quire proof that they formed one writing, including evidence, it may be, as to when the document or its alleged different parts were formed, as bearing on the question whether the detached parts did form one whole. Here, however, proof is not required, for looking at the documents they will be found to contain inherent evidence that they form one consecutive deed by their external appearance and the continuity of the sentences at the end of each sheet or the beginning of the next. They are all in the same handwriting, and no doubt it was for that reason that the testator only signed them on the last page.

LORD ADAM—I am of opinion that the rule of the law of Scotland, to be found set forth not only in the institutional writers of books of practice, but also in decided cases, is that where a document such as the present bears *in gremio* to be written by the subscriber or granter, it is to be taken as probative without further proof. The document is, in short, to be received as if it were a regularly tested deed. That I take to be the rule of the law of Scotland on the matter in all cases, and not merely in the Commissary Court.

What the effect may be as to the *onus* of proof if the genuineness of the deed be challenged I do not think it necessary to inquire, because the question does not arise here. With reference to what has been said as to altering the practice in the Commissary Court, the practice of holding deeds like the present to be probative has been in existence in these Courts for fully three hundred years, and as it has not been shown or suggested that any evil has arisen from the practice, I should be slow to alter it. I can see that if the practice of requiring proof of such a document was introduced in any case, a great deal of additional expense would be occasioned in numerous cases, and so far as I can see without any necessity.

On the whole matter, I think we ought to be slow to alter a rule from the adoption of which it is not said that any harm has arisen.

LORD M'LAREN—The rule which we have had under consideration seems to be one peculiar to the Commissary Courts, and judging from the expressions of opinion which we have heard, I should imagine that it has not many friends outside that ancient jurisdiction. It being a rule, however, which has prevailed for a very long period, we do not see our way to alter it. For my part I do not think that the rule is either consistent with the principles of the law of Scotland or with logic and common sense. It is inconsistent with our law, because by our law a holograph deed is not probative. At a jury trial or a proof you may put in a tested deed without any proof whatever, and the deed is then evidence for the party putting it in. Holograph writings must be proved before they can be made evidence, and I do not think it would make any difference in regard to the necessity for proof that the writing stated *in gremio* that it was "written with my own hand." I should not hold that the decision we are going to pronounce has any application, except as regards the non-contentious business of the Commissary, because in all contentious cases the rule of law that a holograph writing is not probative remains intact in accordance with the judgment in *Anderson* v. *Gill*. As regards the reason of the rule, it is only necessary to state it to make its inconsistency apparent. It comes to this, that if the holograph deed contains no attestation clause, but concludes with a signature, it is necessary to prove that it is the deed of the alleged maker, but if the deed contains a statement that it is "written with my own hand," this is to be taken as a statement by the maker that he wrote and subscribed the deed. I think that this is an example of the familiar "question-begging" fallacy, and the fallacy consists in the assumption that the statement that the deed is holograph is the statement of the person whose handwriting has not been proved.

I agree, however, in thinking that it is impossible to alter this rule of practice, and that in the present case where there is no competition the existing practice should be adhered to, and that the judgment of the Sheriff-Substitute should be recalled and the case remitted for confirmation.

The Court recalled the interlocutor of the Sheriff-Substitute and remitted the case to him to grant confirmation as craved.

Counsel for the Petitioner—Low. Agent—Hugh Martin, S.S.C.

Friday, January 24.

SECOND DIVISION.

[Lord Trayner, Ordinary.

MACNAB *v.* MUNRO FERGUSON AND ANOTHER.

Servitude—Constitution—Well—Drawing Water—Continuous Use.

A well upon a farm was used by the inhabitants of an adjoining farm not continuously but only in dry summers when there was scarcity of water; the use was not made as a right, but on the toleration of the proprietor of the well.

Held that no valid servitude of drawing water for domestic purposes from the well had been acquired by the proprietor of the adjoining farm.

Opinion (*per* Lord Young) that such a servitude must originate in a grant, and cannot be constituted by use, although where the memory of the origin of the grant has been lost, the only evidence of its existence may be the conduct of parties for a sufficient period prior to the assertion of right.

