Thursday, March 19.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

REID *v.* HALDANE'S TRUSTEES.

Property—Conveyance—Titles—Construction—"Right and Privilege of a Loan"—Servitude.

In 1723 a barony was feued off in different portions, including Struie, connected with its hill pasture of Dochrie by a "loan," and Whitehill and Baulk, lying respectively on the east and west of the "loan." Struie was always occupied as an undivided holding, Whitehill and Baulk were occupied separately until 1844. The Struie titles included "half of the right and priviledge of the loan . . . according as the said loan lies meithed and marched betwixt the lands of Whitehill and Baulk." . . . The Baulk titles provided, "Reserving the loan belonging to Struie . . . as the said loan lyes and is meithed and marched betwixt the said lands of Baulk and Whitehill." The Whitehill titles contained similar terms. A plan prepared in 1842 showed each of the three estates enclosed by a coloured margin. Struie, the loan, and the hill were within one coloured line, and the other two estates were shown as separated by the loan. The plan was prepared in reference to a proposed sale of Whitehill and Baulk, and there was evidence that in 1859 it had been the subject of considerable scrutiny. The proprietor of Struie subsequently became possessed of the other half of the right and privilege of the loan.

In an action by him for declarator that he was proprietor of the "loan" and entitled to fence both sides of it, and for interdict, the Court *holding*, on construction of the titles, that the words thereof were not inconsistent with a grant of property to the pursuer, *decerned* in terms of the conclusions of the summons.

Process—Proof—Evidence after Proof Closed.

In an action of declarator of property a proof of the nature of the possession was allowed. After the proof was closed the pursuer sought to have it re-opened in order to produce and lead evidence regarding a plan which was alleged to have been accidentally discovered after the proof was closed. The Lord Ordinary refused the pursuer's motion, but the Court ordered further proof, and the plan having been produced, *held* that it was competent evidence.

In this action, which was transferred from the Sheriff Court of Perthshire, John Laurence Reid, of Mains of Struie, Forteviot, Perthshire, sought declarator that he was heritable proprietor of a "loan" communicating between his lands and his hill pasture of Dochrie, and separating during its course the lands of Whitehill and Baulk belonging to the defenders, the trustees of the late Robert Haldane of Cloan Den, and that he was entitled to fence and renew the existing fences on either side of this loan, and to interdict against the defenders.

On 19th August 1723 Dr Robert Hay, Kirkcaldy, proprietor of the barony of Struie, feued off the barony into five portions. The charter in favour of the pursuer's author was in these terms:—"All and haill the just and equal half . . . of all and haill the Mains of Struie, with houses, biggings, yeards, tofts, crofts, mosses, muirs, pasturages, and haill pertinents of the same, and speciallie without prejudice to the generality foresaid with the rights, priviledges, and liberties after-mentioned, to witt, the half of the tree yeard and half of the right and priviledge of the loan leading to and from that hill belonging to the haill Mains of Struie called Douchrie, according as the said loan lies meithed and marched betwixt the lands of Whitehill and Baulk of Strowie." Dochrie Hill was held *pro indivisio*. In May 1878 the pursuer acquired right to these lands with a title in the same terms as in the original charter, and in March 1888 he acquired from a Mrs Vale "All and haill the *pro indiviso* half of that hill belonging to the haill Mains of Struie called Dochrie, with the half of the right and privilege of the loan leading to and from the said hill."

The description in the defenders' title to Baulk, dated 1723, was as follows:—"All and haill the town and lands of Baulk of Strowie . . . reserving the loan belonging to the mains of Strowie, which leads to the hill of the said mains called Douchrie, all along as the said loan lies and is meithed and marched betwixt the said lands of Baulk and Whitehill of Strowie."

The description in the defenders' titles to Whitehill was as follows:—"All and haill the just and equal half of all and haill the town and lands of Whitehill of Strowie, with houses, &c. . . . and reserving the loan belonging to the mains of Strowie leading to the hill of the said mains called Dochrie, as the said loan lies and is meithed and marched betwixt the lands of Whitehill and lands of Baulk of Strowie from Powstink to the Overnook of Tamacreich Dyke, in which space the said loan is not to be cast upon by the possessors of the Mains of Strowie."

