The Court pronounced the following interlocutor:—

"Find, in point of fact, that recently, before the petition and complaint by which the present proceedings originated, had been presented in the Sheriff Court, the North British Railway Company had used the ground in dispute as a dunghill for depositing the police manure or fuilzie, which was intended to be carried away *ex intervallo* by means of the railway; find, in point of law, 1st, that this was a breach or infringement of the clause in the contract of feu and ground-annual, of date 29th April and 14th May 1803, and recorded in the Books of Council and Session on 19th November thereafter, which contract contains the whole ground of which part now belongs to the North British Railway Company and part to the original complainer (respondent in the appeal) Robert Robertson, and which clause is binding and obligatory on the said railway company; 2d, that, having reference to the title-deeds of the parties, including the terms of the clause in dispute, and the nature of the breach or infringement complained of, the said Robert Robertson had and has sufficient title and interest to object to that breach or infringement; and no questions having been raised by either party under this appeal, except as regards the use of the ground in dispute in the first place as a loading stance for the railway, and, in the second place, as a dunghill or place of deposit for fuilzie as aforesaid, Refuse the appeal, and decern; find the respondent Robert Robertson entitled to expenses; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Robertson and M'Casland—Dean of Faculty (Clark) Q.C., Marshall and Laidlay. Agents—Morton, Neilson & Smart, W.S.

Counsel for North British Railway—Scott and M'Kechnie. Agents—Hill & Fergusson, W.S.

M., Clerk.

Friday, July 17.

FIRST DIVISION.

W. PITT DUNDAS AND THOMAS BRODIE, PETITIONERS.

Interim Appointment—Intimation to the Lord Advocate.

This was a petition for the appointment of an interim keeper of the Privy Seal, the office being vacant by the death of the late Earl of Dalhousie. The Court held that intimation to the Lord Advocate was not necessary, and pronounced the following interlocutor:—

"The Lords having considered this petition, nominate and appoint the petitioners to officiate jointly and severally as interim Keepers of the Privy Seal in place of the deceased Earl of Dalhousie, in terms of the prayer of the said petition; and appoint the petition and this deliverance to be recorded in the Books of Sederunt."

Petitioners' Counsel—G. S. Dundas. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Saturday, July 18.

FIRST DIVISION.

[Lord Gifford, Ordinary.

TODD *v.* MACKENZIE.

Succession — Destination — Heir-at-Law — Marriage-Contract.

In the marriage-contract of his daughter, A disponed his heritable estate to himself in liferent for his liferent use allenarly, and to his daughter "and the heirs of her body, or her assignees and disponees, whom all failing, to the nearest heirs whomsoever of the said" A The daughter predeceased A without issue. *Held* that the destination thus failed, and that A took as heir-at-law to his daughter.

John Todd of Glenduffhill had a daughter Janet, who, on 29th June 1865, was married to James Mackenzie, the defender in this action. In the antenuptial contract of marriage John Todd "disponed and conveyed to himself, the said John Todd, in liferent for his liferent use allenarly, and to the said Janet Todd and the heirs of her body, or her assignees and disponees, whom all failing, to the nearest heirs whomsoever of the said John Todd, heritably and irredeemably, but expressly excluding the *jus mariti* and right of administration of her said intended husband, All and Whole his, the said John Todd's, lands of Glenduffhill." Mrs Janet Mackenzie died on 17th September 1872, survived by her husband and father, and without issue. On 3d October 1872, John Todd, on the assumption that by his daughter's death without issue the estate of Glenduffhill had reverted to him, subject to an eventual liferent in the defender James Mackenzie, granted an absolute disposition thereof in favour of himself in liferent, for his liferent use allenarly, and to his son-in-law, the said James Mackenzie, and his heirs and assignees whomsoever in fee. On 7th November 1872 John Todd expede a service to his daughter Mrs Janet Todd or Mackenzie, as his nearest and lawful heir in special in the said lands. The defender James Mackenzie completed his title by registering the disposition in his favour in the Register of Sasines on 4th October 1872, and by writ of confirmation by the Earl and Countess of Home, dated 26th November 1872.

John Todd died on 7th June 1873, and this action was brought by his nephew and heir-at-law, James Todd, who was also served nearest and lawful heir of provision to Mrs Janet Todd or Mackenzie. The object of the action was, in the first place, to have it declared that the service expede by James Todd on 7th November 1872 was inept; and, in the second place, for reduction of the disposition in favour of the defender James Mackenzie.

The pursuer averred that the estate of Glenduffhill was worth £90,000. A small portion of the estate was held upon a disposition from the North British Railway Company, who had acquired from John Todd, Mrs Mackenzie, and the defender, for their respective rights and interests, a portion of the lands of Glenduffhill, in consideration of which the Railway Company made a money payment, and also conveyed to them certain other pieces of land upon a destination precisely similar to that in the marriage-contract.

