of the codicil of 1828, and of the marriage-contract of Mr and Mrs Oliphant, and particularly on that of the words "my own nearest heirs, executors and assignees."

The Court pronounced the following interlocutor:—

"31*st May* 1870.—Find and declare that on the death of Mrs Jane Oliphant without issue in 1851, the right of fee of two-thirds of the one-sixth of her father George Morgan's estate (settled on her and her husband and children by her marriage-contract, and the codicil of the said George Morgan's settlement, dated 17th July 1828), did, in terms of the said marriage-contract and codicil, revert to the trustees under the said George Morgan's settlement, as his assignees, to be distributed by them as part of the residue of the trust-estate, and decern."

After the date of the judgment the trustees of William Oliphant, who were not parties to this special case, on hearing for the first time of the questions which had arisen regarding George Morgan's estate, preferred a claim, on the ground that the share above mentioned, having reverted to George Morgan's trustees, fell to be dealt with by them as undisposed of residue, and to be distributed to the next of kin of George Morgan or their representatives. In this view they claimed as in right of Mrs Oliphant, she and her husband having executed a mutual settlement of their whole estate.

The representatives of George Morgan's other children maintained that the share fell to be distributed according to the provisions of the settlement of 1823, and fell under the clause of survivorship therein.

A second special case was presented, the parties being (1) the representatives of George Morgan's other children; (2) Oliphant's trustees.

The questions were as follows:—

"(1) Does the said share of the late George Morgan's trust-estate fall to be dealt with by his trustees as undisposed of residue, and to be distributed by them among the representatives of the six children of the truster who survived him in the character of next of kin at the time of his death? Or—

"(2) Does the said share fall to be otherwise distributed under the provisions contained in the truster's trust-disposition and settlement, and additional trust-disposition and settlement?"

MUIRHEAD and A. GIBSON for the *first* parties.

M'LAREN, for the *second* parties.

The Court were of opinion that the deed of 1827 did not supersede that of 1823, except in so far as its provisions were inconsistent with it; that consequently the share in question fell to be distributed under the provisions of the settlement of 1823; answered the first question in the negative, and the second in the affirmative; and found the parties of the *second* part liable to the parties of the *first* part in expenses.

Agents for parties of the *first* part—J. Stormonth Darling, W.S., and James Bruce, W.S.

Agents for parties of the *second* part—Dalmahoy & Cowan, W.S.

Thursday, July 6.

STIVEN (YOUNG'S FACTOR) *v.* BROWN'S TRUSTEES AND OTHERS.

Process—Title to Sue—Heir—Service. Circumstances in which a process of reduction of prior infeftments was sisted, in order to allow the pursuer to mend his title to sue, by serving as heir of provision or otherwise, as advised.

This was a summons of reduction and declarator, at the instance of William Stiven, accountant in Dundee, factor *loco absentis* to James Young, a seaman belonging to that town, but presently abroad, seeking to have reduced certain instruments and titles which had been expede to heritable property in Dundee, to a *pro indiviso* share of which the said James Young alleged right. The defenders were the trustees of Young's uncle James Brown junior and his four younger brothers and sisters. From the record it appeared that James Brown senior, who died in 1833, was possessed of several heritable subjects in Dundee, amongst which was a tenement in Whitehall Close. James Brown senior left several children, of whom the eldest surviving son was the above-mentioned James Brown junior, whose trustees were called as defenders in this action, and Janet Brown or Young, the mother of James Young, and also of the four remaining defenders.

Under a disposition by James Brown senior, dated 29th April 1797, the subjects in Whitehall Close vested equally in his five surviving children. Janet Brown or Young therefore became entitled to a fifth share *pro indiviso*. She having died intestate, James Young, as her eldest son and heir of line and conquest, claimed to be in right of her fifth share *pro indiviso*, as heir of provision under James Brown senior's disposition.

The said subjects in Whitehall Close are the only ones that need be noticed at this stage of the action. Janet Brown or Young was never infeft in her share of these subjects, nor has it been taken up by service or otherwise. In 1849 James Brown junior served himself as nearest and lawful heir of his father James Brown senior in the said subjects and others, and was infeft therein. He thereafter conveyed them to his trustees, the first parties called as defenders in this action, who were infeft. The deeds sought to be reduced were the instrument of cognition and sasine in favour of James Brown junior, and his trust-disposition, with the sasines and instruments which had followed thereon, so far as the same affected the share of the properties claimed by James Young as in right of his mother. As a defence against this action, so far as the Whitehall Close subjects were concerned, the defenders James Brown junior's trustees pleaded *inter alia*—"(2) James Young, who is said to be in right of his mother Janet Brown or Young, as heir of provision to her shares of the several subjects libelled, not having produced or expede any service or other title instructing that character, the pursuer, as representing the said James Young, is not entitled to insist in any of the conclusions of the present action."

