No. 4. SIR JAMES COLQUHOUN of Luss, Bart. Appellant. — *Lord Advocate (Jeffrey)—A. M'Neil.*

ROBERT COLQUHOUN, Respondent.—*Lushington—T. H. Miller.*

Service—Entail.—A proprietor in fee simple having executed an entail of his estate in favour of his eldest son and issue—whom failing, of the second son and issue; whom failing, of other substitutes, reserving his own liferent, and power to revoke, alter, sell, and burden the estate. The eldest son predeceased him, without taking infeftment, and the reserved powers never were exercised; the entailer at his death left the deed undelivered. The second son survived, but made up no titles. A general service was expede in favour of his son, as heir of tailzie and provision of his grandfather, the entailer, and infeftment followed under the precept in the entail.—Question remitted for the opinion of all the Judges; 1. Whether the service was valid? and, 2. Whether the service should have been to the eldest son, the institute in the entail, or to any other and what person?

Feb. 17, 1831.

1ST DIVISION. Lord Newton.

ROBERT COLQUHOUN, proprietor in fee-simple of the estate of Camstraddan, (of which Colquhoun of Luss was superior,) entered into a postnuptial contract with Helen Johnstone on the 30th of September 1741, by which he bound himself to resign the lands in his own favour, "and the heir-male "of his body of this marriage; which failing, his heirs and "assignees whatsomever in fee," under burden of an annuity to his wife, and subject to a power of creating heritable securities to a limited extent. In virtue of this deed sasine was taken. Of the marriage he had two sons, James and Walter; and after it had been dissolved by the death of his wife, he executed, on the 28th of January 1774, an entail of the estate. By this deed he disponed the lands "to James Colquhoun, my eldest son, and "the heirs whatsomever of his body; whom failing, to my other "heirs of tailzie and provision after named;" and granted precept of sasine and procuratory of resignation for "new infeftments "of the same to be made, given, and granted to the said James "Colquhoun, my eldest son and the heirs whatsomever, and the "heirs to be procreated of his body; whom failing, to Walter "Colquhoun, my second son, and the heirs whomsoever to "be procreated of his body; whom failing, to any other "son or sons to be procreated of my body, the elder always "succeeding before the younger, and the heirs whomsoever "respectively to be procreated of their bodies successively;

" whom failing," &c. He reserved to himself, " not only my own " liferent of the lands and others before disponed, but also full " power and liberty to me to sell, alienate, and impignorate, or " dispone the said lands and others, or any part thereof, and to " revoke, alter, innovate, or change these presents, in whole or " in part, at any time of my life, even upon death-bed; and all " which revocations or alterations so to be made by me shall be " understood to be a part of the present tailzie, and shall be held " to be as effectual as if engrossed herein." Feb. 17, 1831.

This deed was fortified by the usual clauses in entails, but no sasine was taken upon it. James predeceased without issue; and thereafter, in September 1781, the entailer executed an assignation and disposition of the rents in favour of trustees, for paying off his debts and recording the entail. He died in 1787, leaving the deed unrevoked and undelivered; and the trustees, having accepted and taken possession, caused the entail to be recorded on the 7th of October 1788.

The second son, Walter, obtained a precept of clare constat, but never made up titles to the estate, nor took possession; and, having become bankrupt, his assignees, under a commission of bankrupt, conveyed any right which he had for onerous causes to a trustee for behoof of his family. He died in 1802; and his eldest son, Robert Colquhoun the respondent, who was then in the West Indies, immediately came to this country, and was appointed by the trustees factor on the estate. Being about to return in 1805 to the West Indies, he granted a factory and commission to several gentlemen, (two of whom were trustees of the entailer,) proceeding on the narrative, that as he had not yet made up proper titles in his own person to the lands and estate of Camstraddan, therefore he granted " full power " to my said commissioners to make up and establish such " titles in my person, by general or special service or other- " wise, as heir to my said grandfather, as shall be thought " necessary to vest and complete a full right to the said lands " in my person." No specific orders were given to make up his titles under the entail; but his commissioners were authorized to uplift the rents and apply the same, " in terms of the deed " of entail and bond of provision as relative hereto, executed " by the deceased Robert Colquhoun of Camstraddan, my " grandfather;" and power was given " to set tacks, consistently " with the said entail."

