) The 39th section of the pursuers' Special Act has no application to any of the openings or shafts and barricades brought in question in the present action. (4) The individual defenders have no right or title under the said 39th section, or otherwise, to insist on immediate restoration of the carriageway, nor to interfere in any way with the pursuers' continued use and possession of the openings or shafts, and portions of the surface of streets now in question, for the purposes of their works. (5) The pursuers are entitled, for the due progress of their railway, to have the respective rights of the parties hereto cleared by decree of declarator, in terms of the conclusions of the summons, and to have thereupon interdict against further interference with their works."

Separate defences were entered for the corporation and for two sets of the individual defenders.

The individual defenders set forth that the pursuers' operations had caused inconvenience and loss to them, and referred to the prosecu-

tions before the Sheriff and the result thereof in the Court of Justiciary. They relied on the terms of section 39 above quoted.

The whole defenders pleaded that the action was incompetent.

They also pleaded that on a sound construction of the pursuers' Special Act, and in particular of section 39 thereof, the defenders should be assoilzied.

The Lord Ordinary (KINNEAR) pronounced this interlocutor:—"Assoilzies the defenders from the conclusions of the action, and decerns: Finds the defenders entitled to expenses, but only to the extent of one appearance for the Lord Provost, Magistrates, and Town Council of Glasgow, and one appearance for the other defenders, &c.

"*Note.*—I have doubts as to the competency of this action, but the judgment which I must pronounce upon the merits is so obvious that it is unnecessary to consider the more doubtful question of competency.

"The question which this action has been brought to determine has been already decided by the Court of Justiciary in the case of *The Glasgow City and District Railway Company* v. *Hutchison's Trustees*, March 20, 1884. The judgment may not be technically binding as a precedent, but the unanimous opinion of the Judges who took part in it is of the same weight in itself whether it is expressed in the Court of Session or in the Court of Justiciary. The decision appears to me to be conclusive of the present question."

The pursuers reclaimed, and argued—Where the whole thoroughfare was taken, then no doubt it must be restored within three months, but this did not apply where only a portion of the street was used for the purposes of a shaft. The work at the points complained of could not be done within the three months, and from its nature it could not have been contemplated that it should. None of the streets in question were closed for traffic. The provisions of the Act prohibited more than a certain length of the street to be taken, but said nothing about the breadth. The private proprietors had no right to complain or sue for penalties. The Magistrates had no title under section 39, only under section 37, and under this section arbitration was their remedy.

Authorities — Railway Clauses Consolidation Act 1845 (8 and 9 Vict. cap. 33), secs. 46, 51; *Hogg* v. *Parochial Board of Auchtermuchty*, June 22, 1880, 7 R. 986; *Edinburgh Tramway Company* v. *Torbain*, May 18, 1876, 3 R. 655; *Adamson* v. *Edinburgh Tramway Company*, March 5, 1872, 10 Macph. 533.

Argued for the individual defenders—(1) The action was incompetent; the question between the parties had already been determined before a competent tribunal. The contention of the pursuers, that they could keep the street barricaded as long as necessary provided they did not shut up entirely the carriageway, was unreasonable, and opposed to the clear meaning of section 39. The view of the Court of Justiciary (*ante*, March 20, 1884, p. 527) upon this matter was correct.

Authorities — *Thomas* v. *Keating*, June 18, 1855, 17 D. 1133; *Tod* v. *Burnet*, March 7, 1854, 16 D. 794.

The Magistrates of Glasgow (who adopted both on the question of competency and on the merits the argument for Hutchison's trustees) argued on the question of title that section 37 and 39 gave them a title to defend. They also argued that the construction of the 39th section contended for by the pursuers was that the closing of the street must be for through traffic, whereas there might be most important traffic from one side of the street to another.

At advising—

LORD PRESIDENT—This action of declarator has been raised for the purpose of settling various questions which have arisen as to the true construction of certain clauses in the Glasgow City and District Railway Act of 1882, which gives to that railway company the right, under certain conditions, to open up the streets of Glasgow for the purpose of constructing their railway. The present question is one of great importance to the railway company, and of not less importance to the community of Glasgow.

