CASES

DECIDED IN

THE HOUSE OF LORDS,

UPON APPEAL FROM

THE COURTS OF SCOTLAND.

[Fac. Coll. Vol. xiii. p. 123; et Mor. p. 14,447.]

ANDREW BLANE, W.S., Trustee for Sir Andrew Cathcart, Bart., ... } *Appellant;*

ARCHIBALD, EARL OF CASSILLIS, and Others, *Respondents.*

House of Lords, 24th May 1805.

GENERAL SERVICE—POWER TO ALTER DESTINATION IN ENTAIL.—In a reduction and declarator of the titles to the Culzean estates, held, 1. that Earl David's general service (1776), *tanquam legitimus et propinquior hæres masculus et lineæ* of his only brother german, Earl Thomas, necessarily established in him the character of heir of provision under a previous settlement 1748, and vested in him the personal right of the subjects thereby conveyed to him. The Court, by two previous interlocutors, had found to the contrary; and, in the House of Lords, this part of the judgment was remitted to be reviewed; and *quoad ultra* affirmed as to the subjects contained in the charter 1774. 2. Held that the deed 1748 was alterable, and that Earl Thomas had validly done so.

SIR JOHN KENNEDY of Culzean, Baronet, died in the year 1742, leaving three sons, John, Thomas, and David, and three daughters, Elizabeth, Ann and Clementina.

The eldest son, Sir John, died in 1744, without issue, and was then succeeded by his next younger brother, Sir Thomas, (who, upon the death of John, Earl of Cassillis, in 1759, without issue, also succeeded to the honours and estate of Cassillis), and, upon his death in 1775, without issue, he was succeeded by his immediate younger brother David, both to the title and estates of Culzean, and to the earldom and estate of Cassillis. And, upon David's death,

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without issue, in Dec. 1792, the Culzean estates, as the appellant contended, fell to devolve on Elizabeth, the eldest daughter of Sir John Kennedy the first, who was married to Sir John Cathcart; and Sir Andrew Cathcart, as the only surviving male issue of that marriage, and the heir of line of the said Sir John Kennedy the first and second, as also of Thomas and David, Earls of Cassillis.

Ann, the second daughter, married John Blair of Dunskey, by whom she had several sons, now all deceased without issue. She had likewise two daughters, Jane, married to Sir James Hunter Blair, and Clementina, married to Mr. John Bell. Clementina Kennedy, the youngest of Sir John Kennedy's three daughters, died without issue. But the earldom and estates of Cassillis, as will be seen from the deeds afterwards to be described, went to a remote cousin, (the respondent), in virtue of a restriction to heirs male.

The appellant is trustee appointed by Sir Andrew Cathcart for the purpose of raising the present action of reduction, challenging the respondent's title to succeed to the Culzean estates, founded on several objections stated to the titles, and particularly to Earl David's general service, and his power to alter the previous destination of succession; and therefore the appellant maintained that Sir Andrew Cathcart, besides being Sir John Kennedy's heir of line, was entitled to succeed to these estates as heir of provision under a deed of entail 1748. Thus the whole question hinged on the previous state of the titles, a description of which is necessary.

Jan. 28, 1743. Sir John Kennedy the *second* was served nearest and lawful heir male and of line to his father, Sir John Kennedy the first, and also nearest and lawful heir of provision to him, under a contract of marriage dated the 15th of March 1706, executed by his parents. Feudal titles were completed to the barony of Greenan, and some other parts of the estate; but he died without making up feudal titles to Culzean and some other lands; but he had, however, a personal right to the whole estate that belonged to the family in 1706, in virtue of his service of heir of provision under this contract.

April 12, 1743. Sir John the second then executed a procuratory of resignation, whereby he bound and obliged himself, his heirs and successors, to make due and lawful resignation of the lands, baronies, and other heritable subjects therein mentioned, being the barony of Culzean, and the whole other lands and estate, in favour of himself and the heirs male of

his body, whom failing, to the heirs female of his body; whom failing, "to the heirs male procreated of the marriage "between Sir John Cathcart, Bart., and the deceased Dame "Elizabeth Kennedy his spouse, my eldest sister german." No resignation was taken thereon during the lifetime of Sir John, who died within a year thereafter.

Sir Thomas Kennedy, on succeeding to his brother Sir John, in 1744, expede a general service, as nearest and lawful heir of line, and heir male, and also as nearest and lawful heir of provision, in terms of the contract of marriage 1706, and of the above procuratory in 1743, to his deceased brother. And, at same time, (Jan. 1747), he expede a service as heir of line, heir male, and of provision to his father. Service 1747.