The pursuer averred that the defender had obtained the disposition in his favour from John Todd by fraud and circumvention.

The pursuer pleaded—"(1) The pursuer, as nearest and lawful heir of provision in special and general to the said Mrs Janet Todd or Mackenzie, has the only good and undoubted right and title to the fee of the subjects conveyed by the said antenuptial contract of marriage and the disposition by the said North British Railway Company. (2) The conveyance of the said subjects by the said John Todd to the defender James Mackenzie ought to be reduced, in respect that the said John Todd had not, either at the date thereof or subsequent thereto, any right or title to the fee of said estates, or any power to grant the said conveyance. (3) In respect that the special service expede by the said John Todd to his daughter Mrs Janet Todd or Mackenzie was inept and did not transmit any right to him in or to the lands and others therein mentioned, the pursuer is entitled, in virtue of his services as heir of provision to her, the said Mrs Janet Todd or Mackenzie, to decree of declarator as concluded for. (4) The said conveyance by the said John Todd in favour of the defender James Mackenzie not being the deed of the said John Todd, it ought to be reduced. (5) The said conveyance having been impetrated and obtained from the said John Todd when he was weak and facile in mind, by the said defender James Mackenzie, by fraud or circumvention, the same should be reduced and set aside. (6) In the event of any of the defenders appearing to oppose the conclusions of the present summons, they ought and should be found conjunctly and severally liable in the expenses of this process."

The defender pleaded—"(2) The pursuer's general service as heir of John Todd is inept, in respect that it was not expede before the Sheriff of the county within which the said John Todd had at the time of his death his ordinary or principal domicile, but before a Sheriff who had no jurisdiction to pronounce the decree of service. (3) In respect of the ulterior destination or clause of return in the said antenuptial marriage-contract and disposition by the Railway Company, the said John Todd had right to the lands in question upon the death of his daughter, and his title thereto was effectually completed by the service which he expede and the infeftment which followed thereon. (4) The said ulterior destination, so far as regarded the heirs of the said John Todd, being gratuitous and revocable, was effectually revoked by him. (5) The said John Todd's service is valid and effectual as a service of heir of provision to his daughter, in respect that the antenuptial contract of marriage and disposition by the Railway Company are duly mentioned therein; and that it also appears *ex facie* of the decree that the said John Todd, and he alone, possessed the character of such heir of provision. (6) *Separatim*, the said service would be effectual even if construed as a service as heir of line. (7) The pursuer's special service as heir of provision to Mrs Mackenzie is inept, in respect that she was not last vest and seized in the fee of the said lands, and that the said service was excluded by the existing titles. (8) In no view can the pursuer's claim to the said lands be sustained, or his said service be available, while the said John Todd's service and the existing titles stand unreduced. (9) The defender James Todd Mackenzie having, by virtue of the existing titles, the full and true right to the lands in question, the present action is unfounded."

The Lord Ordinary pronounced this interlocutor—

"*Edinburgh, June* 9, 1874—The Lord Ordinary having heard parties' procurators, and having considered the closed record, writs, and title-deeds produced, and whole process: Finds that, assuming the validity of the disposition granted by the late John Todd, Esq. of Glenduffhill, in favour of himself in liferent, and the defender James Mackenzie in fee, dated 3d October 1872, that is, assuming that the said disposition was the proper deed of the said John Todd, and that the same is not subject to reduction as improperly obtained from him by fraud or circumvention, then and in that case the said disposition effectually conveys the fee of the lands and others thereby disponed to and in favour of the defender the said James Mackenzie: Therefore, and to this extent, assoilzies the defenders from the first or declaratory conclusion of the summons, and decerns; and with reference to the reductive conclusions, Appoints issues to be adjusted on a day to be afterwards fixed: Grants leave to reclaim against this interlocutor, reserving in the meantime all questions of expenses.

"*Note*—This is a very important action, involving the right to the lands and estate of Glenduffhill and others, said to be of the value of £90,000. This estate belonged at one time to the late John Todd of Glenduffhill, and was settled by him on his only daughter and the heirs of her body, on the occasion of her marriage with the defender James Mackenzie of Glentore.

