thing essentially different from the combination for which the complainer took out his patent, and so, I think, there is here a failure on the part of the complainer to prove that the device of the respondent is an infringement on his patent.

On the other point I shall only say, with regard to the complainers' application to be allowed to lead further evidence as to the alleged publication of this invention at the exhibition in Glasgow, that I am satisfied there were grounds for allowing further proof, and I agree with your Lordships that the subject has not been dealt with in the proof with that precision which the parties were bound to exercise in leading evidence, and I am struck that the complainer, when under examination as to the alleged exhibition, was allowed to leave the witness-box without stating what was the nature of it, what was exhibited by him, and to whom it was shewn. It would have occurred to me to bring that out with some distinctness, and not to leave it upon a general answer, like what we have here, and if we had had that before us we might have been able to get materials for arriving at a proper knowledge of the true state of the facts and thus enabled us satisfactorily to dispose of the case, not upon the question of infringement only, but also on the question of publication. But the materials not being satisfactory, I think it better that our judgment should proceed upon the point of infringement alone.

The Court recalled the interlocutor of the Lord Ordinary, sustained the third plea-in-law for the respondents, repelled the reasons of suspension, and refused the interdict.

Counsel for Reclaimers (Complainers)—Guthrie Smith—Alison. Agent—John Gill, S.S.C.

Counsel for Respondents — Pearson — Thorburn. Agent—A. Wallace, Solicitor.

Friday, January 20.

FIRST DIVISION.

CRAIG AND OTHERS, PETITIONERS.

Succession—Vesting — The Presumption of Life Limitation (Scotland) Act 1881 (44 *and* 45 *Vict. c.* 47), *sec.* 4 *and sec.* 8.

A man left this country for America, and was last heard of "upwards of thirty years ago." A petition, under section 4 of the above-cited Act, by his next-of-kin for authority to make up title to and divide his share of a succession, which opened twenty-three years after his disappearance, was *refused*, in respect that in terms of section 8, there being no presumption arising from the facts of his having died at any definite date, he must be held to have died seven years after he was last heard of, and so to have predeceased the opening of the said succession.

By the Presumption of Life Limitation (Scotland) Act 1881 (44 and 45 Vict. c. 47) it is provided, section 4, that—"In the case of any person who has been absent from Scotland, or who has disappeared for a period of fourteen years or upwards, or who has not been heard of for fourteen years, and who at the time of his leaving or disappearance was possessed of or entitled to moveable estate in Scotland, or who has since become entitled to moveable estate there, it shall be competent to any person entitled to succeed to the said absent person in such moveables to present a petition to the Court setting forth the said facts; and after proof of the said facts, and of the petitioner's being entitled as aforesaid, and after such procedure and inquiry by advertisement or otherwise as the Court may direct, the Court may grant authority to the petitioner to make up and to receive and discharge, possess and enjoy, sell or dispose of, the said moveable estate in the same manner as if the said absent person were dead." Section 8 provides—"For the purposes of this Act, in all cases where a person has left Scotland, or has disappeared, and where no presumption arises from the facts that he died at any definite date, he shall be presumed to have died on the day which will complete a period of seven years from the time of his last being heard of, at or after such leaving or disappearance."

William Craig, residing in Glasgow, died childless and intestate on 27th September 1874. His widow and one of his sisters were confirmed executrices-dative on his moveable estate, which amounted to £8039, 14s. 6d. The present application was made by them and by two other sisters and a brother of the said William Craig, and also by the children of a deceased brother, the petitioners alleging themselves to be the sole next-of-kin of the deceased, for authority to make up title to, receive, and divide, in terms of section 4 of the above-cited Act, the share of the said William Craig's moveable estate (amounting to £786, 15s. 9d.), which fell on his death, as they averred, to Robert Craig, another brother of the said William Craig.

The petitioners averred that Robert Craig "left this country for New York in the end of the year 1844 or beginning of the year 1845. Shortly after his arrival there he wrote a letter to his brother the said William Craig, or to his father (now deceased). That letter long ago went amissing, and cannot now be found, and since its receipt nothing further has been heard from the said Robert Craig. Upwards of thirty years ago he was seen in St Louis; but since then he has not been heard of. At the time he sailed for America he would be about thirty-seven years of age." They further averred—"In order if possible to trace the said Robert Craig, the executrices of the said William Craig caused advertisements to be inserted in the various newspapers enumerated in a statement herewith produced, of the dates, and in the terms therein set forth. But no authentic information has down to the present date been obtained regarding the missing man. That the petitioners are the sole next-of-kin of, and the only persons entitled to succeed to, the said Robert Craig in said moveable estate."

The Court ordered the petition to be intimated on the walls and in the minute-book, and to be advertised once in the newspapers in which advertisement had formerly been made as above stated, and they allowed the petitioners a proof on commission. The result of that proof was substantially to establish the petitioners' averments as above.

