Saturday, October 25.

OUTER HOUSE.

[Lord Kyllachy.

SCOTT'S TRUSTEES *v.* SCOTT.

Succession—Legitim—Discharge of Legitim—Renunciation of "all claim in whatever effects or money my father may leave."

A son during his father's lifetime wrote out and signed a holograph document in these terms—"Having received and had expended for me much more than my share, I renounce all claim to any share in whatever effects or money my father may leave at his death." *Held* that upon a just construction of this document it constituted a discharge of the son's right to legitim.

Proof—Admissibility of Proof prout de jure—Parole Proof that Discharge of Legitim Granted as Part of Arrangement not Carried out.

A son having in 1897 granted to his father a discharge of his claim to legitim upon the preamble that he had received and had expended for him much more than his share, after his father's death in 1900 maintained that this discharge ought not to receive effect, in respect that in fact he had received no money from his father beyond a few presents of small sums, that he had granted the discharge as his part of a proposed arrangement whereby his father was to provide him with capital to start in business, and that this arrangement had never been carried out. *Held* that he was entitled to a proof *prout de jure* of these averments.

This was a competition arising in a multiplepoinding brought by the testamentary trustees of the late James Scott, Plevna, Newmains, who died on 4th March 1901, as pursuers and real raisers. The fund *in medio* was the amount due by the trustees to the children of the deceased as legitim. Claims were lodged (1) for John Scott, the eldest son of James Scott, and (2) for the other children of James Scott, four in number.

The claimant John Scott claimed to be ranked and preferred to the extent of one-fifth of the fund *in medio*.

The claimants the children of James Scott other than John Scott claimed to be ranked and preferred to the whole fund *in medio*. They maintained that the claimant John Scott had discharged his claim to legitim during his father's lifetime.

In support of this contention they founded on the following document—"*Newmains, 2nd November* 1897.—Having received and had expended for me much more than my share, I renounce all claim to any share in whatever effects or money my father may leave at his death.—JOHN SCOTT."

This document was admitted to be holograph of the claimant John Scott.

The claimant John Scott, with regard to this document, maintained (1) that upon a sound construction thereof his right to legitim was not discharged thereby, and (2) that it was not effectual as having been granted as the claimant's part of an arrangement between him and his father which was not carried out, and also as having been granted under essential error.

In support of the second of these contentions the claimant made the following averments:—Statement 3. "The claimant received no money from his father beyond a few presents of small sums from time to time. . . . Some years before his death the truster frequently expressed himself as desirous of assisting the claimant to make a start for himself in business. On or about 2nd November 1897 the truster, at an interview with the claimant, discussed this proposal with him, and asked the claimant whether he would be willing to grant a document in the terms of the document above referred to if the truster provided him with capital to commence some business. No particular business was at the time in view, but this claimant expressed his willingness to do so. It was at this interview that the document was written and signed by the claimant at his father's request. The proposal as to starting the claimant in business was not, however, carried out, and the claimant received no capital or other funds from his father. The said writing was not intended to be acted upon unless the truster carried out his said intention. If, and in so far as it purports to discharge his legal claims, the said writing was obtained from the claimant in ignorance of his right to legitim and of the position of his father's estate, and under essential error. The said writing states, contrary to the fact, that this claimant had received and had expended for him more than his share. Even including sums spent upon his education the total sums received by him from his father would not exceed £100, whereas his share of the legitim fund amounts to £1400 at least."

The claimants the children of James Scott maintained that these averments were irrelevant, and *separatim* could only be proved by writ or oath.

Argued for the claimant John Scott—1. The document founded on did not discharge this claimant's right to legitim. A discharge of legitim to be effectual must be express, and was not to be implied. A discharge of all that the child can claim at his father's death was not sufficient. "Legitim or bairn's part of gear' must be mentioned expressly as the claim which was discharged—Stair, iii. 8, 45; Ersk. iii. 9, 23; *Marquis of Breadalbane* v. *Marchioness of Chandos*, January 20, 1836, 14 S. 309, 2 S. & M'L. 377; *Keith* v. *Keith*, July 17, 1857, 19 D. 1040; *Crellin* v. *Muirhead's Judicial Factor*, November 16, 1892, 20 R. 51, 30 S.L.R. 72; *Clark* v. *Burns*, January 27, 1835, 13 S. 326. If anything was discharged here it was the son's right to a share of dead's part. At least the words used were satisfied by reading them as referring to dead's part and *in dubio* they must be read as referring to dead's part rather than to legitim. 2. This claimant

was entitled to a proof of his averments with regard to the considerations in view of which, and the circumstances and the suppositions under which the discharge was signed and delivered—*Ross* v. *Mackenzie*, November 18, 1842, 5 D. 151. [The LORD ORDINARY referred to *Fowler* v. *Mackenzie*, March 15, 1872, 9 S.L.R. 379, *affd.* 11 S.L.R. 485]. That case showed that parole proof of such facts as were here averred was competent.