Sir Thomas, in Jan. 1748, then executed a disposition and deed of entail to himself and the heirs male of his body, whom failing, "to Mr. David Kennedy, my only brother "german, and the heirs male of his body; whom failing, to "David Kennedy, advocate, my uncle, and the heirs male "of his body; whom failing, to John Kennedy of Kilthenzie, "advocate, and the heirs male of his body; *whom all fail-* "*ing, to my own nearest heirs whatsoever*, (the eldest heir "female and heir descendants so oft as the succession de- "volves upon females or their descendants, excluding still "all others from being heirs portioners, and succeeding al- "ways without division throughout the whole course of "succession, so as that the right of primogeniture shall take "place among the female heirs in like manner as the same "does among male heirs), all and sundry the lands, baro- "nies, and other heritages hereafter described, viz. all and "whole the lands and barony of Greenan, &c. (here the whole lands then belonging to him are specially enumerated), "and all and singular tithes, both parsonage and "vicarage, of all and sundry the lands before specified, and "all other lands and heritages of whatever kind, or wher- "ever lying, which I shall hereafter acquire or succeed to." This deed was registered in the Books of Council and Session five days after it was executed. Entail Jan. 1748.

There was a difference in the line of succession between this deed and the procuratory of 1743. In the procuratory Sir Andrew Cathcart is called expressly after the failure of heirs male; but he contended that even under this deed 1748, he was called under the substitution of the "heirs whatsoever," of the maker of that deed.

In the year 1748 Sir Thomas made up titles to the lands which stood in the family upon personal titles, viz. to the Charter 1748.

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lands of Balchaystens, Balkennay, Macgowanstown, Dunimuck, and Mill Drumgirlock, by charter partly from the crown and partly from the prince, proceeding upon procuratories of resignation in the title deeds of his predecessors, and the service of his brother Sir John, as heir to his father, Sir John's procuratory 12th April 1743, his own service as heir to his brother, and his own disposition of 2d Jan. 1748, as giving right to the original procuratory, and upon this charter infeftment was taken, whereby the heirs of the deed 1748 became heirs of investiture. These lands had stood in the family upon personal titles for some generations. He completed feudal titles to the rest of the estate in 1757, in the following manner: His brother Sir John had made up titles, and been infeft in all the other lands holding of the king or prince, besides those already mentioned; and Sir Thomas, for completing his titles to the lands in which his brother had been so infeft, viz. the barony of Greenan, the

Charter 23 Feb. 1757.

£7 land, &c. the barony of Turnberry, and part of £10 land of Thomastown, expede a charter of all these lands, proceeding upon his brother's procuratory of 1743, his own service, as heir to his brother, and his own disposition of 12th Jan. 1748, upon which he was infeft; and in the same charter and infeftment were included the remainder of the lands of Thomastown, the kirk lands of Kirkoswald, and the lands of Balvaird, being three purchases made by himself, whereby the heirs of the deed 1748 became the heirs of investiture in all these lands.

The barony of Culzean and other lands being held of the family of Cassillis, and which remained *in hæreditate jacente* of his father, Sir John the first, and there being no room for completing titles to the lands, in the way of resignation upon a procuratory, Sir Thomas obtained a precept of *clare constat* from the then Earl of Cassillis for infefting him as heir of his father in that barony, the lands of Coiff, the ten pound land of Drumgirlock and Drumbane, the annual rent payable out of the barony of Girvanhead, and certain tene-

Feb. 14, 1757.

ments in Maybole, and got himself infeft thereon.

Previous to this, Sir Thomas had made various purchases, and also subsequently had made further considerable purchases both before and after succeeding to the estate of Cassillis, viz. the teinds of various lands conveyed by Crawford of Ardmillan in 1758—the lands of Pennyglen, *Smithstones*, St Murray, *Over Culzean*, and Cargilston, in April 1762; *Ballochniel* in Dec. 1763; Enoch in December 1764; *Daljarbrie* and others in August 1768; and Bardarocks in

February 1771. The dispositions to these were taken in general terms to him and his heirs and assignees whomsoever. He was infeft base in these. There were some changes of the title; in particular, in 1765 and 1774, with a view, as it was alleged, to political influence, Sir Thomas Kennedy, then Earl of Cassillis, created a great number of wadset and liferent votes upon his estate; in doing which, it was alleged the titles underwent some alterations, but that the settlement of 2d Jan. 1748 remained unaltered and unrevoked by Earl Thomas until the day of his death. In particular, it was alleged that so far from having the most distant thought of ever making his paternal estate of Culzean, and his own acquisitions, devolve with the estate of Cassillis upon remote heirs male, that, only a year before his death, he took measures for withdrawing the superiorities of such parts of the estate of Culzean as were held of the family of Cassillis out of the entail of the Cassillis estate.