This was an action by John Macnab, of Kinglassie, Fifeshire, against Ronald Crau-

furd Munro Ferguson of Raith and Novar, and Alexander Mitchell, residing at Dogton, a farm upon the estate of Raith, to have it declared that the pursuer had the sole right of property in the well known as "The Summer Well," situated in the Whinnyfield, part of the lands and farm of Pitlochie, on the pursuer's estate, free of any right of servitude *aquæ haustus*, or otherwise, in favour of the defender Munro Ferguson, his tenants and servants, or others, and for interdict against both defenders from troubling and molesting the pursuer in the peaceable possession and enjoyment of the said well, or invading the pursuer's lands and well. The farms of Pitlochie upon Kinglassie and Dogton upon Raith marched with each other. The well lay about 250 yards west from the Pitlochie steading, and about 200 yards from the nearest part of the march between the pursuer's and defender's lands, and was the principal well on the farm. It was situated on the Whinnyfield of Pitlochie, which in 1818 was part of a commonty. In that year the proprietors of the commonty (among whom were William Murray of Pitlochie, and Robert Ferguson of Raith, the respective authors of the pursuer and defender) agreed upon a division of the commonty, which was finally arranged under a submission to Lord Balmuto, then Sheriff of Fife.

By section 4 of the contract of agreement it was provided that as the watering-place between Dogton and Pitlochie, described inthe submission, was indispensably necessary for the watering of the bestial of these lands, and could not be divided by a wall without the risk to one or other of them being deprived of the water at certain seasons, therefore the proprietors agreed to keep the said water-place open for mutual accommodation. No provision for water for domestic uses was made in the submission.

The pursuer averred that the defender Mitchell and his servants, on the advice of the defender Ferguson, had since Martinmas 1882 persisted in entering upon the pursuer's lands to take water from "The Summer Well," although repeatedly informed that they had no right to do so, that in doing so they had invariably disturbed the cattle, and that "in consequence of the actings of the defender the said Alexander Mitchell and of his servants the pursuer's water supply, which is very limited in dry seasons, has been so drawn from and tampered with that he has oftentimes been unable to get a sufficient quantity for his own uses, and he had also suffered loss from the trespass."

The defenders averred—"Explained that from time immemorial, or at all events for a period greatly exceeding that of the long prescription, the defender Mr Munro Ferguson and his authors, and his and their tenants, servants, and others, have been in use so to enter upon the said lands of Pitlochie and to draw water from the 'Summer Well,' without interruption or protest of any kind from the proprietors of Pitlochie or anyone else. There is no supply of water for domestic purposes on the farm of Dogton, and the water for such purposes has during the said period always been taken for said farm exclusively, or almost exclusively, from the said well. It is denied that the pursuer's cattle have been disturbed, but explained that, with the view of obviating any chance of such disturbance, the defenders some time ago expressed their willingness that persons going from Dogton to the said well for water should pass over the pursuer's land by any suitable road or path which he might appoint, said road or path being, if the pursuer desired it, enclosed by railings."

The defenders pleaded—"(2) The defender Mr Munro Ferguson and his authors having acquired a valid servitude of drawing water for domestic purposes from the said well, the pursuer is not entitled to decree of declarator or of interdict as craved."

The Lord Ordinary allowed a proof, which established these facts—There was no original grant of servitude. There were several wells of water upon Dogton, but although full in winter, the wells nearest the farmhouse were not always full in summer. One of the wells had a very peaty taste, and was avoided by some, although used by others. For many years before 1860 the inhabitants of Dogton had been in use to send for water to "The Summer Well" during very dry summers, or indeed when it was needed, but that was seldom except in summer, although the well was famed for its good drinking water. The farmers at Dogton and Pitlochie were always upon good terms with each other, and although the persons who went from Dogton to draw water were never challenged, they did not go as in assertion of a right to draw water. Mrs Campbell, who was born at Dogton, and who deponed that she was in the habit of using the Summer Well in dry seasons, stated—"I never asked permission from anybody to let me go to the Summer Well. I did not think I was doing anything wrong in going. We knew we should not have gone, but we never were quarrelled. The other people at Dogton went to it just as we did. (Q) What do you mean by saying you should not have gone?—(A) We knew we had no right to go to the well, but I never was quarrelled, and was not afraid to go. (Q) Who ever told you you had no right to go?—(A) The well was not on Dogton ground. (Q) But you just went without asking leave, and nobody quarrelled you?—(A) Yes. That was the case all the time I was at Dogton, and the other people at Dogton were doing just as I was. I never heard of any of them being quarrelled." (2) From 1860 till 1864 the tenant of Dogton did not send for water from that well, as he and his sister were content with the water to be got from the wells on the farm, but he did not know and did not inquire where his farm servants got the water for domestic use. Upon one occasion when the tenant of Pitlochie complained that one of the domestic servants from the farmhouse of Dogton had been drawing water from the Summer Well she was forbidden to do so again. (3) For

the last fifteen years the use had been more continuous than previously. It appeared that no complaint had been made that the taking of water from the Summer Well had inconvenienced the people at Pitlochie, but Mr Kilgour, the present tenant, had latterly stopped persons going for water, and turned them off the ground, although several did not cease to go on that account.

