on the merits. It is obviously beyond the province of the Sheriff to give a judicial opinion on the validity of the deed of provision as an entail. The deed in question is the subsisting investiture; the fee is vacant, and the petitioner is the heir. These considerations, in the opinion of the Sheriff, are sufficient for the decision of the claim of service.

"With regard to the formal objections taken to the proceedings, the Sheriff is of opinion—(1) That the statutory requirement of a special mandate is sufficiently complied with by the production of the power of attorney, containing authority to make up titles; (2) That this Court has all the authority to grant diligence for the recovery of writings, or to compel the attendance of witnesses, that is possessed by any of the inferior courts in Scotland. The power of granting diligence has been exercised ever since the establishment of the Court of Chancery in 1847, and without such a power the business of the Court, even in *ex parte* applications, could not be carried on."

Against this interlocutor Mrs Catton appealed.

LORD-ADVOCATE, DEAN OF FACULTY, and DUNCAN for her.

SOLICITOR-GENERAL and SHAND in answer.

At advising—

LORD-PRESIDENT desired to say at the outset, in order to guard against misconception, that the question of possession had nothing to do with the case. It could not be disputed that the petitioner possessed the character of *nominatim* heir of tailzie and provision next in the order of entail after his brother the late Hugh Mackenzie of Ardross and Dundonnell. And his service was opposed by Mrs Catton on a title made up under the recent Titles to Land Consolidation Act. Her title was made up by a notarial instrument, narrating the infeftment of Mr Hugh Mackenzie, a general disposition by him to trustees, and its assignation by them to her. Thus the first step in the progress on which her notarial instrument was founded was the registered instrument of sasine by which Mr Mackenzie was infeft in the lands mentioned in it. The warrant of this notarial instrument was thus the sasine of Mr Mackenzie, and therefore, of necessity, the sasine of Mr Mackenzie was before the Court. Now, in that sasine Mr Mackenzie was infeft, not as fee-simple proprietor, but as heir of entail. *Ex facie* therefore of Mrs Catton's warrant, the sasine of Mr Mackenzie was that of one who possessed the estate under fetters. But Mrs Catton alleged the entail was invalid and that she had an action of declarator to that effect pending in Court. She also maintained that Mr Mackenzie, being institute under the entail, was not bound by its fetters, and that he intended by his general disposition to convey the lands under the entail. But the Court had only Mrs Catton's word for these allegations, and the Court had no certainty till the entail was reduced that it was bad, or that Mr Mackenzie had the power and intention to convey the entailed lands. In the case of *Thoms* it was admitted that the entail was bad, but here there was no such admission. Till it was established in some competent form of process that it was Mr Mackenzie's intention to convey this entailed estate Mrs Catton had no title at all; and it would also have to be shewn that he had such power. On this ground, alone, Mrs Catton had no title to oppose this service; and the Sheriff's interlocutor was right and should be adhered to.

LORDS DEAS and ARDMILLAN concurred.

LORD KINLOCH—I think the Sheriff of Chancery has rightly dealt with these proceedings, and that his judgments must stand, notwithstanding the fresh grounds of objection which have been now presented to us.

The petition is for service of Kenneth Mackenzie as heir of entail under a special deed to Hugh Mackenzie of Dundonnell. His sister, Mrs Catton, has appeared, not simply to take part in the proceedings of service by cross-examining the witnesses or the like, but to demand that the service should be stopped and the petition of service dismissed.

She does not claim the character of competing heir of entail. What she founds on is an alleged general disposition of all lands and heritages by the deceased Hugh Mackenzie, followed by a notarial instrument under the Titles to Land Act, which she alleges constitutes sasine in these particular lands. By this deed, she contended, the Sheriff's difficulties were overcome, and the present special service was precluded by reason of the fee being full.

I shall not enter on the general question to what extent an *ex facie* full fee may be made the ground for stopping a special service. I shall in fitting time discuss this question, on which not a little misapprehension often occurs. For the present purpose it is sufficient to say that the notarial instrument in question cannot be received as evidence of the fee being full—(1) because *ex facie* it infers a fee-simple conveyance by one holding in entail, whose capacity to grant such a conveyance cannot be assumed; and (2) because in a question with a third party the notarial instrument, applying to these subjects the general disposition of all lands and heritages, can be taken as no better than the mere statement of the objector that these lands are contained in the conveyance.

For these reasons I think the production of this document cannot stop the service; and to hold this will not injure Mrs Catton, whose right, if valid, will still prevail in competition. To hold anything else might be most injurious to a petitioner for a service; who, even though proved in the end to have the only true claim, would be meanwhile prevented, for want of a complete title, from constituting any right over the lands, either *inter vivos* or *mortis causa*, and might die in a compulsory apparency.

Agent for Petitioner—Andrew Webster, S.S.C.

Agents for Respondent—Murray, Beith, & Murray, W.S.

Tuesday, January 25.

WOTHERSPOON, PETITIONER.

Judicial Sale—Recess. Judicial sale authorised to take place during a recess of the Court.

In an action of ranking and sale at the instance of the petitioner, the subjects had been appointed to be sold on the 9th of February before the Junior Lord Ordinary. Subsequently the Court having resolved not to sit between the 5th and 12th February, the petitioner moved the Court to delay the day of sale, as there was considerable doubt whether a sale could take place when the Court were not sitting.

PATTISON, for him, quoted Bell's Com. p. 1009,

as settling that a judicial sale could not take place whilst the Court were not sitting.

