plate her daughter predeceasing her, and from that they argue that the expression "heirs and assignees whomsoever" could not have been inserted for the purpose of conditionally instituting her daughter's heirs. Another consideration is that it is improbable that the testatrix intended that her whole estate made by her own exertions, or at least two-thirds of it, should go to her husband's relatives if her daughter predeceased her without issue, the daughter, be it observed, having *ex hypothesi* no power to assign it. I think that there is considerable force in these contentions, and my impression is that the pursuers are right as to the intention of the testatrix. But the question is narrow, and as your Lordships all agree with the Lord Ordinary, I do not feel justified in dissenting.

The Court recalled the interlocutor reclaimed against and sustained the fourth plea-in-law for the defenders.

Counsel for the Pursuers and Reclaimers — Macfarlane, K.C. — Graham Stewart. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders and Respondents — Solicitor-General (Dundas, K.C.)— Hunter. Agents—Steedman & Ramage, W.S.

Saturday, May 23.

OUTER HOUSE.

[Lord Low.

DAVIDSON *v.* CAMPBELL RENTON.

Game—Ground Game—Ground Game Act 1880 (43 *and* 44 *Vict. c.* 47)*—Interference with Agricultural Tenant's Exercise of his Concurrent Right to Take Ground Game—Interdict.*

The agricultural tenants of a farm, in the exercise of their concurrent right to take ground game, employed a rabbit catcher to snare rabbits. The landlord's gamekeeper selected the same fields for setting snares, with the object of obstructing the rabbit-catcher, knocked over some of the rabbit-catcher's snares, and set his own in positions to render others ineffectual, and on one occasion put paraffin on the runs on which the rabbit-catcher's snares were set. *Held* that the agricultural tenants were entitled to interdict against the gamekeeper, prohibiting him from designedly obstructing the agricultural tenants in the lawful exercise of their right to kill and take ground game upon their farm under the Ground Game Act 1880.

Master and Servant — Scope of Employment—Gamekeeper—Interdict.

Held, where a gamekeeper had designedly interfered with the agricultural tenants in the exercise of their right to kill and take ground game upon their farm, and the agricultural tenants had been found entitled to interdict against him from doing so, that the agricultural tenants were not also entitled to interdict against the landlord as the gamekeeper's master and responsible for the gamekeeper's acts within the scope of his employment.

George Davidson, George Davidson junior, and William Gladstone Davidson, tenants of the farm of Lamberton, in Berwickshire, raised an action against their landlord Robert Charles Campbell Renton, Esquire of Mordington, and Joseph Tait, his gamekeeper, craving the Court "to interdict, prohibit, and discharge the said respondent Robert Charles Campbell Renton Esquire, and the respondent Joseph Tait, and all others acting by the said Robert Charles Campbell Renton's authority, from trampling down or destroying snares or traps set by the complainers or any person duly authorised by them for the purpose of killing and taking ground game on the said farm of Lamberton, and from sprinkling paraffin or other noxious substance, or setting other snares or traps, or stopping up rabbit runs in such immediate proximity to snares or traps lawfully set by the complainers or any person authorised by them, as to prevent ground game being so killed and taken, and from otherwise preventing the complainers or any person authorised by them from killing and taking ground game on the said farm, and from unlawfully obstructing or interfering with the complainers in the exercise of their right to kill and take ground game on the said farm." . . .

The complainers' averments of fact, so far as held to have been substantially proved, were as follows:— "(Stat. 2) As occupiers of the farm the complainers are entitled, in terms of the Ground Game Act 1880, by themselves or any person duly authorised by them, to kill and take ground game thereon. The farm is a large one, and is a good deal exposed to depredations from ground game, which the complainers have found it necessary to keep in check. A considerable part of the farm consists of unenclosed moorland, upon which the complainers have no right to kill game except from 11th December to 31st March, and from which rabbits make their way in large numbers into the arable land through runs in the enclosing fences. For the purpose of keeping down the ground game the complainers have employed a rabbit-trapper named George Johnston. (Stat. 4) On 9th July 1902 Johnston by the instructions of the complainers set some snares in the Camps Field. Shortly thereafter the respondent Joseph Tait, who is employed as a gamekeeper by Mr Campbell Renton, went over the ground and set snares within one yard of those set by Johnston. The result of this was to prevent any rabbits from being caught, and Tait informed Johnston that that was his object in setting the snares. Again, on 14th July 1902, Johnston set snares in the Cove Field and Seabraes, when Tait proceeded to set others within one foot of those set by Johnston, with the same result. On 15th July the same thing was repeated in the Heathery House Field.

