the *inter vivos* disposition and the antenuptial contract of marriage, but there was none. The antenuptial contract purported to operate only on the estate which might happen to belong to Captain Leslie at the time of his death. The *inter vivos* disposition on the other hand purported to operate upon certain property, heritable and moveable, which belonged to him at its date, and the property thereby conveyed formed no part of his estate at his death. He never attempted to revoke this disposition even if he had the power to do so. I am therefore of opinion that the second party is not put to her election between the subjects conveyed to her by the disposition and her *jus relictæ*. Her counsel admitted that she could not claim terce.

As regards the third and fourth questions of law, I agree that the antenuptial contract between Captain Leslie and his second wife secured to John Leslie junior (the son of Captain Leslie by his first marriage) an interest in the estates of the two spouses equivalent in all respects to the interest secured to the issue of the proposed marriage. The present case differs from that of *Mackie* v. *Gloag's Trustees* (1884, 11 R. (H.L.) 10), where the marriage-contract operated as an immediate conveyance of property which was placed in the hands of trustees for behoof of the children of the lady both by her first marriage and also by the second marriage then in contemplation, whereas in the present case the interests conferred upon Captain Leslie's son by his first marriage and upon the issue of the second marriage take effect only out of the free estates of the spouses at their respective deaths and vesting is postponed until the death of the survivor of them. None the less the opinions delivered in the case of *Mackie* support the judgment about to be pronounced, viz., that the interest conferred upon the child of the first marriage was contractual and irrevocable in like manner as was the interest conferred upon the children of the second marriage.

LORD CULLEN—I concur. As regards the *jus relictæ*, we have not to do here with the class of case referred to by Mr Sandeman, where under a universal settlement contained in one or more writings a provision is made for the widow which impliedly puts her to her election. The husband on the occasion of his second marriage settled the whole free estate belonging to him at his death on the issue of the first and second marriages, which left that estate subject to the second party's claim of *jus relictæ*. The deed of 1918 was not a testamentary deed, but was, as regards its operation after the husband's death, one whereby he made *inter vivos* an irrevocable provision for the second party in the event of her surviving him. He did not attach to this provision any conditions putting her to an election, and I do not think that such a condition can be implied.

As regards the other question in the case I think that by the delivered antenuptial deed of 1899 the parties contracted together that the child of the first marriage should be put on the same footing, and be given precisely the same species of right, as if he had been one of the children of the second marriage, to whom the consideration of the marriage primarily and properly applied, and that accordingly the contract created in his favour a *jus quæsitum* which was not defeated by the deed of 25th February 1909.

The Court in answer to the first question of law found that the second party was entitled to both the subjects provided to her in the disposition in her favour and also to her legal right of *jus relictæ* but excluding her right of terce; and answered the second and third questions of law in the negative, and the fourth in the affirmative.

Counsel for the First and Third Parties—C. H. Brown, K.C.—R. C. Henderson. Agents for the First Parties—Melville & Lindesay, W.S. Agents for the Third Party—Scott & Glover, W.S.

Counsel for the Second Party—Macmillan, K.C.—Cooper. Agents—Macpherson & Mackay, W.S.

Counsel for the Fourth Parties—Sandeman, K.C.—Aitchison. Agents—Alex. Morison & Co., W.S.

Friday, July 15.

FIRST DIVISION.

[Lord Anderson, Ordinary.

STOBIE *v.* STOBIE AND OTHERS.

Service of Heirs—Decree of Service—Reduction—Decree of Special Service in Favour of Persons not the Nearest Lawful Heirs of Last Proprietor—Disposition by Persons so Served in Favour of Onerous and Bona fide Third Parties—Bond and Disposition in Security by said Disponees—Reduction of Disposition and Bond and Disposition in Security—Prescription—Titles to Land Consolidation (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 101), *sec.* 46.

The proprietor of certain heritable subjects having died intestate a decree of special service was erroneously granted in favour of persons who were not his nearest and lawful heirs. In an action at the instance of the true heir-at-law for reduction of the said decree, and also of a disposition of the subjects granted by the persons so served in favour of certain onerous and *bona fide* third parties, and of a bond and disposition in security over the subjects granted by the said disponees, *held* that the heir-at-law was entitled to challenge these writs within the period of the vicennial prescription, and reduction *granted*.