Something was said in the course of the discussion against the competency of this action. I shall have occasion before concluding what I have to say to make some reference to this matter, but it will be better, I think, that I should at first deal with what may be called the merits of this question—namely, the view of their powers put forward by the pursuers.

This railway is to be constructed underground, and in order to enable the company to construct it they are entitled by their Act to open up certain of the streets of Glasgow. The railway is intended to be under streets, but not under houses, and the way in which it is contemplated that the greater part of the railway is to be constructed is by working open cuttings along the streets, and building arches over the railway when constructed, and then restoring and filling up the streets. But there are other parts of the line where a somewhat different mode of construction must necessarily be adopted—that is to say, where the streets are very steep. It is not intended of course that the line shall in those parts follow the gradient of the street, but, on the contrary, that it shall be kept as nearly as possible on the level. In these parts of the line therefore it becomes indispensable that the works should be done by mining or tunnelling, and in order to enable the company to make such tunnels they required to construct and sink shafts. The public streets are thus interfered with in two ways—first, longitudinally, and second, by driving the shafts to allow of the mining operations underground.

In the case of opening up streets longitudinally it became necessary, at least in most of the places, to occupy the entire width of the street during the progress of the works, but in the case merely of sinking a shaft that could be done without occupying the entire width of the street. There are thus two modes in which the company can occupy the streets for the purposes of their works. The question raised under the statute in this action therefore involves the question whether the clauses referred to are to be interpreted as applying to both of these modes of working. The railway company say they apply only to the case where a street is entirely shut up and all traffic along it is put an end to, and not in the case where a portion of the width of a street only is occupied by sinking a shaft. Now, the first

section of the Act which requires attention is that which empowers the railway company to interfere with the streets at all—the 34th section. Here the provision is, that the company "may appropriate and use the sub-soil of the streets, roads, roadways, lanes, footpaths, and places shown on the deposited plans, and described in the deposited books of reference, and may break up, remove, alter, or interfere with all drains or sewers, and all water, gas, and other pipes therein or thereunder; and the company may, during the construction of the railways, cross, alter, stop-up, or divert the said streets, roads, roadways, lanes, footpaths, and places, or any of them, and use and appropriate any of them so stopped up." Now, the most remarkable thing about the powers so conferred is, that they are—and here this Act differs from ordinary Acts giving such powers—given without any provision for compensation, and therefore parties who are likely to be affected by the operations of the railway company are certainly entitled to be very diligent in looking after their own interests, and seeing that the company in the exercise of their very extensive powers do not go one hair's-breadth beyond the statute. The next section to be looked at is the 37th, which is in these terms—"For the further protection of the Lord Provost, Magistrates, and Council of the city of Glasgow, as a municipal corporation, and as trustees or commissioners acting in execution of the several public and local and personal Acts, by which any powers, jurisdiction, or authorities are conferred on them (in this section called the corporation) the following provisions . . . shall have effect and be binding on the company: That is to say—(*a*) At least twenty-one days before the company commence any works, the execution of which would in any way interfere with or affect any of the roads or streets in the city and royal burgh of Glasgow, or which would interfere with or affect the sewers and drains belonging to the corporation, the company shall give to the corporation notice thereof in writing, accompanied by plans, sections, working drawings, and specifications, showing the manner in which the proposed railways and works are to be executed, and also the means to be employed for protecting the said roads, streets, sewers and drains during the operations of the company, and also the means to be employed for making good any injury or damage done to or interference with the said roads, streets, sewers, and drains; which plans, sections, working drawings and specifications shall be subject to the approval of the corporation previously to the works of the company affecting the said roads, streets, sewers or drains being commenced. (*b*) Where the railways and works and operations of the company are carried on upon the surface of the ground, the company shall not at any one time, without the consent of the corporation, interfere with or occupy, for the purposes of the said railways and works and operations, a greater extent of road or street surface than 150 lineal yards. In every case in which the company interfere with the said roads or streets the company shall, to the satisfaction of the corporation—(1) restore the road or street so interfered with to its original level; (2) cause the formation of the road or street to be properly consolidated; (3) to make good the paving and metalling of the road or street; (4) provide and maintain all requisite communications and accesses for foot passengers to and from the houses and other buildings in the streets or roads so interfered with." Now, the most important part of this is sub-section (*b*), which provides that, where the works are carried on upon the surface of the ground, the company are not at any one time, without the consent of the corporation, to occupy more than 150 lineal yards.