The Court, holding that delay would cause additional expense, and that the only reason for such a sale not taking place during a recess of the Court was one of expediency, gave a special warrant for the sale taking place on the day fixed before the Lord Ordinary on the Bills.

Agent for Petitioner—Andrew Hill, W.S.

Tuesday, January 25.

FERGUSSON *v.* HIS NEXT OF KIN.

Curator—Deed of Nomination—Minor. Deed of nomination by a minor of a curator resident in England, who offered to find caution to any amount required, and to give any necessary guarantee for his appearance in Court when called on, and to prorogate its jurisdiction for the purposes of the curatory, *refused*, in respect of no necessity shewn.

Robert Cutlar Fergusson of Craigdarroch, in the the county of Dumfries, and of Orroland in the stewartry of Kirkcudbright, sought to have Major Dormer, residing at Craigdarroch House in the county of Dumfries, and at No. 6 Prince of Wales' Terrace, Kensington, London, decerned curator to him. On the maternal side, the nearest of kin to the pursuer, major and resident in Scotland, were his mother, now the wife of Major Dormer, and her brothers, Colonel Sir Archibald Alison, Bart., and Major Alison; while on the paternal side, the only next of kin who was major, was, so far as the pursuer knew, Madame Forçade de la Roquette, wife of the French Minister of the Interior, and resident in France. A deed of nomination in favour of Major Dormer was executed; but as the Lord Ordinary (BARCAPLE) expressed doubts as to the approval of the deed of nomination, Major Dormer offered to bind himself to find caution in Scotland to any amount which might be required, and also to give such guarantee as might be deemed necessary that he would appear in Court to answer for his conduct as curator, or to find additional caution at any time that he might be called on to do so, and to submit himself to, and to prorogate the jurisdiction of, the Court of Session for the purposes of the curatory, and to assign a place in Scotland at which he might be cited. The Lord Ordinary reported the case to the Inner House.

SOLICITOR-GENERAL and ORR PATERSON quoted the case of *Lord Macdonald* v. *His Next of Kin*, June 11, 1864, as a precedent for approving of the nomination.

The Court held that no such necessity had been shewn as would justify the appointment of a curator resident in England.

Agents for Pursuer—H. & A. Inglis, W.S.

Tuesday, January 25.

OGILVIE'S TRUSTEES & OTHERS *v.* MILLER.

Revocation—Residue—Intestacy—Expenses. By his trust-disposition a trustee appointed his widow residuary legatee. By a codicil he revoked certain bequests and made his brother James residuary legatee if he survived him and his widow. James survived the trustee, but not the widow. *Held* that the bequest of the residue to the widow was not revoked, that there was no intestacy as regarded it, and that the unsuccessful claimant must bear the expenses of the case.

This was a special case presented by the trustees of the late Major General Ogilvie and some of the beneficiaries under his trust-deed to have their rights determined. The trust-deed conveyed all the truster's heritable and moveable estate to trustees for certain purposes. Mrs Helen Allan or Ogilvie, his wife, was, in the event of her surviving him, to get all his household furniture, bed and table linen, plate, books, and wines and spirits in his cellars, and a liferent of his whole trust-estate. By the third purpose the truster directed, on the death of Mrs Ogilvie, if she survived him, that the trust-estate should be realised, and certain legacies paid to his half-sisters Isobel and Margaret, and Barbara, the daughter of his half-brother Thomas; £3000 in Bank of Bengal stock to his half-brother James; and the lands of Blackford conveyed to his half-brother Archibald: it being declared that if the trust-estate was not sufficient to meet the three first legacies, certain specific diminutions were to be made on the two last, or the trust-estate divided in a different manner as therein specified; but if after payment of the legacies there was any residue it was to go to the widow, to be disposed of by her as she might think proper. It was also declared that any codicil he might make should be held part of his trust-deed. He executed such a codicil, and by it revoked the bequeathments to his half-sisters Isobel and Margaret, and changed the destination of his niece Barbara's legacy. The codicil went on to say:—"I confirm the bequests in the will to my half-brothers James and Archibald, with the addition that if the said James shall survive myself and spouse he shall be considered my residuary legatee not only of bank shares but of all other property; also, that if the surplus of my personal property after paying all other legacies shall exceed Twelve thousand pounds sterling, he shall pay to his brother Archibald or his heirs such amount as, added to the assumed valuation of Blackford, &c. (if unsold by me), shall make his share up to Six thousand pounds. But if the aforesaid surplus do not exceed Twelve thousand pounds, then its amount shall be added to the assumed value of Blackford, &c., and the aggregate sum divided into five parts, three of which shall fall to James, and two to Archibald. In any case Blackford, &c., if unsold, is to be part of the portion of the latter at the assumed value of Two thousand seven hundred pounds sterling. I further authorize my wife Helen, if she survive me, to alienate by gift, or bequeath by will, any portion or portions of my personal or moveable property of which she is to enjoy the use or income, not exceeding in all Three thousand pounds sterling, and she may include plate, furniture, &c., at a valuation, but it shall be optional with my surviving executors or executor to pay cash instead."

The truster died on 20th September 1847, survived by his widow. James Ogilvie predeceased her on 21st July 1865, leaving six children; and on 24th March 1866 she executed an assignation by which, on the narrative of her desire to fulfil what her husband intended, she conveyed to trustees the whole residue provided to her under her husband's trust-disposition, directing them, after payment of her debts, &c., and her husband's legacy of £6000