The Titles to Land Consolidation (Scotland) Act 1868, enacts—Section 46—"On being recorded and extracted as aforesaid every decree of special service . . . shall to all intents and purposes, unless and until reduced, be held equivalent to and have the full legal operation and effect of a disposi-

tion in ordinary form of the lands contained in such service granted by the person deceased being last feudally vest and seised in the said lands to and in favour of the heir so served . . ., and in order that the feudal title may be completed in the person of the heir so served it shall be lawful and competent for him to use such extracted decree in the same manner and to the same effect as if such extracted decree were actually a disposition of the nature above mentioned, and in particular he shall be entitled to record the same in the appropriate Register of Sasines as a conveyance under this Act along with a warrant of registration thereon on his behalf, and such extracted decree and warrant of registration, upon being so recorded in favour of such heir, shall form as effectual an investiture . . . as if such investiture had been created by a disposition from the deceased as aforesaid recorded . . . in favour of such heir at the date of so recording the said extracted decree of service . . ."

Louisa Stobie, 9 Brighton Street, Edinburgh, *pursuer*, brought an action of reduction against (1) Janet Stobie, Margaret Stobie or Adams, wife of John Sutherland Adams, and the said John Sutherland Adams for his interest, and Agnes Stobie or M'Killop; (2) James Alexander Stobie, executor-dative of the deceased David Stobie; (3) Robert Smith, and Mary Agnes Wells or Smith, wife of the said Robert Smith; and (4) the testamentary trustees of the deceased Adam Manson, *defenders*, concluding for reduction of "(1) an extract decree of special service granted by the Sheriff of Chancery, dated 27th May, recorded in the books of Chancery 30th May, and recorded in the Division of the General Register of Sasines applicable to the county of Edinburgh 16th June, all in the year 1916, whereby the said Janet Stobie, Margaret Stobie or Adams, and Agnes Stobie or M'Killop were served nearest and lawful heirs in special to the said deceased David Stobie in" certain heritable subjects in Gladstone Terrace, Edinburgh; "(2) a disposition of the said subjects granted by the said Janet Stobie, Margaret Stobie or Adams, John Sutherland Adams, and Agnes Stobie or M'Killop, with consent" therein mentioned "in favour of the said Robert Smith and Mary Agnes Wells or Smith and the survivor, dated 9th, 12th, and 15th June, and recorded in the said Division of the General Register of Sasines 16th June, all in the year 1916; (3) a bond for the sum of £50 granted by the said Robert Smith, and disposition of the said subjects in security granted by the said Robert Smith and Mary Agnes Wells or Smith in favour of the" testamentary trustees of the said Adam Manson, "dated and ratified 10th November, and recorded in the said Division of the General Register of Sasines 11th November 1919 . . . so far as the said bond and disposition in security purported to affect the said heritable subjects or to create a burden thereon."

The following narrative is taken from the opinion *infra* of the Lord Ordinary (ANDERSON):—"On 13th March 1916 David Stobie died unmarried and intestate. He was infeft in heritable subjects at No. 3 Gladstone Terrace, Edinburgh, which he had acquired as heir of his sister Elizabeth Stobie. Shortly after the death of the said David Stobie a petition was presented to the Sheriff of Chancery by the defenders Janet Stobie, Margaret Stobie or Adams, with consent of her husband John Sutherland Adams, and Agnes Stobie or M'Killop, to have them served as nearest and lawful heirs in special to the deceased David Stobie. These petitioners were nieces of the said David Stobie, being the daughters of his only brother Robert Stobie. The said Robert Stobie had also a son William, who died intestate in 1897, leaving as issue the pursuer in the present action, who is thus a grandniece of the said David Stobie, and admittedly his nearest and lawful heir-at-law. The pursuer was unaware of the said petition in Chancery, and had not known of the death of the said David Stobie. The proof in said petition consisted of two affidavits, which did not disclose the fact of the pursuer's existence. It is in my opinion regrettable that the proof took this form. Had oral testimony been given it is more than likely that the fact of the pursuer's existence would have been ascertained, and intimation to her of the Chancery proceedings would have been ordered. The Sheriff of Chancery pronounced decree of special service in favour of the petitioners on 27th May 1916. An extract of said decree was recorded in the Books of Chancery on 30th May, and in the Division of the General Register of Sasines applicable to the county of Edinburgh on 16th June, both in the said year 1916. The said petitioners thereafter sold the said heritable subjects to the defenders Robert Smith and Mary Agnes Wells or Smith for £158, and granted a disposition of said subjects in favour of the said disponees or the survivor dated 9th, 12th, and 15th June, and recorded in the said Division of the General Register of Sasines 16th June, all in the said year 1916. The said disponees granted in favour of the defenders fourth called a bond and disposition in security over said heritable subjects for the sum of £50, dated 10th, and recorded in said Division of the General Register of Sasines 11th, both days of November 1919. The pursuer recently learned of the death of the said David Stobie and of her rights as heir-at-law, and she has brought the present action for reduction of the said decree of special service, disposition, and bond and disposition in security, the last-mentioned deed only in so far as it purports to affect the said heritable subjects or to create a burden thereon. In addition to the said disponees and security holders, both of whom have lodged defences, the pursuer has called as defenders the said petitioners in Chancery and also the executor-dative of the said David Stobie, but defences have not been lodged either by the said petitioners or by the said executor-dative."