Upon 26th June 1889 the Lord Ordinary (TRAYNER) pronounced this judgment — "Sustains the second plea-in-law for the defenders: Assoilzies the defenders from the conclusions of the summons, and decerns: Finds the pursuer liable in expenses," &c.

"*Opinion.*—I think it is proved that the defender and his authors, by their tenants and servants on the farm of Dogton, have resorted to the Summer Well and drawn water there for their own purposes for more than forty years.

"The use made of the well was no doubt chiefly in summer, when the water supply on Dogton ceased or became inadequate. But the evidence shows that the well was also used as a water supply by the tenants and servants on Dogton in winter whenever they had need or indeed thought fit to go to the well.

"The evidence as to the use of the well in winter during the earlier years of the prescriptive period is scant enough. But probably it is not more so than might naturally be expected, considering that the use of the well in winter was not nearly so great as in summer, and that the number of witnesses who could speak to a period so remote is necessarily limited. I think it is established that the Dogton people went to the summer well whenever their necessity or their inclination prompted them to do so, for more than the prescriptive period; that they did so as of right, and not by permission, and that the servitude right claimed by the defenders has been made out."

The pursuer reclaimed, and argued—The defenders' case failed on their own showing. The use made by the Dogton people of this well was admittedly not continuous; they used it only in the summer time when the water in the wells on Dogton fell low; they did not even use it every year. During four years—from 1860 to 1864—the use stopped altogether, as the tenants of Dogton did not need it. The use was only made by toleration.

The respondents argued—The tenants of Dogton and their servants had continuously used this well from 1818 until now. It was true that the use was not continued during the whole year, but it was continuous in this sense, that the people at Dogton made use of it whenever they needed to do so, and did it every year. There was evidence that this was the only well to which Dogton people could go for water in summer time, and in these circumstances it was fair to assume that they went to it in assertion of a right. There was evidence that the tenant had tried to prevent people going to the well, but he had not been successful in doing so, and it was good evidence in support of a right that interruption of the right had been attempted and had not been successful. Before the division of commonty in 1818 the well was upon common ground, and not upon any farm, so that there could be no servitude acquired, but if it was proved that after the division into separate properties the tenant of one farm exercised a right over the estate of another proprietor continuously for forty years, that would show there was a right, and the Court could not disturb it. This was the same as the *Glendoll* case. The proprietor had stood by and allowed the neighbouring tenants to go over his lands for the prescriptive period, and he could not now stop it. It was true that the *Glendoll* case was one of a public right-of-way, but the principle was the same—*Durham*, Hume's, Dec. 1735; *Macpherson* v. *Scottish Rights-of-Way Society, &c.*, May 14, 1888, 15 R. (H.L.) 69.

At advising—

LORD JUSTICE-CLERK — The proprietor of the estate of Kinglassie, upon which is situated the farm of Pitlochie, desires in this case to interdict the tenant of the farm of Dogton, and the proprietor of the estate of Raith, upon which estate the farm of Dogton is situated, from taking water from a certain well called the "Summer Well" situated upon Pitlochie. For the purpose of this opinion I will call the two estates by the respective names of Pitlochie and Dogton, as that defines them accurately enough. The case is peculiar in one aspect, because we are not in a position that we often are in cases of this kind, that the origin of the right is not known, and that all possibility of discovering the origin has been lost. We know that the right of using this well by the Dogton people must have begun after a certain date. The right to use this well cannot have been in dispute before 1818, because before that time the lands upon which the well is situated was part of a commonty. In that year the different proprietors came to the conclusion that it would be better for all parties if the commonty was divided amongst them in proportion to their rights in it. Now, at the time this division was made it is quite clear from the terms of the contract entered into between the parties that very careful consideration was given to the question of providing water for the bestial upon the different farms into which the commonty was broken up, and the parties provided a particular watering-place for the cattle upon Dogton and upon Pitlochie, as is shown by the decree—"*Quarto*, that as the watering-place between Dogton and Pitlochie at the west end of Common Rigg, marked on the plan by letters A and A, is indispensably necessary for the watering of the bestial of these lands, and could not be divided by a wall without the risk to one or other of them of being deprived of the water at certain seasons; therefore it is agreed, and the said proprietors of these lands hereby bind and oblige themselves, to keep the said watering-place open for mutual accommodation." It is plain therefore that the question of water supply to these farms

was at that time before the parties. No arrangement was come to at that time as regarded the wells upon Dogton and Pitlochie farms; there is therefore no doubt that in 1818 the wells upon these farms belonged respectively to the lands upon which they were situated.