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In 1806, while he was in the West Indies, his commissioners expede a general service in his favour as heir of tailzie and provision of his grandfather the entailer; and, in September of the same year, sasine was taken under the precept contained in the entail, and recorded in October thereafter. He returned to Scotland several years thereafter, and in 1820 obtained a precept of clare constat from the superior, Sir James Colquhoun, the appellant, authorizing him to be infeft as nearest and lawful heir of his grandfather, without reference to the entail.

In March and April 1826 a minute of sale was executed between him and Sir James, by which he sold to Sir James the estate at the price of £32,000 (of which £6,500 were paid); and authority was granted to Sir James to set aside the previous titles made up under the entail. In virtue of the precept of clare, the respondent was infeft on the 29th of April; and in the meanwhile the trustees of the entailer had been judicially exonered and discharged.

Two questions then arose—1. Whether the titles made up by the respondent under the general service in 1806 were effectual? and, 2. Whether, on the supposition that they were not so, he had not homologated the entail, and so was barred from disregarding it, and availing himself of his rights under the contract of marriage? To try these questions two processes were brought, both at the instance of the appellant,—the one being a suspension as of a threatened charge on the minute of sale, and the other an action of reduction of the service and sasine in 1806 against the heirs of entail.

The respondent at the same time raised an action of reduction of the service and titles against the heirs substitute in the entail.

The Lord Ordinary having reported the cases to the Court, their Lordships in the suspension found the letters orderly proceeded, and in the reductions decerned in terms of the libel, reserving the rights of the heirs of entail in regard to any claim which they might have against the respondent as to the application of the price.*

Sir James Colquhoun appealed in the suspension; but as the judgment was in his favour in the reduction instituted by

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* 7 Shaw and Dunlop, No. 94. On pronouncing judgment, *Lord Balgray* observed, The title is quite inept. The eldest son was the disponee and institute, and therefore a personal fee was vested in him. The service ought consequently to

him, and as he was no party to the other reduction, he could not appeal in them; and no appeal was entered by the other parties. Feb. 17, 1831.

Appellant.—By the structure of the entail, the respondent's grandfather, reserving his own liferent, and a power to revoke or alter, disponed the estate to his eldest son James and the heirs of his body; whom failing, to his second and other sons successively in the same terms; whom failing, to his eldest and other daughters successively and other substitutes.

James Colquhoun, the first disponee or institute, predeceased his father without issue, and no title was made up under the entail till the present respondent did so by the service in 1806. He was served heir under the entail to his grandfather the entailer; whereas the Court of Session held, that he ought to have been served heir to his uncle James, the disponee or institute under the entail.

But it is absurd to say, that a party can acquire an estate by serving heir to a person who never had it. The entail during the life of the entailer was a mere deed of settlement or testamentary deed undelivered and revocable. James Colquhoun, having died without issue before the entailer, took nothing, and was vested in nothing by the deed of entail; so that by serving heir to him nothing could be transferred to any successor.

It is, no doubt, said, that Scottish deeds of settlement of land estates are all of necessity dispositions de præsenti, or expressed in terms of instant alienation, although, by keeping them undelivered, and inserting a reservation of the granter's liferent and power to alter, the means of defeating them may be retained by the testator. This, however, amounts to an admission that they effectually convey nothing till after the death of the testator. On that footing it would have been idle for the respondent to serve heir of entail in the lands of Camstraddan to his uncle

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have been to him, and not to the entailer; and therefore that which has been expede is invalid.

Lord Craigie.—I consider the title made up by Robert Colquhoun, the grandson, to be inept and invalid.