Then we come to section 39, which is in these terms—"In constructing the railways the company shall restore the portions of the carriageway of any street, to be from time to time closed by them for traffic for the purposes of their works, within three months from the day upon which such portions shall respectively be so closed; and they shall be liable to a penalty not exceeding twenty pounds for every day after the expiration of the said period during which such portions respectively shall not be so restored; and such penalty shall be recoverable, with costs, in the Court of the Sheriff of the county of Lanark on summary application by all or any of the proprietors or tenants in that part of the street which is opposite the respective portions which shall not be restored." It is maintained by the railway company that this section does not apply to the case of a shaft sunk in the street where only a portion of the surface of the street is disturbed. But I can see nothing in the section to support such a construction; the words are very general—the company are to restore "the portions of the carriage-way of any street . . . within three months from the day upon which such portions shall respectively be so closed." Is there anything in these words to limit the section in the case of a street being closed on one side and a mere cart-track left upon the other? Is that portion so closed not a portion of the carriageway? and yet the words are that any portion is to be restored within three months of the time from which it was closed for traffic. There is a limit of time provided in this clause, yet if the railway company's contention is sound that limit of time will apply only to the case in which the entire width of the street is occupied. If this clause does not apply, then there is no limit of time whatever as regards the occupation of such a portion of a street as is here in question, except the limitation of time within which the whole works must be finished—namely, five years—and thus it would be in the power of the railway company to occupy a large portion, it may be, of any of the streets of Glasgow, so as only to allow one cart to pass along at a time, and that during the whole of the five years allowed by their Act of Parliament. A more startling construction of this clause it is difficult to imagine. It is impossible to believe that the Legislature ever intended to confer such powers, and it is impossible to construe this clause in such a way. The words of this section are sufficiently wide to embrace any portion of the street—a portion in length and also a portion in breadth. I am therefore of opinion that the pursuers' construction of this statute is unsound, and that they are not entitled to prevail in this declarator.

It is satisfactory to know that the Court of Justiciary came to the same conclusion in an appeal which was taken to them from the Sheriff Court under this same statute, and although the result at which that Court arrived is in no way binding upon us here, yet it is satis-

factory to know that the two Courts came to the same conclusion.

Upon the question of competency, I think that this action is perfectly competent, and I cannot say that I participate in the Lord Ordinary's doubt upon that question. If the Magistrates were desirous of preventing the company from overstepping the provisions of the Act, the circumstance that certain private parties who were injured by the delay in the operations had a title to complain, and succeeded in recovering penalties, would not prevent the Magistrates from raising an action to have it found that the railway company were bound to complete their operations within the specified time. If the Magistrates were entitled by means of an action of declarator to have it found that the company were not entitled to use the public street for a longer period than three months at a time, and to have them interdicted from so doing, it seems to follow, on the other hand, that the company should be entitled by the present action to have it determined whether or not they have power which they here claim, and also that owners of shops and dwelling-houses have also the right to prevent the company from overstepping the provisions of the Act, and, if they can, of recovering damages from the company for injury suffered by these operations, quite apart from the penalties which the Act provides may be recovered under criminal proceedings. I see nothing in the fact that such penalties may be recovered to prevent a civil action of damages for injury caused by the company exceeding its statutory powers. While, therefore, I am against the pursuers on the merits, I am with them upon the question of competency.

Lord Mure and Lord Shand concurred.

The Court adhered.

