Kirks, in 1618 for another liferent, and two terms of nineteen years from the ish of the original tack. The objection, that in such circumstances the Commissioners sustained the appearance of Sir James as titular, is just of the same kind with that which was held in the case of the *Chapel Royal* to fall under the negative prescription. If prescription applied when the objection was stated by the titular himself, it must do so equally where it is brought forward by the minister. This is not a case in which the plea of the minister is that the valuation does not apply to him, being *res inter alios acta.* His predecessor was not only called, but appeared, and was heard for the interest of the benefice. That may not affect the right of the present incumbent to appear and state objections to the competency or validity of the valuation. But in so doing he seeks to challenge the decree as fundamentally null as against all parties since the expiry of the tack, and in the present case he does so on a ground extrinsic of the decree itself. The right to insist on such a challenge of an *ex facie* valid and competent decree, falls under the negative prescription at whosoever instance it may be brought. In the present case there does not seem to be any question of practical importance as to the period from which prescription began to run. As the minister was not only called, but took part in the proceedings, the valuation was judicially known to him from its date; and on that ground the Lord Ordinary is of opinion that prescription ran from the first. Again, it was founded upon and given effect to in the locality of 1710, with express consent of the minister, who was thus made aware of its import and of the effect to which it was founded upon against him and his successors in the benefice.

"If the valuation bore to be, as is pleaded by the minister, a mere transaction between the heritor and a tacksman, that would have been properly pleaded *ope exceptionis* by way of objection to the surrender, but as, in the view which the Lord Ordinary takes, that form of the case for the minister is clearly untenable, and his contention resolves into a challenge of the decree on an extrinsic ground, it could only be effectually made in a reduction. If the Lord Ordinary had not, after fully hearing parties on the whole case, been satisfied that the ground of challenge is not maintainable on its merits, he would have allowed the minister an opportunity to bring a reduction, if so advised. But in the view which he takes of the case, he is in a position to decide it independently of the plea that a reduction was necessary. "E. F. M."

Parties acquiesced.

Counsel for Sir James Liston Foulis, Bart., and his Curators—Mr Hall. Agent—Andw. Grieve, W.S.

Counsel for Minister—Mr Cook. Agent—W. Traquair, W.S.

COURT OF SESSION.

Friday, July 19.

SECOND DIVISION.

TRUSTEES OF WILLIAM S. YOUNG AND OTHERS *v.* WILLIAM YOUNG AND HIS TUTOR *ad litem.*

Service—Conditional Institute—Substitute—Obligation to Infeft. By *mortis causa* settlement A disponed his whole estate, heritable as well as moveable, to himself and the child or children of his body, equally between them, and to their assignees and disponees, whom failing to B, C, D, and E, and their assignees and disponees, the share of any of them dying without issue to go to the survivors. The clause of obligation to infeft was directly and exclusively in favour of B, C, D, and E. A died without issue, and survived by all the grantees, and shortly afterwards B died without having expede service to A. In an action at the instance of B's testamentary trustees, and of C, D and E against A's heir-at-law, Held (1) that, by the terms of A's settlement B was a substitute, and, not having served to the granter, no right had vested in him capable of being transmitted to third parties; (2) that the obligation to infeft did not confer upon the substitutes a *jus crediti* capable of being enforced against the granter's heir-at-law, and vesting in them *a morte testatoris*, but that that clause must be read consistently with the dispositive clause, and as intended simply to afford facilities for completing their titles as subsitutes.

Observations (*per* Lords Cowan and Neaves), repudiating the authority of the case of *Hamilton* v. *Hamilton* as reversed by the House of Lords (1724).—Robertson's Appeals, 493.

This action of declarator, constitution, and adjudication in implement was raised against William Young, as heir of the late Joseph Young of Dunearn, by (1) Peter James Gavin and others, the testamentary trustees of the deceased William Simson Young (the defender's father); (2) David Young; (3) Margaret Meldrum Young, children of the deceased Thomas Young; and by (4) Joseph Matheson Purvis; (5) Jessie Mary Purvis; and (6) John Murray Purvis.

The summons concluded for declarator that the said Joseph Young died on or about 17th November 1864 without leaving issue, and also for declarator that the obligations contained in the deceased Joseph Young's settlement in favour of the said deceased William Simpson Young vested in the latter during his lifetime, and were transmitted by his settlement to his said trustees. The summons further concluded that, in implement of the obligation contained in the settlement of the deceased Joseph Young, the defender, as his heir, should be ordained to make up his title to the deceased's estates, and convey them to the pursuers. There was also the usual alternative conclusion to meet the case of the defender renouncing or failing to convey.

The pursuer's case was based entirely on the terms of Mr Joseph Young's settlement, under which they maintained a personal right to the lands vested in William Simson Young and the individual pursuers upon the death of the testator.

The following are the important parts of Mr Young's settlement:—

"I, Joseph Young of Dunearn, in order to regulate the management and distribution of my means and estate after my decease, and for the love and favour which I have and bear to the persons afternamed and designed, and for other good causes and considerations, do hereby give, grant, assign, alienate, and dispone to and in favour of myself and the lawfully-begotten child or children of my own body, equally between them, and to their assignees or disponees, whom failing to William Simson Young,

David Young, Margaret Meldrum Young, and Helen Young, residing in Leith, my cousins, children of the deceased Thomas Young, merchant in Leith, two third-parts or shares; and in the event of any of these my disponees dying without leaving lawful issue, or disponing or assigning their share, his, her, or their shares shall go to and belong equally to the survivors or survivor, or the lawful children of the said survivors or survivor; and to John Purvis junior, merchant, Singapore, Joseph Purvis, merchant there, and Jessie Mary Purvis, presently residing in Edinburgh, my cousins, children of John Purvis, merchant in Singapore, one third-part or share, and to their respective heirs and assignees whomsoever, my whole means and estate, heritable and moveable, real and personal, wherever situated or addebted, which shall belong or be addebted to me at the time of my death, with the whole vouchers and instructions of the said moveable and personal estate, and the writs and evidents of said heritable estate."