Lord President.—I am of the same opinion. Robert the entailer no doubt remained fiar to the effect of having reserved rights which he might have exercised; but he did not exercise them; and as he disponed the estate to his son, the fee was vested in him.

Feb. 17, 1831. James Colquhoun, who never had right to these lands; on the contrary, he acted rationally and legally in serving heir to his grandfather the entailer, by doing which he became bound to fulfil all the grandfather's deeds, including the settlement by entail which the grandfather executed.

Respondent.—The title expede in 1806 was plainly invalid and inept, for various reasons; but particularly because, by the form and conception of the deed of entail, the personal right to the fee of the estate was exclusively in James Colquhoun the institute; and consequently the only habile mode by which the respondent, or any other substitute, could have connected himself with the entail, and taken up the estate under that deed, was by service to James the institute,—not by service to Robert the granter, whom the deed of entail by its form and conception divested, and in whom no right remained to be carried, or taken up by service as heir of entail.*

The House of Lords ordered and adjudged, "That the cause "be remitted back to the Court of Session, to review generally "the interlocutor complained of, &c.: And it is further ordered, "That the Court to which this remit is made do require the "opinion of the other Divisions and of the Lords Ordinary, in "writing, in regard to the law, and to the practice of conveyancers, "in Scotland, in the services of heirs; and whether, according to "such law and practice, the service in this case of the 21st "August 1806 by Robert Colquhoun of Camstraddan, as heir "of tailzie and provision to his grandfather Robert Colquhoun, "the maker of the entail of 1774, was a valid service, or whether "such service should have been to James Colquhoun the insti-"tute in the said entail, who predeceased his father, the granter "thereof, or to any other and what person?"†

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* Several other pleas were maintained, unnecessary to be noticed, except that the respondent contended, that the title made up in 1806 stood reduced by a final judgment of the Court of Session unappealed from.

† Under this judgment the Court of Session having ordered cases on the points remitted, the following opinions were given:

Lords Justice-Clerk, Glenlee, Cringletie, Meadowbank, Mackenzie, Corehouse, Medwyn, Newton, Fullerton, and *Moncrieff,* returned the following opinion:—Robert Colquhoun, by a disposition and settlement executed in 1774, conveyed his estate of Camstraddan, under the fetters of a strict entail, to his eldest son James Colquhoun, and the heirs whomsoever of his body; whom failing, to his second son

Walter Colquhoun, and the heirs whomsoever of his body; whom failing, to a series of substitutes. The disposition contained procuratory of resignation and precept of sasine. Feb. 17, 1831.

James died before his father, without heirs of his body. Walter survived his father, but died without making up a title to the estate, leaving a son (Robert). Robert the younger attempted to make up a title by a general service as heir of tailzie and provision to his grandfather under the disposition 1774, in virtue of which he was infeft on the precept it contained. We are clearly of opinion, that by the law of Scotland, and according to the practice of the best conveyancers, the service of Robert was not a valid service.

By the law of Scotland there are two modes in which rights of this nature may be transmitted, namely, by inheritance on the one hand, and by grant or conveyance on the other. When rights are inherited, a title is completed to them by service — a form equivalent to the aditio hæreditatis of the Roman law; and without service, or certain proceedings which in some cases may be substituted for it, the right does not pass to the heir, or vest in his person. When rights are conveyed, the conveyance itself constitutes the title, and vests the subject, except in so far as it requires to be feudalized (a point not now under consideration); and there is no room for service on the part of the grantee, because he inherits nothing from the granter.

In the present case, Robert the entailer might have disponed the estate to himself; whom failing, to his son James and the other members of the destination; a form of conveyance extremely common. If he had done so, he himself would have been the institute or immediate grantee, and on his death the substitute entitled to succeed must have taken up the right by service to him; but, instead of instituting himself, he disponed to his eldest son James as the institute, who, if he had survived, could not have served heir to his father; but being, by virtue of the conveyance, in full right as grantee, he could have proceeded at once to execute the procuratory, or take infeftment on the precept contained in it. On the same principle that a service by James to Robert would have been inept, so a service by any other member of the destination to Robert must be inept also, there being nothing in his hæreditas jacens to which it could apply.