The well in question is a draw-well, the water of which is used for domestic purposes. I think that a claim to a servitude of drawing water from a well is a very different sort of claim, and is to be dealt with on very different considerations from a claim to a public right-of-way or to a servitude of way. In the first place, the demand to draw water is not merely a demand to pass over another proprietor's land, but it is a demand to take something away which is a benefit to the lands, and the deprivation of which may at particular times be a source of great inconvenience to the inhabitants of the land. Then, secondly, the proprietor of the well may permit his neighbour to use its water not merely out of good neighbourliness, as in the case of a road, but his toleration of his neighbour's use of the water may be due to the most ordinary dictates of humanity. I can figure cases where it would be gross inhumanity for him to prevent his neighbour getting the water. I think, therefore, that there must be clear evidence upon the following points—First, the use made of the access by those claiming the right must have been continuous and uninterrupted: Second, this use must have been made in the direct assertion of a right: Third, this use in the assertion of a right must have been acquiesced in by those having a right to object. If there was serious conflict of evidence on these points I think it would be for us to hold that the right had not been established.

Now, applying these principles to the present case I do not find that there has been continuous and uninterrupted use of this right to draw water at all seasons of the year. This well goes by the name of the "Summer Well," and it is plain that that name is assigned to it because it stands good for use in summer when the other wells fail. There is evidence that sometimes it needed to be resorted to for a supply of water, and sometimes it was superfluous. The people at Dogton only made use of it at a period of the year when there was a scarcity of water by the failure of their own wells. Not only was this use not continued throughout the whole year, but the use that was made was such as to suggest that this well was kept to provide against a scarcity of water. In some years, even in summer, there was hardly any use made of it. There was thus not uninterrupted possession of this right, if it was a right. There can be no assertion of right unless the party claiming the right has been challenged, but has continued his use of the right successfully in spite of the challenge. In this case it can hardly be said that either party thought that a right was being exercised by the people at Dogton. But, secondly, there is no direct evidence whatever that this use of taking water from the "Summer Well" was done in assertion of a right. On the contrary, one of the witnesses of the defender says—"I never asked permission from anybody to let me go to the Summer Well. I did not think I was doing anything wrong in going. We knew we should not have gone, but we never were quarrelled. The other people at Dogton went to it just as we did. (Q) What do you mean by saying you should not have gone? —(A) We knew we had no right to go to the well, but I never was quarrelled, and was not afraid to go. (Q) Whoever told you you had no right to go?—(A) The well was not on Dogton ground. (Q) But you just went without asking leave, and nobody quarrelled you?—(A) Yes. That was the case all the time I was at Dogton, and the other people at Dogton were doing just as I was. I never heard of any of them being quarrelled." I do not read that evidence as meaning that the witness went to the well in any wrong spirit; I take it as meaning merely that the one party went and the other party suffered her to go, because they both knew that she was not going as of right.

Then I think, further, that the right was not only not continuous, and not in assertion of a right, but I think there is evidence that it was interrupted. Persons from Dogton when going to the well were stopped and turned back. When the tenant of Pitlochie, Mr Kilgour, found that the use made of this well was to the detriment of his own people he at once put a stop to it.

Now, from the facts of the case as I have stated them, it appears that there is a very strong conflict of evidence. Even if it had been a question of the preponderance of evidence, I think that the preponderance is upon the side of those who are objecting to the right claimed.

No doubt it may be remarked here, as in most cases of this kind, and remarked with some force, that the only evidence brought against this claim of right is negative evidence. It is very difficult to see, however, what other evidence persons objecting to a right-of-way over their lands could bring forward except negative evidence. Surely it is good evidence when one person is claiming a right-of-way over the lands of another that that other should bring forward persons who can swear that although they might have used this alleged right-of-way, yet they never did use it, and yet that is negative evidence. It is obvious from the evidence that certain people on Dogton thought they required to go to this well, and it was only from their necessities that they did go. Is it not a strong thing that numbers of people living upon Dogton did not go to this well, and that indicates, I think, a feeling in the community of Dogton that they had no right to go, and that those who went did so simply by toleration of the proprietor of Pitlochie. But no amount of use following upon toleration would constitute a right. This toleration need not be wondered at if the proprietor of Pitlochie and his tenant knew that the use made by the Dogton people of this well was only occasional, and was not done in assertion

of a right, more especially if they knew the well was only used in times of drought. In my opinion therefore the judgment of the Lord Ordinary cannot stand.