Counsel for the petitioners was thereafter heard on the petition and proof. He argued—The

fourth section of the Act is unqualified in its terms; to entitle the petitioners to decree it is only necessary to show that the absentee has since the date of his disappearance become entitled to moveable estate in Scotland. The presumption of death at the expiry of seven years from disappearance created by the 8th section is only to be applied where under a petition it becomes necessary to determine the rights of competing claimants to a fund. In the present case the same persons would take whether the absentee were held to have died seven years after disappearance or at any subsequent time. It is therefore unnecessary in this case to apply the 8th section at all. Its application in every case would produce a result inconsistent with the provisions of the first five sections of the Act. There is no reason why the representatives of an absentee should be called upon to wait (under the 4th section) fourteen years and (under the 5th section) twenty years before being entitled to ask the authority of the Court to make up title to moveable and heritable property respectively if the absentee is in every case presumed to be dead within seven years after his disappearance. To apply the presumption in question in every case would be to limit the operation of the Act to the very narrow class of cases where the absentee either was possessed of property at the date of his disappearance or succeeded to it within seven years thereafter.

At advising—

Lord President—This petition is presented under the authority of the Presumption of Life Limitation (Scotland) Act 1881, section 4, which provides that—"In the case of any person who has been absent from Scotland, or who has disappeared for a period of fourteen years or upwards, or who has not been heard of for fourteen years, and who at the time of his leaving or disappearance was possessed of or entitled to moveable estate in Scotland, or who has since become entitled to moveable estate there, it shall be competent to any person entitled to succeed to the said absent person in such moveable estate to present a petition to the Court setting forth the said facts; and after proof of the said facts, and of the petitioner's being entitled as aforesaid, and after such procedure and inquiry by advertisement or otherwise as the Court may direct, the Court may grant authority to the petitioner to make up a title to, receive and discharge, possess and enjoy, sell or dispose of the said moveable estate in the same manner as if the said absent person were dead."

The person who disappeared in this case was Mr Robert Craig, brother of a Mr William Craig, who died in Glasgow on 27th September 1874, and the petitioners are brothers and sisters, and the children of a deceased brother of the said William Craig. Robert Craig left this country for New York at the end of the year 1844 or the beginning of 1845, as the petition states, and it is also stated that shortly after his arrival there he wrote a letter, which however has disappeared and cannot now be recovered. The only other statement in the petition on this matter is that "upwards of thirty years ago he was seen in St Louis, but since then he has not been heard of. At the time he sailed for America he would be about thirty-seven years of age." A proof was allowed, and these statements have been confirmed on oath by the petitioners and their agents, and there is no reasonable doubt that they are perfectly well founded. The state of the facts therefore is, that Robert Craig was last heard of thirty years ago in America. Now, if he had been possessed of moveable estate when he left this country there is no doubt the petitioners would have been entitled on these averments to succeed to it. That, however, was not the case. What is alleged is that he has since become entitled to moveable estate on the death of William Craig on 27th September 1874. It might be a difficult and doubtful question whether, if there were no direct light to guide us through this statute, we could fairly assume that Robert Craig having been last heard of thirty years ago was still alive in 1874, and so in a condition to succeed to William Craig as one of his next-of-kin. But fortunately that matter has not been left in doubt, for by section 8 of the statute it is enacted that—"For the purposes of this Act, in all cases where a person has left Scotland, or has disappeared, and where no presumption arises from the facts that he died at any definite date, he shall be presumed to have died on the day which will complete a period of seven years from the time of his last being heard of, at or after such leaving or disappearance." Now, applying that section to the present case, we are bound to presume, in the absence of any other "presumption arising from the facts," that Robert Craig died seven years after what is called "thirty years ago"—that is to say, twenty-three years ago; and if that is so, it is plain that he did not succeed, and could not have succeeded, as one of the next-of-kin of William Craig in 1874. If, indeed, there had been any special facts in the case to raise a presumption that he died at any definite date subsequent to 1874, we should be bound by the 8th section of the statute to give effect to such presumption. But there are no other facts stated other than those which I have mentioned. I am therefore of opinion that the petitioners have not made out their case. They have not, and cannot, in the face of the 8th section, establish that Robert Craig has become possessed of moveable estate in Scotland since his disappearance.

Lord Mure concurred.

Lord Shand—I am clearly of the same opinion. The Court is asked, for the purpose of finding that a succession vested in Robert Craig, to hold that he was alive in 1874, for 1874 is the date at which the succession opened. But at the same time we are asked, in order to let in the petitioner's right of succession, to hold, under the terms of the statute, that Craig died so long ago as 1858. The obvious inconsistency of holding by the same judgment that a man died in 1858 and yet succeeded to moveable estate in 1874 is very startling; and it would be most unfortunate should it become necessary for the Court in effect to affirm in the same judgment facts so obviously contradictory of each other. But it appears to me that we are not shut up to that result. The key to the whole provisions of this statute must, I think, be found in section 8, which enacts—[*His Lordship read the section as above*]. Proceeding on that section as the leading provision of the Act, and indeed as containing the

reason or ground in respect of which the property of persons whose death must be presumed to have occurred is disposed of, the statute in its other clauses gives rights of liferent and fee respectively to the successors of the absent party after the lapse of certain specified times. Accordingly, if a petitioner finds it necessary to appeal to the provisions of the statute to make out his right of succession, he cannot, I think, ignore the enactment of section 8, or ask the Court to ignore that section. The provision of section 8 must apply not only to the succession which has opened to the petitioner, but also to that which is said to have opened to the absent person himself through the death of another. In other words, I think a petitioner cannot at one and the same time maintain that the absent person must be held to have died many years ago so as to let in the right of his successors to his property, and yet that he was also for many years after to acquire property by succession which had been transmitted through him.