The opinion now given is confirmed by the express authority of Mr. Erskine, iii. 8. 73, by the decision in the case of Mercer, to which he refers, and by the recent case of Dennistoun, Feb. 5, 1824.

It is true that Robert the entailer reserved his own liferent, with power to revoke the entail and sell the estate; but neither these reservations, nor any other that can be imagined, could make him the institute in the entail, or render effectual a general service to him by his grandson Robert, or any one else, as heir of provision under that settlement. The feudal fee of the estate remained in him, notwithstanding the execution of the entail with the benefit of all those reservations; but that fee could be taken up only by a special service expede by the heir of line, or by infeftment in his favour on a precept of clare constat; and the person so completing a title would have been proprietor in fee-simple, though he might afterwards have been compelled, by an action at the instance of those having interest, to bring the estate under the fetters of the entail.

Accordingly the general service of Robert Colquhoun, and the infeftments which followed upon it, were reduced, and we think rightly reduced, in the actions brought for that purpose at the instance of the suspender.

But if the service of Robert Colquhoun was invalid, the whole question between the parties in this suspension is exhausted, and it follows that the interlocutor under appeal is well founded.

But we are required by the remit to say, not only whether the service of Robert

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Colquhoun to his grandfather was a valid service, but "whether such service should "have been to James Colquhoun, the institute in the said entail, who predeceased "his father, the granter thereof, or to any other and what person." As to this point, it appears to us, that if there was an actual delivery of the disposition and settlement 1774 to James the institute, or to any person for his behoof, or if there was any thing which the law holds as equivalent to delivery, so that a right vested in James during the lifetime of his father, (an inquiry in law and in fact not fully entered into in the pleadings, and into which it was unnecessary to enter, not being relevant to the merits,) then the right so vested in James was a right of inheritance in respect of the remaining substitutes, and it would have been necessary for Robert to expede a general service as heir of provision to James; but if, on the contrary, there was neither delivery to James, nor any thing equivalent to delivery, we are of opinion that no right vested in James, and that a service to him by Robert the younger would have been as invalid and inept as the service was which Robert expede to his grandfather.

To explain the mode in which a title ought to have been made up by Robert, and assuming that no right vested in James by delivery, it will be remembered that Walter was instituted conditionally on the failure of James and the heirs of his body. If Walter himself, therefore, who survived the entailer, had intended to complete a feudal title in his person to the estate, he ought to have proceeded, not by service, but by an action of declarator in the Court of Session against all having interest, concluding to have it found that he was conditional institute in the entail; that the condition was purified by the death of his brother James without issue, and therefore that he was entitled to take infeftment in that character. The decree of the Court in that action would have been a warrant authorizing the notary to give sasine upon the precept, without which, in consequence of the act 1693, c. 35, relative to the deduction of titles, the notary might not have been in safety to expede the infeftment. The decree, it is obvious, would not have vested the right to the precept in Walter, for it had been previously vested by the grant itself; but the decree would have furnished the notary with evidence of the fact, which it was incumbent on him to state in the instrument of sasine. On Walter's death, without completing a title, his son Robert in like manner ought to have obtained decree, that the right had vested in his father by his survivance of the entailer, and the failure of James and his issue; and he ought then to have expede a general service as heir of provision to Walter, which would have put him in right of the procuratory and precept contained in the entail. Other modes of making up a title might have been followed, but what has been stated we consider to be the most correct.