These lands were purchased about sixty years ago, 1827-1828, by Mr Condie of Perth under separate titles. They first came to be held under one deed in 1857, when a trust-deed was granted by James Condie in favour of James and Robert Morrison, accountants, Perth; and in 1861 both properties were purchased by Robert Haldane. The defenders, as Robert Haldane's trustees, made up their title to these lands, *inter alia*, by notarial instrument recorded 29th November 1877. They were thus admittedly the possessors of the lands on both sides of the loan in question, which was about 600 yards long and from 20 to 60 yards

wide. The loan also admittedly was the pursuer's only means of access from his property of the Mains of Struie to his other property, the hill of Dochrie. At the date of the action it was only fenced here and there by low peat dykes, leaving full communication between Baulk and Whitehill.

The pursuer averred—"From time immemorial, and at least for more than forty years prior to the raising of this action, the pursuer and his authors, by themselves and their tenants, had exclusive possession of said loan in property as part of the Mains of Struie and of the hill called Dochrie. The pursuer is proprietor of said loan. For a long period the tenant of Mains of Struie also held, as tenant under the pursuer and his authors, the hill called Dochrie, and the loan leading to it, but latterly the hill and loan have been let by pursuer and his authors to the tenant of Whitehill and Baulk of Struie. In particular, this was the arrangement in the case of the present tenant of Whitehill and Baulk of Struie, Mr M'Callum. He had a nineteen years' lease from pursuer's father, which expired at Martinmas 1887, but not having been warned out in time he retained the Dochrie hill and loan for another year—that is, to Martinmas 1888, and even for a number of weeks beyond that term, for which he is still due rent. Since that time the hill and loan have been in the possession of pursuer along with Mains of Struie proper."

The defenders averred—"Explained that the defenders and their authors have, by themselves and their tenants, from time immemorial always been, and are at the present time, in possession of the loan in dispute, and have used the same for pasturage and free access and as part of their estate of Baulk and Whitehill of Struie, subject to and concurrently with the use of the said loan by the pursuer or his tenants, as a means of passage between the pursuer's property of Dochrie hill and his other property on the north, which use by the pursuer or his tenants never has been, and is not at present being or proposed to be interfered with by the defenders."

The pursuer conceded that the defenders had a servitude of road across the loan near the north end for access between Whitehill and Baulk of Struie, and the servitude was reserved in the conclusions of the summons.

The pursuer pleaded—"(1) Pursuer being proprietor of the loan in question, but the defenders contesting his right, he is entitled to declarator in terms of the prayer of the petition, subject to the defenders' servitude right of road across the loan. (5) The pursuer and his authors having had exclusive possession in property for the prescriptive period of the said loan as part and pertinent of Mains of Struie, all as condescended on, decree ought to be pronounced in terms of the conclusions of the action."

The defenders pleaded—"(3) On a sound construction of the titles the pursuer is not entitled to decree as concluded for. (4) The said loan being the property of the defenders, and the pursuer having only the right and privilege of using the same as a passage between his said properties, the defenders should be assoilzied. (5) The pursuer having no right in or to the said loan, except that of using it as a means of passage between his said properties, has no right to interfere with the state of possession of the said loan by the defenders, as the same has subsisted from time immemorial, or to exclude the defenders from the said loan, or to fence the same, and has no right to the interdict craved."

After the record was closed in the Sheriff Court the process was transmitted in October 1889 to the Court of Session. The Lord Ordinary (KYLLACHY) allowed a proof, the result of which is fully stated in his opinion.

Upon 20th March 1890 the Lord Ordinary assoilzied the defenders from the conclusions of the action.

