Thursday, November 15.

FIRST DIVISION.

[Sheriff of Chancery.

MACDOUGALL AND OTHERS, PETITIONERS.

Service of Heirs—General Service—Heirs of Provision—Fiduciary Fee—Destination to Parent in Liferent Allenarly and Children Nascituri in Fee.

Under a destination to a parent in liferent allenarly and his children *nascituri* in fee, the children are entitled on the death of the parent to be served as heirs of provision in general to him.

Observations (*per* Lord M'Laren) on *Maule, Petitioner*, June 14, 1876, 3 R. 831.

Peter Paul, grocer in Greenock, died in 1832, leaving a trust-disposition and settlement, by which he conveyed his whole estate, heritable and moveable, to trustees for, *inter alia*, the following purpose:—"In the Third place, my said trustees shall dispose, convey, and make over my whole heritable and moveable means and estate . . . to and in favour of Mary and Andrew Paul, children procreated of the marriage between me and the deceased Jean Cameron, my former wife, and Janet, Ann, Jean, Catherine, Peter, and William Pauls, and any other child or children that may be procreated of my present marriage, equally among them in liferent, for their liferent use allenarly, but excluding always the *jus mariti* and right of administration of the husbands of my daughters, and the diligence of their creditors, and the creditors of my sons, and the share of each liferenter to the children to be lawfully procreated of his or her body equally among them, males and females, in fee; and failing any of my children without leaving a child or children lawfully procreated of his or her body, or failing such issue without leaving lawful issue, then to the survivors of my children equally among them in liferent, excluding always the *jus mariti* and right of administration of the husbands of my daughters and the diligence of their creditors, and the creditors of my sons, and the share of each liferenter to the children to be lawfully procreatedof his or her body equally among them, males or females, in fee; it being expressly understood that my grandchildren, upon their parents' decease, are to be entitled to the share of my means and estate falling to the parent in liferent, equally among them, whether males or females, in fee."

In 1847 John Walker, who was then the sole surviving trustee under the said trust-disposition, on the narrative that he was desirous to dispossess himself of the trust estate, granted a disposition containing the following clause:—"In the Second place, I do hereby give, grant, assign, dispone, convey and make over to and in favour of the said Mary Paul, spouse of Andrew Paul, in the employment of the Glasgow, Paisley, and Greenock Railway Company at Bishopton, Andrew Paul, spirit-dealer in Greenock, Janet Paul, spouse of Duncan Macdougall, grocer in Greenock, Jean Paul, spouse of Walter M'Symon, shipmaster in Greenock, Peter Paul, seaman in Greenock, Catherine Paul, residing in Greenock, and William Paul, seaman in Greenock, the only surviving children of the said Peter Paul, equally among them in liferent, for their liferent use allenarly, but excluding always the *jus mariti* and right of administration of the husbands of the said Mary, Janet, Jean, and Catherine Paul, and the diligence of their creditors, and the creditors of Andrew, Peter, and William Pauls, and the share of each liferenter to the children to be lawfully procreated or already procreated of his or her body, equally among them, males and females, in fee; and failing any of the said children without leaving a child or children lawfully procreated of his or her body, or failing such issue without leaving lawful issue, then to the survivors of the said children equally among them in liferent, excluding always the *jus mariti* and right of administration of the husbands of the daughters and the diligence of their creditors and the creditors of the sons, and the share of each liferenter to the children procreated or to be lawfully procreated of his or her body equally among them, males or females, in fee, it being expressly understood that the grandchildren of the said Peter Paul upon their parent's decease are to be entitled to the share of his means and estate falling to the parent in liferent equally among them, whether males or females, in fee, all and whole the just and equal seven-eighth parts or shares of the whole lands and heritages which belonged to the said Peter Paul, and generally conveyed to said trustees by said settlement." The remaining one-eighth part or share was conveyed by the same disposition to a grandson of Peter Paul, the testator.

Mrs Janet Paul or Macdougall, one of the disponees referred to in the above disposition, took infeftment on this disposition for her liferent interest only. She died at Caulfield, in the colony of Victoria, on 16th January 1890.

In 1900 Dugald Græme Macdougall and another, being the children of Mrs Janet Macdougall's eldest son, who had predeceased her, and Mrs Catherine Johnstone Macdougall or Corney and others, being the surviving children of the said Mrs Janet Macdougall, presented a petition to the Sheriff of Chancery, in which, after narrating the trust settlement and the disposition mentioned above, they prayed to be served as "nearest and lawful heirs of provision in general to the said Mrs Janet Paul or Macdougall, under and by virtue of said trust-disposition and settlement and disposition."

There was no opposition to the petition.