The clause of obligation to infeft was in these terms:—

"Moreover, I oblige myself and my heirs and successors, to infeft and seise the said William Simson Young, David Young, Margaret Meldrum Young and Helen Young, and the survivors or survivor of the said disponees, or the lawful children of the said survivors or survivor; and the said John Purvis junior, Joseph Purvis and Jessie Mary Purvis, and their respective heirs and assignees, in the whole lands and other heritages above disponed requiring infeftment; and for that purpose to grant all deeds and conveyances that may be necessary: But always with and under the burden of my lawful debts and obligations, payment of my funeral expenses, and of such gifts or legacies as I may think proper to leave by any deed or writing to be executed by me at any time of my life: And I hereby nominate and appoint the said William Simson Young, David Young, Margaret Meldrum Young, and Helen Young, and the survivors or survivor of them, and the lawful children of the survivors or survivor, and the said John Purvis junior, Joseph Purvis, and Jessie Mary Purvis, to be my sole executors: And I reserve full power to alter, innovate, or revoke these presents in whole or in part: And I dispense with the delivery, and I reserve my liferent right, and I consent to registration hereof for preservation. In witness whereof," &c.

The pursuers averred, and it was not disputed, that Mr Joseph Young died without leaving issue, and was survived by William Simson Young and the other beneficiaries mentioned in the deed. William Simson Young died on 12th August 1865, leaving a mutual general trust-disposition and settlement conveying to the pursuers Peter James Gavin and others, as trustees, his whole heritage of every description.

Defences were lodged for the defender William Young, a pupil, and a tutor *ad litem* was appointed to him.

The defender pleaded—

1. The pursuers have no sufficient title, at least they have not set forth any sufficient title, to sue the present action, or to obtain decree in terms of the conclusions thereof. 2. The late William Simson Young being only a substitute heir of provision under the disposition and settlement of the late Joseph Young, and having died without being vested, by service or otherwise, with any title to the subjects described in the conclusions of the summons, he could not and did not transmit any title thereto to the trustees named in the trust-disposition and settlement executed by him and his spouse. *Et separatim*, the defender, being himself the substitute-heir of provision next in order to the said William Simson Young under the said Joseph Young's disposition and settlement, is entitled in his own right to the share of the subjects in question, which is said to have fallen to the said William Simson Young, and is under no obligation to give effect to William Simpson Young's trust-disposition and settlement. 3. The remaining pursuers being, according to the terms of the disposition and settlement of the late Joseph Young, mere substitute-heirs of provision, and having alleged no active title by service or otherwise to the subjects in question, they are not entitled either to sue the present action, or to succeed in it. 4. As the defender does not represent, and is under no obligation to represent, the late Joseph Young as heir of line or conquest, and as the pursuers have no good grounds of action, he is entitled to absolvitor.

The Lord Ordinary (Ormidale), on 15th March 1867, pronounced this interlocutor:—

"Finds that the deceased Joseph Young, by his disposition and settlement, dated 7th May 1858, libelled on, alienated and disponed his whole means and estate, heritable and moveable, which should belong to him at the time of his death, to and in favour of himself and of the lawfully-begotten child or children of his body, equally between them, and to their assignees or disponees, whom failing to William Simson Young, now deceased, whose trustees are pursuers, and to the pursuers David Young, Margaret Meldrum Young, and Helen Young, two-third parts or shares; and, in the event of these, his disponees, dying without leaving lawful issue, or disponing or assigning their shares, his or her share should go, and belong equally to the survivors or survivor, or the lawful children of the survivors or survivor, and to the pursuers John Purvis junior, Joseph Purvis, and Jessie Mary Purvis, one-third part or share, and to their respective heirs or assignees whomsoever: Finds it is admitted that the said deceased Joseph Young died on or about the 17th of November 1864, unmarried and without leaving lawful issue of his body: Finds it is stated by the pursuers, the trustees of the said now deceased William Simson Young, that he, having survived the said Joseph Young, died on or about the 12th of August 1865, and that it is not stated by them that he had expede any service as substitute-heir of provision or otherwise to the said Joseph Young, or that he had made up any title whatever to the heritable estate, or any part thereof, which had been alienated and disponed as aforesaid by the said disposition and settlement of the said Joseph Young; but that, on the contrary, it was expressly admitted at the debate that no such service was expede or title made up: Finds also that it is not alleged by the other pursuers that they have expede any service to the said deceased Joseph Young, or made up any title whatever to the foresaid heritable properties or estate, or any part thereof; and finds that no such service or title has been produced or founded on by them: Finds in these circumstances, that the said now deceased William Simson Young was only substitute-heir of provision under the disposition and settlement of the late Joseph Young, and having died without being vested by service or otherwise with any right or title to the heritable properties or estate referred to and described in the conclusions of the action, or any part thereof, he did not transmit any title thereto to the pur-

suers, his trustees; and, therefore, to that effect and extent sustains the plea in defence, and in respect thereof assoilzies the defender from the conclusions of the summons, so far as it is at the instance of the said William Simson Young's trustees, and decerns: And, in regard to the other pursuers, finds that they also are substitute-heirs of provision to the said Joseph Young under his disposition and settlement, and have not averred or produced any sufficient title to sue or maintain the action, and therefore, *quoad* them, and to that effect and extent sustains the pleas in defence, and in respect thereof dismisses the action, and decerns: Finds the defender entitled to expenses," &c.

"*Note.*—The question discussed before the Lord Ordinary was, Whether the late William Simson Young and the other pursuers were to be viewed and treated as the direct and immediate disponees of the late Joseph Young, or conditional institutes under his disposition and settlement, or as substitute-heirs of provision merely to him under that deed? If the former, as was contended for by the pursuers, a personal right and title to the properties in question vested in William Simson Young and the other pursuers on the death of Joseph Young without issue; but if, on the other hand, it is to be held, as was contended for by the defender, that William Simson Young and the other pursuers were merely heirs of provision substituted to Joseph Young as the institute under the destination in his disposition and deed of settlement, it appears to the Lord Ordinary necessarily to follow, and indeed was not disputed, that the result the Lord Ordinary has arrived at is correct.

