'disclamation; and to the respondent, his answer thereto. And 'it is ordered and adjudged, that the several interlocutors com- 'plained of, so far as they are inconsistent with this finding, be 'reversed: And it is further ordered, that the cause be remitted 'back to the Court of Session, to proceed further according to 'this judgment, and as shall be just.' May 31. 1825.

*Respondents' Authority.*—2. Hume on Crimes, 132.

J. Butt—J. Campbell,—Solicitors.

---

Sir Andrew Cathcart, Appellant.

Earl of Cassillis, and Others, Respondents.

No. 30.

*Service—Consolidation—Exhibition—Re-hearing.*—Thomas having in 1748 executed a deed of settlement of his estates, and of those to be acquired by him, containing a simple destination, and procuratory of resignation in favour of his brother David, and the heirs of his body; whom failing, certain other substitutes; whom failing, his own nearest heirs whatsoever; and the superiority of part of the lands being separated from the property, and having, after making up titles to the superiority, and, in order to consolidate it with the property, given a commission to a third party, who granted to him a charter of confirmation of the base right, and a precept of clare constat for the specific purpose of consolidation, on which he was infeft; and having thereafter purchased certain parcels of lands, on which he was infeft; and for political purposes granted a procuratory of resignation for new infeftment of the greater part of the lands included in the deed 1748, to himself, his heirs and assignees, in fee, on which he expede a charter in 1774, but did not take infeftment; and having died without issue, and been succeeded by David, who obtained a general service to him 'tanquam legitimus et propinquior hæres masculus et 'lineæ,' and been infeft on the precept in the charter of 1774; and David having thereafter executed an entail in favour of a series of heirs, exclusive of the heirs whatsoever of Thomas, and died without issue; and the intermediate substitutes under the deed 1748 having failed, and the heir whatsoever of Thomas having brought an action of exhibition against the heir succeeding in virtue of the entail, and a reduction of the titles made up by David, and of the entail;—Held, (affirming the judgment of the Court of Session), 1. That the service of David to Thomas was effectual to convey to David the personal right of all the subjects specified in the settlement 1748, and contained in the charter of 1774, and entitled him to execute the entail, but not as to lands not included in the charter of 1774: 2. That the terms 'heirs and assignees' under the charter of 1774 did not necessarily imply the same heirs as those called by the deed of 1748: 3. That (without deciding the point of consolidation) as Thomas was vested in the personal right both of the superiority and property, that right was transmitted to David by his service: But, 4. A remit made to consider, whether the right to the lands which had been acquired by Thomas subsequent to the deed 1748, and not contained in the charter 1774, could be transmitted to David by the above service: 5. That the entail was sufficient to exclude the heir of Thomas from insisting in an exhibition of the previous titles: And, 6. That a party who had an opportunity of being heard at the Bar of the House

of Lords on points incidentally noticed in his printed case, and on which judgment was given, although he alleged he was not heard, was not entitled to a re-hearing.

May 31. 1825.

Lords Justice-Clerk MacQueen, Armadale, and Craig.

GILBERT, Earl of Cassillis, was proprietor of the estates of Cassillis and Culzean, the former of which was entailed on the same heirs as the peerage, but the latter was held by him in fee-simple. In 1569 he conveyed Culzean to Sir Thomas Kennedy, who, after some intermediate generations, was succeeded by his descendant, Sir John Kennedy. Sir John had three sons—John, Thomas, David; and three daughters—Elizabeth, Anne, and Clementina. John, the eldest son, succeeded his father in Culzean. His sister Elizabeth married Sir John Cathcart of Carleton, Baronet, and was the mother of the appellant, Sir Andrew Cathcart. After making up titles to Culzean, John, in January 1743, executed a disposition and deed of settlement, containing a procuratory of resignation which he executed in April thereafter, 'in favour of myself and the 'heirs-male of my body in fee; whom failing, the heirs-female 'of my body, the eldest succeeding without division; whom 'failing, Mr Thomas Kennedy, my immediate younger brother-'german, and the heirs-male of his body; whom failing, Mr 'David Kennedy, my youngest brother-german, and the heirs-'male of his body; whom failing, the heirs-male procreated 'of the marriage between Sir John Cathcart of Carleton, Ba-'ronet, and the deceased Dame Elizabeth Kennedy, his spouse, 'my eldest sister-german; whom failing, Mrs Anne Kennedy, 'spouse to John Blair of Dunskey, my second sister-german, and 'the heirs-male of her body; whom failing, Mrs Clementina 'Kennedy, my youngest sister-german, and the heirs-male of 'her body; whom all failing, my nearest lawful heirs and assig-'nees whatsomever.' This deed was registered in the books of Council and Session July 31. 1747; but the destination was not fortified by any prohibitory clause. On the death of his brother, Thomas (afterwards called Sir Thomas, and thereafter Earl Thomas) obtained a general service as heir of line and provision to him. In January 1748, and before Thomas had vested in himself any feudal title, he executed a disposition and deed of settlement, containing a procuratory for resigning the lands and all others which he should acquire, 'to and in favour 'of myself, and the heirs-male of my body; whom failing, to 'David Kennedy, my only brother-german, and the heirs-male 'of his body; whom failing, to Mr David Kennedy, advocate, my 'uncle, and the heirs-male of his body; whom failing, to Mr

May 31. 1825.

'John Kennedy of Kilhenzie, advocate, and the heirs-male of 'his body; whom all failing, to my own nearest heirs whomso-'ever; the eldest heir-female and her descendants, so oft as the 'succession devolves upon females or their descendants, exclud-'ing still all others from being heirs-portioners, and succeeding 'always without division throughout the whole course of suc-'cession, so as that the right of primogeniture shall take place 'among the female heirs in like manner as the same does 'among male heirs.' The property of part of the estate, viz. the lands of M'Gowanston, Mill of Drumgirloch, Dunnymuck, and Whitestone, being separated from the superiority, Thomas made up titles to them in this way:—He got himself vested in the superiority by a charter and infeftment, proceeding on his own and his brother's procuratory of resignation, and having then granted a commission to Hugh Crawford, writer to the signet, for establishing in him proper titles, Mr Crawford granted to Thomas a charter of confirmation and precept of clare constat, as nearest and lawful heir of Sir John Kennedy, who was last infeft in the base fee, to the 'effect that the right 'of property of the same, which stood in the person of the 'said John Kennedy, may be consolidated with the right of 'superiority of the said lands, mill, and others, standing in the 'person of the said Sir Thomas Kennedy, and the rights of pro-'perty aud superiority remain inseparable for ever hereafter in 'the person of him and his heirs-male and of provision, to whom 'the same are or shall be limited by any disposition thereof, grant-'ed or to be granted by him.' Thomas was accordingly infeft in terms of this precept; the instrument of sasine bearing, that this was done for the purpose of consolidating the property with the superiority, so that the same might remain inseparable in all time coming. In February 1757 he also expede a crown-charter to those parts of Culzean held of the Crown, in virtue of his brother John's procuratory of resignation, and that in his own disposition, on which he was infeft. Under this infeftment were included the barony of Greenan, forming part of the estate of Culzean, and the lands of Balvaird, which he had purchased. He was also infeft in the lands, holding of the Earl of Cassillis, under a precept of clare constat from the then Earl, as heir of the person who had been last infeft in them. In 1759 he succeeded to the estates and honours of Cassillis. Between 1764 and 1771, he purchased the lands of Enoch, Daljarbrie, Portmark, Polmeadow, certain tenements in Maybole, and teinds, from Crawford of Ardmillan, and was infeft on the

May 31. 1825.

dispositions by the purchasers, to him, his heirs and assignees. In 1764 he granted for political purposes five feu-rights of five separate parcels of the barony of Greenan to his brother David, who was infeft; and at the same time he gave five wadsets of the corresponding superiorities to his law agent, redeemable by him, his heirs and assignees. On the procuratories contained in these wadsets, crown-charters were expede, and assigned to five political friends, who were infeft; and then his brother David reconveyed to him the feus, on whose precept Thomas (now Earl Thomas) was infeft. In 1774 the Earl granted a procuratory of resignation for new infeftment in the estate of Culzean, (but which did not include Greenan, or Enoch, and the other lands which he had purchased), to himself, 'his heirs and assignees whatsoever.' On this he expede a crown-charter to himself, 'et heredibus suis et assignatis 'quibuscunque;' and about the same time, with the view of creating additional votes, he executed a feu-right in favour of his brother David, who was infeft in June of that year. Earl Thomas then assigned the crown-charter to his political friends in liferent, who were infeft; but quoad the fee no infeftment was then taken, the precept remaining unexecuted. His brother David then reconveyed the dominium utile to him, his heirs and assignees whatsoever; and Earl Thomas, in virtue of his disposition, was infeft. He died in 1775 without issue, and was succeeded by his brother David both in the honours and estates of Cassillis and Culzean. Earl David then made up titles to Culzean by a general service as 'legitimus et propinquior heres masculus et 'lineæ dicti quondam Thomæ, Comitis de Cassillis, sui fratris ger-'mani;' took infeftment on the unexecuted precept contained in the crown-charter of 1774; and considering himself to be thus vested in the superiority, granted in his own favour a charter of confirmation of the base right which Earl Thomas had executed in his favour, and of the reconveyance to the Earl, and a precept of clare constat for infefting himself in the lands, on which he was infeft. After this, and with the view of consolidating the property with the superiority, he granted a procuratory of resignation ad remanentiam of the lands holding of the Crown, except Greenan, on which resignation followed. With regard to Greenan, he, as immediate superior, granted a precept of clare in his own favour, as heir of his brother, and was infeft. In 1783 he executed an entail of Culzean, similar to that of Cassillis; and in 1790 made another, by which he disponed the estate to himself; whom failing, to Captain Archibald Kennedy, (who was, under the entail of Cassillis, entitled to succeed to the honours