The mode in which these changes took place was, after separating the property from the superiority, by means of feu-rights granted to his brother, Mr. David Kennedy, he resigned the lands into the hands of the crown, and obtained a new charter of this date, (23d Feb. 1774), comprehending the superiority of the barony of Culzean, and various other valuable portions of his estates (Greenan excepted), in favour of himself, and his heirs and assignees whatsoever. Charter 1774.

After granting the above feu right, Earl Thomas conveyed the charter 1774 to certain persons in liferent, who were infeft, and thus became invested with the liferent superiority; but, with respect to the fee, which was taken to Earl Thomas and his heirs and assignees whatsoever, the procuratory remained unexecuted until after his death.

Upon the death of Thomas, Earl of Cassillis in 1775, David Earl of Cassillis, who was next heir, both of the entailed estate of Cassillis, and of the estate of Culzean and others, belonging to Earl Thomas, made up titles to a great part, though not to the whole of these lands; but he never made up any title as *heir of provision* in terms of the settlement of 1748. The method adopted by him in completing his title as to most of the lands was this; having expede a general service in April 1776, as nearest and lawful heir of *line and heir male* to his brother, which he thought carried the personal right in the charter 1774, and thereupon took infeftment upon this and other unexecuted charters obtained by Earl Thomas in the course of political operations above men- Service 1776.

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tioned, and being thus vested, or imagining himself to be vested, with a right of superiority, he granted a precept of *clare constat* for infefting himself in the property, when that happened to be disjoined from the superiority, but without always attending to the real state and situation of the base rights, of which there were often more than one subordinate to another, under the same right of superiority.

Sir Andrew Cathcart, Earl Thomas, and David's nephew, lived upon the best terms, and they having no children, he, as the nearest and natural heir to the estate of Culzean, was naturally led to expect to succeed to it. But, upon Earl David's death in 1792, it appeared that, by certain settlements, (deeds of entail 1783 and 1790), he had called after the heirs male of his own body, and failing whom, all the prior substitutes of the former entail, the *heir male whatsoever* of the said John, Earl of Cassillis, making the succession to continue to descend to his other *heirs male whatsoever*, who were entitled also to inherit the titles of honour and dignities of the family, and this, not only in regard to the lands and earldom, but also in regard to all his other lands and estate therein mentioned, declaring that they should continue with the same heirs male. By the entail 1790, he had excluded Sir Andrew, and all his own near relations, from the succession; and, particularly, by that deed, the whole estate of Culzean, and all the acquisitions of Earl Thomas, and the purchases of Earl David himself, with an exception presently to be mentioned, were conveyed to the respondent, Captain Archibald Kennedy of the navy, late of New York, America, a cousin three or four times removed, but who happened to be the *heir male* to the Cassillis estates and honours.

Action of reduction and declarator having been raised by the appellant, it was maintained, that as Earl David never made up a title, as heir of provision, in terms of the deed 1748, he remained a mere apparent heir of the lands in question, and, by the well known rule in law, had no power gratuitously to alter the destination to the prejudice of the heirs in that deed. It was therefore made a material question in the case, how far, by the destination in the charter 1774, the destination in the former deed 1748 was altered and affected. Sir Andrew Cathcart claimed to succeed under the deed 1748, which, he contended, must regulate the succession to the Culzean estates; and, after leading an adjudication against the estate upon a trust bond granted to the appellant, his constituent, to try the question, he

