

Captain EWEN MACPHERSON, Appellant.—*Robertson.*

No. 10.

Mrs. CATHARINE CAMERON, or MACPHERSON, and Others,
Trustees of the late Colonel MACPHERSON, Respondents.

Marriage Contract—Entail.—Question remitted, as to the validity of an entail executed by a father, who was bound by a marriage contract to secure his estates in favour of the heirs of the marriage, with power to make an entail, and had, as was alleged, exceeded that power.

COLONEL DUNCAN MACPHERSON of Cluny entered into an ante-nuptial contract on the 12th of June 1798 with Mrs. Catharine Cameron, by which, after making a provision of £200 per annum in favour of her, in case of her survivance, he bound himself to secure the whole heritable property of which he was then possessed, or might be possessed at his death, “to and in
“favours of himself and the heirs-male of the marriage between
“him and the said Catharine Cameron; whom failing, to the
“heirs-male of the said Colonel Duncan Macpherson in any
“subsequent marriage; whom all failing, to the other heirs and
“substitutes named or to be named by the said Colonel Duncan
“Macpherson, in any deed of entail already executed, or that
“may be executed, by him, with and under the usual prohibitory, irritant, and resolute clauses competent by the law
“of Scotland, and such other clauses as the said Colonel
“Duncan Macpherson has inserted or shall hereafter insert
“in the said deed of entail, not inconsistent with these presents,
“heritably and irredeemably; and for that effect the said
“Colonel Duncan Macpherson obliges him and his foresaids
“to make and grant dispositions and other proper conveyances,
“containing procuratories of resignation, and all other clauses
“needful for obtaining such charters and infestments; under
“the reserved power and faculty always to the said Colonel
“Duncan Macpherson, at any time during his life, by a deed
“of entail or other deed under his hand, to put the heirs
“hereby entitled to succeed to the said lands and estate under
“such limitations and restrictions, with respect to alienating
“the same, or contracting debts thereupon, as he shall think
“just and reasonable, and to vary, alter, and enlarge the substitution in any manner he may think proper, provided the
“same in no way hurts or prejudices the heirs-male to be
“procreated of the present marriage.”

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1ST DIVISION.
Lord Newton.

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Of this marriage Captain Ewen Macpherson was the eldest son. His father increased the widow's annuity to £500; and in 1801 executed in favour of a series of substitutes (of whom Captain Macpherson was the first) a deed of strict entail. This was followed, on the 30th of August 1804, by the execution of a trust-disposition, by which the Colonel conveyed to his widow and certain trustees the whole estates of which he should die possessed, for payment of debts, of the annuity to his widow, and provisions to younger children. He then directed them, "after
" payment of the said jointures, annuities, interest of debts, and
" expense of management, to apply an annual sinking fund, to the
" amount of £500 sterling money, if so much remain, towards
" payment and extinction of the principal or capital sums due
" by me; and after deduction thereof, and of the said jointures,
" annuities, interests of debts, and expense of management, to
" make payment of the free residue to the heir of entail, who
" would be entitled to assume the possession of my said estate if
" this trust-deed did not exist; nor shall it be competent to
" the said heir to inquire into or interfere with the manage-
" ment, nor to quarrel or impugn the accounts, of my said
" trustees, nor to object to any article for which they shall take
" credit, upon pretence of enlarging the said annual free residue;
" but he shall be obliged to accept of their accounts, or of any
" abstract showing the free residue, as the same shall be attested
" by the acting trustee or trustees for the time, or their quorum,
" without any inquiry or ground of objection whatever other
" than what may arise from the adjustment and ascertainment
" of their accounts, by an accountant of character, in manner
" hereafter directed: And it is hereby declared, that the said
" annual payment shall not be the foundation of any adjudi-
" cation, or other real diligence against the fee or property of
" my said estate, or a foundation for affecting the rents thereof,
" which shall be uplifted by my said trustees only; and they
" shall be no farther answerable to such heirs than to apply
" the said free balance or residue, after such deduction, as
" aforesaid, in manner above directed." He further " expressly
" provided and declared, that the present trust shall subsist until
" the whole debts chargeable upon the said estate, or owing by
" me, are paid and cleared off, so that my said estate becomes
" perfectly free and disencumbered, and that the heir entitled to
" succeed to it attains the age of twenty-five years complete; and