After a proof, the Sheriff of Chancery (CHISHOLM) issued the following interlocutor:—"The Sheriff having considered the petition, proof, productions, and whole process, finds that the deceased Mrs Janet Paul or Macdougall died at Caulfield, Melbourne, in the colony of Victoria, on the

16th day of January 1890, and had at the time of her death her ordinary or principal domicile furth of Scotland: Finds that the petitioners Dugald Græme Macdougall and Mrs Marion Macdougall or Laidlaw are children of the deceased Dugald Macdougall: Finds that he was the eldest son of the said Mrs Janet Paul or Macdougall: And further, Finds that the said Dugald Macdougall has left no other children or issue of children now surviving: Finds that the petitioners Mrs Catherine Johnstone Macdougall or Corney, Mrs Margaret Macdougall or Williams, Mrs Ann Jane Macdougall or Paterson, and James Macdougall, are all children of the said Mrs Janet Paul or Macdougall: Finds that she has no other children or issue of children now surviving other than as above mentioned: Finds that under the destination in the disposition founded on, the said Mrs Janet Paul or Macdougall was only a liferenter for her liferent use allenarly, and that there is nothing in her *hæreditas jacens* which requires to be taken out of it by a service: Finds further, that the petitioners are not heirs of provision to her under and by virtue of the trust-disposition and settlement and the said disposition, both mentioned in the petition: Therefore refuses the prayer of the petition, and decerns."

Note.—"In this case I am of opinion, on the authority of the case of *Maule* (3 R. 831), that the service craved is not competent. The petitioners claim service as heirs of provision under two deeds—(1) a trust-deed, in which there is no conveyance, but merely a direction to convey to the person to whom they are claiming to be served heirs of provision—viz., Mrs Janet Paul or Macdougall; and (2) a disposition in implement of the direction in the trust-deed. By these writs the said Mrs Janet Paul or Macdougall has only a liferent *for her liferent use allenarly*, and there is a destination-over to her children. In these circumstances I do not think that the petitioners are heirs of provision under the deeds."

The petitioner appealed to the Court of Session, and argued — The prayer of the petition should be granted. The result of the destination was to vest a liferent in the parent with a fiduciary fee for the children *nascituri*. Under such a destination it was the established practice to make up the children's title by service as heirs of provision in general—Duff's Feudal Conveyancing, p. 447; Montgomery Bell's Lectures (3rd ed.), p. 1105. That was the only way in which the petitioners could obtain a marketable title, because only in that way could it be established that they were the only surviving children of the liferenter. This form of title had been sustained in *Creditors of Carleton* v. *Gordon*, Feb. 8, 1748, M. 14,366-14,368; *Dundas* v. *Lord Dundas*, Jan. 23, 1823, 2 S. 115; *Peacock* v. *Glen*, June 22, 1826, 4 S. 742; and *Andrews* v. *Lawrie*, Dec. 12, 1849, 12 D. 344. It was also approved by Lord Deas in *Ferguson* v. *Ferguson*, March 19, 1875, 2 R. 627, at p. 633. There was nothing in the decision in *Maule* (June 14, 1876, 3 R. 831) to necessitate an alteration in this practice. That case decided that the fiduciary fee ceased on the death of the fiduciary fiar, and therefore was not in his *hæreditas jacens* to be taken up by service. At the most that created a logical difficulty, but did not, expressly or by implication, render incompetent a method of making up a title which was sanctioned by practice, and was the only convenient way of obtaining a marketable title to the subjects.

Lord M'Laren—This appeal has been brought from the Sheriff of Chancery to determine whether the appellants, who are in the position of beneficial fiars, are entitled to be served heirs of provision in general to their mother, who is designed in the deed as a liferenter for her liferent use allenarly. There is no doubt at this period of the history of the law as to what is the meaning of such a destination. It vests in the mother a fiduciary fee for her children unborn and unnamed, and gives her a beneficial interest in the income only. The mother having died the fiars now desire to make up a heritable title to the property. If they cannot make up a title by service, it is not easy to see how they can make up a marketable title.

The question is, whether as a general deduction from the theory of such destinations, or as a consequence of a practice continued for such a length of time as to have the force of law, these children are entitled to be served heirs of provision to their mother.

The difficulty which presented itself to the Sheriff of Chancery was this, that as the mother took only a liferent title in the estate, there was no fee in her *hæreditas* to be taken up by the heirs. The view of the Sheriff is that the children are the direct disponees under the settlement, and that they ought to be infeft by a notary on the disposition. I am not sure whether the Sheriff had fully considered that, although the beneficiary right of the mother under the deed is limited to a liferent use, yet she had a nominal fee in contemplation of law which might, if supported by practice, be used as the basis of a general service. I do not think that there was any substantial right such as could be taken up by special service, but there was at least a nominal fee in the mother, and this, it is said, entitles her children to be served heirs-in-general to her to the effect of having their propinquity ascertained and their characters as heirs determined. Much might be said for and against the competency of this procedure if the point were open; but it is known to the profession that for a very long time it has been the practice to serve children heirs of provision to their parents under destinations such as the present. The cases of *Dundas* and *Peacock* are very direct authorities for this procedure. I have reason to know that this procedure has been largely followed, because when I held the position of Sheriff of Chancery I had to inquire into the practice.