If the subject appears to be attended with any difficulty, it arises from the following circumstances:—A practice, not very correct, but sometimes convenient, has prevailed, of using a service, not as the form of transmitting a right from the dead to the living, its primary and proper purpose, but as a substitute for a declaratory action to ascertain facts relative to the succession by the cognition of an inquest, instead of the decree of a Court. It is to this that Lord Kilkerran alludes in reporting the case of Gordon of Carlton. The destination was to the male issue of James Gordon the entailer; whom failing, to John Gordon and his heirs male; whom failing, to Nathaniel Gordon;—and John Gordon, the conditional institute, having predeceased the entailer, who left no male issue, it was held that a service to him by Nathaniel Gordon, the next conditional institute who survived the entailer, was inept; for, as the reporter rightly observes, there was plainly no right in John which could be carried by service; but Nathaniel served to the entailer, and that was held sufficient—not certainly because the service transmitted any right from the entailer to Nathaniel, but because it afforded evidence that both the entailer and John

Gordon had died without male issue, and consequently that the conditional institution in favour of Nathaniel had taken effect. On the same footing, if Walter Colquhoun, in the present case, being the second son of the entailer, had served to his father, it might have been considered as equivalent to a decree, that his elder brother James and his issue had failed before the entailer, and therefore that he was in titulo; but Walter having died without any proceeding of this kind, it was incompetent for his son Robert to serve to the entailer, because it was incumbent on him first to establish by decree that the right had vested in Walter, and, secondly, to take it out of Walter's hæreditas jacens by service to him. Feb. 17, 1831.

This subject has also been perplexed by a doctrine maintained in the Case for the respondent, and which at one time received some countenance in practice—namely, that a disposition not delivered to the grantee, or for his behoof, vested a right in him, even in the granter's lifetime, which required to be taken up by service, though he predeceased the granter. We think that this doctrine is not consistent with legal principle, and that it would lead to anomalous and mischievous consequences. It assumes a right to be vested which the grantee has not accepted, and which he has the power to repudiate—of which he may be absolutely ignorant, which may infer burdens he would never consent to undertake, and which confessedly can neither be alienated by himself nor attached by his creditors. Neither the case of Lord Strathnaver, nor that of Campbell, which the respondent quotes, can be held as precedents in point; for in both the argument, that the service to the predeceasing institute was valid, was maintained, with this alternative, that assuming it to be otherwise, the right of the next member of tailzie as conditional institute (or creditor, as it was termed,) vested without a service at all; and the judgment of the Court in neither case distinguishes on which ground it proceeds. In Lord Strathnaver's case, Kilkerran, a counsel in the cause, mentions in his argument that the service was held to have been properly expede; but Kames, in reporting the decision, represents it as a case of conditional institution. On the other hand, in Campbell's case, from the terms of the disposition, the service, which was in the character of heir-male, and not of heir of provision, was clearly equivalent to decree of declarator that the condition of the institution had been purified, and as such it is expressly relied upon by the party.

But although those two decisions, which are ambiguous, had been directly in point, they never could have outweighed the mass of precedent and authority on the other side, part of which is quoted in the argument in M'Kenzie v. M'Kenzie, Nov. 24, 1818, and much more could easily be adduced.

But it is proper to repeat, that our opinion with regard to the validity of a service by Robert Colquhoun to his uncle James is given only in consequence of the terms of the remit by the House of Lords. It cannot in any way affect the question at issue between the parties in this cause.

When this opinion was returned, the cause was again advised by the 1st Division, and *Lord Balgray* delivered the unanimous opinion of that Division:—The question remitted for us to consider is, "Whether, according to our law and practice, the "service of the 21st of August 1806 by Robert Colquhoun of Camstraddan, as heir "of tailzie and provision to his grandfather Robert Colquhoun, was a valid service; or "whether such service should have been to James Colquhoun, the institute in the "said entail, who predeceased his father, the granter thereof, or to any other and what "person?" In the law of conveyancing this is a most important question; and if it be meant to regulate the making up of titles to heritable property in future times, it would require a most extensive and accurate inquiry into practice. In the present case its determination is of little importance, as the judgment of the Court is now

Feb. 17, 1831. irrevocable*, and a res judicata; and, of course, whatever may be the opinion of the Court on the question, it can only be a hypothetical opinion, declaring, somewhat anomalously, what should be the law and practice. If such be so meant, then I humbly think that the service of 21st August 1806 was not a valid service, and that the service should have been to James Colquhoun, the institute in the entail, although he predeceased his father, the granter thereof, and that it should not have been to any other person.