LORD YOUNG—I also think that the servitude which has been alleged by the defender to exist has not been established, and that our judgment must be in favour of the pursuer. The question in the case is, whether there is a servitude of drawing water over the lands of Pitlochie in favour of the dwellers upon the lands of Dogton? It is usual in cases of this sort to specify more particularly than is done here the lands both of the servient and of the dominant tenement, but the question is, whether the proprietor of the lands of Dogton or his tenants are entitled to resort to a well upon the lands of the proprietor of Pitlochie, 200 or 300 yards from the farm, for a supply of water? The servitude is one of a right to draw water from a well, and of course, and as a necessity of that, a right to go to and return from the well over the lands of Pitlochie.

Now, if this servitude exists it must have been constituted as a burden upon the one estate in favour of the other. When was that servitude constituted? It is admitted that it could not have been constituted before 1818, because before that time the lands upon which these two farms are situated were part of a commonty, and it was only at that time that the land passed into the possession of the pursuer and defender or of their authors. It became the property of the pursuer at that time without any such servitude as the defender now claims upon it, so that the right must have been constituted some time subsequent to that date. It is certain that the pursuer made no express grant of this servitude, and there is nothing in the titles of the defender to suggest that such a servitude had been constituted in his favour.

It has been said that this servitude has been constituted by use since 1818. I think that argument rests upon a mistaken view of the law. A servitude such as alleged here cannot be constituted by use. The use may prove that such a right has been constituted, but it cannot constitute the right. If there has been use of a road over a neighbouring proprietor's lands, which cannot be reasonably accounted for otherwise than on the assumption that the person using the road does so in the exercise of a right, that may prove the servitude but it does not constitute it. The origin of the right may not be known, but it must have originated in a grant by the proprietor sometime or other. That grant may have have been made in any one of a number of ways, and the memory of the origin of the grant may have been lost, and the only evidence of its existence may be the conduct of parties for a long period prior to the assertion of right, and that may be taken as sufficient evidence in law of the existence of the right.

Our law on this subject is in marked contrast to the law of England, not only as regards the law relating to servitudes or easements, as they are called there, but even as to property in land. If any person should hold his land with such possession as a proprietor of land would use—although without any title—for a period of years, that constitutes him a proprietor of the land. It sounds an alarming doctrine, but it is so, and whereas the period of years during which such possession required to be kept in former times used to be twenty years, it has now been reduced to a period of twelve years, so that if a person exercises the rights of a proprietor over land for twelve years without rent being demanded of him he becomes the proprietor of that land.

In Scotland the law is different. Here there must be a good *prima facie* title, and if that can be shown, then peaceable and uninterrupted possession for forty years will bar any objection to his title. The same difference holds good in regard to the doctrine of ancient lights in England. If a man has a house the windows of which look into his neighbour's back garden, that may not establish a right in him to have the space kept clear before his windows any time during twenty years, but whenever the twenty years have elapsed he can prevent his neighbour building upon land which is undoubtedly his own because it would interfere with the light coming to his windows. That is in marked contrast to the law of Scotland.

Now, taking this case and applying those principles to it, the facts are that the people of Dogton resorted to this well in summer weather when there was a scarcity of water elsewhere, and that that resort had been from 1818 downwards. I put the question to the respondent's counsel whether that resorting was such as showed it was done as a matter of right, and he very frankly admitted that it might have been stopped any day within the forty years. There was no grant of servitude. Till when therefore was it necessary that the resort to this well should continue to establish a right? The answer is, until forty years have elapsed. The use of this well then might have been stopped at any period prior to 1858. Is that use of the well then down to 1858 a use as by right or by tolerance? The very admission that the right might have been stopped at any period prior to 1858 is an admission that the right was by tolerance only, but the use of a well or a road does not avail to prove prescription if it is a right by tolerance; if a servitude is to be proved the use must be as of right. Accordingly, when these kinds of cases were tried by a jury that was the form of issue that was always put before them. Here the use of this well might have been stopped at any time. Then that use is of no value to prove that a servitude existed, because it was a use solely by tolerance, and not as of right.