The pursuer pleaded—"1. The decree of special service under reduction having been granted in favour of persons who are not the nearest lawful heirs in special of the

deceased David Stobie, and who are not entitled to succeed as heirs to the said heritable subjects, the said decree and all that has followed thereon should be reduced as concluded for. 2. The defences being irrelevant they should be repelled."

The defenders Robert Smith and Mary Agnes Wells or Smith pleaded, *inter alia*—"2. The said decree of special service having been pronounced by a competent Court, and these defenders having onerously and in *bona fide* and on the faith of the records acquired right to the subjects thereby disposed of, neither it nor the disposition in their favour following thereon is reducible at the instance of the pursuer, and these defenders are accordingly entitled to absolvitor. 3. The pursuer not having come forward to oppose the petition for special service before the Sheriff of Chancery is barred from suing the present action. 4. *Esto* that said decree and deeds fall to be reduced, these defenders are in the circumstances entitled to have it made a condition of decree of reduction being pronounced that they be recompensed by the pursuer for the price of the said subjects, and *restitutio in integrum* made to them."

The defender Adam Manson's trustees pleaded, *inter alia*—"2. The said decree of special service having been pronounced by a competent Court, and the defenders the said Robert Smith and Mary Agnes Wells or Smith having onerously and in *bona fide* and on the faith of the records acquired right to the subjects thereby disposed of, and these defenders having onerously and in *bona fide* and on the faith of the records having obtained the said bond and disposition in security, neither the said decree of special service nor the deeds following thereon are now reducible at the instance of the pursuer, and these defenders should be assoilzied, or otherwise, as a condition of reduction, the amount of said bond, principal, interest, and penalties, if any, due thereunder, ought to be paid to these defenders. 3. The pursuer not having come forward to oppose the petition for special service before the Sheriff of Chancery is barred from suing the present action. 4. *Separatim*—These defenders are in the circumstances entitled as a condition of decree of reduction being pronounced to have the pursuer ordained to find caution or security for the amount of their loan to the defenders Mr and Mrs Smith."

On 2nd June 1921 the Lord Ordinary (ANDERSON) granted decree of reduction as concluded for.

Opinion.—[*After the narrative quoted supra*]—"The immediate purpose of the action is to clear the way for an application by the pursuer to the Sheriff of Chancery for a decree of special service in her favour as nearest heir of the said David Stobie. Remoter results of the pursuer's success in the action will be the dispossession of the said disponees and the deprivation of the said bondholders of their real security.

"It is therefore obvious that whatever decision may be pronounced this is a hard case for the unsuccessful party.

"The pursuer's contention is very plain, and, I am afraid, difficult to meet. She says that she comes forward at the earliest possible moment and well within the period of prescription to vindicate her legal rights. The claim which she makes is not and cannot be challenged by the rival heirs who forestalled her in Chancery. She alleges that it necessarily follows that those who derived their rights from those rival heirs, and who are defending the action, must be unsuccessful in their defence.