The Lord Ordinary (MACKENZIE) on 31st January 1871 pronounced an interlocutor, which, in so far as regarded the subjects in Whitehall Close, sustained the defender's plea in law above stated, and dismissed the action. His Lordship added the following Note:—

"*Note.*—The pursuer, as factor *loco absentis* to James Young, insists in this action in so far as regards the heritable subjects in Whitehall Close, which belonged to the deceased James Brown senior, on the ground that James Young has, under the disposition of the said James Brown, his grandfather, dated 29th April 1797, right to the one-fifth part or share thereof as heir of provision to his mother, Mrs Janet Brown or Young. Mr Brown senior died last vest and seised in the said subjects. By the said disposition he conveyed them to his wife in liferent, and to his lawful children 'equally among them, and to the survivors or survivor of them, and their heirs or assignees whomsoever in fee.' Mrs Janet Brown or Young survived her father, and also her mother, the liferentrix, and died intestate, and without having made up any title to the said subjects. James Young has not made up any title by general service to his mother, Mrs Janet Brown or Young, as heir of provision to her under the foresaid disposition, and he has, therefore, the Lord Ordinary is of opinion, no title to insist in the conclusions of the present action. The defenders are the testamentary trustees of James Brown junior, the son and heir-at-law of James Brown senior, who made up a title to and conveyed the subjects to them. They admit that they hold these subjects to the extent of one-fifth for the heir of Mrs Janet Brown or Young. When James Young has, by general service, become vested as heir of provision in the personal right conveyed to his mother by his grandfather's disposition, he will be entitled to call upon the defenders, the trustees of James Brown junior, to convey to him one-fifth share of the Whitehall Close subjects. But before making such a claim, or instituting an action to enforce it, he must complete his title as heir of provision."

Against this interlocutor the pursuer reclaimed.

Solicitor-General (CLARK) and MACKINTOSH, for him.

J. M'LAREN and MARSHALL, for the respondent.

Authorities referred to—*Mackintosh* v. *Munro*, 23d Nov. 1854, 17 D. 99; *Malcolm* v. *Dick*, 8th Nov. 1866, 5 Macph. 18; *Rutherfurd* v. *Nisbet's Trustees*, 12th Nov. 1830, 9 S. 3; *Cochrane* v. *Ramsay*, 11th March 1828, 6 S. 773-4; Bell's Prin. 1683.

The Court recalled the Lord Ordinary's interlocutor *in hoc statu*, and, on condition of payment of expenses since the date of the interlocutor reclaimed against, sisted process in order to enable the pursuer to mend his title to sue, by serving as heir of provision or otherwise, as advised.

Agents for the Pursuer—Hill, Reid & Drummond, W.S.

Agents for the Defenders—Fyfe, Millar & Fyfe, S.S.C.

Thursday, July 6.

SECOND DIVISION.

ROSS *v.* DURIE.

Donation—Deposit Receipt. A deposited money in a bank in the name of himself and B, payable to "either or survivor," and gave the deposit-receipt to B. *Held* that there was no presumption in favour of donation, and that the proof did not establish that A intended to make a donation to B.

This was an action in the Sheriff-court of Fife, raised by John Ross against James Durie and his wife, concluding for payment of a sum of £90, 5s. 8d., contained in a deposit-receipt. The facts are fully set out in the interlocutor of the Sheriff.

The Sheriff-Substitute (BELL) pronounced the following interlocutor:—"Finds, in point of fact, that on or about the 20th day of September 1867 the pursuer handed to the female defender the deposit-receipt mentioned on record; but that the pursuer has failed to prove, as averred by him, that he did so in order that it might be retained by her for the pursuer's behoof, and for her own behoof in case of his decease: Finds that, on the contrary, the pursuer, when handing the receipt to the female defender, said, "That is a present to you:' Finds, in point of law, that the defenders are not bound to restore said receipt, or to repay the money therein contained, to the pursuer; therefore assoilzies the defenders from the conclusions of the summons, and decerns: Finds them entitled to expenses, allows an account," &c.

The Sheriff (CRICHTON) recalled this interlocutor, and pronounced the following judgment:—"Finds, in point of fact (1), That on 10th May 1867 the sum of £100, belonging to the pursuer, was deposited in the Royal Bank of Scotland at Cupar, and that the deposit-receipt, No. 16 of process, was granted by the bank therefor in the names of the pursuer and his now deceased wife, 'payable to either or survivor;' (2) That the pursuer's wife, who was a sister of the defender, Margaret Laing or Durie, died on 19th September 1867, and on that day the pursuer went to live in family with the defenders; (3) That on 20th September 1867 the pursuer, accompanied by the defender James Durie, went to the Royal Bank at Cupar and uplifted the said sum of £100 contained in the deposit-receipt, and that the pursuer then proposed to re-deposit £90 of the said sum of £100 in his own name and that of the defender James Durie; (4) That the defender James Durie objected to the said sum of £90 being deposited in his name, and he advised the pursuer to re-deposit the money in his own name; (5) That thereafter the pursuer proposed to re-deposit the said sum of £90 in his own name and that of the defender Margaret Laing or Durie; (6) That the said sum of £90 was, on 20th September 1867, re-deposited by the pursuer with the Royal Bank of Scotland at Cupar, and that he then received from George Ramsay, the accountant of the said bank, the deposit-receipt, which is in favour of the pursuer and 'Mrs Margaret Laing or Durie, Cupar, ... payable to either or survivor;' (7) That on the said 20th day of September 1867 the pursuer handed to the defender Margaret Laing or Durie the said deposit-receipt for £90 sterling; (8) That the pursuer continued to live with the defenders for about six or seven weeks after 20th September 1867, when, in consequence of a quarrel with the defender Margaret Laing or Durie, he left the house; (9) That on 15th November 1867 the defender Margaret Laing or Durie called upon the said George Ramsay, and stated that she wished to uplift part of the money contained in the said deposit-receipt; (10) That on 16th November 1867 the said Margaret Laing or Durie received from the said George Ramsay £20 of the sum contained in the said deposit-receipt, which she retained and still retains; and that she re-deposited the balance of £70 on a deposit receipt in favour of 'Mr John