"Mrs Mackenzie, John Todd's only child, died without issue on 17th September 1872, survived by her father, the said John Todd, and by her husband, the said James Mackenzie. Shortly after his daughter's death, and on 3d October 1872, the said John Todd, on the assumption that by his daughter's death without issue the said estate had reverted to him, subject to an eventual liferent in the defender, granted an absolute disposition in favour of himself in liferent, for his liferent use allenarly, and to his son-in-law, the said James Mackenzie, and his heirs and assignees whomsoever in fee. Thereafter, and with a view to validate the said deed, in case a service should be necessary, the said James Todd expede a service to his daughter Mrs Janet Todd or Mackenzie as her nearest and lawful heir in special in the said lands. This service is dated 7th November 1872. The defender James Mackenzie completed his title by registering the disposition in the Register of Sasines on 4th October 1872, and by writ of confirmation by the Earl and Countess of Home, dated 26th November 1872.

"The said John Todd died on 7th June 1873, and the present pursuer is his nephew and heir-at-law.

"In the present action the pursuer challenges Mr John Todd's disposition to the defender of 3d October 1872, as not the deed of the granter, the said John Todd, and as having been impetrated from him by the defender by fraud and circumvention, and while the said John Todd was weak and facile; and the present action contains appropriate reductive conclusions on these grounds.

"But the pursuer maintains, alternatively, or

rather in the first place, that even if John Todd's disposition is valid and not subject to reduction on the grounds libelled, it is inept to convey the lands and estate of Glenduffhill, in respect that the granter, the said John Todd, had no right thereto, and had made up no habile title thereto at the time of his death. As the legal questions depending upon the state of the title stand quite apart from the grounds of reduction of John Todd's disposition, and admit of being decided irrespective thereof, both parties concurred in asking the Lord Ordinary to decide the questions of law and of conveyancing in the first place, as in one view this might make it unnecessary to send issues to a jury. The Lord Ordinary has complied with this request, assuming, as he must do, *hoc statu*, that John Todd's disposition is valid and not subject to reduction on any of the grounds stated. The legal questions upon title and on the competency and sufficiency of John Todd's service arise thus:—

"By his daughter's marriage-contract, dated 24th June 1865, the late John Todd, then absolute proprietor, vest and seised in the lands of Glenduffhill and others, disponed and conveyed the said lands 'to himself, the said John Todd, in liferent for his liferent use allenarly; and to the said Janet Todd and the heirs of her body, or her assignees and disponees; whom all failing, to the nearest heirs whomsoever of the said John Todd." Upon this conveyance infeftment followed by notarial instrument in favour of the said John Todd in liferent allenarly, and Janet Todd or Mackenzie and the various substitutes to her in fee, in precise terms of the conveyance and destination.

"Mrs Janet Todd or Mackenzie, the said John Todd's only child, having died on 17th September 1872 without issue, survived by her father, the question arose to whom did the lands go under the subsisting destination. It seems to have been at first assumed by the father, the said John Todd, or his advisers, that the lands reverted to him without the necessity of making up any new title at all, and that his original infeftment revived by virtue of the express or implied clause of return. Upon this footing, and upon this narrative, and to carry out the alleged wish and intention of his deceased daughter, John Todd, the father, on 3d October 1872, conveyed the whole lands to himself in liferent for his liferent allenarly, and to his son-in-law, the said James Mackenzie, and his heirs and assignees whomsoever, in fee; and upon this conveyance his son-in-law Mr Mackenzie completed a title. Thereafter, and seemingly as a precautionary measure, a service was expede by the said John Todd as 'the father and nearest and lawful heir in special of the said Janet Todd or Mackenzie in the lands and others foresaid,' that is, in the lands and estate of Glenduffhill, including certain lands which had been conveyed by the North British Railway Company in exchange for a portion of Glenduffhill taken by the Company. This conveyance had been granted by the Railway Company in precise terms of the marriage-contract. In virtue of this service, John Todd was infeft by registration on 30th November 1872, and there seems to be no doubt that this infeftment, if it fail, would accresce to the disposition which John Todd had granted in the preceding month. The legal questions are, Was John Todd, either in virtue of his original infeftments revived by a clause of return, or in virtue of his service and infeftment, so vested with lands as to be able effectually to convey them to his son-in-law Mr Mackenzie?

"A special argument was founded on the small portions of land conveyed by the North British Railway Company, but in the view taken by the Lord Ordinary the special position of these lands does not affect the result.