and estates of Cassillis), and to his heirs-male; whom failing, a series of other substitutes. Earl David died on the 18th December 1792, at which time the entail had not been published. On the supposition that no such deed had been executed, the appellant, Sir Andrew Cathcart, (the son of Elizabeth, sister of Earl David), by the failure of the other substitutes, was entitled to succeed to Culzean, as one of the heirs-portioners and of provision under the procuratories of resignation by John in 1743, and by Earl Thomas in 1748. When, therefore, the repositories were about to be opened, he claimed right to the possession both of the house and title-deeds of Culzean. This was resisted on the part of Archibald, now Earl of Cassillis, whose agent stated, that for security he had deposited the entail in the hands of the Keeper of the Records in the General Register House, and he produced the scroll of the deed. The appellant's agent not being satisfied, an arrangement was made, by which the repositories were opened, the deeds cursorily examined, and again shut up, and the keys placed in the hands of Thomas Kennedy, Esq. of Dunure, to be kept by him 'until the said Lord Cassillis's settlements are examined, and it 'is thereby ascertained who is to have the custody of the title-'deeds.' This was accordingly done; and the entail, together with an opinion of Counsel that Earl Archibald was entitled to the deeds, having been exhibited to Mr Kennedy, he delivered the keys to his Lordship, who thereupon took possession of the title-deeds.

Sir Andrew then brought an action of exhibition ad deliberandum against Earl Archibald, and certain trustees named by Earl David, and of damages against them and Mr Kennedy of Dunure, in which, after founding on his right as heir-portioner, of line, and of provision, to John, Thomas, and David, he set forth, 'that the pursuer, in consequence of the 'right which he unquestionably had, by virtue of his apparency, 'to a full and unlimited inspection of the repositories of his an-'cestors, and especially in respect of the facts and circumstances 'before specified, which took place on opening the repositories 'at Culzean, and of the letters and proposals which afterwards 'passed at Edinburgh relative to that business, did repeatedly 'desire and require the several defenders before-named, to ex-'hibit to him the whole writs, title-deeds, and securities made, 'granted, or conceived, to or by his said predecessors, with all 'other writs and documents regarding the estates, heritable and

May 31. 1825.

'moveable, of his said predecessors, in order that he might have 'an opportunity of deliberating upon the nature and extent of 'their succession, and the propriety of his entering thereto in 'the respective characters aforesaid; yet the said defenders not 'only refused so to do, but the said Thomas Kennedy of Dunure 'took upon himself to deliver up to the said Lord Kennedy, or 'others acting in his name, the whole keys of the said reposi-'tories, which had been deposited in his hands for the behoof of 'those having a right and interest therein, and that without giving 'the pursuer an opportunity of being heard for his interest; 'and the said whole title-deeds, and other writs and documents, 'are now in the possession of the said several defenders before-'named, or one or other of them.'

The summons therefore concluded, that the defenders should be ordained to produce 'the whole title-deeds, &c., and all other 'writs and obligations, of whatever kind or denomination, which 'they, or any of them, have in their possession and custody, 'made, granted, and conceived by or in favour of the pursuer's 'predecessors above-named, or any of them, or their predeces-'sors, with all inventories of the title-deeds of their lands and 'other writings, and all adjudications or other legal diligence 'deduced against their estates, and all other writings relative to 'the estates, heritable and moveable, which pertained to them 'respectively;'—'to the effect that the pursuer may have access 'thereto, and full inspection thereof, in order to his deliberating 'upon the nature and extent of the succession which has now 'opened to him in consequence of the death of his ancestors 'before-named; and may be enabled to judge, whether it is 'proper and expedient for him to enter and represent his said 'predecessors as heir of line or of provision to them respectively 'before-mentioned.'

There was also an alternative conclusion, failing such exhibition, that the defenders should be found liable in the 'damages 'sustained by him through the improper and unwarrantable 'conduct of the defenders, or any of them, in withholding or 'putting out of the way writings in which the pursuer has so 'deep an interest.' In defence it was pleaded, that as Sir Andrew's right was completely excluded by the entail made by Earl David, the action was incompetent; and in regard to the claim of damages, that Mr Kennedy had correctly performed the trust committed to him, which was only to endure till the nature of Earl David's settlements should be ascertained.

Lord Craig, on the 14th December 1793, assoilzied the respondents, and to that judgment the Court adhered on the 4th of February 1795.* May 31. 1825.

Thereafter, Sir Andrew granted a trust-bond to his agent, Mr Blane, writer to the signet, who, with the view of adjudging the estate of Culzean, and in order to try the question of right, brought a reduction of the titles made up by Earl David, and the entails executed by him, as inept.†

In support of the action, Sir Andrew, by his trustee, contended,—

1. That as Earl David never made up a title as heir of provision, in terms of the disposition by Thomas in January 1748, he remained a mere apparent heir of the lands in question; and by a well-known rule of law, had no power gratuitously to alter the destination, to the prejudice of the heirs thereof: That this objection applied to all the lands in dispute, but particularly to certain parcels, (which, in the course of the discussion, were styled the 'pendicles,') viz. the lands of Enoch and Little Enoch, the lands of Portmark and Polmeadow, the tenements in Maybole, and teinds, conveyed by Crawford of Ardmillan, which had been acquired by Earl Thomas by purchase subsequent to the deed of 1748, and were not included in that of 1774.

2. That although Earl Thomas had, in order to extend his political influence, passed the charter of 1774, containing most of the lands in question, in favour of himself, his heirs, and assignees, that charter was not intended to alter the previous settlement of the estate, which had been made by the deed 1748, and could not have that effect; that the terms, heirs and assignees, in the charter 1774, being flexible, must be understood as of the heirs of the destination in the deed 1748; and that, at all events, the service of Earl David, as heir-male and of line to Earl Thomas, could not connect him with the charter 1774, as it was necessary to be served heir of provision under the deed which regulated the succession.

3. That even supposing Earl David had, by his service as nearest and lawful heir-male and of line, effectually vested himself in the right of the charter 1774, still that charter, with regard

---

* See Morr. 3993.

† Although this action did not form the subject of the present appeal, yet, as it gave rise to several important questions, of which there is no connected report; and as the reporters have been favoured with notes of the opinions of the Judges, they have been induced to present a full report of the case.

May 31. 1825.

to certain lands, (M'Gowanston, &c.), carried nothing but the naked superiority, which had been separated from the property, and the two estates of property and superiority never were consolidated in Earl David's person by the known legal method of resignation ad remanentiam, but remained separate estates,—the charter of confirmation and precept of clare constat being insufficient to consolidate them; that therefore the deeds under challenge could only apply to the superiority, and not to the property, which consequently was not conveyed by these deeds, but, upon the most favourable supposition for the respondent, still remained in hæreditate jacente of Earl David, and were descendible to Sir Andrew Cathcart under the destinations of 1743 and 1748.

To this it was answered,—

1. That though Earl David's general service was not per expressum a service as heir of provision under the disposition 1748, yet, as it sufficiently demonstrated Earl David to be necessarily, and to the exclusion of all others, the person called to the succession by that deed, it was sufficient by the law of Scotland, as fixed by a series rerum judicatarum, to carry the whole personal rights which stood under the disposition 1748, just as effectually as if the general service had found Earl David to be the nearest and lawful heir-male and of line, and heir of provision, under the disposition 1748. And further, that the personal right to the lands of Enoch, Portmark, Polmeadow, tenements in Maybole, and teinds, were carried by Earl David's general service, as connecting him with the deed 1748 conveying all subjects to be acquired by Earl Thomas.

2. That whatever object of conveniency, whether connected with political operations or otherwise, might have induced Earl Thomas to expede the charter 1774 in favour of himself, and his heirs and assignees, contrary to the terms of the disposition 1748, the latter charter must be held to have altered the former destination, and to have devised the estate to the heir of line; that there was no power in the Court, upon the supposed flexibility of the word 'heirs,' and upon vague imaginations as to the probable intention of Earl Thomas, to give any effect to the charter 1774, other than that which the technical terms employed legally imported: That besides, were the Court entitled to take such liberties with the deeds of individuals merely ex presumpta voluntate, there was no reason for believing that Earl Thomas, in expeding the charter 1774, meant to use the words 'heirs and assignees' in any other sense than that

of heirs whatsoever: That however this question might stand, it would have no effect to invalidate Earl David's general service, as a proper title to connect him with the charter of 1774; because, whether the words 'heirs and assignees' were to be construed according to their usual meaning, or as controlled by the terms of the disposition in 1748, it was clear that the most unexceptionable service which Earl David could expede, in order to take up the subjects contained in the charter 1774, was one in the precise character to which that charter conveyed the subjects, viz. the character of heir of line—the destination which alone a disposition to heirs and assignees imports. And, therefore, the service completely took up the subjects in the charter 1774, whatever question might arise as to whether Earl David was to hold the subjects affected by the settlement 1748,—a matter of nothing more than mere speculation, or, at least, one which could only have occurred had Earl David died intestate. For, as the settlement 1748 contained no prohibition to alter the order of succession, and Earl David having altered it by the settlements under reduction, it became no longer of any consequence whether the charter to heirs and assignees was, or was not, to be controlled by the settlement 1748.