"*Opinion.*— . . . I cannot say that the recent proof throws much or indeed any material light upon the question in dispute. It was allowed because parties were at issue as to the possession, which it was thought might go some way towards construing the titles, and might also affect the question as to the pursuer's right to fence the loan, which right he maintains, even on the assumption that his interest in the loan is only one of servitude. The result, however, has been that the possession, so far back as the evidence goes, appears to have been quite consistent with the contention of either party; while, with respect to the fences, the pursuer has certainly failed to prove any practice of fencing the loan such as would justify his proposed operations, supposing him to fail in his claim to the property. And indeed this result of the proof was almost inevitable, because it appears that from 1845 till quite lately the whole lands in question—both those of the pursuer and those of the defenders—were occupied together by the same tenants; while prior to 1845 the evidence is not only extremely meagre, but relates to a period when the whole country, being more or less open, little attention was paid to such questions as those at issue.

"The question therefore must be determined upon the titles of the parties, which titles have been produced, and so far as material have been printed in a joint print —[*His Lordship narrated the history of the properties and their respective titles as above stated*].

"What has to be decided is, whether upon the just construction of these titles the property of the loan is with (1) the pursuer; or (2) the defenders; or (3) the superior. The pursuer of course requires to establish that it is with him. It is enough for the defenders on the other hand that the property is either with them or was not given off at all, but was reserved (intentionally or unintentionally) by the superior.

"I am unable to hold that the pursuer's title even when construed by the aid of the defenders' title, establishes his alleged right of property. *Prima facie* a grant of a right and privilege of way or passage implies servitude and not property, and in this

view it is not material whether a right of 'loan' is a mere right of passage or a right of passage *plus* pasturage. In either case the grant is a grant of a right and privilege, and it would require in my opinion very cogent grounds of construction to justify the conclusion that a right of property was conveyed by that expression. I do not say that such a construction is impossible; but in the first place I find nothing in the pursuer's title which at all helps such a construction. The purpose in view is quite satisfied by a grant of servitude. There seems no reason why, if a grant of property was intended, it should not have been expressed. And, on the other hand, the pursuer's argument on the application of the words 'right and privilege' to the half of the 'tree yeard' seems much too remote and conjectural, at all events in the absence of information as to what the tree yeard was, and what was the nature of the right to it which the superior possessed. Altogether, if the question had to be decided on the pursuer's own title, I hardly think there could be room for doubt. The pursuer's case really rests on an appeal to the terms of the defenders' title, and assuming such an appeal to be competent (which for purposes of construction it probably is), the defenders' title appears to me to do no more at best than raise a difficulty. It is no doubt in the pursuer's favour that the reservation of the loan is not expressed as the reservation of a servitude, but as the reservation of the loan itself, and of the loan as a subject belonging to Struie, and lying betwixt the lands of Baulk and Whitehill. It is also in the pursuer's favour that at least in the Whitehill title there is an exclusion of the right of the possessors of Struie to cast (*i.e.*, I suppose, to cast peat) on a certain part of the loan. But this last clause is at least extremely obscure, and with respect to terms of the reservation itself, it seems to me that the defenders have at least two answers to the pursuer's argument. In the first place, the language may probably be more suggestive of a reservation of property than of servitude, but making allowance for looseness of expression, it is, I think, quite consistent with, and quite satisfied by, the hypothesis of servitude. In the second place, if that be held otherwise, and the reservation be construed as a reservation of a right of property, I do not see how anything else follows than that the right of property so reserved is still in the superior. *Ex hypothesi* he has in a question with the defenders reserved the property in express terms, but *ex hypothesi* also, he has in terms not less express confined the pursuer to a servitude. There is, in short, no more reason for construing the pursuer's title favourably to him by the help of the defenders' title than for construing the defenders' title favourably to them by the help of the pursuer's title. In other words, as I have already said, the defenders' title, if appealed to, raises a difficulty, but does no more.