"It is in my opinion immaterial, and therefore it is unnecessary to determine, whether the petitioners acted innocently or fraudulently in failing to disclose in the Chancery proceedings the fact of the pursuer's existence, of which I am satisfied they were well aware. The pursuer's position on either assumption is the same, to wit, that the petitioners were not entitled to obtain the decree of special service which was pronounced, and that the pursuer as the only person entitled to obtain that decree may now have it reduced.

"It is necessary to take note of certain statutory enactments as to decrees of special service.

"Originally service as heir proceeded on a brieve issuing from Chancery and directing a judge to ascertain the validity of the claimant's title by an inquest or jury of inquiry. After the jury's verdict the service and brieve were retoured to Chancery, an extract from which, called the retour, was the claimant's evidence of the service.

"The Service of Heirs Act 1847 abolished brieves of service and substituted a petition to the Sheriff of the county of the deceased's domicile or to the Sheriff of Chancery. The decree of special service granted under this Act contained a precept of sasine, and the extract had the legal effect of a disposition by the party deceased last infeft in favour of the heir served, with obligation to infeft, assignation of writs and rents, and precept of sasine. Upon this infeftment might pass, but only in favour of the party served — *Moreton's Trustees*, 16 D. 1109. This infeftment with the decree of service was declared by the Act of 1847 to be an effectual investiture holding base of the deceased and his heirs until confirmation.

"By the provisions of the Titles to Land Consolidation (Scotland) Act 1868 there is no precept of sasine in the extract decree of special service (sec. 46), and the decree is now equivalent to an unrecorded disposition by the ancestor in favour of his heir, containing the clauses in the form of the disposition provided by the Act. The title of the heir was completed prior to 1874 by recording the decree in the Register of Sasines and obtaining a writ of confirmation endorsed upon it by the superior.

"By the Conveyancing Act 1874, section 9, the heir's title is completed by recording the decree of special service in the Register of Sasines.

"The Consolidation Act 1868 contains elaborate provisions as to the procedure to be followed in applying for and obtaining decrees of service as heir (sections 27-49). By section 30 it is provided that publication of a petition to Chancery for service as heir

should be made edictally in Edinburgh, and by an abstract of the petition being affixed on the doors of the court-house or other conspicuous place in the county of the deceased's domicile. Section 42 provides that when a process of reduction of any decree of service is brought in the Court of Session the cause may be tried by a jury.

"The Act 1617, cap. 13, establishes a vicennial prescription of retours. This vicennial prescription has been adapted to the new rule of vesting introduced by the Conveyancing Act of 1874 by the 13th section of that Act.

"The Act of 1617, cap. 12, establishing the positive prescription specially refers to 'retours' as being the appropriate warrant for an instrument of sasine upon which the period of the positive prescription might be based. Finally, the 34th section of the Conveyancing Act 1874 reduced the period of the positive prescription to twenty years of possession on 'any *ex facie* valid irredeemable title to an estate in land recorded in the appropriate Register of Sasines.'

"The defenders' counsel resisted the motion made by the pursuer's counsel for decree of reduction *de plano* on a variety of grounds which are disclosed in the pleas-in-law.

"1. The main contention of the defence is to be found in the second plea-in-law of the disponees. I am unable to hold, keeping in view the law of prescription, that any of the points emphasised in that plea are material or relevant.

"That the title attacked is a decree, that it emanated from a court which was competent, that the property was acquired onerously and in good faith and on the faith of the records—all this seems to be beside the mark; none of the statutory enactments as to prescription refers to any of the considerations emphasised in this plea or makes the operation of prescription dependent on their presence or absence.

"The procedure in petitions for service to which I have alluded was founded on by the defenders' counsel. It is plain, however, that if it were to be held that regularity of procedure made a decree of the Chancery Court inviolable, the provisions of the two Acts of 1617 and of the 35th section of the Act of 1874 would be meaningless.