"I. The first question is, Whether upon the death of Mrs Mackenzie without issue, John Todd's original infeftments revived as by the effect of a clause of return? The Lord Ordinary answers this question in the negative, and if the defence had rested only upon this point, he would have felt himself unable to sustain it. There is really no proper clause of return in the marriage-contract—the marriage-contract is not in any sense a conditional conveyance of the lands. It is an absolute divestiture of the granter's right of fee, and does not constitute in any view a mere burden on the granter's original infeftment. There is nothing left in the granter save his liferent allenarly. His daughter is made the absolute fiar. The conveyance is express 'to Janet Todd and the heirs of her body, or her assignees and disponees.' These words necessarily make Janet Todd the fiar—she could assign or dispone the lands to whom she pleased—she could alienate them gratuitously, and gratuitously disappoint even by *mortis causa* deed the whole series of substitutes. Now, when a fee is conveyed absolutely, and without any condition, there is hardly room for a proper clause of return—for a clause of return generally bears, and always implies, that in certain contingencies the disposition shall fly off or be held null, and the granter's original right revive as if the deed had not been granted. It may be true that a clause of return sometimes operates in the same way as a destination, but the cases are distinct in their nature—in the one case the disponee's right is conditional, and on the failure of the condition the disponer resumes under his old title; in the other case he only takes as heir of provision. The Lord Ordinary is of opinion that the conveyance in the marriage-contract is not a conditional one—he thinks that Janet Todd was infeft as absolute and unconditional fiar, and that if her father John Todd was to take at all on her death, he must take as her heir. See *Mackay* v. *Campbell's Trustees*, 13th January 1835, 13 S. 246.

"II. The next question is—On Mrs Mackenzie's death without issue who was entitled to take the lands and estate? Of course if Mrs Mackenzie had left heirs of her body, they would have taken up the estate by service; but failing such heirs, and Mrs Mackenzie not having conveyed the lands, and the next member of the destination being 'whom all failing to the nearest heirs whomsoever of the said John Todd,' the question arises—Does John Todd himself (who survived) take under this destination? The pursuer maintains that John Todd himself is excluded, and that the person entitled to take up the estate at Mrs Mackenzie's death was the person who, if John Todd had been dead, would have been his nearest heir, however remote. The pursuer maintained, for example, that if John Todd at the date of his daughter's death had no nearer relative than a cousin many times removed, such remote relative would have taken the estate and defeated John Todd himself. The Lord Ordinary cannot take this view. The question is really one of intention, to be gathered from the deed itself, and there is no absolute or inflexible rule compelling a

construction so foreign to what must have been the meaning of the parties. Strictly speaking, John Todd could have no heirs at all while he lived—he might have an heir presumptive, or even an heir apparent in the sense of an heir *aliogue successuris*, but when the heirs whomsoever of a person still alive are spoken of, there is plainly room for construction. It seems quite clear that the deed was framed on the presumption that John Todd would not survive his daughter and the heirs of her body, and that the destination was taken to his heirs whomsoever, because all parties thought he would be deceased before the destination came into play. The Lord Ordinary feels warranted in reading the destination as implying a destination to John Todd himself, or as importing a condition that John Todd himself shall have predeceased. As if it had borne 'whom all failing (and I myself having deceased, or if I shall have deceased) to my own nearest heirs.' Equity seems to demand such a construction. No doubt, when grants come from third parties, the heirs of a person named may be preferred to the person himself, but in these cases the intention is clear, and the expression 'heirs' is almost always read as meaning children. There is no room for this reading in the present case, and it is impossible to say that the maker of the destination (whether the maker be regarded as John Todd or his daughter) intended to call a distant relative in preference to John Todd himself.

"Still further, the pursuer must contend that the distant relative cut out not only John Todd himself, but John Todd's children, for John Todd might have had sons after his daughter's decease. He was only seventy-two when he died, and under a destination to heirs whomsoever it would be at least a very serious question whether the subsequent birth of a nearer heir, say a son, would void the service of a remoter heir serving when the succession opened. See the recent case of *Preston-Bruce* regarding the Stuartfield entail.

"III. The other alternative put by the pursuer was still more untenable, that the heir whomsoever of John Todd called to the succession was the person who might happen to be John Todd's heir at the date of his own death, and not at the death of Mrs Mackenzie. This would leave the fee nowhere during John Todd's life, and this strongly strengthens the view that John Todd himself is conditionally called if he should survive when the succession opens.

"On the whole, the Lord Ordinary holds that when Mrs Mackenzie died without issue and without conveyance, the succession to the estate opened to John Todd himself.

"IV. But the next question is—In what character did John Todd take? and here there are two views; the first is, that John Todd took as his daughter's heir-at-law, the destination having failed; the other is, that John Todd took as his daughter's heir of provision under the destination.

"The first view was very strongly pressed by the counsel for the defender, and it is very important for him, for if well founded it would obviate the objection to John Todd's service, which is a service as heir-at-law and not as heir of provision. The Lord Ordinary attaches great weight to this view, and he is disposed to rest his judgment on it alternatively with his view of the service after explained.