"I therefore decide the case on the titles and in favour of the defenders. And I have only to explain in conclusion that after the proof was closed and the case was awaiting discussion, the pursuer proposed by minute to reopen the proof, and to produce and lead evidence about a certain old plan which was said to have been accidentally discovered after the proof was closed. For reasons which I stated at the time I did not consider that I was at liberty to allow this. I did not consider that the case was different from that of the discovery by a party after proof was closed of a new witness or a new piece of evidence, and I was, moreover, not satisfied that the discovery, although so far accidental, was not capable of having been made sooner. Similarly, I refused at a later stage to order production of a copy of the same plan which was said to be in the possession of the defenders. It is said that the pursuer had a diligence which covered this plan, and that the defenders were not cited to produce it under the diligence only because it was understood that a full production was to be made voluntarily. But the parties, or those representing them, were at issue about the facts, and in these circumstances I did not feel at liberty to go into the matter after the proof was closed. I may say that, so far as I could gather, neither the plan nor the copy would have materially affected my judgment, but I cannot at the same time say that their bearing was altogether unimportant."

The pursuer reclaimed. After hearing counsel, the Second Division ordered further proof, which was accordingly taken, and the plan referred to in the Lord Ordinary's interlocutor was produced. The result appears in the Lord Justice-Clerk's opinion.

The reclaimer argued—On the titles it was plain that the property of the loan was in the pursuer. No doubt the words "right and privilege" were not commonly used in conveying property, but they were sufficiently explicit when taken in connection with the use which had undoubtedly been made of the loan by the pursuer. In the defenders' titles the loan was expressly reserved, so that there could be no right of property to them, and as the original proprietor, Dr Hay, had given off the whole barony, he must be held to have divested himself of the property of this loan, and given it to the person in whose title there was said to be a right to the subject—*Duke of Hamilton* v. *Dunlop*, May 13, 1885, 10 App. Cas. 813, 12 R. (H. of L.) 65. As regarded the question of further proof, the pursuer was entitled to the benefit of any proof he could produce if he showed that it was not known to him at the time the proof was ordered, and was therefore omitted—*Bannerman* v. *Scott*, November 24, 1846, 9 D. 163.

The respondents argued—As regarded the extra proof desired, the only purpose was to bring forward an old plan, which the pursuer said he had discovered since the proof was taken. It was not competent to bring it forward now, and it could not be evidence of the titles of either party.

Although the question had not been actually decided, the opinions of the Judges were against admitting such a plan as evidence—*Place* v. *Earl of Breadalbane*, July 17, 1874, 1 R. 1202. On the titles, the defenders contended that the words "right and privilege" in the pursuer's title did not convey any right of property in the loaning to the pursuer; all that was given was a servitude right, and that the defenders were willing to allow. It was settled law that a right of loaning was a servitude right—*Chatto* v. *Lockhart*, March 5, 1790, Hume, 734 (*voce* note at end of report); Ersk. ii. 9, 12; *Malcolm* v. *Loyd*, February 4, 1886, 13 R. 513. When Dr Hay feued off the barony, therefore, he only gave the pursuer a servitude right over the loaning, and it could not be regarded as property—*Dyce* v. *Lady James Hay*, July 10, 1849, 11 D. 1266; *Graham* v. *Duke of Hamilton*, July 5, 1869, 7 Macph. 976—*rev.* July 28, 1871, 9 Macph. (H. of L.) 98. The words "meithed and marched" in the titles referred to the boundaries of the loan, and not to the boundaries of the lands. If the pursuer was allowed to put up fences, as he claimed in his summons, the defenders would be cut off from their proper possession in the loan—*Hagart* v. *Fyfe*, November 15, 1870, 9 Macph. 127; *Irvine* v. *Robertson*, January 18, 1873, 11 Macph. 298.

At advising—

LORD JUSTICE-CLERK—The pursuer is proprietor of one-half of the Mains of Struie in Perthshire, and of a hill called the Hill of Dochrie, which is at some distance from the Mains. The access from the Mains to the Hill of Dochrie, to which hill the pursuer has now the sole right, is by a loan about 600 yards long which passes between the properties of Whitehill and Baulk of Struie, both belonging to the defenders, Whitehill being on the east and the Baulk of Struie on the west. This loan, which is from 20 to 25 yards wide, was formerly marked off by peat dykes, which are sufficiently indicated still upon the ground to mark its lines.