raised the present reduction, to have those deeds set aside, 1st, On the ground that they flowed *a non habente potestatem*, in so far as respects the land rights in question. That as Earl David had never made up a title as heir of provision, in terms of the settlement 1748, he remained a mere apparent heir as to that disposition, and so had no more than a mere personal right, and therefore could not alter the order of succession, to the prejudice of the heirs of the standing destination. 2d, That although Earl Thomas had, in the year 1774, in order to extend his political influence, passed a new charter containing the superiority of many of the lands in question, which charter was conceived in favour of himself, and his heirs and assignees, and which charter was not intended to alter the settlement of the estate which had been made by the deed 1748, and could not have that effect. 3d, That the term "heirs and assignees" being flexible, must be understood in the charter 1774 as of the heirs of the destination in the deed 1748, and therefore that the service of Earl David, as heir male and of line to Earl Thomas, could not connect him with the lands in the charter 1774, as it was necessary for that purpose that he should have been served heir of provision, in terms of the deed 1748, by which the succession was regulated. 4th, That even supposing "heirs whatsoever," in the charter 1774, to signify heirs of line; and that Earl David had, by his service as heir of line, vested in him the right to that charter, and had been duly infeft thereon, still it would not enable him to alter the succession to the lands and superiorities contained in that charter, as they remained subject to the governing settlement of 1748, under which he had made up no titles; and, separately, that the settlement of 1748 contained an implied prohibition against altering the order of succession, so that Earl David, even if he had completed titles, could not make an alteration of the succession. In answer, it was maintained that Earl David was both heir of line and heir of provision, and that the general service *tanquam legitimus et propinquior hæres masculus et lineæ* of his brother was in effect a general service as heir of provision, in terms of the destination 1748, and did import and imply such service, and carry all and every right in that character; and that by this service, therefore, the disposition 1748 was vested in Earl David. 2d, That there was no prohibition against altering the order of succession; and the general service did sufficiently connect him with the charter of 1774 in favour of

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heirs and assignees, so as to carry all the lands therein mentioned.

The case came first before the Lord Justice Clerk, (M'Queen) as Ordinary, who pronounced this interlocutor: —" Having considered the mutual memorials for the parties, " finds, that Earl David's service, as heir male and of line " to his brother Earl Thomas, necessarily established him " to be heir under the settlement 1748. But, *Secundo et* " *separatim*, finds that the settlement 1748 was alterable " by Earl Thomas at pleasure, and in respect that by the " disposition 1774, executed by Earl Thomas, and charter " following thereupon, a *considerable* part of the lands in " dispute stood devised to Earl Thomas, his heirs and as- " signees: Finds, that Earl David's said service did effect- " ually carry the right of *superiority* of these lands, as " established by the foresaid charter, and that the precept " of *clare*, granted by Earl David in his own favour, with " the infeftment thereupon, did effectually carry the pro- " perty: Finds, that it is of no importance, in this question, " whether the property was consolidated with the superi- " ority or not in Earl David's person. For, although in a " question of succession *ab intestato*, these lands, without " consolidation, would be considered as two separate estates, " descendible to different heirs, if so devised, yet, as both " property and superiority were effectually vested in Earl " David's person, so any deed of conveyance of these lands, " executed by him, would carry every right and title he " had in the lands, whether of property or superiority; " and, therefore, upon the whole, repels the reasons of " reduction as to the whole of the lands contained in " the disposition 1774; repels also the reasons of reduc- " tion as to the whole of the other lands and tenements " in dispute, except as to the tenements in Maybole, " the lands of Portmark and Polmeadow, the teinds con- " tained in the conveyance by Mr. Crauford of Ardmillan, " the lands of Enoch and Daljarbrie, as to which, desires " to hear parties farther; and, with the foresaid exceptions, " assoilzies the defenders, and decerns." Two representations were given in to the Lord Ordinary, but his Lordship adhered. Another representation having been given, went before Lord Armadale as Ordinary, (from Lord Justice Clerk's indisposition,) and his Lordship adhered; and having heard parties as to the lands excepted, he found, in regard to Portmark and Polmeadow, that Earl Thomas was infeft in these, on dispositions granted by the persons from

whom he acquired them; but as these were not comprehended in Earl Thomas' disposition of 1774, or charter following thereon, Earl *David's* general service was insufficient to vest in him the right and title to these lands, and reasons of reduction sustained as to these. But his Lordship, on representation, altered this interlocutor (13th Jan. 1799), and found "that Earl Thomas' disposition in 1748, "in favour of his brother David, conveyed not only the "lands therein specially enumerated, but also all the other "lands which the said Earl Thomas should thereafter ac- "quire; and that Earl David's general service in 1776 was "sufficient to establish his right as heir under the disposi- "tion 1748, and therefore adheres *in toto* to the interlocu- "tors pronounced by the late Justice Clerk, of date 13th "May and 29th June 1797, and assoilzies the defender "from the whole conclusions of the libel."