"That the late Joseph Young was, according to the terms of the destination referred to, the institute or disponee to whom the properties in question were in the first instance conveyed, cannot be questioned; and that he survived for some time the execution of his disposition and settlement could not of course be denied. If, therefore, the properties had been so disponed to Joseph Young by any deed, not being a *mortis causa* settlement, there could be no doubt that the personal right and title to the properties would be *in hæreditate jacente* of him on his death, and that the late William Simson Young and the pursuers could not take up or become vested in that personal right or title except by general service to Joseph Young, as heirs of provision substituted to him.

"But the pursuers relied on the circumstance of Joseph Young's disposition and settlement being a *mortis causa* deed, and on the peculiarity of many of its clauses, denoting, as they maintained, that it was not intended to have, and cannot be held as having had, any effect until after the granter's death; and, in this way, it was argued for the pursuers, that Joseph Young himself neither did nor could take anything under the deed, and, as he left no issue of his body, they on his death stood, with reference to the destination in his disposition and settlement, in the position of direct or immediate disponees or conditional institutes, in whom a personal right and title to the properties and relative obligations in question then vested, and that not only was there no necessity for a general service by them to Joseph Young, but that any such service would have been inept and of no avail. In support of this view, the pursuers cited the cases of *Colquhoun* v. *Colquhoun*, 17th February 1831, 5 Sh., W. and S., 32, and 8th July 1831, 9 Sh., 911; and *Fogo* v. *Fogo*, 28th February 1840, 2 D., 651; 22d June 1841, 2 Robinson, 440; 11th March 1842, 4 D., 1063; and 18th August 1843, 2 Bell's Appeals, 195.

"It appears to the Lord Ordinary that the contention of the pursuers is ill founded, and that the authorities relied on by them are inapplicable to the present case.

"If Joseph Young, in place of disponing his heritable estate, as he did, to himself and the heirs of his body, whom failing to the pursuers, had made it in favour of some individual *nominatim*, whom failing to the pursuers, and if such individual, who would in that case be the institute, had predeceased him without the deed having been ever delivered to him or otherwise made operative in his favour, then the pursuers would have been in the position of conditional institutes, and have been vested in a personal right and title to the properties on the death of Joseph Young as such conditional institutes, and the authority of the cases of *Colquhoun* and *Fogo* would have been in point. But here Joseph Young, by his disposition and settlement, instituted himself as first disponee, and he necessarily took under it, and became vested in the personal right and title to the properties thereby conveyed; and if this be so, it of course follows that, at his death, the personal right and title which had been thus vested in him did not *ex ipso* transmit to the pursuers, but remained till taken up by the proper service in his *hæreditas jacens*.

"In conformity with this view, Mr Erskine states (Institutes, iii, 8, 73) that 'a service as heir to one who was not at his death in the right of the subject intended to be carried, is improper and ineffectual. *A settlement, therefore, or disposition in which the granter does not first institute himself*, but makes over the subject from himself to his son, whom failing to a stranger, can be no foundation for a service by the substitute as heir of provision to the granter. For, although the feudal right of fee of the estate remained with the granter notwithstanding the disposition, yet the personal right of the subject, which is the only thing conveyed by the disposition, did not continue to the granter, and so cannot be carried by a service as heir to him.' So also, in conformity with the same doctrine, Professor Bell (Principles, sect. 1836), says that 'a disposition to the granter himself, whom failing to A B, followed by infeftment, vests the fee in the granter, and on his death A B must enter by special service as heir of provision to him.' And in the next section (1837) the professor goes on to explain that 'where in such a case infeftment has not followed on the disposition, service is still necessary in the person of A B. But there is no place for a special service to take up the right under the disposition. The right to the unexecuted procuratory or precept contained in the disposition being personal must be taken up by a *general* service' (sec. 1838). 'Where the *nominatim* substitution is not immediate (as in a destination to A and his heirs, whom failing to B), the necessity for service by B has never been doubted, and that service must be special if the institute have taken infeftment' (sec. 1839). 'Where the disposition is not to the granter himself, but to the heirs-male of the granter, whom failing to a *nominatim*, and there are no heirs-male of the granter, this is not held a conditional institution of A, and he must serve heir of provision in special to the granter.' To the same effect do the late Mr Sandford (Treatise on Entails, 492) and Professor Menzies (Lectures, 2d ed., p. 758) state the law. And all of these learned authors cite various decided cases in support of

their statements. Reference may be made in particular to the cases of *M'Culloch* in 1731, Mor., 14,366; *Creditors of Carlton* v. *Gordon*, 8th February 1748, M., 14,366; *Livingstone* v. *Lord Napier*, in 1762, M., 15,409 and 15,418; and *Peacock* v. *Glen*, 22d June 1826, 4 Shaw, 742. Although the decision in the last of these cases appears to have turned a good deal on a point which was not founded on by the defender here, the principles of law and conveyancing on which the Lord Ordinary has proceeded were expressly referred to as being undoubted by the learned Judges in the course of their opinions.

"Nor has the Lord Ordinary found anything in the reports of the cases of *Colquhoun* and *Fogo* opposed to the law as adopted by him, and illustrated in the cases referred to; on the contrary, the law as so adopted, and the cases referred to, appear to have been distinctly recognised as unchallengeable in *Fogo's* case, especially by Lords Moncreiff, Cockburn, Mackenzie, and Cuninghame, whose opinions met with the approval of the great majority of the Court, and were given effect to in the judgment pronounced. See particularly pages 1106, 1107, 1109, 1123, 1125, and 1129 of the report of the case in the fourth volume of Dunlop.

"The pursuers founded strongly on the deed in the present instance being a *mortis causa* settlement, on its being a conveyance of the *universitas* of the granter's estate, on their being alluded to throughout the deed as 'disponees,' and on its containing an obligation to infeft directly and expressly in their favour as disponees. But many, if not all, of these peculiarities are to be found in the decided cases which have been referred to; and, indeed, some of these cases appear to the Lord Ordinary to have been more unfavourable for the principle given effect to in them and by the prefixed interlocutor than the present. Thus, in the case of the *Creditors of Carleton* v. *Gordon*, the deed was a *mortis causa* settlement of the *universitas* of the granter just as here; and it was held that the fee of the property in dispute was in the granter at his death, and that a service was necessary to take it up, although the disposition was not to himself directly and expressly as institute, but to and in favour of the heirs-male of his body, whom failing to John Gordon. But there having been no heirs-male of the granter's body, the fee was held to have remained with himself, and that John Gordon, who survived him, was merely an heir of provision substituted to him, and bound accordingly to make up his title by service to the granter. In the case also of *Peacock* v. *Glen*, the deed was a *mortis causa* settlement, and it contained both precept and procuratory, and, in the latter, the party, who was found to be an heir of provision merely, was expressly alluded to as a 'disponee.'

