

Friday, January 15.

FIRST DIVISION.

MONTEITH *v.* WANDS.

Appeal—Court of Session Act 1868—Personal Intimation to Appellant. Under section 71 of the Court of Session Act 1868, when an appellant does not move in his appeal, and the other party, after intimation to the appellant's agent, moves that the appeal be dismissed, the Court will not in general grant the motion, except on certificate that a registered letter containing notice of the motion has been posted to the appellant, at his known residence.

This was an appeal from the Sheriff-court of Clackmannan. After the appeal was taken, the inferior court process was transmitted to the Court of Session and marked as received by the clerk. The appellant did not further move in the case. The appeal was then put to the roll by the respondent, who moved the Court, under the 71st section of the Court of Session Act 1868, to dismiss the appeal, with expenses. Due intimation had been made to the appellant's agent, and no appearance was made for the appellant.

BROWN for respondent.

LORD PRESIDENT—It is desirable to have some general rule in such cases, which appear to be of not unfrequent occurrence. Dismissing an appeal when not insisted in would be an interlocutor of this Court which, if it were found out that the non-appearance of the appellant was founded on a mistake, could probably only be got the better of by an appeal to the House of Lords. That is undesirable. Perhaps the safest course is to require that in all such cases there shall be a registered post letter, containing intimation of the motion, addressed to the appellant himself at his known residence and, a certificate of that being lodged in process, the Court will then have safe grounds upon which to proceed.

Agent for Respondent—Alexander Morrison, S.S.C.

Tuesday, January 19.

ARBUTHNOTT *v.* ARBUTHNOTT.

Entail—Destination—Devolution—Special Case. An entail, in order to preserve his estate of H. distinct from his estate of A., as a permanent property to the second son of his only son J. A., whom failing, to his other sons and their heirs-male in their order, entailed the estate of H. on H. A., second son of J. A., and the heirs-male of his body who shall not have succeeded or become next in succession to the estate of A.; whom failing by death, or by succeeding or standing next in succession to A., to R. A., third son of J. A., similarly, and so on to J. A. and D. A., fourth and fifth sons; whom failing by death, or by succeeding or standing next to A., to the other heirs-male of the body of J. A. who should not have succeeded or become next in succession to A., and the heirs-male of their bodies who should not have succeeded, &c., respectively and successively in their order. Other sons were born to J. A. besides those existing at the date of the entail. On the death of the entailer, H. A. took the estate. After his death without issue, held, in

a competition for the estate of H. between W. A. (immediate younger brother of H. A. now in life, and one of the sons of J. A., born after the date of the entail) and D. (the second son of the eldest son of the eldest son of J. A.), that the entailer meant to exhaust all the younger sons of J. A. and their issue male before calling any of the issue male of J. A., and therefore that the estate of H. descended to W. A.

This was a special case presented for opinion of the Court under section 63 of the Court of Session Act 1868. The facts, as stated in the special case, were as follows:—John, sixth Viscount of Arbuthnott, executed on the 2d day of November 1786 a deed of entail which was recorded in the Register of Entails on the 20th day of July 1787, and in the Books of Council and Session the 16th day of May 1791, and which ran thus:—"I, John Viscount Arbuthnott, Lord Inverbervie, &c., heritable proprietor of the lands and estate of Halltown and others aftermentioned, for the more effectually preserving the same distinct from my lordship and estate of Arbuthnott, as a permanent property to the second son of my only son and future representative John Arbuthnott, whom failing, by death or otherwise, as aftermentioned, to his other sons and their heirs-male in their order, subject to the provision aftermentioned, and for other good causes and weighty considerations, Have Given, Granted, and Disposed, as by these presents, but always with and under the conditions, provisions, burdens, declarations, restrictions, limitations, prohibitions, clauses irritant and resolute, and reservation after expressed, Give, Grant, Convey, and Dispose to and in favour of Hugh Arbuthnott, second lawful son of the said John Arbuthnott, now my only lawful son, and the heirs-male of his body who shall not have succeeded or become next in succession to the lordship of Arbuthnott, in manner aftermentioned; whom failing, by death or by succeeding or standing next in succession to the lordship of Arbuthnott, to Robert Arbuthnott, third lawful son of the said John Arbuthnott, and the heirs-male of his body who shall not have succeeded or become next in succession to the lordship of Arbuthnott; whom failing, by death or by succeeding or standing next in succession to the lordship of Arbuthnott, to Francis Arbuthnott, fourth lawful son of the said John Arbuthnott, and the heirs-male of his body who shall not have succeeded or become next in succession to the lordship of Arbuthnott; whom failing, by death or by succeeding or standing next in succession to the lordship of Arbuthnott, to Duncan Arbuthnott, fifth lawful son of the said John Arbuthnott, and the heirs-male of his body who shall not have succeeded or become next in succession to the lordship of Arbuthnott; whom failing, by death, or by succeeding or standing next in succession to the lordship of Arbuthnott, to the other heirs-male of the body of the said John Arbuthnott who shall not have succeeded or become next in succession to the lordship of Arbuthnott, and the heirs-male of their bodies who shall not have succeeded or become next in succession to the lordship of Arbuthnott, respectively and successively in their order; whom failing, to my own nearest heirs-male whomsoever; whom all failing, to my own nearest heirs and assignees whomsoever, heritably and irredeemably; But with and under this express provision and declaration, as it is hereby expressly provided and declared,—That in case the succession to the lordship of Ar-