"Failing Mrs Mackenzie's issue, the succession opened to the "heirs whomsoever of John Todd." But John Todd himself was alive, and therefore could have "no heirs whomsoever," for it cannot be held that heirs whomsoever means *personæ prædilectæ*, who are merely so designed and pointed out. But the heirs whomsoever who thus fail are the last members of the destination, and the result is to leave the fee absolutely in Janet Todd, to be taken up by her heir-at-law, that is, by her father. The Lord Ordinary is free to admit that there are difficulties in this view, which were largely discussed, but he thinks the difficulties are less both in extent and in degree than those which attend the position for which the pursuer contends. In this aspect of the case, John Todd's service of 7th November 1872, as nearest and lawful heir of his only daughter, was the right and habile service to take up the estate, and this would suffice for the defender's victory.

"V. But supposing that John Todd took the estate, not as his daughter's heir-at-law, but as proper heir of provision under the destination, the serious question remains, whether the special service which he expede on 7th November 1872 is habile and sufficient to take up the estate, or whether it is inept as not having served him in the proper character of heir of provision? On this point the Lord Ordinary had a long and able argument, and he has come to be of opinion that even if John Todd was proper heir of provision, the special service is sufficient to take up the succession. No doubt it should have described John Todd as heir of provision, but it is a special service in the particular lands in question. It contains *in gremio* a reference to the titles under which these lands are held, and it so happens, rather perhaps by good fortune than by good guidance, that it proves that John Todd, whom it describes as heir-at-law, must have been also heir of provision to his daughter in the lands in question. In such cases service has been sustained, although the heir was not expressly described in his proper character. The leading authorities upon this point are *Haldane* v. *Haldane*, Nov. 27, 1766, Mor. 14,443; Ross' Leading Cases, ii. 564, following *Bell* v. *Carruthers*, June 21, 1749, Mor. 14,016, as reported by Lords Kames and Kelkerran. In *Haldane's* case, a service as nearest and lawful heir to a father was held equivalent to a service as heir male of provision, because it showed that being his father's eldest son, the heir must have been heir male as well as heir at law. See also *Cathcart* v. *Cassels*, Ross' L. C., ii., 525; *Ogilvy* v. *Ogilvy*, Hume, 724. The Lord Ordinary thinks he is bound by the authorities to hold that the service in the present case in the special lands in question, though only a service as heir-at-law, has the effect of a service as heir of provision, which character it establishes that John Todd had.

"Reference may also be made to the recent case of *Hutchison* v. *Hutchison*, Dec. 20, 1872, 11 Macph. 229, and to the cases therein referred to, particularly *Gordon* of *Carleton* against his Creditors, Mor. 14,366, as explained by the Lord President.

"If the Lord Ordinary is right in the view of the law which he has taken, there will only remain the reduction of John Todd's deed, and this will be tried by issues in common form."

The pursuer reclaimed, and argued—By the conveyance in the marriage-contract John Todd was absolutely divested of the fee of the estate, and Mrs Mackenzie was infeft as absolute and unconditional fiar. She could alienate the lands gratuitously—she

might gratuitously disappoint even by *mortis causa* deed the whole series of substitutes. Then, on Mrs Mackenzie's death who was entitled to take the the estate? "The nearest heirs whomsoever of the said John Todd." Under that destination John Todd himself could not take, but the person who, if John Todd had been dead, would have been his nearest heir. If, however, it should be held that John Todd took the estate on his daughter's death, in what character did he take it. Plainly as heir of provision under the destination in the marriage-contract. If that was the case, then the special service which he expede on 7th November was not habile and sufficient to take up the estate. That was a service as heir-of-law, and such a service could not be held as equivalent to service as heir of provision, whatever it might show as matter of fact.

The defender argued—The presumption upon which the marriage-contract was obviously framed was that John Todd would not survive his daughter and the heirs of her body, and that imported into the destination a condition that John Todd himself should have predeceased. Thus, the destination meant that if Mrs Mackenzie should die without heirs of her body the estate should go to the heirs of John Todd if, and only if, he was dead. There being no heirs of Mrs Mackenzie, and John Todd having survived her, in what character did he take? The destination had failed, and that being the case John Todd took as Mrs Mackenzie's heir-at-law. Even if he took as heir of provision, the service which he expede was habile to take up the estate.

Authorities cited:—Bell's Conveyancing, p. 1014; *Woodmas* v. *Hislop's Trs.*, Jan. 28, 1825, 3 S. 476; *Colvin* v. *Alison*. Dec. 14, 1796. Hume, 723; *Ogilvy* v. *Ogilvy*, June 5. 1817. Hume 724; *Cathcart's Trs.* v. *Cassillis*, M. 14,447; Menzies Com., p. 796; *Dalhousie* v. *Hawley*, M. 14,014; *Haldane* v. *Haldane*. Nov. 26, 1866, 2 Ross' Leading Cases (Land Rights) 564; *Pearson* v. *Corrie*, June 28, 1825, 4 S. 119; Duff's Conveyancing, p. 331; *Aitchison* v. *Brown and Milne*, July 22. 1835, 2 Elchies. *voce* "Fiar"; *Bell* v. *Carruthers*, June 21, 1749, 2 Bell's Leading Cases (Land Rights) 525; *Tumoch* v. *M'Lennan*, Nov. 26, 1817, F. C.