"On the other hand, there was cited for the pursuer, besides the cases of *Colquhoun* and *Fogo*, the case of *Steele* v. *Young*, 23d January 1823, 2 Sh., 146; but that was a very special case, and in no view of it does the Lord Ordinary see how it affords any aid to the pursuer. In some respects, indeed, it might be referred to as a case favourable to the defender; for there not only was the deed a *mortis causa* settlement, but that portion of it on which the judgment turned was a conveyance in general terms, just as in the present instance, of the *universitas* of the granter's estate; but it does not appear from the report that this circumstance was of itself held to affect the question of title which was raised and determined.

"The Lord Ordinary, however, understood the pursuers chiefly to rely on the circumstance of the obligation to infeft in the present case—not the precept of sasine or procuratory of resignation, for there is none such—being directly, expressly, and exclusively in favour of the late William Simson Young and the other pursuers, as the granter's disponees; and they cited, in support of their argument founded on that circumstance, and as illustrative of the efficiency of such an obligation, the case of *Renton* v. *Anstruther* (1 Bell's Appeals, p. 129, and 2 Bell's Appeals, p. 214, and more especially pp. 226-7). But really that case has no bearing on the present, the question there being whether a party having a mere personal right to lands could validly make a procuratory of resignation the basis of an entail. Nor can the well established principle of law be overlooked, that the dispositive clause is the dominant and ruling one, to which all the others are held to be subordinate and accessory merely. Accordingly, in *Shanks* v. *The Kirk Session of Ceres*, 27th January 1797 (M., 4295), where the fee of a property was given to one person by the dispositive clause of a deed, and the precept of sasine contained warrant for infefting a different person in the fee, the right of fee was held to be determined by the dispositive clause, and it was observed that the effect of the discrepancy was not to vest the fee in the party named in the precept, because there was no act of transmission to him, but merely to make the true disponee's right still personal, inasmuch as the mistake in the precept prevented his converting it into a real right by infeftment. So also, in the case of *Forrester* v. *Hutchinson*, 11th July 1826 (4 Sh., 824), where an estate was given by the dispositive clause to the disponee and heirs-male of his body, but the procuratory authorised resignation for new infeftment in favour of the disponee and the heirs of his body, the dispositive clause was held to rule and received effect. The Lord Ordinary cannot, therefore, allow himself to be affected by the circumstance of the obligation to infeft in the present case being directly and exclusively in favour of the late William Simson Young and the other pursuers, in place of being strictly in accordance with the dispositive clause.

"For the reasons now stated, the Lord Ordinary has, notwithstanding the very able and instructive argument which was addressed to him on behalf of the pursuers, found himself constrained to decide as he has done; and he may add that, having regard to the arrangements which appear to have been in the course of being carried into effect prior to William Simson Young's death, on the faith and assumption, apparently, that a right to a share of the properties in question had vested in him on the death of his cousin Joseph Young, it is with regret that he has been unable to arrive at any other conclusion. The Lord Ordinary, however, feels that to interfere with established and generally understood rules in matters of conveyancing and the making up of titles might lead to very perilous consequences."

The pursuers reclaimed.

Gifford and Rettie for them argued—

1. According to the proper construction of the dispositive clause, William S. Young and the individual pursuers were conditional institutes, and not substitutes. The structure of the deed showed that the granter intended it not to have effect till the moment of death, at which date, if he had children, he was to be institute himself; if he had

no children, William S. Young, &c., were to be institutes. The opinions of the large majority of the Judges in the case of *Fogo*, though no judgment proceeded upon the point, may now be regarded as settling that a *mortis causa* conveyance to a stranger who predeceases the granter carries no personal fee to him. From this it follows that there is no feudal necessity for a *de presenti* personal fee being given to any one in a *mortis causa* conveyance. It was, therefore, quite competent for the testator to frame the deed so as to suspend its effect till it should be ascertained whether he should die childless or not. The fact of the testator in all the subsequent parts of the deed calling William S. Young, &c., his "disponees," showed the testator's intention to dispone to them subject to the condition *si sine liberis* which he had expressed. The natural reading of the clause was, "I dispone to myself and my children; failing children, I dispone to William Simson Young," &c.; *Colquhoun* v. *Colquhoun*, 17th February 1831, Jurist, iii., 311, and 8th July 1831, p. 594; *Fogo* v. *Fogo*, 25th February 1840, xii., 369, and 18th August 1843, xvi., 6; *Hamilton* v. *Hamilton*, 10th June 1714, M., 14,360, *rev.* 18th April 1724, Robertson's App., 493.

2. Even if the dispositive clause were read as giving the granter a personal fee during his life, and therefore as placing William S. Young, &c., in the position of substitutes, the obligation to infeft being directly in favour of William S. Young, &c., gave them, whenever the succession opened to them as substitutes, a good personal right to the lands. This obligation to infeft was an obligation on the granter and his heirs of line and of provision to complete a title, and convey to the substitutes named. If this obligation was a good obligation to any effect, being conceived in favour of William S. Young, &c., directly, no service was required to vest it in them, and no service was competent. It never was an obligation in favour of the granter, and therefore could not be taken out of his estate by service. The only question was, whether it was competent for the granter to impose this obligation to infeft the substitutes upon himself and his heirs? The fact of the granter having given a personal fee to himself by the dispositive clause did not prevent him from imposing any burden upon that fee. No doubt, the obligation to infeft must be read as conditional on the granter dying without issue, but this does not affect its efficacy when the condition was purified. The Lord Ordinary was wrong in supposing that there was a collision between the dispositive clause and the clause of obligation to infect. The two clauses were independent of each other. The obligation to infeft was obviously inserted for the purpose of enabling the *nominatim* substitutes to complete their title in the easiest manner without the necessity of service. There was not the slighest reason to suppose that the testator intended this obligation to infeft William S. Young, &c., to be conditional on their serving to the granter as heirs of provision. The only condition expressed or implied was the condition *si sine liberis*, and that having been purified, a pure obligation remained in favour of William S. Young, &c.—*Ogilvy* v. *Ogilvy*, 16th December 1817, F. C.; *Stewart* v. *Stewart*, 2d March 1815, F. C.; *Gordon's Trustees* v. *Harper*, 4th December 1821, 1 S., 185 (N. E., 175): *Steele* v. *Young*, 23d January 1823, 2 S., 146; *Renton* v. *Anstruther*, 28th February 1843, Jurist, xvi, 53; *Buchanan* v. *Young*, 13th March 1860, Jurist, xxxii, 418.