3. That with regard to the want of consolidation, it was a matter of no consequence, since both the property and superiority being vested in Earl David, his settlements conveyed them both, and every other right that was in him, with equal effect, whether separate or consolidated; but the proper and correct mode of consolidating had been adopted.

Lord Justice-Clerk, (Braxfield), on 13th May 1797, pronounced this interlocutor:—'Finds, that Earl David's service 'as heir-male and of line to his brother Earl Thomas, neces-'sarily established him to be heir under the settlement 1748: 'but, 2do, et separatim, finds, that the settlement 1748 was 'alterable by Earl Thomas at pleasure: And in respect that, 'by the disposition 1774, executed by Earl Thomas, and charter 'following thereupon, a considerable part of the lands in dis-'pute stood devised to Earl Thomas, his heirs and assignees, 'finds, that Earl David's said service did effectually carry the 'right of superiority of these lands, as established by the foresaid 'charter, and that the precept of clare granted by Earl David 'in his own favour, with the infeftment thereupon, did effectually 'carry the property: Finds, that it is of no importance in this 'question whether the property was consolidated with the supe-'riority or not in Earl David's person; for although, in a ques-

May 31. 1825.

'tion of succession ab intestato, these lands, without consolidation, 'would be considered as two separate estates, descendible to 'different heirs if so devised, yet as both property and supe- 'riority were effectually vested in Earl David's person, so any 'deed of conveyance of these lands executed by him would 'carry every right and title he had in the lands, whether of pro- 'perty or superiority; and therefore, upon the whole, repels the 'reasons of reduction as to the whole of the lands contained in 'the disposition 1774; repels also the reasons of reduction as to 'the whole of the other lands and tenements in dispute, except 'as to the tenements of Maybole, the lands of Portmark and Pol- 'meadow, the teinds contained in the conveyance by Mr Craw- 'ford of Ardmillan, the lands of Enoch and Daljarbrie, as to 'which desires to hear parties farther; and with the foresaid 'exceptions, assoilzies the defenders, and decerns.'

Sir Andrew's trustee having lodged a representation, and the cause having been afterwards remitted to Lord Armadale, during the Lord Justice-Clerk's indisposition, his Lordship, upon advising it, with answers, pronounced this interlocutor on the 22d January 1799:—'Refuses the desire of the representation, 'and adheres to the interlocutor pronounced by the Lord Jus- 'tice-Clerk, in so far as respects the lands contained in the dispo- 'sition 1774 executed by Earl Thomas, and infeftment following 'thereon; but with respect to the lands of Portmark and Pol- 'meadow, finds, that Thomas Earl of Cassillis was infeft in these 'lands, upon the dispositions granted by the persons from whom 'he acquired right to them, and that he died infeft therein: Finds, 'that the lands of Portmark and Polmeadow were not compre- 'hended in Earl Thomas's dispositions 1774, and charter there- 'on following, nor in any personal deed or conveyance executed 'by him, either in his own favour or in favour of Earl David, 'posterior to the infeftment taken by him in these lands upon 'the original disposition thereto: Finds, that Earl David's gene- 'ral service was insufficient to vest in him any right or title to 'these lands of Portmark or Polmeadow, in which Earl Thomas 'died infeft; and that no title to these lands was made up by Earl 'David, that enabled him to carry these lands to the defender, 'and to disappoint the right of Sir Andrew Cathcart; and 'therefore, quoad these lands of Portmark and Polmeadow, 'sustains the reasons of reduction, and reduces, decerns, and 'declares accordingly.' Thereafter his Lordship, on advising mutual representations, pronounced the following interlocutor:—'Alters that part of the interlocutor, of date 22d January

May 31. 1825.

'1799, which finds that Earl David had no sufficient title in him to these lands of Portmark and Polmeadow: Finds, that Earl Thomas's disposition in 1748, in favour of his brother David, conveyed not only the lands therein specially enumerated, but also all the other lands which the said Earl Thomas should thereafter acquire; and that Earl David's general service in 1776 was sufficient to establish his right as heir under the disposition in 1748; and therefore adheres in toto to the interlocutors pronounced by the late Lord Justice-Clerk, of date 13th May and 29th June 1797; refuses the desire of the representation for the pursuer; assoilzies the defender from the whole conclusions of the libel, and decerns.'

Sir Andrew's trustee having reclaimed, the Court, on the 15th January 1800, 'found, that David Earl of Cassillis, by his general service tanquam legitimus et propinquior hæres masculus et lineæ to his brother Earl Thomas, carried right to the unexecuted precept in the charter 1774, and did thereby vest in him a sufficient personal right to the lands therein contained; that as Earl David was heir to his brother, as well by the special destination contained in the deed of settlement executed by Earl Thomas in 1748, and the charters following thereupon, as by all the other titles and investitures in the person of Earl Thomas, it is unnecessary to determine the question, whether the special destination was altered or not by the charter 1774, the general service being, in all events, sufficient in point of form to connect him with the lands contained in that charter, or in any similar titles; and so far adhere to the interlocutors reclaimed against; but ordain the parties to give in memorials upon the other points of the cause, and particularly upon the question of consolidation, respecting the lands of M'Gowanston and others, and upon the question, whether the general service was sufficient to connect Earl David, as heir of provision under the settlement 1748, with the different parcels of land which were acquired by Earl Thomas.' *

---

* Morr. 14,447. The following Notes of the opinions when the above judgment was pronounced were taken by James Ferguson, Esq. Advocate:—

*President.*—The first point is the validity and effect of Earl David's general service to his brother Earl Thomas.

*Lord Justice-Clerk* thinks the effect of the charter 1774 of Earl Thomas as importing an alteration of the destination of the investiture 1748, and therefore, as a question which may prejudicate the other, ought to be first considered.

*Lord Justice-Clerk.*—*1st Point.*—Clear, in the first place, That Earl Thomas held the whole estate in fee-simple: 2dly, That he never limited the powers of his heirs. In-

May 31. 1825.

**Sir Andrew's trustee having reclaimed, and memorials having been lodged, the Court, on the 15th January 1801, adhered; and**

---

deed, he expressly conveyed to Earl David a fee-simple of the whole estate. Will not now go into the nice distinctions as to the history and form of the titles of the different parcels. A general service will vest a right to expede titles to all personal rights which have devolved upon the person served in the character established by the service. If service does not describe exactly the character in which all the estates may be taken, but establishes these by implication, it is a question of intention how and to what extent a person served may apply his service. The jury find the facts proven to them, which may establish an additional character as heir beyond that specified in the brief or claim. The jury here have found that Earl Thomas died without issue; that Earl David was his only lawful brother living. Clear, then, that Earl David was heir-male of his brother; and this is also established by the service. Also that he was heir of line. Not in the service described as heir of provision, but called by charter 1748 in the very case of devolution found to exist by the service, viz. as heir-male of his brother Thomas on his death without issue. Can it be argued that David's right was to be set aside, because, though his service established every fact which proved every character of heir and every right of succession to unite in his person, yet it did not specify one of those characters as heir arising from the facts proven and sworn to?

*2d Point.*—Besides, charter 1774 clearly, in his Lordship's opinion, an universal settlement. Political purposes might be the reason for chusing the time to execute this settlement, but will this qualify or invalidate the settlement? A procuratory of resignation then granted by Earl Thomas of his whole estate. This the best and most usual mode of making a new settlement or entail. Charter thereon expede to 'heirs and assignees whatsoever.' Can this be carried back by implication, and restricted to the terms of a former investiture? and can these terms be limited because not the same with the terms in investiture 1748, which might be altered at pleasure, and had been partially at least altered before? Had infeftment followed on this charter 1774, could an heir have served in special as heir of the prior investiture 1748 afterwards? As no infeftment followed on the charter in 1774 before Earl Thomas's death, a general service of Earl David alone could take up the personal right of this charter. Where was the obligation on Earl David to go back from the last incomplete title of 1774, which was a catholic title, and only wanted infeftment, to the prior more limited titles? Earl David completed this catholic title habili modo by service, carrying the procuratory, &c. and then by infeftment. Nothing to bar him from doing so. No prohibitions, restrictions, irritancies or limitations in the former titles of Earl Thomas, which could found a challenge against the title completed on resignation 1774 followed by the charter. It is said, that the term 'heirs whatsoever' in charter 1774 may be interpreted or restricted to mean the heirs of the investiture 1748. Accessory rights may be carried by presumpta voluntas; but the term 'heirs whatsoever' is a technical phrase, perfectly understood, and, when the only destination used in the investiture of an estate, must bear its own meaning, and receive the weight due to that meaning.

*Lord Meadowbank.*—Of the same opinion.

*Lord Craig.*—Of the same opinion.