The pursuer maintains that this loan is his property, or at least that he has sole right to it in a question with the defenders, and he proposes to fence it on either side. This is objected to by the defenders, who maintain that the properties of Whitehill and Baulk of Struie are conterminous and include the *solum* of the loan, and that the pursuer has only a right of passage along it.

The pursuer in support of his contention founds upon the description of the loan in the titles, where it is described as the "loan leading to and from that hill belonging to the haill Mains of Strowie called Douchrie, according as the said loan lyes meithed and marched betwixt the lands of Whitehill and Baulk of Strowie," and the way in which the right is described in the pursuer's title is "the right and privilege of the loan."

There can be no doubt that these expressions in the pursuer's title are not altogether such as would be expected in a conveyance of property, but at the same time they can hardly be said to be words usual in a description of a mere right of passage. Being words not common in titles, and somewhat ambiguous, they require construction, and can only be construed satisfactorily with relation to the state of things existing at the time of the grant as this can be ascertained from contemporaneous documents, aided by such evidence as is necessary to make them intelligible, and by such evidence of the character of the possession had in past time as may tend to throw light on the question in dispute.

It appears that prior to 1723 the whole lands of the pursuer and defenders along with certain others were parts of a barony called Struie. In that year it was feued off in portions, one portion going to the pursuer's authors, one portion forming the lands of Baulk, and a third the lands of Whitehill, these latter two portions being the lands which lie on either side of the loan in question, and which now belong to the defenders. These properties were possessed by separate proprietors till 1828, when they were united in the person of Mr Condie of Perth, who disponed them to the defenders' author Mr Haldane.

It appears that for many years the whole properties of the pursuer and defenders were in one occupation, but that prior to 1844 they were all separately occupied.

The title given to the pursuer's author has been already noticed. The titles given to the feuars of Baulk of Struie and Whitehill are—as regards the loan—expressed in very similar terms. In the Baulk title the following appears:—"Reserving the loan belonging to the Mains of Strowie which leads to the hill of the said Mains called Douchrie, all along as the said loan lyes and is meithed and marched betwixt the said lands of Baulk and Whitehill of Struie." Again it is referred to as "the loan belonging to the said Mains of Struie." In the titles of Whitehill the loan is described in the same manner, "reserving the loan belonging to the Mains of Strowie."

Thus the defenders' titles, obtained from the same author and on the same date, describe the loan in question as a reservation from the lands conveyed to the defenders' authors, and as "belonging" to the Mains of Strowie, and describe this loan so belonging to Mains of Strowie as "meithed and marched" between the properties of Baulk and Whitehill, which were then being feued off as separate estates. And accordingly the marching seems to have been accomplished not by mere indications defining the lines within which the loan was to run, but by peat dykes, the usual mode at that time of separating off one piece of hill ground from another.

It is very difficult to see how, in the face of the reservations and the titles of Baulk and Whitehill, the defenders' authors could at that time have asserted a right to take possession of and use as their own any part of the loan. The claim of each could only have been to come up to the centre line of the loan, crossing by a few yards only the peat dykes which were then erected, or if

erected previously were recognised as existing by their titles. The value of such an addition to their properties would necessarily have been infinitesimal, and the properties being separate there could be no practical inconvenience in a strip of hill ground being interposed between them, while there would be great inconvenience in having the march of their properties left undetermined in the middle of the loan. The loan being described both in the pursuer's title and in the defenders' as "marched betwixt" the lands of Baulk and Whitehll seem to indicate that the loan itself is to form the boundary of each property. The loan being a definite piece of land marked off by fences, is described as marched betwixt two other properties named. It is very difficult to read such a description—which is common to the titles on both sides—as meaning that there is nothing between these two properties, but that they lie together, having only the imaginary line of a march between them. Had the loan been a mere reserved servitude to Mains of Struie as a dominant tenement, while the property went with the lands of Baulk and Struie respectively, it would have been reasonable to expect that this would have been clearly, as it certainly could have been easily expressed. It is to be noted that the loan is described as already existing in the earliest titles, and if it was at that time only a servitude of right of passage and pasturage in passage, the language chosen to describe it in all the titles is most unhappily chosen. It is quite true, as the Lord Ordinary points out, that the language in the pursuer's title is not that usual in describing a right of property, in so far as it speaks of it as "a right and privilege," but it is equally true that the description of it as "meithed and marched" between the defenders' properties of Baulk and Whitehill is unlike a description of a servitude over two properties directly marching with one another, and that the description of it as "reserved" because "belonging" to Mains of Struie is scarcely consistent with its having been conveyed in halves to those to whom Baulk and Whitehill were conveyed.