On a reclaiming petition to the whole Lords, the Lords pronounced this interlocutor:—"Find, that David, late "Earl of Cassillis, by his general service, *tanquam legiti-* Jan. 16, 1800. "*mus et propinquior hæres masculus et lineæ* of his brother, "Earl Thomas, carried right to the unexecuted precept in "the charter 1774, and did thereby vest in him a sufficient "personal right to the lands therein contained, and also "to every other lands belonging to his brother, which stood "upon personal titles of the same kind, devised to heirs "and assignees whomsoever. Find, that as Earl David was "heir to his brother, as well by the special destination "contained in the deed of settlement executed by Earl "Thomas in 1748, and the charters following thereupon, "as by the other titles and investitures in the person of "Earl Thomas, it is unnecessary to determine the question, "whether the special destination was altered or not by "charter 1774, the general service being in all events suf- "ficient, in point of form, to connect him with the lands "contained in the charter, or in any similar titles, and so "far adhere to the interlocutors reclaimed against. But "ordain the parties to give in a memorial upon the other points "of the cause, and particularly upon the question of conso- "lidation respecting the lands of Macgowanston and others, "and upon the question, whether the general service was "sufficient to connect Earl David, as heir of provision under "the settlement 1748, with the different parcels of land "*which were acquired by Earl Thomas.*"

The appellant reclaimed, and upon advising together with the memorials which had been ordered as to the con-

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solidation; and whether the general service was sufficient to connect Earl David with the deed 1748, so as to enable him to take up those lands to which he had no other title but under that deed. The Court adhered "to their inter-
Jan. 15, 1801. "locutor reclaimed against, and refuse the desire of the "petition; and farther, find the general service of Earl "David sufficient to carry the subjects not contained in the "charter 1774: Repel the reasons of reduction, assoilzie "the defendant from the whole conclusions of the libel, "and decern."

This interlocutor made the cause final before the Court of Session, with regard to the whole lands contained in the charter 1774, and upon similar titles. But, upon other points of the cause, the appellant reclaimed, contending that the general service of Earl David, as nearest lawful heir male and of line to his brother, was not a service as heir of provision under the settlement 1748, sufficient to vest in him the right descending to such heirs of provision, or to carry the subject not contained in the charter 1774.

May 26, 1801. The Lords pronounced this interlocutor:—"Find, that "the general service of David, Earl of Cassillis, *tanquam* "*legitimus et propinquior hæres masculus et lineæ* of his bro-"ther Earl Thomas, was not a service as heir of provision "under the settlement 1748, and, consequently, is not suffi-"cient to carry the subjects in question, which are not con-"tained in the charter 1774, sustain the reasons of reduc-"tion as to these subjects, and remit to the Lord Ordinary "to proceed accordingly." The respondent reclaimed
July 7, 1801. against this interlocutor, whereupon the Court "Find that "the meaning of the Court, in pronouncing the interlocutor "26th May last, was, to find, that Earl David's general "service was not a service, as heir of provision, to connect "him with the settlement in 1748, or with any similar deed "of provision or settlement; and, consequently, was not "sufficient to carry the subjects which were specially pro-"vided by any such deed, and which were not contained in "the charter 1774, or in any other title deed or charter of a "similar nature: Finds that the lands of Enoch and Little "Enoch, the lands of Portmark and Polmeadow, and tene-"ments of Maybole, and the teinds conveyed by Crawford "of Ardmillan, were of this description, and were not car-"ried to Earl David by the said general service; but that "all other lands in question were so carried: And, with "this explanation, allow an additional petition upon the "general question of law respecting the import or effect of

" the general service expede by David Earl of Cassillis 17th
" April 1776." On this petition the Lords pronounced this interlocutor: " Find that Earl David's general service *tan-*
" *quam legitimus propinquior et hæres masculus* et lineæ of
" his only brother german Earl Thomas, necessarily esta-
" blished him to be the heir under the settlement 1748, and
" vested in him the personal right of the subjects thereby
" conveyed to him; and therefore that he has now right to
" the lands of Enoch and Little Enoch, the lands of Port-
" mark, Polmeadow, the tenements in Maybole, and the
" teinds conveyed by Crauford of Ardmillan; repel the
" reasons of reduction as to these subjects, assoilzie him from
" the conclusions of the summons as to these, as well as
" to those contained in the charter 1774, and decern."

Opinion of the Judges.

Advising 15th January 1801.

LORD PRESIDENT CAMPBELL said,—" I am of opinion that the interlocutor is clearly right. Earl David had two ways of making up his titles to the lands, contained both in the charter 1774 and deed 1748; and as he was unlimited proprietor, no third party could object to the mode which he chose. And there is clearly nothing in the last argument contained in the close of the petition, because, if Earl David did, in any shape, make up a title sufficient to connect him with the estate, he was under no limitation as to altering.

" The simple question here is, Whether Earl David has made up a habile title to enable him to alter or to burden? not what rule of succession would have obtained, suppose he had made no alteration? A deed of settlement of succession is one thing, and a charter or a title is another."

LORD JUSTICE CLERK.—" I am also for adhering."