But I take the simple view that your Lordship has done. Suppose that a right of servitude can be constituted by use, this use might have been stopped at any time. Was that use then a use by tolerance or as of right? What is the reasonable view to take of it?

The parties interested in the question were the farmers and their families who lived at Dogton and Pitlochie farms respectively, and their people. I do not know that the proprietors had any knowledge or took any interest in the matter. Well, the people upon Pitlochie allowed their neighbours upon Dogton farm to come to this celebrated well for water when they needed to do so from exceptional circumstances such as a dry summer or the like. What would have been thought of them, if the two families were upon friendly terms with each other, if they had refused this permission to the Dogton people? I put this question to Mr Asher during the debate. Suppose the attention of the proprietor of the estate of Pitlochie had been called to the matter, and he was desirous that this intercourse and good neighbourhood between his farm and the next one should continue, but was also desirous of preventing a servitude being established over his lands, what should he have done? The answer was that he should either have put in writing his objection to a servitude being acquired and sent it to his next neighbour, or he should have insisted on getting a writing from him repudiating the idea of creating a servitude by the use made of the lands. That is a different view from mine of what is the true condition of the parties to each other, I think if one person desires to create a servitude over the lands of a neighbouring proprietor he ought to go to that proprietor and ask for it—ask for a grant of what he desires—and that it is not for the neighbouring proprietor to guard himself from being supposed to grant what he never intended to grant. I think that the one course is reasonable and that the other is not reasonable. I find nothing in this case except that the one party upon whose farm this well was situated was reasonably accommodating to the other party, and I think there is no evidence here that would lead us to subject the one farm to the burden of having a servitude for taking water from this well created over it in favour of the neighbouring farm upon another estate.

LORD RUTHERFURD CLARK concurred.

LORD LEE—The proposition in point of law which the defenders had to put forward in supporting the Lord Ordinary's interlocutor was this. All that was necessary for the constitution of the servitude of drawing water from this well over the lands of Pitlochie was that the people of Dogton should have drawn water from this well as their needs made it requisite for a period of 40 years. I do not think that that is a sound proposition in law.

The question of fact involved in the case was whether the use which had been made of this well was to be ascribed to tolerance or to the existence of a right. I think that the facts as they appear in the evidence in the case show that the use was to be ascribed to tolerance, and that the question of right was never raised.

The Court recalled the Lord Ordinary's interlocutor and granted the interdict craved.

Counsel for the Appellant—Sir C. Pearson—Guthrie. Agents—Tait & Johnston, S.S.C.

Counsel for the Respondents—Asher, Q.C. —Dundas. Agents—Dundas & Wilson, C.S.

Thursday, January 30.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

RUSSELL AND ANOTHER (SCOTT'S TRUSTEES) *v.* BOGIE AND OTHERS (METHVEN'S TRUSTEES) AND OTHERS.

Succession—Legacy—Residue—"Executors and Representatives whomsoever."

A testatrix bequeathed the residue of her estate to her executor Robert Methven and his two co-executors "equally between and among them, share and share alike, . . . and failing all or any of them by their predeceasing me to their several and respective executors and representatives whomsoever, whom I do hereby appoint to be my residuary legatees." Robert Methven predeceased the testatrix, leaving a trust-disposition and settlement, whereby he appointed his trustees his executors and intromitters with his moveable means and estate.

In a competition between his only brother and next-of-kin and his trustees, *held* that the latter were entitled to be ranked and preferred to the one-third share of the residue as the "executors and representatives whomsoever" of Robert Methven.

Miss Jessie Scott of Ferniebank, Newton of Panbride, died on 20th July 1888 leaving a trust-disposition and settlement dated 2nd September 1882, by which she appointed Robt. Methven, of Hilton, Robert Russell, and James Russell to be her only executors and intromitters with her whole moveable means and estate. This settlement provided, *inter alia*—"And lastly, with regard to the free residue of my whole moveable means and estate of every description which may remain at the period of my death after fulfilment of all my debts and the foresaid legacy, I leave and bequeath the same to the said Robert Methven, Robert Russell, and James Russell, equally between and amongst them, share and share alike, for their own use and behoof, and failing all or any of them by their predeceasing me, to their several and respective executors and representatives whomsoever, whom I do hereby appoint to be my residuary legatees."

Miss Scott was predeceased by Robert Methven, who died on 3rd April 1887, and was survived by Robert Russell and James Russell, who accepted the office of executors. The one-third share of the residue of