Counsel for Pursuers—Trayner—R. V. Campbell. Agents—Millar, Robson, & Innes, S.S.C.

Counsel fo Magistrates ofr Glasgow—J. P. B. Robertson—Pearson. Agents—Campbell & Smith, S.S.C.

Counsel for Hutchison's Trustees—Mackintosh—Goudy. Agents—J. & J. Ross, W.S.

Counsel for Mrs Watson and Others—Mackintosh—Dundas. Agents—Macandrew, Wright, Ellis, & Blyth, W.S.

---

*Friday, July* 18.

## FIRST DIVISION.

[Sheriff of Chancery.

## LORD LOVAT *v.* FRASER.

*Succession—Entail—Destination*—Falsa Demonstratio—Falsa Causa—*Construction—Description of Grantee—"Namely."*

By the dispositive clause of a deed of entail the entailer disponed the lands "to and in favour of the nearest legitimate male issue of my ancestor Hugh Lord Fraser of Lovat, namely, Thomas Alexander Fraser of Strichen, being the nearest lawful heir-male of the deceased Alexander Fraser of Strichen, and his heirs-male," and then failing certain other destinations, to and in favour of the person who should then be able to prove himself to be the chief of the Clan Fraser by legitimate descent. A claimant to the lands maintained that Thomas Alexander Fraser was not "nearest legitimate male issue of Hugh Lord Fraser of Lovat," and that it was a condition of the destination that the person called should truly answer that description. *Held* that the destination imported that the entailer intended to give the lands to Thomas Alexander Fraser, whom he had satisfied himself to answer the description; that it was not a condition of his taking them that he should be truly entitled to the description, and that, assuming him to be not, the case was one of *falsa demonstratio* or of *falsa causa*, neither of which would affect his title to the lands.

The late Archibald Thomas Frederick Fraser, Esquire, of Abertarff, in the county of Inverness, died on 2d March 1884 last vest and seised in various portions of the lands of Abertarff, as well the *dominium utile* or property as the *dominium directum* or superiority of the same which stood in the person of the late Honourable Archibald Fraser of Lovat in fee-simple through the failure of heirs of his body. Competing petitions for service were presented to the Sheriff of Chancery by (1) The Right Honourable Simon Baron Lovat; and (2) John Fraser of Mount Pleasance Villa, Carnarvon, each of whom claimed to be served nearest and lawful heir of tailzie and provision in special of the said Archibald Thomas Frederick Fraser of Abertarff.

Alexander the sixth Lord Lovat, who died in 1557, had two sons, of whom the elder was Hugh the seventh Lord, and the younger was Thomas Fraser, called Fraser of Strichen, and the first of the younger branch of the family, who were known as the Frasers of Strichen. Hugh the ninth Lord Lovat had several sons, of whom one, Hugh, died before his father, but his son Hugh became the tenth Lord, and left a son Hugh who became the eleventh Lord, and died without male issue. Hugh the ninth Lord, however, had left other sons, of whom one was known as Thomas of Beaufort. It was one of the sons of this Thomas of Beaufort, namely, Simon, that became twelfth Lord. He was beheaded in 1747.

In this competition it was averred by John Fraser, the competing petitioner, and assumed to be true for the purpose of the case, that Thomas of Beaufort had an older son than Simon, namely, Alexander, who was alive when Simon succeeded, and who would have been twelfth Lord in preference to Simon, but who was obliged to fly from Scotland in or about the close of the seventeenth century, and went to Wales, where he married and left issue, John Fraser, from whom this petitioner claimed to be directly descended.

Simon, known as the twelfth Lord, left issue, one of whom the Hon. Archibald Fraser of Lovat, who was born in 1736 and died in 1815, executed the deeds of entail under which Abertarff was entailed. The first of these deeds of entail was executed by him in 1808. He entailed the lands of Abertarff upon the following order of heirs, viz., "to and in favour of the nearest legitimate male issue of my ancestor Hugh Lord Fraser of Lovat, namely, Thomas Alexander Fraser of Strichen, being the nearest