*Lord Hermand.*—The second point in the order of the petition is prejudicial to the first. This noticed in the answers. Thinks the order of the answers is the best. Speaks therefore first as to the second point. Charter 1774 not a total settlement. Did not include lands holden of a subject, some of the most valuable parts of the estate, Greenan barony, Maybole tenements, &c. It has been argued, that the terms heirs and assignees in a partial settlement, must be interpreted according to the destination in a

further found 'the general service of Earl David sufficient to con- 'vey the subjects not contained in the charter 1774,' and assoilzied

---

prior general settlement. Case of Rose, but for specialties, would have been so decided. For the truth of this refers to the argument in that case, and to the President's recollection. Thinks it extremely questionable whether charter 1774 can be regarded as importing an alteration of the destination in the investiture 1748. Doubts on second point also. David Earl of Cassillis's service, if it is to be regarded as equivalent to a service under charter 1748, then it refers to that investiture in toto; and suppose the competition here between a daughter of Earl Thomas, or a son of David Kennedy, the uncle of Thomas and David Earls of Cassillis, or of John of Kilhenzie, and a stranger disponee of Earl David, could they or any of them set aside such a service as Earl David's? Thinks the question might merit serious discussion. Names will not alter the principles of law or their application. Conceives it improper for him to go into argument.

*President.*—If any thing turns on alteration or non-alteration of settlement 1748, I am of opinion that it never was altered, and at Earl Thomas's death remained a standing investiture of the estate. Ready to give reasons for thinking so, but thinks it not essential to the cause at present. Will consider, 1st, The effect of general service expede by Earl David at the death of Thomas. This service comprehended every general character that Earl David could possibly have. Whether investiture 1748 altered or not altered by devisement in charter 1774, the words heirs and assignees in that devisement, technically mean the very same thing as legitimus et propinquior hæres, the words in the service. These last are strengthened by the addition of the words, masculus et lineæ. Perfectly clear, that Earl David having in him every character as heir in every sense, of provision, and heir-male, and of line; the service must be therefore good as applying to the character in the charter 1774 of the heirs called by that charter, whether it altered investiture 1748 or not. A different question, whether when so served and invested, David must give effect to the investiture 1748. He would have been obliged to do so, if that a taillie. If there had been competing heirs when he was served, or heirs having interest to require him to make up his titles under the investiture 1748. There were none. No person could shew an interest to require that he should make up his titles under investiture and destination 1748 by any action. He had in himself every title and character of heir of every kind when he was served. The precise same rule in judging of Earl David's service, applies in so far as regarded his own right and title to the parts of the estate not in the charter 1774; for example, as to the barony of Greenan; feu-rights granted of that estate before the 1774; by the feu-rights that barony devised to the heirs of the destination 1748. The reconveyances of these feu-rights expressly refer in some cases to that investiture. Some of these reconveyances also, are hæredibus et successoribus quibuscunque. A charter obtained, and continuing unaltered, may change the former settlement and destination of an estate held in fee-simple, though not followed by infeftment, but revokable till the death of the person who obtains it. Case of Rose was decided on special circumstances, which fully proved the intention. It was there laid down, that a political charter did not alter the investiture; and although against my client, I approved, as I do approve, of that doctrine. Charter 1774, according to the evidence of intention which exists, was not meant to alter the destination 1748. That, however, does not affect the consequences of the general service of Earl David, as vesting the whole estate and prior rights and titles thereto in him. Every right was thereby carried to him which existed; still, however, this does not exhaust the whole cause. Suppose that the rights in his person still remained separated and distinct. His settlement might not convey all these. As to some parcels, not clear: I would wish to hear and to read something more. Question of con-

May 31. 1825. in toto.* Sir Andrew's trustee having reclaimed, in regard to the question, whether the service carried the lands contained in the

---

solidation, respecting M'Gowanston and two other parcels. There a base infeftment of preceding owner was in the way when Earl Thomas expede his charter to the superiority. No resignation ad remanentiam was used. The consolidation was attempted by confirmation, and by declaring in the charter of confirmation his purpose of consolidating. Decision in the case of Buchanan and Bald settled the point, that there could be no consolidation without a resignation ad remanentiam. A go-by is given in the answers to this point. William Buchanan of Drummakiln did precisely in that case what has been here done, and the consolidation not being affected, his disposition was ineffectual to his daughter, and the succession lost by that mistake, by the solemn decision in that case as to a very valuable property, the dominium utile of the estate. There never was a consolidation in this case. The dominium utile, therefore, in hæreditate jacente of Earl Thomas. But this point is not yet fully explained. Should go to the Ordinary. The interlocutor shews that the point has not been argued so as to point out the application of the legal principles to the titles of this property to the Judge. At present, doubts if, in point of fact, even Earl David's service carried both property and superiority of these parcels.

*Sol.-Gen. (Blair, for Lord Cassillis).*—Both property and superiority, whether consolidated or not, of these parcels, contained in investiture 1748; and therefore carried by service of Earl David. If that service had the effect of taking all that was in investiture 1748.

*President.*—At present I am of opinion, that the service does not connect with the purchases, nor with the special destination 1748, independently of the intermediate charter and disposition. Dominium utile of M'Gowanston, if not consolidated, and the purchases, stand on the footing of charter 1748. If these were only to be taken up on the footing of the conveyances from the purchasers, then a special service was necessary. There was a general right in charter 1748, which might have been the subject of an adjudication, and therefore of a general service. But the general service expede by Earl David, in its general characters does not necessarily include a special character. A general service never found to connect with a particular investiture without reference to it; so found in the case in papers of Edgar. At present inclines to think, therefore, that the general service does not carry purchases, nor dominium utile of M'Gowanston. January 1706, Livingston; 14th December 1796, Calder against Ellison. There might have been two Davids.

*Lord Bannatyne* of opinion, that charter 1774 not an alteration of investiture 1748; and therefore that the destination of that investiture still regulates the succession.

Vote put by the President,—Does the general service of Earl David carry right to all the subjects devised to heirs and assignees?—That it does, Lords Justice-Clerk, Polkemmet, Armadale, Balmuto, Craig, Stonefield, Ankerville, and Meadowbank.—Not, Hermand and Bannatyne.

Found unnecessary to determine whether the settlement 1748 is altered by charter 1774.

N. B.—Lord Glenlee being one of Earl David's trustees, did not vote; and Lords Dunsinnan, Methven, and Cullen, were not present.

* The following notes of the opinions were taken by Lord Advocate Dundas, Counsel for the Earl of Cassillis:—

*Justice-Clerk.*—Deed 1748 gives estate nominatim to Earl David,—an unlimited settlement, and in fee-simple, both adquisita et adquirenda. Deed 1774, although

disposition of 1748, or other titles, and not in the charter of 1774, the Court, on the 26th May 1801, after a hearing in presence, and

May 31. 1825.

---

for making votes, a good investiture. Resignation the most formal and complete mode by which a man infeft in lands can reinvest them for the purpose of settling succession. Must judge only ex facie of the procuratory and subsequent charter following thereon. His service as heir-general to Thomas took up every personal right; and last substitution in deed 1748 being to heir and assignee, David, though not named nominatim before, took up the estates habili modo as heir and assignee whatever. His subsequent settlements, therefore, good. Had deed 1748 preferred different persons to Earl David, might have been some doubt as to the service. Only question is, was there a proper feudal title made up or not in the person of David? Thinks there was, and that subsequent settlements good.

*Hermand.*—Import of service the main question. If material to consider service in case admitted by Justice-Clerk of different persons being called from Earl David, cannot think it immaterial here. Charter 1774 made no alteration.

*Armadale.*—One point, not stated before him as Ordinary, implied prohibition, but nothing in that case. If Earl David's title to Earl Thomas connected him properly with his brother and the estates, then the settlements are good. Earl David thought he had done so, and meant to do so. Settlement 1748 was one of the settlements with which David was to connect as the governing settlement; and, second, the charter 1774. If at Earl Thomas's death any question could have occurred from the state of the family between heir-male and heir-line of Thomas, then agrees with us, that necessary to have attended to the distinction. Clear that no alteration intended by Earl David of the investitures; but then he was heir to his brother, and to the estates in every character, and in his power to have taken up succession either as heir of 1748 or of 1774, or of both, just as he pleased and chose. Instances daily occur of different estates belonging to a defunct, which stand to heirs-male, of entail, or line. Now, if heir is heir to all these estates in each character, he may do it in any form he chooses, most unquestionably by general service. But no doubt true that some lands contained in 1748, which not contained in deed 1774; and question as to these, if title 1776 connects with these. Understands, on force of decisions quoted in case, that if character appears from general service to be truly in the heir, although not correctly expressed, that is sufficient; and interlocutor of Braxfield, 13th May 1797, is therefore good. If it is necessarily implied from service that heir is not only of line, but also male and of entail, that is perfectly sufficient, and he will take conquest, entail, and every thing which truly belongs to him, though that not expressed. Unnecessary, too, to take notice of the particular deed under which any such heir is rendered male, of provision, conquest, entail, &c. Not sure if it would not be proper that a general invariable rule had been established to the contrary, and obliging heirs of provision to notice the deed and state the character; but finds no such rule which will entitle him to say, that if service as heir of line implies service as heir-male, that it shall not also imply heir of provision. A general service has no immediate relation to lands. It only establishes the character, through and by means of which the heir served generally may afterwards connect himself with lands. No danger of extending the doctrine of implication to heirs of provision, because he could only take up after a general service the particular lands specified in the deed by which he is constituted heir of provision, and no more.

Decisions in Menzies, Dalhousie, Haldane, support the general doctrine above laid down. The other decisions not contradictory, because in these services it did not appear ex facie of the service that the other character implied. Refers to and quotes the service of Earl David as actually expressing him to be only brother-german of

May 31. 1825.

advising memorials, found, 'that the general service of David 'Earl of Cassillis, tanquam legitimus et propinquior hæres mas-

---

Thomas, who died without issue or heir-male, and that he is of course both heir-male and of line. What more necessary? Not surely required to produce the deed by which heir is rendered either heir-male or provision, as found in case of Linplum.