The proof which has been led affords scarcely any light upon the question before us. Indeed, it was hardly to be expected that it could do so, seeing that for so many years the question of right to this loan was of no importance to anyone, as the Mains and Baulk and Whitehill were all occupied by the same tenant. But a plan has been produced at the additional proof which, if it be competent to look at it as evidence, throws considerable light upon the matter. After mature consideration I have come to be of opinion that the plan is competent evidence for our consideration. That plan is, I think, on too small a scale to admit of very accurate test by measurement of areas, and I throw out of view altogether the evidence by which it is endeavoured to show that the loan is not part of Baulk and Whitehill. But the really important thing to be noticed in regard to that plan, which was an estate plan dated in 1842, is that upon the face of it, it does not make the lands of Baulk and Whitehill to march with one another when they are opposite the one to the other. Baulk, Whitehill, and Mains of Struie are each enclosed by a coloured margin, and the coloured margins of Baulk and Whitehill leave the loan distinctly marked between them. It is worthy of remark that a lithographed copy of this plan was before an intending purchaser of Baulk and Whitehill in 1859, and that on examination he discovered a discrepancy between the acreage as marked on each field and the acreage marked upon the margin of the plan. The question of the contents of the plan was therefore carefully gone into, but it does not seem ever to have been suggested in the correspondence that the area of the loan had anything to do with it. Now, the plan as presented to the intending purchaser upon the face of it indicated that there was a strip of ground dividing the lands of Baulk and Whitehill from one another. Each was enclosed in lines of its own, and these lines did not touch at any point. On the other hand, the lines of Mains of Struie and of the hill of Dochrie are continued along the sides of the loan, enclosing the Mains, the hill, and the loan within one line. It seems to me to be clear that the sellers, in laying that plan before the proposing purchaser, with the boundaries of Baulk and Whitehill distinctly delineated as not marching on the same line, but as separated by a strip of ground not included in the bounds of either, and included in the continuous bounds of another property, must be held to have represented the *solum* of the loan as not forming part of the lands to be conveyed, and that no purchaser buying on missives applicable to that plan could immediately after the bargain was concluded have demanded with any chance of success a conveyance including that *solum*. The preparation of a plan on behalf of the proprietor of Baulk and Whitehill, such as that now produced, would be wholly incomprehensible if it were assumed that the *solum* of the loan formed part of these two properties respectively, and that it was his intention to convey the loan to a purchaser buying the property as shown upon the plan. Now, this plan was made in 1842, and must either have been made in respect that the older plans, if any existed, were similar, or that the titles as interpreted by the possession before 1842 were held by the proprietor of Baulk and Whitehill to exclude the right of these estates to a claim of property in the loan. It was against the interest of the estate, in whose office the plan was prepared, to have the boundaries shown as they were when the properties of Baulk and Whitehill were intended to be sold together, and that they were so intended to be sold together is plain from the advertisement and correspondence.