Before assigning the reasons for such an opinion, it is proper to premise, that if there existed no peculiarities in the conveyance of heritable property according to the feudal form, and if the transmission of such from the dead to the living were open to the regulation of the principles of general law, the question would assume a very different aspect. If our feudal conveyances were permitted by the law to assume the nature of testamentary deeds, then predeceasing disponees would be held as non-existing persons, and so opening the way to those who followed them, and existing as conditional institutes. But this is not the form of our feudal conveyances. All such grants must be executed in words de præsenti, and are understood to be complete the day they are dated. It is that consideration which induces me to think that the service should have been to the institute. 1. Although Robert Colquhoun, the grandfather, died last vest as of fee in the feudal estate, it never was vested in him on this entail. 2. Although, in this entail, this Robert Colquhoun, the granter of it, reserved his own liferent of this feudal estate, and power to sell, &c., yet, by the dispositive and governing clause of this deed, he disponed the estate, per verba de præsenti, to James Colquhoun nominatim, with procuratory of resignation and precept of sasine for vesting this feudal estate directly in this James Colquhoun, nominatim disponee. 3. Every disposition of feudal estate, a habente potestatem, to a nominatim disponee, per verba de præsenti, does in law convey to that disponee a legal estate, which may lawfully be vested in such disponee by immediate infeftment, if the disposition be delivered. Although the disposition be not delivered during the life of the granter, he is nevertheless presumed in law to have intended and done what he declares himself, by his own complete and uncancelled deed, to have done, and this a fortiori, if in that deed he has dispensed with the delivery of the same. 4. The nominatim disponee, James Colquhoun, being alive at the date of the deed, did thereby immediately acquire a legal estate, which might have been legally inherited by the heirs of his body, if he had died on the morrow, leaving an heir of his body, and such heir might have been legally and effectually served heir of tailzie and provision to this his immediate ancestor James Colquhoun, and thereby would have been entitled to the legal estate disponed to James by this deed, and to the therein contained procuratory and precept, and thereon he might have been lawfully infeft. (See 1693, c. 35.) 5. To say that the fee remained in Robert Colquhoun, the tailzier, is merely to say that his infeftment of fee remained the last infeftment, because none had yet followed on his procuratory or precept, and he remained in the dominion of the estate by not delivering his dispositive deed; but all this is nothing to the purpose in the question of making up the feudal title, under this dispositive deed, after his death. The quality of his right is not at all in question. 6. Any service to Walter Colquhoun, or to any other substitute as heir of tailzie and provision, would have been inept and useless. Such a service would not have constituted legal certainty that the institute James Colquhoun, and the heirs whatsoever of his body, had failed. The only legal certainty that this James, and the heirs whatsoever of his body, had failed, was by

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* In the relative action of reduction.

service as heir of tailzie and provision to this James. A service as heir of tailzie and provision to Robert Colquhoun, the tailzier, never could be a title to the unexecuted procuratory and precept in this tailzier's own deed. He had not disponed to himself, nor had he granted any procuratory or precept for infefting himself. Either this his deed was of some legal effect or of none. If of none, there is an end of the whole case on both sides, and the fee-simple title made up must be good; but if this deed of the tailzier was of any legal effect, it was a disposition, procuratory, and precept for infefting James Colquhoun, the nominatim disponee alive at the date of this deed, and, failing him, the heirs of his body. Feb. 17, 1831.