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“ upon the termination of the said trust, the said trustees
 “ shall be obliged to yield the possession of my said estate to the
 “ heir of entail,—who, if there was no trust-disposition, would
 “ be entitled to assume the possession of my said estate,—and
 “ to denude thereof in favour of the same series of heirs, and
 “ under the same conditions, provisions, and declarations,
 “ clauses irritant and resolute, that are contained in the said
 “ deed of entail; and always with and under the different
 “ provisions in favour of my said spouse, by the foresaid con-
 “ tract of marriage and bond of provision, and codicil thereto
 “ annexed, and the additional provision in favour of my said
 “ spouse and daughters by this deed. And my said heirs shall
 “ be obliged henceforth to possess my said estate under the
 “ deed of entail above mentioned, and the relative deed to be
 “ executed by the said trustees, which shall be recorded in the
 “ register of tailzies, and by no other right or title whatsoever.”

The Colonel died in August 1817, leaving a family of eight children. At this time Captain Macpherson was a minor. The trustees took possession in virtue of the trust-deed, and continued in the management of the estates uninterrupted till the month of October 1826, when Captain Macpherson brought an action of reduction of the trust-disposition, on the ground that it was “ ultra
 “ vires of the granter, inasmuch as the deceased Colonel Duncan
 “ Macpherson, by the said contract of marriage entered into
 “ betwixt him and the said Mrs. Catharine Cameron or Mac-
 “ pherson, did, in contemplation of the said marriage, inter alia,
 “ expressly contract, provide, and secure the foresaid lands and
 “ estate of Cluny, Kinlochlaggan, and others therein and above
 “ specified, and the whole other heritable property and estates
 “ belonging to him at his death, to and in favour of the pursuer,
 “ and the other persons, in manner therein and under-written.”
 He therefore concluded that it ought to be reduced in toto;
 “ or at least the same ought to be reduced, saving and except-
 “ ing in so far as the said trust-deed of 30th August 1804 may
 “ be held by our said Lords to be a security for payment of the
 “ bonâ fide and onerous debts owing by the deceased Colonel
 “ Duncan Macpherson, the granter, at the time of his death,
 “ and for payment of the subsisting family provisions, or for
 “ payment of other debts and obligations contracted by the said
 “ trustees, for the purpose of discharging the debts outstanding,

Feb. 28, 1831. “ or exigible from the said Colonel Duncan Macpherson himself,
 “ at the time of his death; and also saving and excepting the
 “ heritable bonds, and the bonds and dispositions in security,
 “ or personal bonds, granted by the said trustees to third
 “ parties in security of the repayment of the money borrowed
 “ by the trustees and applied for the purposes foresaid; and
 “ also saving and excepting the instruments of sasine fol-
 “ lowing on the said heritable bonds, and bonds and dispositions
 “ in security, and all deed of transmission or assignation of the
 “ said heritable debts and securities.” He further concluded,
 “ that it should be declared that the pursuer is entitled to
 “ succeed to the foresaid lands and estate of Cluny and others,
 “ contained in the foresaid marriage-contract and trust-deed,
 “ free of all limitations, conditions, and restrictions, in so far
 “ as imposed by the trust-deed, excepting always as aforesaid;
 “ and that he is entitled to the just and true rents, produce, and
 “ profits thereof from and after the term of Martinmas 1817,
 “ being the first term after the death of the said Colonel Mac-
 “ pherson;” or, in case the trust-deed shall not be reduced in toto,
 that the trustees “ should be decerned and ordained, by decree
 “ foresaid, forthwith to dispoise, convey, and make over the said
 “ lands and estate of Cluny and others, contained in said mar-
 “ riage-contract and trust-deed, to the pursuer; and under
 “ burden of the debts bonâ fide contracted by the trustees to
 “ third parties, and still outstanding; or in such form as our said
 “ Lords shall direct.”