"Any retour by the Act 1617, cap. 13, however solemnly and regularly made, may be challenged within the vicennium. The foundation of prescription which the 1874 Act postulates is an *ex facie* valid title. How then can it be successfully maintained that such a title is beyond challenge, and that no prescriptive possession is necessary? It was said that the conditions of onerosity and good faith protected the disponees' title from challenge. There is no authority for this proposition and it cannot be reconciled with the statutory provisions as to prescription. The cases relied on by the defenders—*Wilson & Others*, 3 W. & S. 60; *Baird*, 13 Sh. 927; *Williamson*, 14 D. 127; and *Buist*, 3 R. 1078—do not appear to me to be in point or to support the contention which was urged. The pursuer's counsel founded on the case of *Rocca*, 4 R. 70. There the action was held to be barred by the vicennial prescription of retours, but the point now under consideration was touched by the Lord Justice-Clerk in the concluding paragraph of his judgment at p. 73. What is said is this—'It is said, however, that the service was radically bad in respect that it was obtained by fraud. Questions of considerable subtlety might have arisen if there had been a relevant and sufficient allegation of fraud. For I am not sure whether in that case the defenders could say that their title as singular successors excludes the action. A general service establishes propinquity, and although part of the property which belonged to the ancestor has been transferred to a singular successor that will not prevent the true heir from reducing the service of the false heir. In that case it might be contended that the title of the singular successor is annulled not on the ground of fraud but because it flows *a non domino*. But I do not think that these questions arise in the present case, because the allegations of fraud and subornation of perjury are far too vague to be admitted to probation.' Reference may also be made to the case of *Neilson*, 15 Sh. 365, *aff.* 1 Rob. 82. In that case it was decided that the Act 1617, cap. 13, establishes an absolute protection of retours against parties alleging themselves to be the true heirs after the lapse of twenty years. The converse of that proposition as it seems to me is extractable from the judicial opinions that were delivered, namely, that during the currency of the vicennium there is no absolute protection of any retour against challenge by a nearer heir. In the House of Lords the Lord Chancellor (Cottenham), dealing with an argument based on the provisions of the Act 1494, cap. 57, which established a triennial prescription of actions of error against the inquest, said, at 1 Rob. p. 95—'Then, my Lords, it was said that the Act of 1617, cap. 13, must be considered as applying only to the species of process which at that time existed, namely, to the prosecution of the jury for an erroneous conclusion. I do not find any ground in the statute for that argument; on the contrary I find that the statute expressly distinguishes and separately provides for both cases; it gives the opportunity for twenty years of instituting proceedings for the purpose of reducing the retour, but it gives him three years only for the purpose of instituting this proceeding against the jury. With respect to that proposition I have also carefully looked through the text writers that have been referred to for the purpose of seeing whether in those text writers there was anything to support it and I can find no allusion to it.'

"With this paucity of authority the point falls to be determined on principle, and it is plain to me that the contention of the defenders' counsel is antagonistic to and inconsistent with the whole law of prescription.

"Moreover, that contention is out of harmony with the law of warrandice. There is a clause of warrandice in the disposi-

tion granted in favour of the disponees. The obligation thereby laid on the disponers was so imposed just to meet such a contingency as has arisen. The disponees got what looked like an unimpeachable title—an *ex facie* valid title—based on what appeared to be a good decree of a competent Court, and a search for encumbrances showed that the subjects of the transaction were unencumbered. They transacted, as it is put, 'on the faith of the records,' and all seemed well. But it is just because despite appearances of this auspicious character all might not be well that the clause of warrandice was inserted in the deed. The disponees were or ought to have been aware that their title was open to challenge for twenty years, and it was just because it might be challenged within that time, and challenged successfully, that they took the disponers bound in warrandice. But if the contention of the defenders' counsel is sound this was an unnecessary stipulation. The transaction was onerous, in good faith, and proceeded on the faith of the records, and therefore it is implied warrandice was unnecessary; the disponees cannot in these circumstances, it is suggested, be ousted.

"Finally, the said contention conflicts with the law of *bona fide* possession. The disponees claim in the present action for meliorations. The meaning of that is that they have hitherto possessed in good faith although not as of right. But the result of the contention I am considering is that there is no such rule of law; the disponees according to the argument cannot be evicted inasmuch as they transacted onerously and in good faith.

"I am therefore against the defenders in this the main question in the case. The remedy of the disponees if evicted from the subjects is to proceed against the disponers under the warrandice clause. They have stated no relevant defence to the reduction craved by the pursuer.

"The disponees state two other pleas which fall to be considered.