It may be that the petitioner here may make out at common law a right to this property, but it must be on the assumption that the absent person has survived the period of vesting.

Lord Deas was absent at the hearing of the case.

The Lords refused the prayer of the petition.

Counsel for Petitioners—Ure. Agents—Smith & Mason, S.S.C.

Saturday, January 21.

SECOND DIVISION.

GRIERSON *v.* SCHOOL BOARD OF SANDSTING AND AITHSTING, AND WILLIAMSON.

Property—Servitude—Cutting Peat—Prescription—Interdict.

For the prescriptive period a schoolmaster and his successors in office had cut peat on a portion of a commonty. The commonty having been divided, the heritor to whom that part of the commonty had been allocated on which the schoolmaster had been in use to cut peat, raised a process of interdict against his doing so. In respect of the long usage, interdict *refused.*

Servitude—Res sua nemini servit—*Grant of Servitude Implied from Long Exercise.*

Held (1) that though the school buildings belonged to the heritors having interest in the commonty, a servitude of cutting peat might be constituted over the commonty in favour of the schoolmaster, since the school buildings belonged to the heritors as trustees for public uses, while the commonty belonged to them for their patrimonial interest, and (2) that the inference to be derived from the usage of cutting peat for so long a period was that it was due, not to tolerance, but to right—*diss.* Lord Young, who held that the usage must be of such a character as to raise the presumption of a grant, and that from the schoolmaster's usage of cutting peat for the prescriptive period no antecedent grant of a right in favour of the schoolhouse as dominant tenement to do so could be inferred.

Andrew John Grierson, proprietor of two hundred and forty-four merks and four ures land in the scattald of Aithsting, brought this process of interdict in the Sheriff Court of Zetland at Lerwick against the School Board of Sandsting and Aithsting, and Gilbert Williamson, teacher of the school at Twatt, which had become vested in that Board under the Education Scotland Act 1872, to have the defenders interdicted "from entering upon and cutting and curing any peats in or upon the mosses on that part of the scattald of Aithsting belonging to the pursuer, and removing them therefrom, or in any way interfering with said mosses."

Aithsting was originally a commonty, but had been divided in a process of division in the Court of Session, by decree pronounced on 5th June 1878, and the above-mentioned portion had by that decree been allocated to the pursuer. Neither the School Board nor the teacher were parties to the action of division of commonty. It was admitted that since that decree Williamson had cut peats for the use of the schoolhouse on the allotment of scattald set apart for the pursuer, and that the School Board claimed a right for their teacher to cut peats there. The schoolhouse was not one which had ever formally been designed and set apart for the teacher by the heritors of the parish under the Act of 1803 (43 Geo. III. c. 54) or otherwise. It stood on land belonging to the pursuer, of which he had in 1876 granted a disposition to the School Board, he being the principal heritor in the parish.

No proof was led, but the parties by joint-minute agreed "that for the prescriptive period prior to the division of the scattald of Aithsting, which then belonged to the whole heritors of that parish, the schoolmaster of that parish cut peats on said commonty."

The Sheriff-Substitute (Rampini) being of opinion that the defenders and their predecessors had a right of servitude of peat-cutting, refused the prayer of the petition.

He added this note:—"The pecuniary interest at stake is small, but the principle involved is of some importance. The pursuer is heritable proprietor in virtue of decree of division of the Court of Session of the commonty of Aithsting dated 5th June 1878, of the subjects over which the defenders, through their teacher, claim a servitude of peat-cutting. It is admitted that for the prescriptive period prior to the decree of division the schoolmaster of the parish of Aithsting cut peats on that commonty. But it is alleged by the pursuer that the right so exercised was not a servitude. The heritors being bound, under 43 Geo. III. c. 54, to settle a school, the parish schoolmaster cut peats in virtue of the heritors' rights. He was *eadem persona* with the heritors, and could not acquire a right antagonistic to their own. The Sheriff-Substitute cannot accept this reasoning. The choice of the old parochial schoolmaster no doubt lay with the heritors and minister, but once elected he was so far independent that he held his office *ad vitam aut culpam.* Contracts have been set aside where the parochial schoolmaster agreed to hold his office at pleasure, and he exercised his office not under the superintendence of the heritors but of the presbytery. By the Act