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RICHAN v. TRAILL, &c.

WM. RICHAN, Esq. of Rapness, . . *Appellant;*
THOMAS TRAILL, Esq., and Others, Trustees of the deceased JAMES STEWART, *Respondents.*

House of Lords, 1st July 1808.

SUCCESSION—PROPINQUITY—SERVICE—PAROLE—HABIT AND REPUTE.—Circumstances in which it was held that the appellant had failed to establish his claim to succeed as heir of his deceased cousin, his propinquity appearing to be through his mother, though he alleged, but failed to prove, that it was traced up through her, until it met in descent from one common ancestor in the male line. In the House of Lords, remitted for consideration, with special directions.

The following case arises out of the appellant claiming an estate, as heir of the deceased James Stewart, in the following circumstances:—The deceased James Stewart, having left no issue, William Richan was habit and repute his heir. The deceased had himself acknowledged this to all and sundry. And although this connection was through the appellant's mother, Mrs. Jean Stewart, yet it was traced up until the deceased and he met in descent from one common ancestor. His mother was daughter of Robert Stewart of Eday, son of Captain Stewart of Eday, who was the son of Sir James Stewart of Tullos, third son of Robert Stewart, first Earl of Orkney, the common ancestor of both. In consequence of the deceased's blindness, and when his sister died, the appellant had been sent for to carry her head to the grave; and, by the respondents, he was appointed to do this last office to the deceased himself.

In these circumstances, he, immediately after the death, procured himself served heir to the deceased—his claim setting forth, "that I am nearest and lawful heir in general to "the said James Stewart, my cousin." He was served heir accordingly by the verdict of a jury.

But it then appeared that the respondents had obtained from the deceased, a short time before his death, a trust-deed, conveying his whole property, amounting to £6000, for pious uses, and were actually in possession. This trust-deed having been hurriedly executed, wanted the necessary clauses for vesting the property, and they were in the course of applying to the Barons of Exchequer for a gift of *ultimus hæres*, when the appellant brought the present action of reduction to set aside the trust-deed; which was met on the respondents' part by a reduction of the appellant's service, which being remitted *ob*

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contingentiam of the other, Lord Meadowbank then ordered the defender (appellant), in the reduction at the instance of the trustees, "to give in a condescendence of the facts he "held himself in a condition to prove in support of his service."

June 15, 1797.

Regularly vested with the character and *status* of heir, by the verdict of a jury, in his service, he at first thought it unnecessary to adduce any further evidence, the legal presumption being (as he maintained) in his favour, until the contrary was proved by some party having a better title. But afterwards a condescendence was given in.

Mar. 10, 1798.

Lord Meadowbank pronounced this interlocutor: "Finds "that the two separate claims of propinquity condescended "on by William Richan, in support of his service challenged, "infer, though proved, only relationship to the defunct, "which in that by Jean Richan, the grandmother of the de- "fender, never affords by the law of Scotland any right of suc- "cession whatever, and in that by Margaret Richan (by mis- "take for Stewart), only affords it when a service to her des- "cendants would carry the succession, which, in the present "case, would be totally nugatory: Finds, That in order to sup- "port the service, it was necessary to condescend on and prove "a precise line of propinquity, instructing an heritable *jus* "*sanguinis* in the person of the defender; and as his attempt "so to do appears to have failed, therefore reduces the "said service, without prejudice to the defender's taking the "depositions to lie *in retentis*."

A mistake appearing in this interlocutor, he petitioned, stating that it was not through his grandmother, nor through Jean Richan that he claimed relationship, but through his mother, Mrs. Jean Stewart, descended from the same family of Stewarts with the deceased himself; and craved to be allowed a proof accordingly. A proof was allowed. Upon

Nov. 12, 1801.

which the Lord Ordinary pronounced this interlocutor:— "Being of opinion, according to the finding of the inter- "locutor of 10th March 1798, that a particular degree of "propinquity must be made out to entitle a claimant to be "served heir to a defunct; and being also of opinion, that "if the defendant (appellant) had any expectations of "further proof by writing, or any ground of complaint against "witnesses not answering properly questions put to them "as havers, application for remedy should have been made "to the Lord Ordinary or the Court during the long and "repeated indulgence he has enjoyed; and, at any rate, be- "fore the circumduction of the 16th January last was ac-

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" quiesced in and allowed to become final; and that, in like " manner, he should have applied for authority to open the " depositions *in retentis* before quoting or founding on " them. Finds, That the defendant has still failed to make " out any precise degree of propinquity betwixt him and " the deceased, to entitle him to be served heir to the de- " funct by the law of Scotland; and that, therefore, his ser- " vice was originally irregular and void, and adheres to the " said interlocutor. Repels the objections to the pursuers' " (respondents') title to pursue the reduction, in respect " their title is *sua natura*, probative and prior to the ser- " vice." *

On reclaiming petition, the Court at first altered this interlocutor; but afterwards sustained the reasons of reduction of the service, in respect the proof did not support the condescendence of his pedigree. On further petition, the Court adhered.