*Hermand.*—Difficulty here, that if Armadale's doctrine good, then, if no title at all made up, if it truly appear that he is de facto heir, this sufficient. Denies that proposition—quod potuit non fecit. Cases of Reid and of Fairservice, Court thought, though both characters in the heir serving, yet that this held insufficient. One of these cases was a man heir both of line and of marriage, yet the service set aside. Thinks that Thomas did not mean by charter 1774 to alter investitures of estates; but clear from the circumstances under which the charter was obtained, that not Earl Thomas's intention to do as in case of Kilravock. Then if deed 1748 not altered, a very important and difficult question indeed—recommends attention to Mr Ross's Memorial, which is a lecture on law of services. Material and radical distinction between services as heirs of law, line, male, and conquest, which are definite, and which require no particular deed to be produced to instruct them, and may therefore be necessarily implied from the words insert in claim to jury and verdict, as was the case in Orr's case and in Haldane's case; but widely different where case is of service as heir of provision or entail, and impossible to imply that character, unless deed stated or produced on which that indefinite character is founded. Production of deed perhaps not necessary, as found in the case of Linplum. But there he claimed as heir of provision. Now, had deed 1748, or any other deed, been produced, making David heir of provision, would have agreed with Earl Cassillis; or even if it had necessarily appeared that he claimed as heir of settlement 1748, or any other settlement, would have been inclined to agree; but neither of these the case. Illustrates by hypothetical cases in petition, where David might not have been heir of provision or line. This service would not have interrupted prescription of the settlement 1748 as to decisions, unless implied or necessary; cannot admit it, and so found in case of Reid against Woods. Agree with Haldane's case as if necessary implication, and same nature is case of Orr. Here no such necessary implication,—indeed impossible.

*Meadowbank.*—Notwithstanding able memorial, remains of opinion with interlocutor: concurs entirely with Armadale. Denies Hermand's distinction between services as heirs-male, or line, and heirs of provision. Service 1776 clearly sufficient to take up the deed 1748; and therefore adheres.

Notes were also taken by Thomas W. Baird, Esq. Counsel for Sir Andrew; and as those of Lord Meadowbank's opinion are fuller than those by the Lord Advocate, they are here given:—

[Was formerly of opinion with the interlocutor of Lord Ordinary, and is so still; coincides in every thing with Armadale; only doubts whether, as stated by that Judge, it would be better in practice to require production of deeds of provision, and to mention them in the service. Has no inclination to draw the matter tighter than our ancestors did service of the country; that he who has the substantial right should have the power of disposal, and his settlements not to be disappointed 'by a swirl of 'the law.' A service as heir-male the same as heir-male of provision. The latter necessarily inherent in the former. A decree of declarator, finding that Earl Thomas had died without heirs of body, would have transferred right to Earl David, called nominatim by deed 1748. No difficulty in finding the service sufficient to take up that deed.]

'culus et lineæ of his brother Earl Thomas, was not a service as 'heir of provision under the settlement 1748, and consequently 'is not sufficient to carry the subjects in question, which are not

May 31. 1825.

---

*Bannatyne.*—Alters his former opinion, and thinks the title proper.

*Craig.*—Two separate points. 1st, Is title good on charter 1774? Thinks it a good investiture hæredibus, &c. and enters not as to question for what purpose it was done, and therefore service good. This supports interlocutor as to all subjects contained in deed 1774. As to 2d question, a very general and important one; and in spite of all he has heard, must concur with Lord Hermand, and for altering quoad all lands not contained in the charter 1774.

*President.*—Has had no difficulty in the cause, except the last spoken to by Lord Craig, and even as to that would have had none but for the interlocutor of Lord Justice-Clerk. But thinks he will prove that this a mistake, and that not his opinion. As to implied prohibition, a joke. As to consolidation, that decided in case of Drumakiln; but that at an end by positive prescription. As to lands contained in 1774, clear that Earl David's service did most evidently connect him with that charter. Thinks deed 1748 never altered till by deed of Earl David; but different question whether a title good or no, and question whether succession altered or not; for if David had left a daughter, clear that distant heirs-male would have taken under settlement 1748 in preference to the daughter, because Earl David had not done any thing in his lifetime to alter the succession.

Memorial for pursuer argues most ably the important question here at issue. Amounts to a mathematical proposition. Clear that service as heir-general never can include a service as heir of provision. Sorry for the law of Scotland, and irremediable consequences inextricable to settlements of landed property, if the contrary held to be law. Explains Braxfield's first interlocutor, where preliminary words have that impression, but concluding words reserve for hearing the question as to lands, to which alone this great question can relate. Besides, in the very late case then depending, Braxfield decided the very reverse in the identical same circumstances. Case of Forbes, in p. 58. of Earl Cassillis's memorial. In that case Braxfield set out with approving of Haldane's case, on the very grounds stated by Lord Hermand,—necessary implication; but thought differently in Forbes's case, because no such necessary connexion or unavoidable implication between heir of line and heir of provision. Most dangerous, indeed, and destructive of feudal law of Scotland, if to go into doctrine of supplying characters by remote circumstances not appearing ex facie of service, and necessarily arising from it. Braxfield at that moment had case of Cassillis depending before him.

Asks if it would have been possible for David under this service to have served heir in special to the lands contained in 1748? Clear that it required a service as heir of provision to carry the lands. That not done, and therefore these still in hæreditate jacente of Thomas. (This opinion goes clearly to give Sir Andrew, Portmark, Polmeadow, Enoch, and Maybole, which stood clothed with infeftment in Earl Thomas's person to heirs of provision). If Earl David had not made his settlement, inclines to think with Hermand, that heirs in deed 1748 would have succeeded. Title and rule of succession very different things in law.

*Justice-Clerk.*—Thinks he sufficiently connected himself with the personal right in deed 1748.

*Adhere.*—Armadale, Justice-Clerk, Cullen, Bannatyne, Ankerville, Stonefield, Polkemmet.

*Alter.*—President, Hermand, Craig, Dunsinnan. Glenlee did not vote.

May 31. 1825.

'contained in the charter 1774; sustained the reasons of reduction 'as to these subjects, and remitted to the Lord Ordinary to pro- 'ceed accordingly.'* Their Lordships afterwards explained, 'that the meaning of the Court in pronouncing the interlocutor '26th May last was to find, that Earl David's general service was 'not a service as heir of provision to connect him with the settle- 'ment in 1748, or with any similar deed of provision or settlement, 'and consequently was not sufficient to carry the subjects which 'were specially provided by any such deed, and which were not 'contained in the charter 1774, or in any other title-deed or 'charter of a similar nature: Find, that the lands of Enoch and 'Little Enoch, the lands of Portmark and Polmeadow, and 'tenements of Maybole, and the teinds conveyed by Crawford 'of Ardmillan, were of this description, and were not carried to 'Earl David by the said general service; but that all the other 'lands in question were so carried.

---

* The following Notes of the Opinions were taken by Matthew Ross, Esq. Counsel for Sir Andrew:—

*Hermand.*—An important question of law here occurs, though perhaps, in the circumstances of the case, it will not affect any extensive property. The question is, whether the general service of 17th April 1776 is a good service as heir of provision? The consequences of the interlocutor as it stands would be alarming. A succession may be fixed upon a man which he never thought of, and of course all its passive consequences. In place of Earl David's taking up the character of heir of provision under the deed 1748, by the general service of 17th April 1776, there is every appearance that the deed 1748 was industriously rejected by him, whatever his motive might be for so doing. But the question is, has he connected himself with the deed 1748, let reason of his conduct be what it may? It appears to me he had not. Put this case:—Suppose there had been different dispositions; one in 1748, and another of a different date and tenor, with clauses inconsistent, and a different destination; will it be said, that both could be carried by the general service, and that by the service which makes no mention of any deed, or of any service in the character of heir of provision, the person serving would become heir under both the contradictory deeds? and if not, under which would he be held to be heir? There is no safety but in adhering to principle. Conjectures are not to be regarded. It is said, that in expeding a general service as heir of line, the heir cannot foresee the extent of the obligations he may incur by such service. But, for that very reason, I will not put any construction upon a service that may give it more extensive effects than it necessarily must bear. Earl David well knew the deed 1748, but never did any act importing an intention to take it up. It was said every man may judge how to make up his titles. But the inference from this is against the defender. It follows the more clearly, that therefore the Court cannot, and ought not to judge for him; but he ought to declare explicitly his own intention. Animus adeundi necessary. If a claim necessary, can a man otherwise than as he does claim? It was said it was enough that party has a right to be served. This contrary to all my ideas of the law of service. The decisions are consistent and agreeable to principle. In case of Haldane, the true character implied necessarily. Case of Livingston against Menzies the only exception. This clearly erroneous, and never followed.

The Earl having then reclaimed, the Court, on the 16th November 1802, pronounced this judgment:—'Find, that Earl

May 31. 1825.

---

*Meadowbank.*—Have heard nothing to make me alter my opinion. As the Lord President viewed the case differently, I should wish his Lordship to deliver his opinion.

*President.*—I have a fixed opinion; but I do not wish to break in on the usual order in delivering it.