LORD HERMAND.—" The question reserved in the interlocutor ought to be determined first. I am of opinion that no alteration was intended."

LORD ARMADALE.—" I am for adhering as to the point in the petition and answers. As to the second point, how far the service as ' *legitimus et propinquior hæres masculus et lineæ*,' is a sufficient service as heir of provision, I think it is enough if it is necessarily implied."

LORD HERMAND.—" The service cannot be of provision without saying so in express terms. And I think something more than mere intention is necessary."

LORD MEADOWBANK.—" The term, ' heirs male' itself, means heirs of provision. Earl David was called by these terms; and declarator to that purpose might have been sufficient to complete title."

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LORD BANNATYNE.—" The service clearly pointed him out as heir of provision."

LORD CRAIG.—" In my opinion the service is sufficiently connected with the charter 1774, but not with the deed 1748, as heir of provision."

LORD PRESIDENT CAMPBELL.—" The first point is consolidation. The case of Drummelier was decided on general principles, and not upon the specialities. There is too little said here upon that decision. But, in the present case, it is thought the plea of prescription is good.

" The second point is the effect of a general service to connect with the deed 1748, so as to take up the lands in that deed. This is clearly not a service as heir of provision, and therefore insufficient. The proof of the fact by declarator is not sufficient.

" The third or last point is irregularly introduced, and is untenable in law.

" As to the service, the Lord Ordinary, by the first part of his interlocutor, does not mean to lay down a general proposition, but decides only *in this case*, taking in aid the charter 1774. The greater includes the less. Ergo, a special service includes a general one, and a son serving himself *tanquam legitimus et propinquior hæres* to a father, includes the heir male of the father. This alone is the principle, in the case of Haldane, &c. *vide* the case of Menzies. In the case of Haldane, suppose the case had not been settled on Patrick at all, but on a third person, whom failing, to John Haldane, eldest lawful son of Patrick Haldane, or to the heirs of tailzie, then John had been served nearest and lawful heir to his father, this would not have been a service as heir of provision to the estate. A special service includes a general service *ejusdem generis*, but not of a different kind.

Haldane *v.* Haldane, Nov. 27, 1766. Mor. 14,443.

" The quotation from Mr. Erskine on this subject is correct. The object of a special service is, to connect with a particular estate, and, the titles being produced, an erroneous description may be more easily excused, upon the principle of the decision in Bell *v.* Carruthers; and the same holds in precepts of *clare*.

June 21, 1749. Kames, Rem. Dec. No. 107.

" But a general service as heir of line, heir male, &c., means to vest a certain character of heirship, and, of course, a title to carry any subjects or rights destined in that manner, without being confined to any special subject.

" A general service, as heir of provision, ought always to have reference to a particular subject, and so far is of the nature of a special service, being truly what is called a general special service, being special *quoad* the subject, but general so far as it relates to a right not clothed with infeftment.

Maitland of Pitrichie, Aug. 12, 1753. Mor. 14,431, et House of Lords, *ante* vol. i. p. 570.

" There are many instances of general services as heir of provision, without reference to a particular subject, but it is believed, that in all of these, the deed of provision or settlement, which was the ground of the service, was produced to the jury, in order to instruct

the claim, and was so mentioned in the proceedings. An heir of provision is not a general character, such as heir of line, &c., but a special and limited one, founded upon deed; and in no instance was this ever found to be implied from or included in the general character of heir of line or heir male. Even the case of Livingstone *v.* Menzies, as reported very inaccurately by Forbes, goes no farther than to find, that an eldest son, being served heir of line to his father, was of course also heir male to his father, and entitled to a provision, destined by contract of marriage to heirs male, which was in some degree similar to the case of Dalhousie and Hawley.

Jan. 12, 1706. Forbes' Decisions. Dalhousie *v.* Lord & Lady Hawley, Nov. 13, 1712, Forbes' Dec.

" *Legitimus propinquior hæres* is of pliable signification, and where a son is served in that character to his father, he necessarily must be both heir of line and heir male, at least he cannot be the former without being the latter. This was the principle of the decision in the case of Haldane; but if he had been served *legitimus propinquior hæres lineæ*, this would not have implied a service as heir male, and, at any rate, it never could have been carried a step farther, to imply heir of provision to a subject devised or destined not under any general description of that kind, but under a special description, or to the claimant as a special substitute.