The Sheriff is under a misapprehension in thinking that the case of *Maule*, to which he refers, is an authority incon-

sistent with the practice of making up a title by what has been called a declaratory service. The question in that case was not one of title but of substantial right, and the observations of the Lord President must be taken with reference to a case of that character, and by way of illustration of the nature of the destination.

I do not doubt that it might be possible by a declaratory action to have it established that these fiars are entitled to be infeft, but that would be an unusual mode and not satisfactory to a purchaser. The decree in such an action would not usually proceed on evidence, though I do not say that an *ex parte* proof would not be competent. Lord President Inglis gave great attention to feudal questions, and was certainly not less conversant with this than with other branches of the law, of which he was so eminent an exponent. If his Lordship had intended to discountenance the practice, I should have expected that he would have made a more direct pronouncement. I do not think that the question was in his Lordship's mind, nor did it enter into the decision of the case.

I think that the petitioners, provided their propinquity is proved, which in this case is merely a formal matter, are entitled to decree of service.

LORD ADAM—I agree. My understanding certainly is that it has been the practice to make up titles in this way.

LORD KINNEAR — I agree with your Lordships. If this had been the first application for the service of children as heirs of provision to a fiduciary fiar, there might have been much to be said against it. But the strongest thing would have been that there was no practice to support it. This is a matter in which practice is everything. But there is no doubt about the practice, and it is therefore unnecessary to consider the logical difficulty which embarrassed the Sheriff in reconciling that practice with certain technicalities of the law of inheritance.

THE LORD PRESIDENT concurred.

The following interlocutor was pronounced:—

"Sustain the appeal: Recal the interlocutor of the Sheriff of Chancery, dated 14th February 1900: Find in fact that the deceased Mrs Janet Paul or Macdougall died at Caulfield, Melbourne, in the Colony of Victoria, on the 16th day of January 1890, and had at the time of her death her ordinary or principal domicile furth of Scotland: Find that the petitioners Dugald Graeme Macdougall and Mrs Marion Macdougall or Laidlaw, are children of the deceased Dugald Macdougall: Find that he was the eldest son of the said Mrs Janet Paul or Macdougall: And further Find that the said Dugald Macdougall has left no other children or issue of children now surviving: Find that the petitioners Mrs Catherine Johnstone Macdougall or Corney, Mrs Margaret Macdougall or Williams, Mrs Ann Jane Macdougall, or Paterson, and James Macdougall, are all children of the said Mrs Janet Paul or Macdougall: Find that she has no other children or issue of children now surviving other than as above mentioned: Find further, that the petitioners are entitled to be served as the nearest and lawful heirs of provision in general to the said Mrs Janet Paul or Macdougall under and by virtue of the trust-disposition and settlement and the disposition granted in implement thereof, both referred to in the petition: and remit to the Sheriff of Chancery to serve them accordingly in terms of the prayer of the petition."

Counsel for Petitioner—Cullen. Agent—W. B. Rainnie, S.S.C.

Tuesday, November 20.

SECOND DIVISION.

[Lord Low, Ordinary.

GLASGOW COURT HOUSES COMMISSIONERS *v.* LANARKSHIRE COUNTY COUNCIL.

Statute — Construction — Glasgow Court Houses Act 1890 (53 *and* 54 *Vict. cap.* 58), *sec.* 13 — "*Land and Heritages Situated within Area under Jurisdiction of Public Body.*"

The Glasgow Court Houses Act 1890 authorised the Glasgow Court Houses Commissioners to acquire certain lands and buildings for the purpose of enlarging and improving the Sheriff and Justice of the Peace Court Houses in the city of Glasgow. Section 13 provided that the Commissioners might apportion, assess, and charge the sums of money borrowed under the powers of the Act upon certain public bodies named in a schedule annexed to the Act "in proportion to the gross valuation for the year ending on the 15th of May 1890 of the lands and heritages situated within the respective areas under the jurisdiction of such public bodies." One of the public bodies named in the schedule was the County Council of the county of Lanark.

Section 15 provided that "the County Council of Lanark, as representing the Lower Ward thereof and the police burghs therein," should pay to the Commissioners out of certain specified assessments such sum "as the Commissioners should assess as the share payable by the said County Council" for the expenses of carrying into effect the Glasgow Court Houses Acts.

By previous Acts of Parliament the county of Lanark, for the purpose of providing and maintaining Sheriff and Justice of the Peace Court Houses, had