(Stat. 5) On the 21st July 1902 Johnston set snares in the Shields Field and the Racecourse Hill Field, and immediately thereafter Tait proceeded not only to set other snares, but also stopped up all the rabbit runs through the fences in proximity thereto, for the purpose and with the result of preventing Johnston from killing rabbits. (Stat. 7) On 3rd September 1902 Johnston set snares in the Shields Field and the Racecourse Field. When he went to examine the snares in the morning he found that paraffin had been poured down in front of the snares in Shields Field; that all the rabbit runs through the fences of that field had been stopped up with stones, and that a number of the snares had been trampled down or destroyed. The rabbit runs in the Racecourse Field had likewise been stopped up. All this was done by Joseph Tait for the purpose and with the result of preventing rabbits from being taken by the complainers' servant, without in any way protecting the complainers' fields, the rabbits thereafter getting access thereto in other ways."

The complainers further averred—"The said acts were done in the course of Tait's employment, and were within the scope of his employment."

The complainers pleaded—"(1) The respondents having unlawfully interfered with and prevented the complainers from exercising their right to kill and take ground game on the farm of Lamberton, should be interdicted as craved with expenses. (2) The respondent Mr Campbell Renton should be interdicted, in respect . . . (*b*) that the said acts were within the scope of his servant's employment."

Upon 23rd May 1903 the Lord Ordinary (Low) pronounced this interlocutor — "Having considered the cause (1) as regards the respondent Robert Charles Campbell Renton, repels the reasons of suspension, refuses the prayer of the note, and decerns; and (2) as regards the respondent Joseph Tait, sustains the reasons of suspension, suspends the proceedings complained of, interdicts, prohibits, and discharges the said respondent from designedly obstructing the complainers in the lawful exercise of their right to kill and take ground game under the Ground Game Act 1880 upon the farm mentioned in the note, and decerns."

Opinion.—"This note is brought by the tenants of the farm of Lamberton against the proprietor Mr Campbell Renton and his gamekeeper Tait for the purpose of having them interdicted from obstructing or interfering with the complainers in the exercise of their right to kill ground game under the Ground Game Act 1880.

"I am of opinion the complainers have not proved their averments against Mr Campbell Renton.

"The case, however, is different as regards Tait. . . .

"In my opinion it is proved that Tait selected for the purpose of setting snares the fields in which Johnston was working, with the object of obstructing and interfering with the latter; that he set snares in positions which were calculated and intended to interfere with and render ineffectual snares already set by Johnston; that he knocked over snares set by Johnston, and that upon one occasion he put paraffin upon runs in connection with which Johnston's snares were set with the object of preventing rabbits using these runs.

"Upon the last point there is no direct evidence, because no one actually saw Tait putting paraffin upon the runs, and he denied having done so. The inference from the evidence, however, seems to me to be plain. Three of the complainers' witnesses found paraffin upon runs leading from Lamberton Moor into a cornfield, and Tait admits that he had been putting paraffin into rabbit holes in the moor in order to make the rabbits lie out for shooting purposes. At the time Tait seems to have indicated to Goodfellow that he had put paraffin upon the runs to prevent the rabbits which were turned out of their holes on the moor going into the standing corn. If he had given the same explanation in the witness-box I should have been disposed to accept it, but he did not do so, but denied having put paraffin upon the runs at all. I cannot accept that denial. There seems to me to be no doubt that there was paraffin on the runs, and no one but Tait could have put it there. What then was his object in putting paraffin on the runs? If it was not to keep the rabbits which were turned out of their holes on the moor out of the corn, the inference is that it was intended to prevent rabbits using the runs upon which Johnston's snares were set, because it is proved that putting paraffin on the runs in question would not prevent the rabbits from the moor taking refuge in the corn.

"There remains the question of the remedy. It is plain that where, as under the Game Act, there are concurrent rights to kill rabbits on the same ground, the one party may very easily interfere with the other. If that should happen when both parties are exercising their rights in good faith, I do not know that there is any remedy. But it is a different matter when one party deliberately and intentionally sets himself to make it impossible for the other party effectually to exercise his right. That in my judgment constitutes a legal wrong which may be restrained.

"The complainers' counsel asked interdict against both of the respondents, but for the reasons which I have given I am of opinion that Mr Campbell Renton has done nothing which would justify my pronouncing any decree against him. The complainers, however, plead that Mr Campbell Renton is responsible for Tait's actings, as they were within the scope of the latter's employment. That might have been a good argument if the question had been one of damages, but in my opinion it does not apply to a case of interdict.