" A general service, as nearest heir at law to the predecessor, may be necessary for the very purpose of challenging a deed of settlement granted by that same predecessor, by which the succession is provided to the claimant himself as the first heir, but under burdens and conditions which he does not think it proper for him to acquiesce in. To challenge such a deed, a general service is necessary, Dict. vol. ii. p. 472. Nor was the contrary found in the case of Gordon *v.* Ogilvie, observed in the Dict., for that case is not correctly abridged. Now it would be very extraordinary to maintain that a service as *legitimus et propinquior hæres masculus et lineæ* expede for the very purpose of enabling the heir to challenge his predecessor's deed, was tantamount to a service as heir of provision under that deed, which of course would be a homologation of the deed, and bar him *eo ipso* from insisting in the challenge.

" A service *tanquam legitimus et propinquior hæres masculus et lineæ* does not even include a service as heir of conquest, which is another general character, and, in the present case, had there been an heir of conquest existing, the service expede by Earl David would not have connected him with such of the lands in the charter 1774 as had been conquest by his brother. Far less does it include a service as heir of provision, because it does not directly, nor indirectly, refer to any provision, or to any special destination whatever, nor to any right so devised.

" The decisions have gone far enough in the cases of Haldane, &c., which were merely contested as departing from the strict original principle of the feudal law; but, to carry them farther would produce endless confusion and uncertainty in our land rights, and therefore ought strenuously to be resisted.

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"Sir Thomas might have had a son who predeceased him, but to whom he had disponed the estate in his own life; in that case a service as heir of provision to that son would have been necessary. A general service as heir of line, &c., requires nothing but proof of propinquity; but a service as heir of provision does not prove propinquity, but connection with the successor through some deed, in order to which the deed, or some evidence of it, must be produced to the jury. A service *tanquam legitimus et propinquior hæres masculus et lineæ* takes all rights descendible in that line, and to these general characters or descriptions of heirship, and nothing more, *i. e.* writs, bonds, adjudications, teinds.

"Heir male is, in one sense, *hæres factus*, and an heir of provision, but the law itself has given him a feudal character of a general nature; and a man may choose to be served heir to his ancestor in that character, independent of any subject which he is to take by it. It is a mistake to say that he took up the succession under the service. He was heir apparent of all the investitures, and by all the deeds, and in that character (which was the only one he had to the lands in question) he possessed them. It is not fair to the memory of the late Justice Clerk to suppose, that a hasty opinion, given by him in the Outer House, was his deliberate opinion, contrary to what he gave in the case of Colvile.

M'Queen.

"The great object of a service is to vest a right, and to carry a succession from the dead to the living. It is not merely for proof of a fact, and it is no matter what evidence you see on the face of it; for example, every service of an eldest son to his father, in whatever character, must always prove him to be the nearest heir of his father.

Advising 16*th Nov.* 1802.

LORD PRESIDENT CAMPBELL said:—

"That a general service *tanquam legitimus et propinquior hæres masculus et lineæ*, is not equivalent to a service as heir of provision, in order to take up a personal right to lands destined to particular heirs, and can vest no right in a substitute called by name, is a proposition so clear, that the contrary argument would probably not have been attempted, had it not been thought to receive some countenance from the decisions in the cases of Dalhousie and Haldane.

"The general doctrine of the law is well explained in the answers, and illustrated by many authorities.

"*Mortuus sasit vivum* never was a principle in the law of Scotland, either in heritage or in moveable succession; and, supposing it had been so at an early period, it is and must be admitted, that certain forms are now necessary to transfer property of any kind from the dead to the living, and that succession does not operate *ipso jure*. It is of no consequence when the form of a general service,

as now used, was introduced, or whether the same was done by some other form at the period alluded to in p. 15, of the petition, for still some form of cognition is even there admitted to have been necessary. But, in connecting the heir with the ancestor in a right of lands, there could not originally be any such thing as obtaining an entry from the superior upon a mere personal conveyance or personal right of any kind flowing from the ancestor, who was not at liberty to alien without the superior's consent, and whose procuratory or precept for that purpose fell to the ground by his death, like any other mandate. The superior was not obliged to receive any successor in the fee, except the heir in the investiture. The predecessor's infeftment of course was produced, and the heir entitled to succeed by that investiture was alone entitled to claim a renewal of the fee in his person, which accordingly was done, either by special service, or precept of *clare constat*, or by cognition *mori burgi*, (*more burgagio?*) and sasine following thereon.

" The inference drawn from the passage of Erskine, p. 15, viz. that a personal right to the lands passed without any service at all, is quite erroneous. What it means is, that the original brieve of inquest did not apply to the case, because it was only the heir of investiture, and not the heir in personal rights, that could demand an entry, till the law was gradually altered in this particular; first, in the case of apprisings and adjudications, 1469 c. 37; 1672 c. 19. , Then in the case of purchasers at judicial sales, by 1681, c. 17; 1690, c. 20; by the act 1685 concerning entails, and by the ward act 20 Geo. II., and further, by the act 1693, c. 35, allowing procuratories and precepts to be executed after the deaths of the granter or the grantee.