At advising—

LORD PRESIDENT—This is an action of reduction of a disposition made by the late John Todd in favour of the defender James Mackenzie, and there are two separate grounds of reduction,—one that Mr Todd when he made that disposition had no title to the subjects conveyed, and had no power to convey them, and the other that the deed is reducible upon the head of facility and circumvention. The Lord Ordinary has decided the first of these questions, leaving the other to be determined afterwards. He has decided the first of them in favour of the defender; and the question is whether his Lordship's judgment is well-founded upon either of the grounds stated in his note; for he has stated two quite separate and distinct grounds of judgment.

The estate in question was settled by an antenuptial contract of marriage to which Mr Todd was a party, made upon the occasion of the marriage of his only daughter, Miss Janet Todd, to the defender, Mr Mackenzie, and it bears date the 24th of June 1865. In that contract Mr Todd conveyed the estate to himself, the said John Todd, in liferent, for his liferent use allenarly, and the said Janet Todd and the heirs of her body, or her assignees and disponees, whom all failing to the nearest heirs whomsoever of the said John Todd. Mrs Mackenzie was infeft upon that deed. The infeftment on the deed is taken both in favour of Mr Todd himself and in favour of Mrs Mackenzie, for their respective rights of liferent and fee, and thus Mrs Mackenzie's right in the lands was that of absolute fiar.

She died without executing any deed, and without leaving any children, survived by her husband; and Mr Todd, then assuming apparently that the estate had returned to him as under a clause of return, executed the disposition under reduction in favour of his son-in-law Mr Mackenzie, and the deed is defended apparently upon that among other grounds in this action. The deed itself bears in its recital that the said Janet Todd, his daughter, had deceased without leaving heirs of her body, and without having exercised the power of assigning or disponing thereby conferred on her, whereby he became reinvested in the said lands subject to the eventual liferent therein conferred on the said James Mackenzie in the event of his surviving him. Now I am of opinion, with the Lord Ordinary, and I need say nothing more about it than merely to express that opinion, that the estate certainly did not revert to Mr Todd as under a clause of return. The fee of the estate was undoubtedly in Mrs Mackenzie, and was in her *hæreditas jacens* at the time of her death. But the much more important question is whether what Mr Todd next did vested him with the right to dispose of the estate? for after he had executed the disposition in favour of Mrs Mackenzie he had received apparently further advice, and I think also better advice; and then he procured himself to be served heir of his daughter, and his service is undoubtedly a service as nearest heir of line of his daughter Mrs Mackenzie. Of course the effect of that service was by accretion to make the disposition to Mr Mackenzie good, if the service vested the estate in Mr Todd. But it is contended on the part of the pursuer that he was not entitled to serve to his daughter in any way whatever, because the destination contained in the marriage contract was not exhausted, and did not embrace him.

The destination is, failing the heirs of the body of Janet Todd or Mackenzie, to the nearest heirs whomsoever of John Todd; and it is maintained that as soon as Mrs Mackenzie died without issue, and without having disposed of the estate, it passed in terms of the destination to the nearest heir of John Todd. To this there is a double answer made by the defender:—(1) that the destination was exhausted when Janet Mackenzie died, because Mr Todd being then alive there were no heirs of Mr Todd in existence, and could not be, and therefore the destination, although it had not run out in the proper sense, had lapsed and become unavailing, and consequently the estate passed to the heir-at-law of Mrs Mackenzie. But, secondly, they contend that, suppose the destination is to be held as not exhausted or become void, then it must be read as if it contained the name of John Todd himself, because it is unreasonable to suppose that the parties could intend that the heir of John Todd should take in preference to John Todd himself, if he was alive when his daughter died. Now, the question thus raised is certainly a very curious one in many respects. I don't think I ever saw any-