"In regard to Tait, I think that the complainers are entitled to have him interdicted from desig edly obstructing them in the lawful exercise of their rights to

kill and take ground game under the Ground Game Act 1880."

Counsel for the Complainers — T. B. Morison. Agents—Pringle & Clay, W.S.

Counsel for the Respondents—Younger —Constable. Agents—Strathern & Blair, W.S.

HIGH COURT OF JUSTICIARY.

Thursday, October 22.

GLASGOW CIRCUIT COURT.

(Before the Lord Justice-Clerk.)

HIS MAJESTY'S ADVOCATE *v.* BROWNE, BURNS, & WILLIAMS.

Justiciary Cases—Theft—Habit and Repute —Previous Conviction—Criminal Procedure (Scotland) Act 1887, *sec.* 67.

Held, on an indictment for theft, in which two of the accused were charged with the aggravation of being habit and repute thieves, that sec. 67 of the Criminal Procedure (Scotland) Act 1887 did not apply to the aggravation charged, and that the part of the indictment charging the aggravation of being habit and repute thieves and the evidence in support of it must be laid before the jury.

Justiciary Cases — Theft — Proof — Recent Possession.

Observations per the Lord Justice-Clerk upon "recent possession."

Justiciary Cases—Reset—Personal Possession of Property Stolen—Privity to Retention of Stolen Property.

Reset consists of being privy to the retention of property known to have been dishonestly appropriated, and it is not necessary to prove that the person charged has ever had the property in question actually in his personal possession.

The Criminal Procedure (Scotland) Act 1887 (50 and 51 Vict. c. 35), sec. 67, enacts—"Previous conviction against a person accused shall not be laid before a jury, nor shall reference be made thereto in presence of the jury before the verdict is returned; but nothing herein contained shall prevent the public prosecutor from laying before the jury evidence of such previous convictions where by the existing law it is competent to lead evidence of such previous convictions as evidence *in causa* in support of the substantive charge."

Duncan Browne, George Burns, and William Williams, prisoners in the prison of Glasgow, were charged on an indictment in the following terms—"That you did on 29th June 1903, in the office in Royal Exchange Square, Glasgow, of the Royal Bank of Scotland, steal £5100 of money; and you Duncan Browne and William Williams are habit and repute thieves."

The following objections were stated to the relevancy of the indictment—"That the reference in the indictment to habit and repute is incompetent; that the allegation of habit and repute cannot be sent to trial in respect of lack of specification."

Counsel for the accused argued that if not contrary to the strict letter of the Criminal Procedure (Scotland) Act 1887, the laying before the jury of the allegation of habit and repute was contrary to its spirit, for it cast a reflection upon the character of two of the men at the bar. This was to prejudice their case, and was especially objectionable where as here the panels had never been convicted of theft, but were now to be put in a worse position than if they had been.

The Lord Justice-Clerk repelled the objections, and pronounced the following opinion—As regards the objection to the charge now made, I may say that I think it is important to the prisoners in a case of this kind that the evidence should be dealt with by the jury. The question whether a man is habit and repute a thief is a matter to be inquired into, and is a question about which there may be some counter evidence, and I think it is in favour of the prisoners that that should be dealt with by the jury, because if the evidence is confused or unsatisfactory the jury will consider and give a verdict upon it. There is no ground whatever for saying that any law has been passed since 1887 which has altered the law of Scotland in regard to this matter of proving habit and repute. Of course it is the duty of the judge to direct the jury that in considering the question of guilt or innocence of the principal charge they should not take into consideration at all any such evidence; but they must be satisfied that the act has been committed and then consider whether or not it has been proved that the prisoners or any of them are habit and repute thieves as an aggravation of what they find. And I have no doubt that the jury will deal with the matter perfectly justly if it reaches them. I therefore repel the objection.

The case went to trial. The property which had been stolen consisted to a considerable extent of bank notes for large amounts. The crime was committed on the 29th June 1903, and the evidence for the prosecution showed that on the 28th July, the day of their arrest, and for at least some days previously, the accused had been in possession of similar notes. The numbers of the stolen notes were not proved.

The Lord Justice-Clerk—[*After reviewing the evidence*]—Now, gentlemen, that is really all the evidence to which I need refer in regard to what actually took place. During the time of the transactions these men were constantly together; they were meeting one another, and coming to one another's hotel; and they were all found in close conversation in the Central Station Hotel on the day on which they were apprehended. All that is for your consideration upon the question whether or not you