"Plea 3 is one of bar. It is based on this—that the usual procedure was followed in connection with the petition in Chancery, that is, there was edictal publication in Edinburgh and on the Court-house door. It is not averred, however, that the pursuer had any knowledge of these proceedings, and in my opinion anything short of an averment that the pursuer knew or ought to have known of said proceedings is insufficient to support a plea of bar. I understood that it was common ground that the pursuer was in entire ignorance until recently of said proceedings. The said plea therefore falls to be repelled.

"The fourth plea-in-law for the disponees is to the effect that the pursuer should make *restitutio* by repaying to these defenders the price paid by them to the disponers. This is plainly an untenable proposition. The disponees must obtain repetition of the price if they can from those who received it. There is no obligation on the pursuer to repay these defenders what they must endeavour to obtain under their warrandice clause.

"The fate of the other defenders the bondholders necessarily depends on that of their authors the disponees, and it only remains to consider their fourth plea-in-law. By that plea, as to which I heard no argument, it is craved that as a condition of decree being pronounced the pursuer should find caution or security for the amount of the bondholders' loan to the disponees. I have no difficulty in repelling this plea. The pursuer is entitled to take the property as it was when the succession opened to her, and at that time it was entirely unburdened.

"I propose therefore, as all material facts are admitted, to grant decree of reduction as concluded for.

"The disponees' claim for meliorations does not arise until the pursuer proceeds to evict them from the subjects This is a matter which the parties may well adjust, but lest they fail to do so I shall continue the cause for further procedure and grant leave to reclaim."

The defenders Robert Smith and Mary Agnes Wells or Smith and Adam Manson's trustees reclaimed, and argued—A decree of special service was only pronounced upon satisfactory evidence and after publication. The title it conferred was equivalent to a disposition by the last person infeft. Such a title was valid unless and until reduced—Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101), sec. 46, and secs. 27 to 33 inclusive. The subsequent transfer of the subjects to onerous and *bona fide* third parties made on the faith of the decree rendered reduction no longer possible—Act 1617, cap. 13; Ersk. Prin., i, 7, 40; Bell's Prin., sec. 1840; Begg's Conveyancing Code, 127; *Scottish Widows' Fund* v. *Buist*, 3 R. 1078, 13 S.L.R. 659; *Wilson* v. *Elliot*, 1828, 3 W. & S. 60; *Baird* v. *Neill*, 1835, 13 S. 927; *Williamson* v. *Sharp*, 1851, 14 D. 127; *Rocca* v. *Catto*, 4 R. 70, 14 S.L.R. 40; *Mackie* v. *Mackie*, 34 S.L.R. 34.

Argued for the pursuer—This was a case of radical defect of title. There was no analogy between a disposition fraudulently obtained from the true owner and a service of the wrong person as heir. The cases cited by the defender fell under the former description. Until a decree of service was fortified by prescription it was open to the true heir to have it set aside together with the titles which depended on it for their validity—Bell's Com., i, 299-301; Stair, iii, 5, 42; *Macnair* v. *Lord Cathcart*, F.C., May 18, 1802, M. 12,832; *Younger* v. *Johnstons*, June 30, 1665, M. 10,924. The claim made by the onerous disponees for *restitutio* did not lie against the pursuer but against the granters of their titles.

LORD PRESIDENT—The pursuer in this action was heir-at-law of her granduncle Mr Stobie. But her three aunts, either deliberately or by some unexplained inadvertence, arrogated to themselves the capacity of Mr Stobie's heir-at-law (*qua* heirs portioners), which truly belonged to the pursuer, and obtained service for themselves. The defenders—I make no distinction between the purchaser and the bondholder—are onerous acquirers from the aunts, who

completed title by registering a decree of service in their favour. In the discussion it has been assumed that the defenders were not merely onerous but also *bona fide* disponees, ignorant of the circumstances under which the service was obtained. If they had not borne that character there would of course have been a short and conclusive answer to their defence.

The pursuer seeks to reduce the service and the transactions with the defenders which followed upon it in order to make her own right as heir-at-law effectual, but the defenders reply that their title as onerous and *bona fide* third party acquirers is not thus assailable. It appeared to me to be a novel and startling proposition that a decree of service obtained in their own favour by persons who did not possess the natural capacity of heirs-at-law could, during the running of the vicennial prescription, constitute a sound link in the transmission of the property. But Mr Gilchrist's careful and skilful argument for the defenders revealed the existence of questions of some difficulty in the matter.