thing at all like it in the circumstances. There is no doubt that failing Janet Todd and the heirs of her body, or any assignees or disponees of hers, the estate is provided to go to the nearest heirs whomsoever of the said John Todd. This case has been argued, on one side at least, as if it were entirely a question of intention of the parties to this contract; and in some sense it is. But if we were to try to give effect to the intention of the parties here, I think we should find it very difficult. It is quite plain that the parties to this deed did not contemplate the possibility of Mr Todd surviving his daughter. It is impossible to read the deed without seeing that. They did not contemplate that that was a thing that could happen; or, in other words, they took it for granted that the father would die before the daughter, and, therefore, they called after the daughter and the heirs of her body the heirs whomsoever of the father. Their intention, therefore, so to speak, was that Mr Todd should not survive his daughter, and that his heirs should be in existence as proper heirs of John Todd at the time the succession opened by the death of Mrs Mackenzie without issue. But we cannot possibly give effect to that intention, because what is sometimes called the logic of facts prevents it. The fact is undoubted; John Todd is alive, and therefore the event that is contemplated by the parties has not occurred—but the very opposite has occurred. There are cases, as we all know, in which gifts may be bestowed upon persons under the general description of heirs of a living person. Legacies have been sustained which have been made to the heirs of A. B., and A. B. being in life, his children have been held entitled to the legacies. But these authorities really have no place here. We must construe this destination according to its true legal construction, and the question comes to be, whether, when Janet Mackenzie died without issue, and without disposing of the estate, there was anybody in a position to serve heir of provision to her in the character of the next heir of John Todd? Now, it appears to me that there was not. I don't think anybody can fulfil the part of a man's heir during that man's lifetime. A man's heir has no existence until he dies, and it never can be ascertained till he dies who will be his heir. It depends upon a variety of circumstances. I don't say that it might not be possible to make a destination which should receive the effect contended for by the pursuer here. If the parties had said "whom failing, to the person who will be the nearest in blood to John Todd, supposing him to be alive, or who will be his nearest heir supposing him to be dead," that would effect the object; but without some such phraseology as that I really don't see very well how it is to be done. The parties, I apprehend, did not provide for the case which has occurred. It is quite obvious upon the face of the deed that they did not provide for the case which has occurred; and therefore I think there is not in this case any destination, in the event of Mr Todd surviving his daughter, to the person who is then the nearest in blood to Mr Todd. There is no such destination, and therefore there was nobody upon the occurrence of Mrs Mackenzie's death who could take up the estate in the character of nearest heir whomsoever of John Todd. I think, therefore, that the necessary consequence was that the estate being *in hæreditate jacente* of Mrs Mackenzie, passed to her nearest heir-at-law. The destination was ineffectual beyond her to the heirs of her body, and therefore there was no alternative but that her heir-at-law should take. It was contended, with very great plausibility and force, that to hold that would be, in certain circumstances, which have not occurred, to go very much against the apparent intention of the parties to the contract. For example, it was said, suppose Mrs Mackenzie had had a sister, and that sister had had children, her heirs-at-law would be her sister, in the first place, and her sister's children in the next, and the effect of that would be to take away the estate—it may be from the nearest heir of John Todd, who might have had a son by a second marriage, and so to defeat what was the obvious intention of the parties; that failing the family of Mrs Mackenzie, the nearest heir of John Todd should be preferred. I don't dispute that that very likely would have been contrary to the intention of the parties, but there is no help for it, because the parties have been so improvident as not to provide for the case which has occurred; and that is the reason why the supposed intention of the parties in that event would not have received effect. But I don't think that affects the legal argument in the least degree, or the result at which we must arrive upon the true legal construction of this destination. I am therefore, upon that ground, for adhering to the Lord Ordinary's interlocutor. I abstain altogether from considering the other ground of judgment. I think it embraces two very difficult questions. One is whether you can import the name of John Todd into this destination; and the other is, supposing you can do so, whether his service can be read and given effect to as a service as heir of provision to his daughter. I give no opinion upon either of these questions.

Lord Deas—There are two grounds of reduction in this summons; the one is, that the party who granted the deed was either incapable of making a deed, or he was weak and facile, and was imposed upon; and the other is the legal ground of objection to his service as not vesting him with the right. I have had a feeling all along that I would rather have had the fact tried than the law. There may be two opinions about that, but if it had lain altogether with me, I should have insisted on investigating the matter of fact in place of determining a matter of law, that being a very difficult and delicate matter of law, of some novelty, and which possibly might have never arisen. I think it is a good principle not to decide matters of law that may never arise; and I would rather have followed that course if your Lordships had gone along with me. But I do not withhold my opinion on any ground of that kind; and I am of opinion with your Lordship that under the terms of this destination the subjects vested absolutely in Janet Todd, the daughter, and therefore that John Todd is rightly served as his daughter's heir-at-law. We had a great many authorities quoted to us in this case, and very ably commented on; but I think they were altogether, or nearly altogether, on the other branch of the case. Indeed, they could not well be on the question that we are dealing with, which is a question of the construction of this particular destination. Upon that we had no authority quoted to us, and we had no light except what we got from the argument. It is very plain that Janet Todd was in the position that if she had