The suggestion might possibly be made, that although the loan is held to be a strip of property lying between Baulk and Whitehill, and not forming part of these properties, that nevertheless it does

not belong in property to the proprietor of Mains of Struie and Dochrie Hill, but remains still unfeued off by the superior, the feuar of Mains and Dochrie having only a privilege of loaning, and not having right to the *solum*. I am not prepared to say that the titles might not be so read, but, on the other hand, I do not think that such a reading should be adopted unless no other reading is reasonable, looking not only to the titles, but to the character of the possession. Now, it is plain that if the loan were to be held not to have been conveyed, and that only a privilege of passage and pasture was granted to the feuar of Mains and Dochrie, the anomaly would exist that the superior would possess a piece of property to which he had reserved no access, and which, it is plain, could be of no beneficial use to him after he had given off the Mains of Struie and the hill of Dochrie, on the one hand, and the lands of Whitehill and Baulk, on the other. No access to it is reserved, and none has existed except through these lands, and the possession has been entirely adverse to the idea of any such useless reservation. Holding the words of the titles to be inconsistent with a grant of property, I am of opinion that there is no ground disclosed in this case for interpreting them in any other sense.

I have come, therefore, to the conclusion that the interlocutor of the Lord Ordinary should be recalled, and that the Court should find and declare in terms of the prayer of the petition, and grant interdict as craved, and I move your Lordships accordingly.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

The Court recalled the Lord Ordinary's interlocutor, and gave decree in terms of the conclusions of the summons.

Counsel for the Appellant — Graham Murray—Shaw—Kennedy. Agent—Gregor Macgregor, S.S.C.

Counsel for the Respondents — D.-F. Balfour, Q.C. — Clyde. Agent — W. S. Haldane, W.S.

Thursday, March 12.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

FERGUSON *v.* BUCHANAN'S TRUSTEES.

(*Ante*, p. 100, and 18 R. 120.)

Jurisdiction — Forum non conveniens — Succession—Domicile—Res Judicata.

The executors under a will having obtained probate in England were proceeding to administer the estate there when the testator's daughter brought an action against them in a Sheriff Court in Scotland, raising the question of her father's domicile and of her right to legitim, and craving interim interdict against their removing the trust-estate outwith the jurisdiction of the Sheriff Court. Interim interdict having been granted, the executors raised an administration suit in the Court of Chancery in England, and inquiries were there ordered, *inter alia*, as to the testator's domicile, and in the event of it being found to be Scotch, as to whether his estate was subject to any payment to his daughter. The daughter then brought an action in the Court of Session raising the same questions as had previously been raised in the Sheriff Court, and in this action—the action in the Sheriff Court being meantime sisted—it was decided that the English Court was the *forum conveniens* for determining the questions of the testator's domicile and the pursuer's right to legitim.

Held that after this decision it was not open to the Court to consider these questions in the Sheriff Court action.

Thomas Buchanan died on 22nd September 1889, leaving a will dated 14th May 1889, in which he appointed his brother Robert Buchanan and his nephew Andrew Buchanan his executors. The deceased left moveable property to the value of over £8000, the bulk of which consisted of a sum standing to his credit in the books of a firm in Glasgow. The executors obtained probate in England on 21st October 1889, and were proceeding to administer the estate there when the testator's daughter Mrs Margaret Ferguson raised the present action against them in the Sheriff Court of Lanarkshire, in which she sought (1) to have it found that at the time of his death her father was a domiciled Scotsman; (2) to have the executors interdicted from distributing the estate on the footing that her father was a domiciled Englishman at the time of his death, without providing for the payment of her legitim, and from removing any funds belonging to the testator from the sheriffdom of Lanarkshire; and (3) to have the executors ordained to pay her a certain sum as legitim.

The Sheriff-Substitute having granted interim interdict, the executors raised an administration suit in the Chancery Division of the High Court of Justice in England, in which on 16th December 1889 Mr Justice Chitty appointed a receiver, and ordered certain inquiries to be made, and, *inter alia*, "(6) An inquiry whether the testator was at the time of his decease domiciled in England, and if it shall be found that the testator was not domiciled in England, where was his domicile, and in the event of its being found that the testator was domiciled in Scotland, (7) an inquiry whether the personal estate of the testator is subject to payment of any and what portion thereof to any child or children of the testator living at his death, notwithstanding the provisions of his said will."

On 23rd December the pursuer brought an action in the Court of Session against the executors and beneficiaries under her