N. C. Campbell and Thomson for the defender answered—

1. By his disposition and settlement Mr Joseph Young disponed his estates to himself and, on his death, to his children, if he had any, and failing them to William S. Young and others. In this way a personal right to the estate vested in the granter, and on his death that right required to be taken out of his *hæreditas jacens* by service. If he had left children, they must have taken up that right by service as heirs of provision, and those called failing them could not be in a different position. William S. Young never served to the granter, and accordingly, no interest vested in him which was capable of being transmitted to third parties. The cases of *Colquhoun* and *Fogo* (*supra*) were not in point, as there the granter did not institute himself —Ersk., iii., 8, 73; Bell's Prin., sects. 1836-39; Sandford on Entails, 492; Menzies Lectures (2d ed.), 758; Bell's Lectures, 1023; *M'Culloch* v. *M'Leod*, 10th July 1731, M., 14,366; *Creditors of Carleton* v. *Gordon*, 8th February 1748, M., 14,366; *Livingstone* v. *Lord Napier*, 1762, M., 15,409 and 15,418; *Peacock* v. *Glen*, 22d June 1826, 4 S., 742 (N. E., 749).

2. The clause of obligation to infeft was part of the same deed as the dispositive clause, and it is a well established principle, that the latter is the dominant clause, to which the former must bend as auxillary—*Shanks* v. *The Kirk Session of Ceres*, 27th January 1797, M., 4295; *Forrester* v. *Hutchinson*, 11th July 1826, 4 S., 824 (N. E., 831).

At advising—

Lord Justice-Clerk—In this case the pursuers, who are the trust-disponees of the deceased William Simson Young, as also David, Margaret, and Helen Young and others, the children of John Purvis, in virtue of their alleged rights under the settlement of the late Joseph Young, seek to obtain decree against his heir to make up titles and convey to them certain valuable heritable properties mentioned in the summons, or otherwise to adjudge these estates. The action rests upon supposed obligations contained in the deed in their favour, by which they are said to have a direct right of action or *jus crediti* vested in them enforceable against the heirs of the granter. The Lord Ordinary has found that they have no such right; that the right under the deed was not one of direct obligation in their favour, but a right as heirs substituted to the granter, requiring service; that William S. Young not having served, and having died without having expede service, has transmitted no right to his trust-disponees; and that the other parties who have not expede services in like manner have no such right. The Lord Ordinary has assoilzied the defender in so far as concerns the pursuers the trustees of William Simson Young, and finds, in so far as regards the other pursuers, that they have not averred or produced a sufficient title, and dismisses the action.

The Lord Ordinary, in a very elaborate note, has reviewed the authorities applicable to the case, and has explained the grounds of his judgment very fully. I concur in the result to which the Lord Ordinary has come, and very much upon the grounds assigned by his Lordship.

The argument addressed to us was founded on a construction of the dispositive clause, read in connection with other clauses of the deed, from which it was contended that the deceased William Simson Young and the other pursuers were institutes under the deed on the contingency, which has

happened, of the granter dying without issue, and on the efficacy of a clause by which an obligation was said to be expressly imposed upon the heir, to complete titles in his person in order to vest them in these estates.

The dispositive clause is one by which the granter conveys "to and in favour of myself and the lawfully begotten child," &c. I am wholly unable to read this clause in any other sense than one which institutes the granter and substitutes his children, if he shall have children, as heirs of provision to him, and the remaining parties named as additional substitutes. There seems to me to be no ambiguity about the clause, nothing requiring or admitting of construction from any other expressions in the deed. The granter conveys to himself the estates belonging to him at the date of his death, and then follow the parties who are to take as his heirs of provision, his children, if he shall have issue, and then other substitutes. The granter was the proper custodier of the deed in his own favour, a circumstance giving immediate effect to it. It seems to me perfectly plain, and in conformity with uniform practice, that had he had issue, a contingency which he considered and made provision for, inasmuch as he gave in that view his heritable estate to these children equally, they would have been entitled to serve, and must have served as heirs of provision to their father; and if so, I am at a loss to see how parties substituted to them could take without a service. The conveyance of a granter to himself and the children of his body is nothing else than a conveyance to himself, whom failing to the children of his body; and where the conveyance is, these children also failing, to other parties named, these parties cannot be in a different situation. The personal right to the subject was vested in his person by the deed which he executed; his children, should he have children, would take, and take not by operation of law, but *provisione hominis*, because they are to take equally: they are substituted in the father's right on his failure, and the substituted parties named substituted to them. The pursuers are described in various parts of the deed as *disponees*, from which it is argued that the granter meant them to be conditional institutes. Other passages are referred to as to the supposed views of the testator, as raising an inference of intention to convey an immediate right; the clause of obligation to complete titles is referred to as one of them; it is suggested that he really did not contemplate having issue of his body, and that that is apparent from the general tenor of the deed and clauses as to the partition of the subject. I do not attach importance to the description of the persons as "disponees," which is a flexible term, and is applicable to a party taking under a disposition, whether as substitute or conditional institute. The fact that he did contemplate issue is clear from the provision made for the event, and the giving of an equal right to all the issue. The inference from the omission of a reference to issue in the clause as to infeftment and completion of title merits more consideration. It cannot, however, in my view, go so far as materially to alter and affect the leading clause of the deed; it must necessarily refer to subjects to which a title has been made up. The matter of the form of completing title, or the possible neglect of parties to follow out their rights, cannot be held to have been in view.