chosen she might have disposed of this estate at her pleasure, subject only to any question that might have arisen with heirs of her body, if she had heirs of her body, as to how far she could gratuitously have taken away their right; but having no heirs of her body, it is plain enough, I think, that it was at her absolute disposal. But that would not be enough, in the question of the form of the service, if there were an ulterior destination, which would certainly have made it necessary for John Todd, her father, to have served as the heir of provision. And the question just is, as your Lordship has put it, whether there is an ulterior destination or no. The ulterior destination contended for was in favour of the nearest heirs of John Todd. Now, it really appears to me an extravagant proposition to suppose that in the lifetime of John Todd anybody could have served as heir of provision of John Todd, or rather as heir of John Todd, and thereby heir of provision of Janet Todd, his daughter. I think that is quite extravagant. We have no instances of anything of that kind, and I am very clearly of opinion that that could not have been done. Now, unless John Todd is himself a party in the destination, the consequence is that substantially there is no destination at all beyond Janet Todd. It is clear enough how it came about, as your Lordship has said; for it is quite plain that they took for granted that John Todd in the course of nature was bound to die before his daughter. But that did not happen. If John Todd had thought it probable that he would survive his daughter, and that she would have no heirs of the body, there can be no doubt at all that he would have made the ultimate destination in favour of himself. But that was not done; and I think the consequence just is, that there is no ulterior destination at all, and that John Todd has a right to serve. If that were not so, I think the only possible alternative would be that John Todd himself was the next member of the destination. I by no means say that that is so, nor that it would be easy to put that construction upon it. I only say I think the only other possible construction would be to make John Todd himself the next member of the destination, and consequently to put him in the position of having to serve as heir of provision to his daughter.

It is not necessary to decide whether this is a good service as heir of provision or no; but I am not prepared to say that it is not. The Lord Ordinary is of opinion that it is, and there is a great deal to be said in favour of it, if it were necessary to go into that. I do not find anything awanting in the service at all, unless it be simply the words "heir of provision." I think every other essential is there. I think even the destination is there; because it is a service under the investiture which is contained in the notarial instrument on p. 6, which notarial instrument contains the destination. A special service under the existing investiture, the terms of which we have here, may be fairly said to be a special service under that destination, and if that be so, there is nothing awanting but the words "heir of provision." Now, prior to the statute the want of these words could not have prevented this special service from operating as a special service as heir of provision, and I should be very slow to say that the statute has made any difference on the substantial requisites. There are two forms given no doubt, but if one of these forms contained all that a brieve under the old system contained in order to serve both purposes, I should be slow to say that the one is not as effective as the other. If the only alternative were the other construction which I have stated, it would require great consideration before I could say that this is not a good service. But it is not necessary to decide that. The Lord Ordinary having given his opinion, I thought it right to notice it. The case may go elsewhere and another view may be taken of. All I can say is, that my leaning would be that it might be a good enough service as heir.

Lord Ardmillan—I have given this case a good deal of consideration, and, though not without some difficulty, I have come to the same opinion as your Lordship. I have no doubt the fee was in Mrs Mackenzie. Mr Todd served heir of line to her. Now, the time in regard to which we must consider the question whether that service was right or not, is at the date of Mrs Mackenzie's death, and the question is, who was the party then entitled to serve heir to her. She died without children. John Todd, her father, was then alive and childless; and I think he neither had nor could have any heirs in law or in common sense while he was still alive, for I quite agree with your Lordship that there is something approaching to absurdity in speaking of the heirs of a man as entitled to serve while the man himself is still alive. Therefore, at the date of the daughter's death, the appointed line of succession—the destination by provision—came to an end. There were under that destination no heirs; the fee which had been in Mrs Mackenzie must pass to some person, but that person must be the heir of the last liar—that person must be the heir not *provisione nominis*, but *provisione legis*, because the provision in the deed terminated when Mrs Mackenzie died childless, and the person to take up the property was the heir-at-law or heir of line of Mrs Mackenzie; and that was her father. In that character he has served, and I think that is the appropriate character in which to serve, and that the service is good.

I do not venture to give any opinion upon the other question which has been raised. All that I shall say is, that I think the views expressed by Lord Kilkerran in the case of *Bell* v. *Carruthers*, confirmed I think by the views of Lord President Campbell in the case of *Cathcart* v. *Cassilis*, are most important, especially in regard to the distinction between a special service in lands held under a particular investiture and a general service. I do not dwell upon this. I feel very much the same difficulties which Lord Deas has suggested; and I reserve my opinion upon that question—any impression I have at present on the subject being rather in accordance with that expressed by Lord Deas. But it is not necessary to do more in deciding this case than to adopt the first view, which is to my mind satisfactory.

The Court adhered.

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