The trustees denied that the execution of the trust-deed was ultra vires of Colonel Macpherson; and the Lord Ordinary having reported the question to the Court on cases, their Lordships, on the 22d of June 1827, pronounced this interlocutor:—
 “ Find, in respect of the marriage-contract of the late Colonel
 “ Duncan Macpherson, dated 12th June 1798, that the trust-
 “ deed in question thereafter executed by him was ultra vires
 “ of the granter, and cannot be sustained to any effect whatever,
 “ except as a security for payment of bonâ fide and onerous
 “ debts owing by the said Colonel Duncan Macpherson at the
 “ time of his death, and for payment of reasonable and suitable
 “ provisions to his widow and younger children, and also for
 “ payment of the real and personal debts contracted by the said
 “ trustees, and applied in discharging the bonâ fide and onerous

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“ debts which were outstanding or exigible from the said Colonel
 “ Duncan Macpherson at the time of his death : Find, that the
 “ trustees had full power, by the said trust-deed, to borrow
 “ money for the said purposes, and to grant heritable bonds,
 “ and bonds and dispositions in security, and personal bonds
 “ therefor : Find, that the heritable bonds, and the bonds and
 “ dispositions in security, and personal bonds granted by the said
 “ trustees to third parties in security of the repayment of the
 “ money borrowed by the trustees, are valid and effectual, with
 “ all that has followed or that may follow thereon : Find, that the
 “ current leases granted by the trustees to third parties of the
 “ lands contained in said trust-deed are not challenged by the
 “ pursuer, and that the trustees are to be relieved thereof : Find,
 “ that neither of the subsisting provisions in favour of the widow
 “ nor of the younger children are challenged by the pursuer,
 “ and that the said provisions are to hold as reasonable and suit-
 “ able, and to have effect accordingly : Find, that the pursuer is
 “ entitled to succeed to the lands and heritages contained in the
 “ said marriage-contract and trust-deed, free of all limitations,
 “ conditions, and restrictions, in so far as imposed by the said
 “ trust-deed, but always with and under the real burden of the
 “ existing debts contracted and secured as aforesaid by the
 “ trustees, and of the subsisting family provisions, and that the
 “ pursuer is entitled to the just and true rents, produce, and
 “ profits of the said lands and heritages contained in the said
 “ trust-deed from and after the term of Martinmas 1817
 “ years, being the first term after the death of the said
 “ Colonel Duncan Macpherson, and in time coming, and
 “ to have the said by-gone rents, produce, and profits ac-
 “ counted for to him accordingly : Ordains the said trustees
 “ forthwith to dispone, convey, and make over the said
 “ haill lands and heritages contained in the said marriage-
 “ contract and trust-deed to the pursuer, and to the other heirs
 “ and members of tailzie called by the deed of entail executed
 “ by the said Colonel Duncan Macpherson, and under the
 “ conditions, provisions, and declarations, clauses prohibitory,
 “ irritant, and resolute, contained in the said deed of entail,
 “ but always with and under the real burden of the said debts
 “ contracted by the said trustees to third parties, and secured as
 “ aforesaid, in so far as the same may be yet unpaid, and also
 “ under the burden of the subsisting family provisions, as well

Feb. 28, 1891. “ as of relief to the trustees of all bonâ fide and onerous debts
 “ and obligations come under and contracted to third parties by
 “ them as trustees,—the said conveyance to be a burden upon
 “ the said deed of entail; reserving always to the pursuer all
 “ competent right of recourse against the separate estate of the
 “ said deceased Colonel Duncan Macpherson, if he left any, in
 “ order to obtain relief for such of the said debts as shall, by the
 “ conveyance to be executed by the trustees as aforesaid, in
 “ favour of the pursuer, be enumerated as incumbrances
 “ affecting the lands and heritages contracted as aforesaid; and
 “ also reserving to the pursuer all competent right to insist in
 “ an action, for the purpose of having it found and declared that
 “ he is entitled to sell such parts of the said lands and heritages
 “ as may be necessary for the discharge of the debts and obli-
 “ gations brought against the contracted estate, and interest due
 “ and arising therefrom; and reserving to all concerned all
 “ defences competent against such action as accords; and decern
 “ and declare accordingly; and allow this decree to go out and
 “ to be extracted as an interim-decree, and grant warrant
 “ therefor accordingly; and farther, remit the remaining
 “ points of the cause to the Lord Ordinary, to proceed and
 “ do farther therein as to his Lordship shall seem just and
 “ proper.” * Agreeably to this remit, the Lord Ordinary or-
 dained a draft of the conveyance to be granted in favour of the
 pursuer and the other heirs of entail to be prepared and lodged.