The question is one as to the conveyance of heritable estate, and if there be a clear conveyance to parties not as institutes but as substitutes, and an equally clear conveyance to the party himself as the first party to take, I cannot permit supposed general intention to operate a legal effect in contradiction to what has been so expressed. The other portions of the deed do not seem to me sufficient to affect the clause, when the parties are in right of the subject.

The cases of *Fogo* and *Colquhoun* have no application.

These were cases in which the granter of the deed conveyed the property from himself to stranger institutes; here the disposition is to the disponer himself. I adopt the view shortly expressed by the late Mr Bell in his Lectures on Conveyancing, p. 1023.

Here we have the plain and simple case of a party dying vested in a personal right to his heritable estates of his own creation. According to the rules of feudal law, this right must be taken up by service.

The argument on the clause of obligation to complete titles and to convey, seems to me to be attended with more difficulty. Had the granter, by a separate and independent deed or instrument, imposed an obligation on his heirs to make up titles and convey specified subjects to parties named in the obligation, the obligation might have formed a ground for an action of adjudication in implement of the obligation; but it is not necessary here to deal with such a case. For the clause is not in a separate and independent deed, it is a part of the general disposition, and is plainly subsidiary to the disposition. In general dispositions formally executed, there is invariably inserted a clause of obligation upon the grantee's heirs to complete titles and convey to the granters; and in all deeds of disposition there is a provision as to infefting the disponee. In this case we have the obligation to infeft, and we have the obligation to complete titles; but, contrary to the usual course, we have the obligation expressed so as to leave out the first substitutes, his own issue, and we have a naming of parties instead of a reference to the grantee's foresaids. What is the effect of this? I am unable to read it otherwise than as a mere omission in the expression of a proper ancillary clause of an obligation to infeft his own issue, and of an obligation to compel the heir to complete a title with a view to convey to them the estates destined to them, an obligation not essential or necessary. It seems to me impossible to give it the full effect contended for by the pursuers, because, if so, it would abrogate and defeat the rights conferred upon his own issue, and the heir who is one of the issue, by the disposition in their favour. The case is, and must be, that a direct right is conferred to be made good against the heir and in reference to these estates. Suppose that the granter had left children, and that these children were expeding a service as heirs of provision of their father, Could these parties have reared up this obligation and maintained a direct right or *jus crediti?* Certainly not. And if not, then the clause must be read consistently with the substitution in favour of the children—in other words, the clause must be read, not as altering the character in which the deceased William S. Young and the other pursuers were to take, or defeating the rights of other substitutes, but simply as giving them facilities for completing their titles as substitute heirs,—as in aid of the conveyance. I am, on these grounds, prepared to concur in the Lord Ordinary's interlocutor.

Lord Cowan—Two questions affecting the construction and effect of the general disposition and settlement of the late Joseph Young have been argued, and are for decision.

1. The primary question relates to the effect of the dispositive clause. When ambiguity exists regarding its meaning, or when terms are employed of flexible import, the subordinate clauses of the deed may aid in arriving at its sound construction. But where no ambiguity exists in this leading clause, the subordinate clauses will be construed in a way consistent with its true import,

In this case the general conveyance is in favour of the granter himself and the child or children of his own body, and to their assignees or disponees, whom failing to the Youngs, his cousins, to the extent of two-third parts or shares of his succession, and, in the event of any of them dying without issue, or without disposing of their shares, such shares to go to and belong equally to the survivors or survivor. The other third share of the succession is conveyed to another family of cousins, the Purvises, in similar terms. The disposition is *mortis causa*, and as such intended to take effect at the granter's death—the delivery of the deed being disponed with, and the granter's liferent reserved.

The granter died without heirs of his body, and the question is, Whether the Youngs and Purvises take under the destination as disponees, or as heirs substitute requiring service to vest the right in them?

It does not seem to me possible, on any just reasoning, to hold the destination clause to have any other effect than to give the fee of the estate primarily to the granter himself; and, on his death, to his children, if he had any; and on the failure of the parties thus called in the first instance, that is "*whom failing*," to the Youngs and Purvises in the proportions specified. In this view the necessary inference is, that the fee was *in hæreditate jacente* of the granter when he died, and unless taken up by service of the next heir, it there remains, and no right or interest vests in the heir so long as he delays to expede a service. And the consequence is, that if he dies meanwhile, without service being expede, there is no right or interest in him capable of being transmitted to third parties; and the heir of the destination next in order is entitled to pass by the intermediate party and to serve to the granter, and thus to vest himself with the right. These principles have been fully given effect to by decisions of the Court, and it is only by attempting to assimilate such a destination as the present with that which occurs in a totally different class of cases that any difficulty can be created. Such cases as that of *Fogo*, of which we heard so much in the argument, stand upon a totally different footing, and are to be contrasted with those in which the disposition is in favour of the testator himself as institute, whom failing to other parties named. In the work on conveyancing to which your Lordship has referred, this matter is treated of with great intelligence and perspicuity. Among the authorities there cited in support of the doctrine thus stated is the case of *Hamilton*, 10th June 1714, D., 14,360, and to this case I refer in order to explain that, *as decided by this Court*, it has been always held as a ruling decision. Yet it does appear from the report of the case in Robertson's Appeals, cited by the senior counsel for the pursuers, that the judgment had been reversed on appeal. The reversal is not noticed by our institutional writers, and appears not to have been known to the profession until the publication of Robertson's Collection in 1807. It is therefore desirable to discover how the reversal was brought about, and on what grounds it proceeded.

The litigation in the cause subsisted for many years in this Court subsequent to the interlocutor of June 1714; and various interlocutors, the last of them apparently in January 1717, were the subject of the appeal disposed of by the House of Lords on 18th April 1724. As explained from the bar, the appeal was heard *ex parte*, no appearance having been made for the respondent; and the heads of the appellant's argument given in the report thus state the leading ground contended for:—"The estate in question being conveyed by Mr Walkinshaw to Sir James Hamilton, and, after his decease, to William his eldest son, and the heirs-male of his body, Sir James was only life-renter, and William fiar; consequently there was no occasion for William to serve heir to Sir James. For this the authority of Lord Stair (iii, 4, 33) is express—'if heritage (says he) should be granted, for example to John, and after his decease to William and his heirs, John would be thereby naked life-renter, and William fiar, who could not be served as heir to John.'" The doctrine here stated, however, if it was the ground of the reversal,—which is doubtful, as other views are argued, resting mainly on the special circumstances of the case,—is certainly erroneous. For the principle, established by the judgment in the Court of Session, was fully recognised in the case of *Livingston* in 1757, and that judgment was affirmed in the House of Lords, 11th March 1765, 2 Paton's Appeals, 108. And, as regards the passage from Stair, to which reference was made in *Hamilton's* case, a note will be found appended in all the recent editions of Stair, at least from 1759 downwards, referring to Stewart's Answers to Dirleton, as containing the more correct view of such a destination as that in question, in conformity with the now established rule.