He maintained two arguments, the first of which was founded exclusively on section 46 of the Titles to Land Consolidation Act of 1868. (I omit, for shortness, any reference to the earlier provisions of the Act of 1847.) That section made a decree of service not merely a voucher of the date of the ancestor's death and of the heir's propinquity, but endowed it with the effect of a disposition by the deceased in favour of the heir so retoured. In this way the extract decree of special service was made capable of registration to the effect of completing a title. Even if, it was argued, the service had been procured by fraud, the result was just the same as if the deceased had been a living person and had been fraudulently induced to convey the estate — that is to say, the title carried by the hypothetical conveyance (or in the actual case by the service) was one which was only voidable but not void, and therefore the right of a *bona fide* third party acquirer was unchallengeable. I have no difficulty in rejecting that argument, ingenious as it is. I do not think it is admissible to apply the legal incidents which arise from the effect of fraud on a real consent to the imaginary consent imputed by the terms of section 46 to the imaginary conveyance by the deceased. To confound realities with legal fictions to the length of applying to the latter all the legal consequences which fraud produces in the case of the former would be to open up an endless chapter of error.

The next argument was founded only in part on section 46. It was that the capacity of heir is a capacity which is established by a decree of service, and that by virtue of section 46 such a decree (while unreduced) confers by its own vigour an effectual title capable of being effectually transmitted to a *bona fide* third party, notwithstanding the fact that the decree itself may have been pronounced in error or as the result of fraud. In support of this argument there were cited to us a number of cases, notably *Wilson* v. *Eliott* (3 W. & S. 60) and *Baird* v. *Neill*, 13 S. 927. In these the effect of fraud in procuring from the Court authority for heirs of entail to sell and convey entailed estate for the purpose of redeeming the land tax was considered in relation to the rights of purchasers in good faith under the authority so obtained. It appears from the reports that the sanction of the Court could not and would not have been given except for the improper concealment by the applicants and sellers of evidence relevant and even vital to the question, and it was held that, standing the interlocutors granting authority, the sales and conveyances which had followed upon it could not be challenged. On the analogy of these authorities we were asked to hold in like manner that a decree of service standing unreduced, however erroneous it may be, and even although procured from the Sheriff of Chancery by improper concealment of relevant facts, is nevertheless a sufficient warrant for the transmission of the estate to third parties who, receiving the estate in good faith, get an unchallengeable title to it. If a decree of service is comparable in its character with interlocutors pronounced by the Court under the Acts for the Redemption of Land Tax, I think the defenders would be provided with a strong argument by these cases. But if the nature of the two things be considered they are seen to be not only not similar but indeed completely different. When an application is made to the Court by an heir of entail for authority to sell a part of his estate in order to redeem the land tax, the very purpose is to enable a valid conveyance to be granted which — without such authority — the heir could not grant at all, and the interlocutor of the Court has the effect of relieving the petitioning heir from the disability which his title imposes on him. But the part played by a decree of service is altogether different, and the use to which section 46 of the Act of 1868 allows a decree of special service to be put is incidental and, so to speak, adventitious only. Testament and settlement apart, the transmission of property on death depends on the fact of the ancestor's death on the one hand and of the heir's propinquity on the other. These are natural facts, not susceptible of being modified or tampered with. They are fundamental and conclusive with regard to the question who is heir? Accordingly the important rights of the heir-apparent vest, and always did vest, apart altogether from service. The process of service is no more than a step in the completion of the heir's title—a *quasi*-judicial form which provides him with a voucher of his capacity as heir when he presents himself to his superior for investiture. But whatever short-cuts to investiture a service may—under the Titles Act—enable the person served to take, the service remains open, and necessarily open, to reduction—if it is granted to someone other than the true heir—within the period of the vicennial prescription. The decree of service in the old practice was really a certificate that the ancestor had died and that the person named in the retour was his *hæres propinquior*; but it

was really no more than a certificate. Without such a certificate the Chancery could never have been put into operation so as to enable the title to be completed. But the service never could operate to make a person *hæres propinquior* who was not in fact such. The fallacy which underlies Mr Gilchrist's ingenious argument is in supposing that upon the decree of the Sheriff Court of Chancery depends the capacity of heir—that it confers the quality or the rights of heir upon the person named in the decree. It does not; and the adjection to it of the effect of a disposition by the deceased does not cure an error as to the identity of the hypothetical disponee. Death and propinquity are *facta propria*, the most difficult of all to establish by proof in a Court; but they remain radically fundamental in a question as to the right of the heir. If that is correct then (like other radical defects) the defect which the pursuer alleges against the service in this case—whatever potentialities have been added to it by statute—is inherent in it; and a radical defect of that kind always stands, and must stand, in the way of third party acquirers, however good their faith.