Suppose that this James had left an only child or eldest son, therefore the heir of this James's body, could this status, or quality of relation of this child to this James, ever be proved, or be of legal certainty, by service of this child as heir of tailzie and provision to Robert Colquhoun the tailzier? Most assuredly not. Conveyancers never heard of a declarator of a nominatim disponee or institute having failed. Such a practice never has existed, and such new form of procedure ought never to be resorted to, and is dangerous, as it would tend to perplex and unsettle land-rights. The legal answer to such procedure would be, "The party must produce the legal "certainty that the predecessor died at the faith and peace of the king; and this can "only be done by the verdict and service as a brieve in due form of law. For aught "that appears, the nominatim disponee may have died attainted of high treason, or "he may be still alive." In short, the law believes a service, and believes nothing else in such cases; and the law bestows peculiar privileges on it. It will not do to say, that, in the proof to the inquest on the service of the substitute as heir to the tailzier, the substitute may bring proof that the institute is dead. Any such proof, supposing it admissible, would not appear on the retour, or, if it did, it would only be obiter or incidental. Still the service would not be to the institute or nominatim disponee, but to the tailzier or disponer, and never could be a mid-couple to take up the open procuratory and precept according to the act 1693, c. 35, nor to take up any title or right whatsoever.

The process of declarator is a most useful proceeding in the law of Scotland, particularly for ascertaining the right of parties under complicated settlements and manifold titles; but that process never has been used, nor ought to be used, nor can be used, as a substitute for a service, where such service is the legal mode of transferring the right. The general service was hitherto used and resorted to for that end, and was useful in a declaratory way, without the least intention of taking up or transmitting any thing. In this point of view, the judgment in the case of Ramsay v. Sir Alexander Cochrane * is to be lamented. It is the more to be regretted, as there is no record of general services; and at this time, since that judgment, no conveyancer, however accurate or however careful, can tell whether he has made up a correct title for his client.

This is a feudal question, not one of mere general law, and it relates to the transmission of heritable property according to the peculiarities of the law of Scotland, and ought to be considered with the greatest attention. In such matters, whatever tends to unhinge long-established form and usage is constantly attended with dangerous consequences. The case of Lord Strathnaver I consider of great authority; and I look upon the law, as laid down by Lord Arniston in his paper, as correct.†

The doubt which has arisen in another place seems to have been, "whether

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* See Vol. IV. No. 21.

† One of the cases quoted by the suspender, along with a pleading by Mr. R. Dundas, afterwards Lord Arniston.

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any legal estate could be constituted or conveyed to the institute by the deed in question, he having predeceased the granter, the tailzier; and consequently, whether there could be any legal estate to be taken by service as heir to the institute." But, with great deference, there was constituted and conveyed to the institute by his deed the legal estate of fee, legally capable of being feudally vested by infeftment, although qualified with the reservation of the granter's liferent, and of power to sell, &c.; and the legal estate, thus constituted and conveyed to this institute, might be taken up by service as heir to the institute; and such service was the only legal certainty that the institute had failed—that is, had died; and that thus the open procuratory and precept had become transmissible according to the act 1693, c. 35.

In this question it is no less to be borne in mind, that all dispositions, or deeds conveying heritable rights, must be conceived in words de præsenti, and are full and complete deeds from the date of execution, whatever qualities or conditions they may contain. Again, by the practice of our law, it should also be remembered, that where various persons have various and different rights, the one having the principal or catholic right is understood, and justly so, to be custodier for the whole. A liferenter, particularly one by reservation, as the entailer remained after executing the deed of entail, keeps the whole for the fiar. As it stands, the question is merely hypothetical, and can be intended merely as a declarator of the law in future; but as it may have a great influence, prospectively, on Scottish conveyancing, it is important that our opinions should be promulgated.

His Lordship further stated, that he expressly dissented from some of the principles laid down by the consulted judges.

Jameson for Suspender.—I understand that no point is intended to be decided, except that the general service as heir of entail, which Robert Colquhoun junior expede in 1806 to his grandfather the entailer, was a bad service; and that the proposed judgment does not involve the question whether the service as heir of entail ought to have been to the institute James.