I hold, therefore, the dispositive clause to be free of doubt or ambiguity, and on that account not to be open to have its effect controlled by any of the subordinate clauses of the deed, although these were less capable than they are of being construed in a sense nowise contradictory of the dispositive clause.

2. A separate ground was, however, relied on in the argument, viz., that, by the obligation to infeft, a *jus crediti* was created in favour of the testator's cousins, the Youngs and Purvises, capable of being enforced against the granter's heirs at law, and vesting at once in the parties in whose favour it bears to be *a morte testatoris*. This requires separate consideration, but is, I think, not difficult to solve.

The obligation to infeft does not occur apart from a deed in which there is a dispositive clause. It is one of the subsidiary clauses in a regular disposition of heritage—peculiarly expressed no doubt—but still ancillary only, and not independent.

This being so, it must be construed on such principles as will make it, if that be possible, aid and not contradict the effect of the dispositive clause. As I have already said, no doubt exists as to that, the leading part of the deed; and were this clause construed to give a *jus crediti* to these parties, who are called *dispositive* in the first part, merely as substitute heirs, it would be antagonistic to the express right conferred on those to whom the subjects are in the first place given by the deed. Now that cannot be received as a just

interpretation of a mere ancillary and subordinate clause. I cannot, therefore, hold that a *jus crediti* is conferred on these parties, as contended for by their counsel.

This is sufficient for the decision of this point. But I would further say that the effect given to an obligation to infeft in the case of *Renton* v. *Anstruther*, on which the argument was founded, was in a case where the party granting it held only a personal right, and where it was inserted in aid of the assignation to writs, by which the unexecuted procuratory of resignation in the deed flowing from the party last feudally vested in the property was assigned, in order to the completion of the disponee's feudal title. No dispositive words occurred in the deed conveying the personal right. But it was held to be well assigned, subject to the conditions of a strict tailzie, and did effectually enable the assignee to connect himself feudally with the estate. That case does not aid the plea, therefore, of the pursuers. And the same may be said of all the other cases of this kind which have occurred.

On the whole, I concur in the judgment proposed by your Lordships, and consider that the interlocutor of the Lord Ordinary ought to be adhered to.

Lord Benholme—The summons in this action proceeds at the instance of certain parties, trustees of the deceased William Simson Young, and various other pursuers who sue in their own right. These two sets of pursuers raise an action of adjudication against the heir-at-law of Joseph Young, claiming implement of a grant contained in a very anomalous deed executed by him. The first question appears to me to be, whether these trustees of William Simson Young have any title to insist in this action of adjudication? If we turn to the deed of Joseph to find in what character they sue, we shall see that they are not named in that deed at all, and therefore, their title, if any, must be derived from their constituent William Simson Young, and the question then arises, Have they, or can they ever have, any title through him? As to the other pursuers, the question is, Are they now *in titulo*, or must they vest themselves before they can have a title to sue? The answer to these questions is to be found in the answer to this other question, Are they, or was the late William Simson Young, disponees, or are they only substitutes under Joseph's deed?

The disposition and conveyance here is a very anomalous deed, and is not framed on scientific principles, but we must apply to it scientific principles to ascertain whether these parties are disponees or substitutes. The ruling clause of the deed, the dispositive clause, is a very peculiar one. It runs thus:—"I, Joseph Young, do hereby give, grant, assign, alienate and dispone to and in favour of myself and the lawfully-begotten child or children of my own body, equally between them." This is not a disposition in favour of the heirs of the granter, but in favour of his children, and accordingly they, not being heirs-at-law, could only take as heirs of provision. Then the deed goes on, "to their assignees and disponees, whom failing" to William Simson Young and the pursuers. Now, I think that by the terms of this deed these parties are substitutes. The truster dispones directly to himself and his children, and those taking after them must take as substitutes, and consequently require to serve.

The only other passage in the deed to be considered is the clause near the end of the deed:—"Moreover, I oblige myself and my heirs and successors to infeft and seize the said William Simson Young, David Young, Margaret Meldrum Young, and Helen Young, and the survivors or survivor of the said disponees, or the lawful children of the said survivors or survivor, and the said John Purvis junior, Joseph Purvis, and Jessie Purvis, and their respective heirs and assignees, in the whole lands and other heritages above disponed requiring infeftment; and for that purpose to grant all deeds and conveyances that may be necessary." Here the question arises, Are we to construe this as an independent and conflicting clause, or are we to regard it as merely an ancillary clause, to assist in carrying out the intention of the dispositive clause. If we are to regard it in the latter light, the case is a very clear one. In the cases of obligations to infeft referred to by Lord Cowan, that clause was always given effect to as an ancillary clause to the dispositive clause, and was never read in conflict with the dispositive clause. Here, however, we are asked to interpret it in conflict with the principal clause. My opinion is, that we must adhere to the general rules of conveyancing, and understand this clause if possible consistently with the dispositive clause; but we must maintain the supremacy of that clause, and not allow it to be over-ridden by an inconsistent ancillary clause. On these grounds I entirely concur with your Lordships in thinking that there is no title in any of these pursuers to insist in this action.

I have only to add, with reference to the last branch of the defender's second plea, which is, that "the defender being himself," &c., raises the question, whether the defender takes any right under this deed? This may be a point of some difficulty, but we are not at present called upon to decide it. At present we are only dealing with the question of title.

Lord Neaves—I concur. Any other result, I think, would be opposed to the fixed rules of our law as to the transmission of heritage, and to the established principles of our system of conveyancing. In the case of a *mortis causa* conveyance of heritage by a person who takes up the position both of disponer and disponee under his own deed, it is clear that the right and title which as grantee he acquired remains at his death *in hæreditate jacente* until taken up by service.