Jan. 28, 1803.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—This is *not* a competition of brieves, the appellant being regularly possessed of the character and status of heir by his service, the question is not, Whether he shall be vested with, but whether he shall be *divested* of that legal character by the respondents, who cannot show that they have a better title as heirs, who do not prove that the defender is not the heir, and do not say that any other is a nearer heir, and therefore have no title to challenge that vested right. A service affords evidence that there was consanguinity, or inheritable relationship between the appellant and the deceased; and the retour bears the appellant to be *legitimus propinquior hæres Jacobi Stewart*

* Note by Lord Ordinary.—" The Ordinary cannot find evidence that the Stewarts in How were the Stewarts of How, and descended either of Colonel John Stewart, or his brother Captain Robert of Eday. He would have held repute sufficient evidence, had it been precise and decided; but it does not appear to be either the one or the other, so as to entitle a juryman to serve the defender as any particular relation to the deceased, or as either one particular relation or another particular relation. However probable, therefore, it may be that the defender stands in one inheritable degree of propinquity or another, the Ordinary cannot find such a probability that the law would recognize as proof from habit and repute, nor does he think that habit and repute would be sufficient to serve, unless applicable to a precise degree of relationship."

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consanguinei sui. The word consanguineus properly signifies a relation on the father's side; but even were it susceptible of both significations, it would not affect the present question; for here the context fixes the sense,—when the jury *retoured* the appellant nearest and lawful heir to his cousin, they must be understood to express the *inheritable line.* And, therefore, before the appellant is bound to enter into a defence of his service, the trustees are bound to produce a valid title to pursue a reduction of that service. It is only a party showing a better title as heir who can do so. The trust-deed does not confer that title, because, in truth, it was not the will of the deceased, and is, besides, devoid of the usual formalities to convey heritage. It was executed by the aid of notaries. One of the witnesses was under fourteen. All the witnesses did not see the deceased touch the pen, nor hear him desire the notaries to subscribe for him. Nor was it read over to him in presence of the notaries and witnesses. Independently of this, the proof adduced establishes and supports the service, that the appellant is the nearest lawful heir to the deceased.

Ross *v.* Aglianby, F. C. July 3, 1792. vol. x. p. 459. Affirmed on Appeal, July 11, 1794. Vide ante, vol. iii. p. 365.

Pleaded for the Respondents.—The respondents having been for several years in quiet possession of the deceased's estates, under the will or settlement, cannot be dispossessed, or their title quarrelled, by one who does not show a better title. The validity of the appellant's service, or his propinquity or title to sue, must be first discussed before the trust-deed of the respondents can be assailed or questioned by him. In his efforts to prove a particular degree of relationship to the deceased he has failed. He contends, that it is sufficient if the proof shows that he is, or that there is reason to suppose that he is, connected in blood with the deceased, though he is not able to show the precise relation, or that he is heir at law, a doctrine that is quite unsanctioned and untenable in law. The service, therefore, can be of no use to him. It cannot foreclose inquiry, because neither in the brieve, nor the verdict of the retour, nor in the proof laid before the jury, was there any course of descent or line of propinquity pointed out. The jury had nothing before them but parole testimony of vague report, without any attempt to show how.

Earl of Cassillis *v.* Earl of Winton, July 26, 1629. M. 1442.

After hearing counsel, it was

Ordered and adjudged, that the cause be remitted back to the Court of Session to consider the several interlocutors appealed from, and the interlocutor of

22d June 1802; and more especially to review all parts of the said respective interlocutors which find, or purport to find, that, in order to support the service, (in such a case as the present), it was necessary to condescend and prove a precise line of propinquity, instructing an heritable *jus sanguinis;* and that a particular degree of propinquity must be made out (in such a case) to entitle a claimant to be served heir to a defunct; and that the defender having failed to make out a precise degree of propinquity between him and the deceased, his service was (in such a case as this) originally irregular and void; and more especially, also, to review so much of the said several interlocutors as repel, or purport to repel, the objections to the respondents' title, in their action of reduction of the service, to pursue that reduction upon the ground that their title is found to be *sua natura* probative; the Court having regard, in such review, to the nature of the objection to the said title as alleged against the validity of the trust-deed in the process of reduction of that deed. And further, to consider how far the reduction of the service, in the circumstances of the case, (the finding in the interlocutor making no mention of possession, or of the effect thereof), *was a due proceeding before the objections to the validity of the said deed alleged in the process of reduction thereof,* which was commenced before the reduction of the service were discussed and decided upon; and, generally, to review the several interlocutors complained of, and proceed thereafter as to them shall seem just.

For Appellant, *Sir Sam. Romilly, J. P. Grant.*
For Respondents, *Wm. Adam, F. Horner.*

Note.—It is stated, in a note to the report of another case in the Faculty Collection, vol. xvi. p. 731, that, "By the Court of Session the trustees were understood to be in possession of the heritable as well as the moveable property; but the fact of this possession seems to have been disputed in the House of Peers." It is also stated that, under this remit, the judgment was applied by the Court of Session, and informations ordered on the points remitted (27th May 1810); but the cause was not further proceeded with, and no judgment was therefore pronounced under the remit.