Argued for the claimants the children of James Scott other than John Scott—1. The document founded on was sufficient and effectual to discharge the other claimant's right to legitim. It might be the case that a discharge of legitim must be express, but what was desiderated was an express discharge—Stair and Ersk. *loc. cit.*; *Breadalbane*, *cit.*, and *Keith*, *cit.* Here unquestionably there was a discharge of something. The question then was what did he discharge? He discharged all claims. The only thing which he could claim at his father's death was his share of legitim. He had no claim to a share of dead's part. A discharge of a right to dead's part was meaningless and futile. It was not necessary that the words "legitim" or "bairn's part of gear" should be used. It was enough if, as here, it was clear (1) that the granter discharged something; and (2) that what he meant to discharge was his right to legitim—*Foubister*, 1694, M. 8181; *Stephen* v. *Straiton*, 1803, Hume 286; *Stirling* v. *Luke*, 1732, 11 R. 1019, foot-note; *Clark* v. *Burns*, January 27, 1835, 13 S. 326. The cases of *Breadalbane* and *Keith*, *cit. supra*, were cases where there was no discharge, and they concerned English deeds in which obviously the right to legitim was not in view. 2. What the other claimant proposed to do was to contradict a writing by parole evidence. That was incompetent. The document bore that the granter had received and had expended for him more than his share, and he now after several years, during which he had done nothing to get back the document or to protest against its retention by his father, and also after his father's death, proposed to prove by parole that he had never received anything like his share, and that the discharge was not granted as it bore in consideration of past payments already made, but in consideration of payments as yet unmade but to be made in the future. Such averments could only be proved by writ or oath—Dickson on Evidence, vol. ii., par. 1017, p. 578; *Gordon* v. *Trotter*, 1833, 11 S. 696; *M'Phersons* v. *Haggart*, December 15, 1881, 9 R. 306, 19 S.L.R. 212; *Anderson* v. *Forth Marine Insurance Company*, 1845, 7 D. 268; *Clavering* v. *M'Cunn*, November 26, 1881, 19 S.L.R. 139; *Müller* v. *Weber & Schaer*, January 29, 1901, 3 F. 401, 38 S.L.R. 305; *Johnston* v. *Goodlet*, 1868, 6 Macph. 1067. The last case was a case very much like the present, the allegation being that a discharge was granted in view of something else being done by the grantee which was not done. 3. The averments of essential error were irrelevant for want of specification. But apart from that all that was averred was (1) that the claimant did not know that a son was entitled to legitim by the law of Scotland, and (2) that the deceased ultimately turned out to be a richer man than his son supposed, no fraud or misrepresentation being alleged. Error as to the general law of the land was not a ground for setting aside a deed—*Phibbs* v. *Cooper*, 1867, L.R., 2 Eng. and Ir. Ap. at p. 170. The second statement could not be a relevant ground for setting aside a discharge of legitim.

LORD KYLLACHY — "The first question in this case is one which I may decide now. It arises simply on the construction of the document of 2nd November 1897, by which the claimant John Scott is said to have discharged his claim for legitim against his father's estate. That document is in these terms — '*Newmains, 2nd November* 1897.—Having received and had expended for me much more than my share, I renounce all claim to any share in whatever effects or money my father may leave at his death.—JOHN SCOTT.' The question is whether these words constitute an express discharge in the sense of the authorities — that is to say, whether, it being undoubtedly an express discharge of something, its terms do or do not cover the granter's claim to legitim. In my opinion this question must be answered in the affirmative. It is said that the word 'legitim' is not used, but that is not necessary if words are used which are unequivocably descriptive of the right. It is also said that conceding that proposition the words are satisfied by holding them to refer exclusively to the deceased's share of dead's part in case of intestacy. I cannot, however, so read them. They may cover dead's part as well as legitim. I do not require to consider that question, which might perhaps be doubtful, having in view the fact that the document was granted to the deceased, and *prima facie* applies only to claims by which his, the deceased's, disposal of his property was in some way fettered. But the words I think, whatever else they cover, plainly apply to and cover John Scott's claim of legitim, and accordingly I so propose to find.

"But the claimant John Scott maintains separately, not only that the document was signed and delivered to his father gratuitously—that is to say, without value at the time, and without previous obligation, but (1) that it was granted under essential error and in ignorance of the granter's legal rights; and (2) that in any view it was signed and left in the father's hands not as a delivered document, but in view of a proposed transaction involving an advance of capital to the son, which transaction was never carried out and which advance was never made.