With regard also to the obligation to infeft, it is always a relative and subordinate clause, and must be construed with reference to the principal clauses of the deed, and to the cause and consideration for which it was granted, and the object which it was purposed to effect.

It is true that the clause in question, as it occurs here, is in favour, not of all, but only of some of the persons mentioned in the dispositive clause. But are we to infer, therefore, that the granter intended thereby to alter the destination contained in the former and governing part of the deed? Clearly not. The obligation to infeft, being merely subordinate or ancillary to the dispositive clause, must still be interpreted consistently, and not as conflicting, with the dispositive, which is the ruling clause. An obligation to infeft occurring in such a deed cannot be regarded as conferring upon those persons in whose favour it is conceived any higher right than that which they are entitled to take by the terms of the preceding destination. In the present case these persons are called to the succession as substitutes to the granter of the disposition

and the heirs of his body, and, being substitutes only, they cannot take except by service.

As to the decision in the case of *Hamilton*, referred to by the pursuer's counsel, it admits, I think, of explanation sufficient to detract from its weight as an authority for the purpose for which it was cited. It was an *ex parte* case, and the grounds upon which it was contended that the judgment of this Court should be reversed, to the effect, *inter alia*, of finding that the right to the estate in question had vested without a service, were such as might mislead the Court of Appeal in the absence of a reply.

The second head of the appellant's argument is thus stated by Mr Robertson (p. 497) :—"Supposing Sir James had been fiar, yet William being *nominatim* substitute to him, he, upon Sir James' death, became seised in the fee of the estate without any necessity of a service; for, in that case, *mortuus sasit vivum*, the conveyance to William *nominatim* being considered as an immediate conveyance or interest, vested in William, subject and expectant upon the contingency of his father's death only." In the absence of a contradictor, this view may have appeared plausible to our legal brethren on the other side of the Tweed, where the rule generally prevails *mortuus sasit vivum*, and there are old authorities tending to show that in some heritable rights, such as bonds, a *nominatim* substitute does not always require a service. But as a general rule applicable to proper land rights, the doctrine suggested is quite opposed to the principle of our law, which does not recognise an *ipso jure* transmission of heritable estate from the dead to the living. It is satisfactory, therefore, to find that in the subsequent case, of *Lord Napier* v. *Livingston*, a judgment of the Court of Session, adhering to the necessity for a service by a *nominatim* substitute, was affirmed on appeal, and it is therefore not surprising that the judgment of reversal in the case of *Hamilton* has been disregarded as an authority by all of our institutional writers, and, indeed, remained unnoticed, as Lord Cowan has observed, until the publication of Mr Robertson's Reports in 1807.

Agent for Pursuers—J. & R. Macandrew, W.S.
Agent for Defender—John Ross, S.S.C.

COURT OF JUSTICIARY.

AUTUMN CIRCUITS.

Thursday, September 19.

ABERDEEN.

(Lords Deas and Neaves presiding.)

HER MAJESTY'S ADVOCATE *v.* ALEXANDER DINGWALL.

Proof—Insanity. Held that proof of insanity of a paternal uncle and other relatives of a panel cannot be received in support of a plea of insanity.

Alexander Dingwall was charged with the murder of his wife. A special plea in defence was lodged of not guilty; and farther, that the panel was not of sound mind when the alleged crime was committed. In the course of the evidence, Dr Thom, in examination by the public prosecutor, deponed that he had attended the panel on one occasion previous to the commission of the crime charged; and that he had frequently seen him when in prison. He never observed any decided symptoms of insanity about him. Cross-examined for panel —I would answer the question as to whether I had observed any symptoms of insanity whatever about the prisoner in this way, that from the first time I saw him down to the last, he seemed to be the subject of a very latent tendency to insanity. The first time I saw him, in November last, I was very much struck by his conversation, which was not altogether that of a man of continuous thought. I could not say there was anything else that I could discover. Interrogated, If you had known that he was the subject of repeated attacks of *delirium tremens*, extending over a very long period of time, would that have confirmed the impression that was produced? depones, It would.—If to that were added insanity in his family, would that have a material bearing on the subject? It would certainly.—Dr Jamieson, cross-examined by D.-F. Moncreiff,—Have repeated attacks of *delirium tremens* a tendency to weaken the intellect? Yes.—If, in addition, the patient were subject to epileptic fits, would insanity be more likely to supervene? Yes, I think it would.—And if insanity were hereditary, would it be more likely to follow? If, added to these, a tendency to insanity were hereditary, insanity would be more likely to result.—Dr Howden, examined for defence,—Cases of insanity developing themselves in dipsomania through a long course of years are a common occurrence. Dipsomania, long pursued, has a tendency to produce direct insanity, and it is common for it to do so. This is more likely when there is insanity in the dipsomaniac's family. Interrogated, Suppose the prisoner had in 1851 been certified as of weak and failing intellect, and that he had since been given to drink and had *delirium tremens*, would you think his having a homicidal impulse extraordinary or natural? depones, I should think it quite likely he should have such impulse, and would have predicted it. That opinion would be strengthened if the prisoner had had epileptic fits, and if it were true that some of his relatives had been confined for insanity.—Dr Dyce deponed that he had been medical attendant in the family of prisoner's father and grandfather, and knew the family well. Counsel for panel then proposed to ask witness whether he knew that the panel's paternal uncle William Dingwall, and his aunts Catherine and Madeline Dingwall, and his grand-uncle David Dingwall were all insane, and all inmates of lunatic asylums.

Watson (with him D.-F. Moncreiff and Asher) for panel, contended that he was entitled to this evidence, because it was the expressed belief of medical men in this case, that if there were hereditary insanity in the prisoner's family that would influence their opinion as to his sanity or insanity. He submitted that it would be a great misfortune if the law were found to be that the opinions of medical men could be received while proof of the grounds on which that opinion was formed was rejected. Similar evidence had been admitted in the case of *Bryce*.

Lee (A.-D.) objected, on the ground that the question now at issue was the sanity or insanity of the prisoner, not the sanity or insanity of the prisoner's relatives, who were not before the Court, and as to whom the jury had small means of judging.

Dean of Faculty in reply. The following cases