Lord President.—Certainly not. In compliance with the remit from the House of Lords, the Court have taken the opinions of the other judges on the questions there set forth. We have also delivered our own opinion on these points; and in further compliance with the same remit, which directs us thereafter to proceed as may be just, we adhere to our former judgment, and refrain from deciding a separate question, which, in the opinion of the whole judges, is unnecessary to the final and complete disposal of this cause,

The Court then (8th July 1831) pronounced this interlocutor:—"Having "advised the Cases, &c., with the opinions of the consulted Judges, &c., of new "repel the reasons of suspension, find the letters orderly proceeded, and decern; find "no expenses due to either party under the remit from the House of Lords."

Appellant's Authorities.—Maconochie, Jan. 12, 1780 (13,040); Baillie, Feb. 23, 1809 (F. C.); Turnbulls, Nov. 12, 1822 (2 Shaw and Dun. 1*); Donaldson, March 11, 1786 (8,689); Campbell, Dec. 14, 1790 (8,652); Lockhart, Feb. 19, 1819 (F. C.); Mackenzie, Nov. 24, 1818 (F. C.†); Hamilton, March 3, 1815 (F. C.); 3 Ersk. 8, 23, and 38; Hepburn, June 6, 1814, (2 Dow. 342); Russel, Jan. 31, 1792 (10,300); Douglas, Feb. 22, 1765 (15,616); 3 Ersk. 8, 73; June 30, 1758 (14,369); Campbell, Nov. 28, 1770, (14,949); Sandford on Entails, 323.

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* Reversed on the 15th of April 1825. See Vol. I. No. 12.

† See 1 Shaw's Appeal Cases, p. 150.

Respondent's Authorities.—Strathnaver, 2 Feb. 1728 (15,373); 3 Ersk. 8, 73; Gordon, Feb. 14,1749 (15,384); Campbells, Nov. 28, 1770 (14,949); Baillie, Feb. 23, 1809 (F. C.); Dyke, July 3, 1813 (F. C.); Mackenzie, Nov. 24, 1818, (F. C.)

Feb. 17, 1831.

SPOTTISWOODE and ROBERTSON — RICHARDSON and CONNELL,— Solicitors.

JAMES HUME and others, Appellants. *Lord Advocate (Jeffrey)— Walker.*

No. 5.

WILLIAM DUNCAN, Respondent.—*Sandford—A. M'Neil.*

Prescription—Title to exclude.—Where a proprietor of heritable subjects granted an ex facie absolute disposition, on which infeftment was taken, qualified by a back bond containing a power of redemption within eleven years; and he assigned this bond to a third party, and disponed the property to him; and the assignee, within the eleven years, raised an action of redemption, which fell asleep; and the heir of the original disponee acquired right to the assignation and relative action, which he afterwards wakened—Held, in an action of reduction on fraud and incapacity, (affirming the judgment of the Court of Session,) that although more than forty years had elapsed from the date of the above deeds, yet a prescriptive title had not been obtained, so as to exclude a challenge by the heir.

Feb. 18, 1831.

1ST DIVISION. Lord Meadowbank.

JAMES DUNCAN bought, as was alleged, for £600, certain heritable subjects in the Kirkgate of Leith, under a disposition on which he did not take infeftment; but requiring, in order to pay them, a loan, he executed, on the 4th of September 1771, an ex facie absolute disposition in favour of John Watson, with assignation to the unexecuted precept on which Watson was infeft on the 19th (recorded on the 20th), and Watson on the same day granted a back bond, declaring, that "albeit the said "disposition does bear to be an absolute and irredeemable right "of property to the said tenement and pertinents, I hereby "declare that the same is redeemable and may be redeemed at "any time within the space of eleven years from the date hereof, "upon payment of the sum of £150 sterling," the sum advanced to Duncan.

Thereafter, in 1773, Duncan entered into a transaction with Robert Hope, by which he bound himself, "his heirs and suc- "cessors, to grant a full and ample disposition, containing all