It seems to me accordingly that the judgment reclaimed against must be affirmed.

LORD MACKENZIE—This is one of the unfortunate cases in which loss has to fall on one or other of two innocent parties. I agree with your Lordship that the able argument adduced on behalf of the reclaimers fails. On the first branch of it I think it fails because it is an attempt to read into section 46 of the Titles to Land Act 1868 a great deal more than the section will bear. On the second branch I think the argument fails because a decree of service does not and cannot make a person the heir who is not the heir. Therefore the onerous *bona fide* third parties in this case are just in the position of having acquired their right from one whose *ex facie* title depended upon a *funditus* nullity.

LORD SKERRINGTON — The defenders' counsel submitted an argument which was novel, and for which, as far as I know, there is no authority. He maintained that a person who in good faith buys heritable property from a seller who has an *ex facie* valid feudal title, one of the links of which is a service as heir, is entitled without appealing to prescription to retain the property, even although it afterwards appears that the person who served as heir was not in fact the true heir. I have always understood that, until a retour or service had been fortified by prescription, it was open to the true heir to come forward and set it aside, together with the titles which depended upon it for their validity. That I think has always been the law, and it was not altered in any way by the conveyancing legislation of 1847 and subsequent years.

The case is a hard one for the compearing defenders. At the same time I cannot help regretting that the Sheriff of Chancery did not dismiss the petition for service as irrelevant, but proceeded to pronounce a decree which seems to me to contain a *non sequitur*. It was quite true as the petitioners averred that they were "the only children" of a certain Robert Stobie, but they did not aver, and the decree of service does not bear, that they were Robert Stobie's only descendants. Accordingly it did not follow that the petitioners were the nearest and lawful heirs of Robert Stobie's childless brother David. In point of fact David's heir was the pursuer, the daughter of Robert's deceased son, and the niece of the petitioners who improperly obtained the service.

LORD CULLEN—I think that this is a case of a radical defect of title, and that the judgment of Lord Stormonth Darling in the case of *Mackie* (34 S.L.R. 34), cited to us, rightly proceeded on the ratio that a disposition granted by a person wrongly served as heir is of the nature of a conveyance *a non domino*, and therefore will not support a right to property in the disponee unless fortified by prescription. There is no analogy between a disposition voluntarily granted by the true owner under the inducement of fraudulent misrepresentation and a service of the wrong person as heir. The service is fundamentally vitiated by falsity, and the analogy is rather that of a forged writ. The defenders founded specially upon section 46 of the Act of 1868, but that enactment merely says that unless and until reduced a service shall operate to transmit property in a particular way. If the service be reduced then the natural effect of that is that subsequent writs have no foundation to rest on and that they fall also, and section 46 says nothing to the contrary. In the cases to which our attention was called relating to sales under judicial sanction (*Wilson* v. *Eliott*, 3 W. & S. 60; *Baird* v. *Neill*, 13 S. 927), the authority of the Court was granted for the purpose of enabling a good title to be offered in the market to the purchaser of the land authorised to be sold.

The Court adhered.

Counsel for Pursuer — King Murray. Agent—Donald Shaw, S.S.C.

Counsel for Compearing Defenders — Mitchell, K.C.—Gilchrist. Agents—Welsh & Forbes, W.S.

HOUSE OF LORDS.

Monday, July 25.

(Before Lord Buckmaster, Lord Atkinson, Lord Shaw, Lord Sumner, and Lord Wrenbury.)

CALDWELL'S TRUSTEES *v.* CALDWELL AND OTHERS.

(In the Court of Session, June 22, 1920 S.C. 700, 57 S.L.R. 593.)

Charitable Bequests and Trusts — Uncertainty — "Charitable and Benevolent Institutions."

Held (*aff.* judgment of the First Division) that a residuary bequest in favour