*Meadowbank.*—I agree with the pursuer that the true character must be expressed or implied in the service. But I think the true character, that is, a service in character of heir of provision, was implied in the service in question. A service as hæres masculus is a service, not as heir of law, but as heir of provision; and here the character of heir of provision is implied in the service as heir-male. I consider it the same as if heir of provision had been expressed. The case of two settlements was put by Lord Hermand. I answer, that supposing a man is served heir of provision generally, this is undoubtedly good; yet the same difficulty would have occurred to settle to which deed the service applied. I think your Lordships must determine, whether the deed 1748 carries Earl Thomas's purchases in which he was infeft. I conceive it does, because the deed 1748 was a paramount settlement, governing the whole succession to all his lands; therefore the defences should be sustained generally.

*Armadale.*—After considering the case with great attention, I remain of my former opinion. What is stated in the minute at first moved me; but now I think it can have no influence. Evidence sufficient appeared upon the service that David Kennedy was entitled to be served heir of provision.

*President.*—I agree there was sufficient evidence that David Kennedy was entitled to be served heir of provision; but is this enough? If it were, the eldest son serving heir in any character must be served in all characters. This never was before supposed. To illustrate the question, consider the analogous case of a general and special charge. There are three kinds of charges:—General charge, this only fixes representation; the special charge, as to subjects in which ancestor died infeft; and the general special charge, as to the subjects in which the ancestor was not infeft. General charge does not supply want of special charge, or general special charge. There are in like manner two kinds of general service:—Service in a general character, known in law as heir of line, or heir-male; or in a special character, as heir of provision. The character of heir-male is a general character known in law, and a person may be served in that character though there are no subjects to descend to the heir. But as to heirs of provision, whose specification depends entirely upon particular deeds, no man can be served heir of provision unless there be a deed by which he is called, and a subject which he is to succeed to in that character. The deed 1748 did not call David as heir-male, but as a substitute heir of provision specially called. He might have been served as such, but he never was served as such. The mere reading of the service in question is to me complete evidence that he never was served heir of provision. He was served heir of line, and heir-male,—nothing more. Any thing descendible to those he could take, but nothing more; and in these characters we may take large estates, but can take nothing descendible to heirs of deed 1748. Suppose only object of this service had been to reduce the deed of settlement 1748. It might have been so. Such a thing frequent, nay necessary to enable him to challenge. Upon this service as a title he might have brought a challenge of the very deed under which your Lordships suppose him to have served heir; so that the very act of making up a title to challenge would be a bar to the challenge, which is absurd. It was argued for the defender that Earl David not only had a title to be served heir of provision, but that he also possessed the lands; and this was alleged to be evidence that he intended to be served heir of provision. This, in the first place, is going out of the record; but next, it has

May 31. 1825. ‘ David's general service tanquam legitimus et propinquior hæres ‘ masculus et lineæ of his only brother-german Earl Thomas, ‘ necessarily established him to be the heir under the settlement ‘ 1748, and vested in him the personal right of the subjects thereby ‘ conveyed to him; and therefore that he has now right to the lands ‘ of Enoch and Little Enoch, the lands of Portmark and Polmea- ‘ dow, the tenements in Maybole, and teinds conveyed by Craw- ‘ ford of Ardmillan: repel the reasons of reduction as to these ‘ subjects; assoilzie him from the conclusions of the summons as ‘ to them, as well as to those contained in the charter 1774, and ‘ decern.’*

---

no foundation, for Earl David was heir-apparent in every character. He was heir of the feudal investitures, or personal rights, by which the different properties belonged to Earl Thomas, and he was also heir-apparent of the deed 1748. So in every view he had a title to possess. Earl David never was served heir of the deed 1748, either expressly or by implication. To find that there was here a service by implication, must confound all our law of services, upon which the transmission of land estates from the dead to the living depends. The consequence must be dangerous. It is said, that one service was implied in another in the case of Haldane. I shall suppose that a right decision. But the service there was not a service as heir of line, but a service as legitimus propinquior hæres. This involved and imported that the party was both heir of line and heir-male. An eldest son could not be the one without being the other also. The decision only imports quod majus includit minus. Both are general legal characters; and in the case of an eldest son, the one necessarily includes the other. It is a dangerous thing, however, to relax in the smallest degree any of the legal forms as to land rights; and for that reason, though the decision may be right, I would have hesitated about pronouncing it, on account of consequences, and because it might be thought to loosen as it were one stone in the fabric of our land rights.

*Craig.*—Have hesitated, but, upon the whole, remain of former opinion,—for pursuer.

*Bannatyne.*—The form of transmitting land rights highly important. Form should be fixed and certain; and am of opinion that a service as heir of provision cannot be implied in service as heir-male and of line, which might subject him to consequences he never thought of.

*Lord Justice-Clerk.*—The service in question sufficiently points out Earl David to be heir of provision. It shews that Earl Thomas died without heirs of his body, and that Earl David had thus the substance. And I will not presume that it was intended to omit the form, but rather that he meant to be served, and the jury to serve him as heir of provision. It has been decided, that a service as heir of provision, without reference to any deed, will vest rights descending to heirs of provision under every deed. This attended with every inconvenience objected to the holding the service in question a service as heir of provision. Agree with Lord Meadowbank, that an heir-male is heir of provision. On the whole, think the service a sufficient service as heir of provision.

*Cullen.*—Service sufficient. There are two kinds of heirs,—heirs of line, and heirs of provision. Must think, that by serving as heir-male, meant to be served heir of provision.

*President.*—States difference between service as heir of line and heir-male, and service as heir of provision. No man can be served heir of provision without a deed of provision in his hand.

* The following Notes were taken by Thomas Walker Baird, Esq.:—

*Lord Justice-Clerk.*—If Earl David had applied to be served heir of provision, no

An appeal was then entered against these judgments by Mr Blane, on behalf of Sir Andrew; and on the 24th of May 1805 May 31. 1825.

---

man living could have objected. The service carried in it every description to shew that he was de facto the heir of provision. Heir-male is a character which must be assumed; not so that of heir of provision. This would go to the extent of obliging every one to serve heir of provision, wherever there was any destination whatever of the estate. Many instances where a service as heir of provision sustained where no mention of the deed alluded to. The verdict merely to ascertain the fact that the person has the right by the destination, and not necessary to specify it. Service as heir of provision is necessary when the person serving has no connexion with the estate but in that character.

*Meadowbank.*—No new light in present papers; therefore unnecessary to enter into grounds of opinion at large. Objection to service not favourable. The verdict intended to declare the fact of the relationship of Earl David to his brother Thomas. This it does clearly and distinctly, and no more necessary, according to the principles of decided cases. Opinion of the late Lord Justice-Clerk shews the understanding of the country on this point. No such thing in our law as heir-male provisione legis; always provisione hominis; therefore a service as heir-male is necessarily a service as heir of provision. Any indication of will to accept succession, however slight, is sufficient.

*Hermand.*—Notwithstanding what he has heard, it appears to him the doctrine now stated is attended with incalculable danger. The general principle that rules his opinion is, that there can be no representation in any particular character, without an express declaration of will to that effect. Did Earl David shew any intention of connecting himself with the deed 1748? He did not. It is not for him to say what might be his reasons. Court must be prepared to declare they would pronounce the same judgment if the deed 1748 had been a strict entail, with irritant and resolutive clauses; or if the succession had been clearly damnosa. Proof of identity does not make him heir served; it only shews that he was heir-apparent in that character. The decisions strongly support those principles: The late one of Colvin and Alison, in particular, was moved by the late Lord Justice-Clerk, and went upon no specialty, but upon this ground, that it was not a service as heir of provision.

*Woodhouselee* enters much into considerations of hardship arising from adherence to strict forms. Desirable, perhaps, that our law should relax. But although this may be our wish in speculation, sufficient to say that 'ita lex est.' By the law of Scotland, a particular mode of service required, according to nature of subjects and titles. Even in case where heir de facto heir-male, of line, and provision, a service in the two former characters inept as to the latter.

*Craig.*—Uniformly of opinion of interlocutor, on grounds stated by the two last Judges. At same time, not surprised to find different opinions entertained upon it. A friend to strict law and forms, and the longer he lives the more so, especially as to land rights, which it is dangerous to relax, and the consequences impossible to foresee.

*Armadale.*—Would certainly be more correct, clear, and systematic, were it required that every heir in his claim of service should specify his particular character, the deed under which he claims, and the subjects he means to take up. But having in view the law and the decisions as they stand, he cannot concur in requiring these things. Must take the system as it stands, and make the best of it. The governing rule in all services is, that if it appears the claimant is the person who has the right, sufficient, although the character not specified. An heir-male always an heir of provision. True, an heir of a general character, but still he takes under a deed of destination. Decided, that one who served heir of provision was served also heir of line, although this last not expressed in service,—Kaimes.

May 31. 1825. the House of Lords pronounced this judgment:—'It is order-'ed and adjudged, by the Lords Spiritual and Temporal in

---

*Bannatyne.*—Stair, Bankton, Erskine, concur in opinion, that the heir serving must indicate his intention to assume the character. Where the heir fails to enter, the creditors charge him to enter in the different characters of heir-male, heir of line, heir of provision, to his ancestor. As to decisions, that of Haldane perfectly consistent. Very clear, interlocutor should be adhered to.

*Methven.*—Is at a loss for any sound principle of law on which the interlocutor should be adhered to. As the law has authorized the entry of an heir without specifying the deed he claims under, cannot see any necessity for repeating the expression, 'heir of provision,' nor does he see any additional clearness or distinctness would be provided by it. Inclined to alter the interlocutor.