"Now, if the claimant's case depended on the relevancy of his averments of ignorance and essential error as founding a separate and distinct ground of action or defence, I should have had difficulty in allowing a proof. I should at least have

required a good deal more specification in the claimant's averments. But I see no reason to doubt the relevancy of the claimant's other point, that namely as to the purpose for which and the circumstances under which the document was delivered. It seems to me that that must be matter for proof, and there being to be a proof, I do not see my way to exclude inquiry as to the whole circumstances under which the document was asked or was offered and was signed and delivered. I had a large citation of authorities on this matter, and when the facts are ascertained some of these authorities may be important. But I abstain from saying anything further at present, because I consider it necessary that the exact facts should be first ascertained. I shall accordingly find that on its just construction the document set forth in condescendence 7 constitutes a discharge of the claimant John Scott's claim to legitim, but in respect that he denies that the said document was an operative and binding document I shall allow him a proof of his averments in statement 3 of his claim, and to the other claimants a conjunct probation."

The Lord Ordinary pronounced this interlocutor:—

"Finds that on its just construction the document set forth in condescendence 7 constitutes a discharge of the said John Scott's claim to legitim, but in respect that the said claimant denies that said document is an operative and binding document allows him a proof of his averments in statement 3 of his claim, and to the other claimants a conjunct probation," &c.

Counsel for the Pursuers and Real Raisers—M. P. Fraser. Agent — D. Hill Murray, S.S.C.

Counsel for the Claimant John Scott—Clyde, K.C.—Wilton. Agent—C. Clarke Webster, Solicitor.

Counsel for the Other Claimants—Salvesen, K.C.—J. Harvey. Agents—Dove, Lockhart, & Smart, S.S.C.

Wednesday, November 12.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

SUTHERLAND *v.* TAIT'S TRUSTEES.

Superior and Vassal — Casualty — Composition—Implied Entry—Heir of Investiture Impliedly Entered Still Alive—Blench Holding—Effect of Non-Payment of Relief — Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 4.

When the heir of the investiture, impliedly entered under the Conveyancing Act 1874, has disponed the subjects to a singular successor without having paid relief-duty, the disponee, on taking infeftment, is liable in a composition.

Superior and Vassal—Statute—Retrospective Effect—Entry of Trustees—Conveyancing (Scotland) Acts (1874 *and* 1877), *Amendment Act* 1887 (50 *and* 51 *Vict. cap.* 69), *sec.* 1.

The provisions of section 1 of the Conveyancing (Scotland) Acts (1874 and 1877), Amendment Act 1887, are not applicable to the case where trustees have entered with the superior prior to the Conveyancing (Scotland) Act 1874.

Superior and Vassal—Confirmation—Presumption of Payment of Casualty.

Opinion (*per* Lord Kinnear) that when singular successors obtained an entry from the superior prior to the Conveyancing Act 1874 there is a presumption that any casualty which might be due on their entry was duly paid.

This was an action of declarator and for payment of a casualty at the instance of James Sinclair Sutherland, immediate lawful superior of the lands of Lochend, in the county of Caithness, against George Tait Anderson, William Sutherland Anderson, and David Keith Murray, all residing in Thurso, as trustees acting under the trust-disposition and settlement and relative codicil granted in their favour by John Tait, Esquire, of Lochend, residing at Shrubbery Bank, Thurso, dated said trust-disposition and settlement 16th, and relative codicil 17th, both days of May 1899, and both registered in the Books of Council and Session at Edinburgh on the 15th day of June 1899, proprietors of the said lands of Lochend, concluding for payment of a casualty of composition amounting to £434, being one year's rent of the said lands of Lochend. These lands were held in free blench farm for payment of an annual duty of 1d. Scots, if asked allenarly. The entry of singular successors was untaxed.

The following narrative of the facts in the case is taken from the opinion of the Lord Ordinary (KYLLACHY)—"In this case the facts are a little complicated, but the substance of the position seems to be this—The lands of Lochend, now belonging to the defenders, were at his death in 1855 the property of the late Mr W. J. Sinclair of Freswick. By his trust-disposition and settlement Mr Sinclair disponed the lands to trustees for the purpose (after the payment of debts, &c.) of being conveyed to his heirs-at-law, viz., Miss Sinclair, his sister, and Mr Ferryman, the son of a deceased sister, equally between them. The trustees took infeftment and applied for and obtained an entry from the superior by Charter of Adjudication in Implement and Confirmation; and on that entry they paid a composition. In 1871 they denuded of the trust and conveyed the lands to Mr Ferryman and to the testamentary trustees of Miss Sinclair, who had by that time died. Miss Sinclair's trustees held her estate, subject to certain trust purposes, for Mr Ferryman, who was Miss Sinclair's heir-at-law; and in 1877 they conveyed to him her half of the lands in question. Mr Ferryman was thereupon vested in the whole lands; and it may be taken that he was impliedly entered with the superior,