Captain Macpherson appealed against the above judgment, and the procedure before the Lord Ordinary, in so far,—1. as it found that the subsisting provisions † in favour of the widow and the younger children were not challenged; that they were to receive effect; and that the pursuer was entitled to succeed under the burden of the subsisting family provisions; and, 2dly, in so far as it ordained the lands to be disposed to the pursuer and the other heirs and members of tailzie called by the deed of entail, under the conditions, &c. of the deed of entail, but with the real burden of the debts contracted by the trustees to third parties, and secured as aforesaid, or as might be yet unpaid, and also under burden of the subsisting family provisions.

* 5 Shaw and Dunlop, No. 399.

† The appellant explained, that he did not dispute the marriage contract provisions; but there were additional supplementary provisions, which neither the estate could bear, nor had his father power to grant.

By these findings the appellant contended that the Court had sustained what the appellant's father had no power to direct or accomplish; besides, neither the question as to existing family provisions, nor the efficacy or validity of the entail, was before their Lordships. Feb. 28, 1831.

After, however, lodging his case, the appellant presented a petition to the House of Lords, setting forth, that the petitioner appealed to their Lordships from the above judgment, in so far as it sustains the additional provisions granted in favour of the widow and younger children, and ordains the respondents to dispoise the lands and estate in favour of the petitioner, in terms of the deed of entail, inasmuch as the Court had no power to pronounce a judgment on the validity of the entail, that deed not having been brought before them in the action of reduction and declarator: that, since the petitioner's appeal was presented to their Lordships, viz. on the 28th of April 1830, the petitioner and the respondents, and such of the younger children of Colonel Macpherson as had then attained majority, have executed a deed of agreement as to the amount of the provisions to the widow and younger children of Colonel Macpherson, and all claims against each other, whereby it becomes unnecessary to obtain the judgment of their Lordships' house on that branch of the cause, and the respondents and the other parties to the deed of agreement have also thereby bound themselves to acquiesce in the application of the petitioner for a remit to the Court of that part of the judgment in relation to the validity of the deed of entail, so incompetently pronounced; and therefore praying that their Lordships would be pleased to order that this cause might be remitted to the Court of Session, to consider and determine the question of the validity or invalidity of the deed of entail, or that the petitioner might have leave to amend his appeal, by striking out such parts thereof as related to the provisions to the widow and younger children of Colonel Macpherson, and to withdraw the cases already laid upon their Lordships' table by the petitioner, and to substitute an amended case.

Whereupon the House of Lords ordered and adjudged, That the petitioner be at liberty to amend his said appeal, by striking out thereof all such parts as relate to the provisions for the widow and younger children of Colonel Duncan Macpherson, and that

Feb. 28, 1831. the cause be remitted back to the Court of Session in Scotland, to decide upon the validity of the said deed of entail.

G. W. POOLE, Solicitor.

No. 11. JAMES GALBRAITH, Appellant.—*T. H. Miller—Sandford.*

RICHARD GALBRAITH, Respondent. — *Sir Charles Wetherell — Lushington.*

Service.—Held (affirming the judgment of the Court of Session), in a question as to the validity of a service, that there was sufficient evidence before the jury to prove that the party served was the substitute called in a deed of entail,—the party challenging having failed to establish the existence of any other person to whom the designation in the entail could apply.

March 1, 1831. JAMES GALBRAITH of Balgair executed in 1705 a deed of entail, by which he conveyed the lands of Balgair to himself and the heirs of his body, whom failing:—1. To John Galbraith, eldest son of George Galbraith, merchant burgher in Edinburgh; 2. James, second son of George Galbraith; 3. “Major Hugh Galbraith, in the kingdom of Ireland, son of the deceased Andrew Galbraith, the entailer’s father’s brother consanguinean;” 4. Captain Robert Galbraith, in the kingdom of Ireland; 5. John Galbraith of Old Graden; 6. Archibald Buchanan of Drumhead, and such of his sons as the entailer should point out; 7. John Galbraith, in Hill of Balgair, and the heirs male of their several bodies respectively; whom all failing, to certain other substitutes.

2^D DIVISION.
Ld. Mackenzie.

The entailer left no issue, and in 1794 the first and second branches of the substitution became extinct. Advertisements were thereupon published, calling on the heirs next in succession to come forward; in consequence of which brieves were obtained by Richard Galbraith in 1806, claiming as heir male of Major Hugh Galbraith, the third substitute in the entail; and by William Arthur Galbraith, who claimed as representing Captain Robert Galbraith, the fourth substitute. A competition ensued, in which Richard Galbraith established his descent from a Major Hugh Galbraith of Capahard, in