*President.*—Case of Drumakiln must be remembered by all the Judges, where a considerable estate passed, contrary to clear will of proprietor, through the omission of a very small piece of form. Another topic in petition, that the use of a service is to prove fact of relationship. This, if true, would afford a very short answer to every plea of the respondent. But this is not the object of a service, and no such doctrine is taught in the law of Scotland. The object and use of a service is to carry heritable subjects out of the hæreditas jacens of defunct, and to vest them in claimant. Never was the principle of the law of Scotland, that right of land, either real or personal, could be taken up by merely declaring a fact. The form of service is necessary, and equally necessary to attend to the character which the heir means to assume. Common sense, that a man may choose to represent ancestor in one character, without representing him in another. This appears clear as sunshine. As to general services, two kinds—one rather a general special service, applicable to case of a particular subject where no infeftment. This analogous to general special charge. There is another kind of general service much more comprehensive, *i. e.* a general service as heir of line, meaning to vest merely the character without touching any subject. This entitles him to take up whatever subjects are descendible to heirs of line. But this does not comprehend a general service as heir-male, and will vest no such character in the claimant. Heir-male not a character given by deed, although he may succeed to subjects so provided; but it is a general character given by law,—as much given by law as the character of heir of line itself. Question here is, whether one claiming in a general character entitled to subjects provided to special heirs? Not sufficient the fact be proved that he had right to serve; and after searching through every one of the decisions, sees no authority for such a doctrine. In Haldane's case a service tanquam propinquior et legitimus hæres. The question came to be, what the meaning of this term? It is a mistake to suppose this always means heir of line; most frequently it does; but it may mean also heir of conquest in case of elder brother serving to younger. In same way, when a son serves to father, the service as heir of line necessarily implies heir-male. It was on these grounds the Court went in Haldane's case and Earl Dalhousie's. Can see no fault in giving it such construction. In present case there would have been more doubt if claimant had stopt at propinquior et legitimus hæres. But he has defined the character masculus et lineæ. Doing the highest injustice to the memory of the honourable Judge who has been alluded to, in supposing his opinions would have been different from the interlocutor now before the Court, if he had had opportunity to consider the case as it has since been considered. Complains and laments that so much has been said of the opinion of that honourable Judge. Looks with some anxiety to the issue of this cause, for if the interlocutor altered, thinks he may bid farewell to services. This a point in which the country most deeply concerned, and hopes the Court will consider deliberately before altering the judgment.

May 31. 1825.

'Parliament assembled, that all the interlocutors complained of 'in the said appeal, so far as the same relate to the lands and 'subjects contained in the charter of 1774, or in any similar 'titles, be, and the same are hereby affirmed. And it is further 'ordered, that the cause be remitted back to the Court of Ses- 'sion, to review all the interlocutors, as far as they respect the 'effect of the service of Earl David in 1776, with regard to the 'lands of Enoch and Little Enoch, the lands of Portmark and 'Polmeadow, the tenements in Maybole, and teinds conveyed 'by Crawford of Ardmillan, or any other lands or subjects, the 'title to which is in dispute in this cause, if any such there 'be, not ruled by the aforesaid affirmance; and to hear the par- 'ties again as to the effect of the said service as to the said lands 'and teinds, and as to the right to the said lands and subjects; 'and to do thereupon as to the Court shall seem meet.'

When the case returned to the Court of Session, Sir Andrew and his trustee maintained, that the remit embraced other lands besides those specially mentioned; whereas Lord Cassillis contended, that the only proper question remitted for consideration was, What was the legal effect of Earl David's service as to the above properties, and others depending upon a title similar to those specially mentioned? The Court, on the 10th of February 1807, pronounced this interlocutor:—'Find, that Earl David's 'general service in 1776, was not a service as heir of provision, 'to connect him with the settlement in 1748, or with any similar 'deed of provision or settlement, and consequently was not suf- 'ficient to carry the subjects which were specially provided by 'any such deed, and were not contained in the charter 1774, or 'any other title-deed or charter of a similar nature: Find, 'that this description applies to the lands of Enoch, and Little 'Enoch the lands of Portmark and Polmeadow, the tenements 'in Maybole, and the teinds conveyed by Crawford of Ardmillan, 'and that they were not carried by the general service; therefore 'sustain the reasons of reduction as to these subjects, and so far 'alter their interlocutor of 16th of November 1802; repel the 'defences, and reduce, decern, and declare, in terms of the sum- 'mons: But with regard to the lands of M'Gowanston, Mill of 'Drumgirloch, Dunnymuck, Whitestone, Pennyglen, barony 'of Greenan, and lands of Balvaird, find, that the order of the 'House of Lords contains no special remit as to these lands, nor 'has the pursuer sufficiently made out that they fall under the 'general remit, or that, at any rate, the interlocutors formerly 'pronounced as to these lands ought to be altered; and there-

May 31. 1825.

'fore adhere to these interlocutors, and decern;' and to this judgment they adhered on the 24th of November. Against these judgments Sir Andrew and his trustee appealed, in so far as unfavourable to him; and the Earl also thereupon appealed in regard to the lands of Enoch, &c. (which he stated he would not have done had not an appeal been made by his opponent). To the competency of Sir Andrew's appeal, the Earl objected, that it had reference to lands, the title of which had, by the judgment of 1805, been found by the House to belong to him; whereas Sir Andrew contended, that they did not fall under the affirmance. The matter having been remitted to the Committee on appeals, they made the subjoined report.*

---

* By the Lords' Committees appointed to consider of the petition of ANDREW BLANE, Esq. appellant, in a cause depending in this House, to which the Right Honourable the Earl of CASSILLIS, and others, are respondents, praying that their Lordships will be pleased to take the premises into consideration, and to give such directions for the hearing of the questions which were at issue under the original appeal, and still undetermined, as to their Lordships, in their great wisdom, shall seem meet; and report to the House.

Ordered to Report,—

That the Committee have met, and considered the said petition, and have heard Counsel as well for the appellant as the respondents.

That the House having determined that it was not the intent of the House, in its judgment of the 24th of May 1805, to remit to the Court of Session to review their interlocutors, with regard to the lands of M'Gowanston, the Mill of Drumgirloch, Dunnymuck, the lands of Whitestone, Pennyglen, barony of Greenan, and lands of Balvaird, it has been represented to the Committee, that the title to these lands and subjects was in dispute in the appeal in which such judgment was pronounced: that the affirmance contained in the said judgment does not, according to the meaning of the terms of the judgment, rule the title to these lands and subjects, which, or some of which, are stated not to be lands and subjects contained in the charter of 1774, or in any similar titles: that the judgment thereof, if it contained no remit as to these lands and subjects, doth not contain the judicial opinion of the House upon the title to these lands and subjects, which was in dispute in the appeal; and that the House ought therefore now to proceed to judgment thereupon in some form, and previously to hear Counsel upon the title to these lands and subjects, it being alleged to your Committee, that upon the former hearing of appeal, during many days at the Bar of the House, the Counsel were not thereupon heard.

This supposed fact, your Committee represent as controverted on the part of the Earl of Cassillis, on whose behalf it has been insisted, not only that the title to these lands and subjects was before the House in the printed Cases of the appellant and respondent, but that it was spoken to by Counsel on his part, and on the part also of the appellant.

And your Committee find that it was represented, in the Case laid before your Lordships' House on behalf of the appellant, (the present petitioner), that in the Court below several questions had been agitated, which it had not been deemed necessary to enter minutely into in that printed Case, in as much as the points therein before stated at large, were considered by the appellant as ruling all the matters at issue in the cause; and that he should therefore only cursorily mention such other questions, reserving to

The House of Lords then pronounced this judgment on the 9th of May 1810:—'Find, that it was not the intention of this

May 31. 1825.

---

himself to argue them at the Bar of the House, if that should appear to be expedient. He then represented these questions to relate to the following classes of lands:—

First, 'The lands of Portmark and Polmeadow, and others,' specially mentioned in your Lordships' remit, 'which it was observed were purchases made by Earl Thomas, 'upon which he died infeft upon base holdings, the dispositions whereof had been 'granted to him, his heirs and assignees; but these dispositions, as acquirenda, were 'ruled by the destination of the entail of 1748; and as to them there existed no other 'personal right, which could be taken up by Earl David's service in 1796.'

Secondly, 'The lands of Bardarroch, Daljarbrie, and the Citadel of Ayr: That 'these were not in the charter of 1774, but remained upon the titles which Earl Tho-'mas had acquired therein as a purchaser; that so far they were in the same situation 'with the lands in the first class: That so far they differed from them, that Earl 'David made up a title as heir of line, conform to the destination in the title-deeds of 'these lands; but that, as he made up no title under the ruling deed of 1748, his 'making up a title as heir of line was unessential.'

Thirdly, 'The lands of M'Gowanston, Mill of Drumgirloch, and Dunnymuck, 'in the property of which Earl Thomas was infeft in 1748, and the lands of White-'stone, in which he was infeft in 1757: That these were included in the charter 1774, 'and of course fall under the general argument as to all the lands contained in that 'charter; but they were also affected by other questions, upon which it was contended 'in the Court below, that from a defect in consolidating the property with the superi-'ority of these lands, the titles thereto made up by Earl David were from that 'cause also altogether ineffectual and insufficient.'

Fourthly, 'The barony of Greenan and lands of Balvaird: That these formed a very 'considerable portion of the estate, and were not included in the charter 1774; but that 'they had been in 1765 parcelled out into freehold qualifications for purposes precise-'ly similar to those which regarded the lands in the charter 1774: That Earl David, 'too, made up his title to the barony of Greenan and lands of Balvaird, upon the foot-'ing of the titles taken for these temporary purposes; and also as to them neglected 'the ruling destination in the entail of 1748: That as to them therefore, also, the ge-'neral reasoning relative to the lands contained in the charter 1774 fully applied.'

The Committee, citing this statement from the printed Case of the petitioner in 1805, (then the appellant), take leave to observe, that with respect to the first of these four classes of lands, they are the subjects of express remit to the Court of Session, and not the objects of the petition.

That with regard to the second class, they are stated to differ as to title from the first, but not essentially, and that they are not understood to be the objects of the petition.

That as to the third class, they are expressly stated in the printed Case of the petitioner, 1805, (then the appellant), to be included in the charter in 1774; and the affirmance by the judgment of the House of all the interlocutors relating to the lands and subjects contained in the charter of 1774, is not qualified by any remit as to any supposed defect in consolidating the property with the superiority of these lands. (These lands are the objects of the petition.)

That as to the barony of Greenan and Balvaird, (the barony of Greenan having been particularly pointed out by the Counsel attending the Committee, as not being in a title similar to the lands contained in the charter of 1774), the House will observe, that the petitioner, the then appellant, reserved to himself to argue the title if it should be expedient; and will also observe, how far the appellant admits the reasoning relative to

May 31. 1825.

‘ House, in its order of 24th May 1805, either specially or gene-
‘ rally, to remit to the Court of Session to review their inter-

---

the lands contained in the charter, to apply to these subjects, though not contained in it. These subjects are also objects of the present petition.

The Committee further report, that, whether the question of the title to these lands and subjects was, or was not, argued at the Bar of the House in the year 1805, the state of the title to them appears to have been before the House, with an opportunity for the then appellant, reserved by the appellant himself, fully to argue the titles to them, if it appeared expedient to argue them. They further represent, that it seems obvious that it could not possibly be the intent of the House, under the general words of the judgment, to remit to the consideration of the Court of Session the titles to the 3d and 4th classes of lands and subjects; those contained in the 3d being by the appellant stated, in his Case in 1805, to have been contained in the charter of 1774; and those contained in the 4th class, though not comprehended in the charter of 1774, being stated by the appellant in that Case of 1805, to be lands to which the general reasoning relative to the subjects comprehended in that charter fully applied. And when it is further observed, that the appellant stated those of the 4th class, ‘ to form a very considerable portion of ‘ the estate,’ it is conceived that the House, making express mention in its remit of Enoch, and the other small parts of the estate called the pendicles, could not possibly mean by its general words to remit questions with reference to the considerable parts of the estate mentioned in the 3d and 4th classes, without specifically naming any one of the lands and subjects therein contained: that the House could not possibly intend, with its attention thus far called to these lands and subjects, as a considerable part of the estates, with circumstances in the titles differing them from the titles to Enoch and the pendicles, to remit to the Court of Session the questions relative to such parts of the estates, under the words in the judgment following the express enumeration of the pendicles:—viz. ‘ any other lands or subjects, the titles to which is in dispute in this cause, ‘ if any such there be not ruled by the aforesaid affirmance.’

The Committee further conceive, that it must have been the intention of the House itself, to decide upon or to direct a review of all parts of all the interlocutors which were to be considered and understood as complained of, at the time the House pronounced its judgment: That it could not intend, if its judgment was called for upon all the subjects in dispute, to remit a part of those subjects to the review of the Court of Session, to decide upon a part of them, and with respect to another part of them neither to pronounce a decision or make any remit.

And the Committee report it as their opinion, that it was the intention of the House, in its judgment, to affirm the interlocutors of the Court of Session, with respect to the lands and subjects mentioned in the petition referred to their consideration. The interlocutors, so far as they relate to the lands and subjects contained in the charter of 1774, or in any similar titles, are affirmed: And your Committee observe, that the remit to the Court is, to review the interlocutors, as to the effect of the service of Earl David in 1776.

Most of the lands mentioned in this petition are stated by the appellant's Case in 1805 to be contained in the charter of 1774; and although the words ‘ similar title’ may not be accurately applied to Greenan and Balvaird, and those subjects are not contained in the charter 1774, yet, as it has been above stated, the general reasoning to the lands in the charter 1774 was represented in the appellant's Case itself as fully applying to them; and the titles as to these, your Committee understand to have been made up by Earl David, by precept of clare constat for infefting himself. The Court of Session, though they were of opinion that the remit of the House did not authorize them to review their

'locutors with regard to the lands of M'Gowanston, Mill of 'Drumgirloch, Dunnymuck, Whitestone, Pennyglen, barony of 'Greenan, and lands of Balvaird; and that the Court of Session 'were not authorized to review their interlocutors with relation 'thereto by the said order of this House; and that such parts, 'therefore, of the said interlocutors of the Court of Session, of '10th February and 24th November 1807, as have relation 'thereto, being unauthorized by the remit of this House, are 'null and void, (being the parts of the interlocutor which are 'unfavourable to the appellant, Blane, and as such complained 'of in his appeal); and with this finding and declaration, it is 'ordered and adjudged, that the appeal be dismissed.' May 31. 1825.

Thereafter, in 1825, (the interlocutors in the action of exhibition not having been extracted), Sir Andrew, availing himself of the standing order of the House of Lords, appealed against them.

*Appellant.*—The appellant is entitled to the benefit of the process ad deliberandum in the character in which he sues. As heir, he has right to see the deeds which belonged to his ancestors; and it is no answer to say that one has been executed by which his title to the estate is cut off. This is a mere petitio principii, because the question is, whether his right is cut off? and by law he is entitled to see all the deeds in order to be satisfied on that point.

---

interlocutors as to the subjects of the present petition, did review them, and upon the merits adhered to their former judgment against the petitioner.

But your Committee are further of opinion, upon looking through the papers in the cause which were before your Lordships, that it would be of very dangerous example to permit these questions to be discussed now at your Lordships' Bar; and that, if the judgment of the House is to be represented by the petitioner as not intended to affirm in its terms the interlocutors with respect to those lands and subjects, and to have been pronounced without any manner of discussion having taken place upon the questions relative to them, the appeal, under all the circumstances of this case, ought to be considered as having been passed from, or waived as to these questions, and that the interlocutors therefore of the Court of Session ought to be considered as final. Upon the whole circumstances, therefore, the Committee submit to the House, that it may be expedient to resolve, that the petitioner ought not now to be heard upon the questions relative to these lands and subjects, and that the interlocutors of the Court of Session relative to them ought either to be understood as already affirmed in the judgment of this House, or that, under such circumstances, if, in a strict construction of the terms of the judgment, they are not so affirmed, the House ought to explain the judgment, and affirm them, or declare that the interlocutors of the Court of Session with respect thereto ought now to be considered as final.

Which report being read by the Clerk, was agreed to by the House, and the petition ordered to be rejected.

May 31. 1825.

*Respondents.*—It is settled law, that a disposition or entail, excluding the heir of law, and conferring the right to the estate on a stranger, deprives the heir of his right to an action of exhibition, unless he shall succeed, in the first place, in setting the deed aside. But the entail of Earl David has been recognized and acted on for more than thirty years, and it is not competent, under an action of exhibition ad deliberandum, to allow the heir to ransack the charter-chest in order to find out grounds for reducing the deed which excludes him.

The House of Lords 'ordered and adjudged, that the appeal 'be dismissed, and the interlocutors complained of affirmed,' 'with L.200 costs.'

*Appellant's Authorities.*—3. Stair, 5. 1.; 4. Stair, 33. 4.; 3. Bankton, 5. 7.; 3. Ersk. 8. 56.

*Respondents' Authority.*—4. Ersk. 8. 56. and cases there.

SPOTTISWOODE and ROBERTSON—J. CHALMER,—Solicitors.

---

## No. 31. Honourable WILLIAM MAULE of Panmure, Appellant. *Warren—Brougham—Moncreiff—Murray.*

## FOX MAULE, Esq. Respondent.—*Cranstoun—Jeffrey—Cockburn.*

*Aliment.*—The Court of Session having found, that a son who had a commission in the army as an ensign, with L. 90 of pay, and an allowance of L. 100 a-year from his father, (who was an heir of entail in possession of an estate yielding an income of L. 10,000), was entitled to an aliment of L. 800 per annum from his father; the House of Lords reversed the judgment, and assoilzied the father.

June 1. 1825.

1st DIVISION.

IN 1822, the respondent, Fox Maule, Esq. (who was then about twenty-two years of age), raised an action of aliment before the Court of Session against his father, the appellant, the heir of entail in possession of the estate of Panmure. In the summons, after founding on the deed of entail, he set forth, 'that the pursuer 'is apparent heir of entail under the said deed to his said father, 'and has been educated in a manner suitable to his rank and 'prospects, and is entitled, besides, as the lawful son and pre-'sumptive heir of his father, to a suitable aliment and mainte-'nance out of the ample estates that belong to him; but the only 'provision which the pursuer's father has made for his support 'has been to settle upon him L.100 a-year, and to obtain for 'him an ensign's commission in our 79th regiment of foot, which