" So soon as personal rights of land or other heritages came to be known and practised, some form of cognition to connect the heir with the ancestor in such rights, became of course necessary, as the rule was general that no *ipso jure* transmission could take place, with certain exceptions, none of which apply to the present case, and accordingly it is admitted, that for at least two centuries and more, the established form has been, by general service, under the brieve of inquest, to take up such incomplete rights, which either do not, in their nature, require infeftment, or have never been carried that length, which brieve is just the same with that in a special service, except that it contains fewer heads, because it is not necessary to answer those heads which suppose the predecessor to have been infeft.

" It is necessary, however, to attend to the different kinds of general service, and to the different objects which are in view in expeding such a service, from which we will see, that the term general, when applied to services, has two distinct significations. In the first place, a general service, in the most proper sense, is a service which means to vest a general character of heirship in the grantee, without reference to any particular subject. 2d. It may be a service referring to, and for the purpose of connecting with, a particu-

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lar subject or subjects, in which the predecessor did not die infeft This is what Lord Stair calls a service in general, and what some lawyers call a *general special service*, analogous to the general special charge which may be given by a creditor to the heir of his debtor, to enter in a particular subject in which his predecessor died uninfeft.

"Of the first kind, viz. services merely general, are the service *tanquam legitimus et propinquior heres lineæ;* the service *tanquam legitimus et propinquior hæres masculus;* the service *tanquam propinquior et legitimus hæres conquestus.* All these are distinctly marked and known, and can admit of no ambiguity. It is unnecessary to refer to any particular subject. The object of the service is to vest one or other of these general characters in the heir, which will entitle him to take up without any further ceremony or form, every *personal right*, which, either by law or by deed, is descendible to that particular character of heirship so described in the retour.

"A general service *tanquam legitimus hæres provisionis* is of more limited nature, in so far as the law does not know any such heir, unless arising out of the provision of some particular deed. He is not an heir at law, but a *hæres factus*, and therefore a service as heir of provision ought regularly to refer to some particular deed or subject, and, for the most part, does so, as the jury cannot well answer to the brieve without some evidence being laid before them, by production of a deed, and reference to a subject thereby conveyed, and therefore it was a disputed point, in the case of Maitland of Pitrichie, whether a retour of service, bearing the claimant to be nearest and lawful heir of tailzie to his predecessor, in general terms, without saying to what estate or to what deed, was a good service, although it appeared from the proceedings, that, for instructing their claim, she had produced the tailzie itself. But the service was sustained both here and in the House of Lords; and it is believed there have been instances of services, as heirs of provision, without production of any deed, or at least without any such thing appearing on the face of the proceedings; but all the inference to be drawn from this is, that juries have sometimes proceeded, in such cases, upon very slender evidence, which seems to be of little importance one way or another, the object of such a service being merely to vest in the claimant the general character of heir of provision, and, consequently, a title to take up the succession to any subject which may happen to be provided to him by the ancestor. If there be none such, the service will do neither good nor harm.

Vide ante.

"It was observed by one of the judges, that an heir male is always, by the law of Scotland, an *hæres factus*, as much as an heir of provision, and, therefore, that we have no occasion to distinguish his case from that of any other heir of provision, because nothing passes to him by law except by some particular deed or destination.

"Supposing this observation to be right, it does not occur what inference arises from it which can bear upon the present question.

If it be meant that a service as heir male is tantamount to a service as heir of provision, this is evidently a mistake; a person may have in him the technical character of heir male to such a person, without any provision at all. Heir male is a designation which birth alone bestows, and cannot be conferred by any deed, so that, *qua* such, he is clearly a *hæres natus*, not a *hæres factus*. This distinction is clearly laid down by Balfour. In Balfour's time it was understood to be a destination to the heir male, in contradistinction to the heir of line; and, therefore, he speaks of two kinds of brieves only, one for the heir of line and another for the heir of tailzie, under which last the claimant (says he) may be served not only as heir of tailzie, but as heir male; but he does not admit of a brieve for serving as heir male alone, for this reason, that all heirs male are not heirs of tailzie, but heirs of tailzie (says he) are heirs male. Although, therefore, in Balfour's time, a service as heir of tailzie, meaning a *special* service, might virtually denote heir male, because there were no other heirs of tailzie, or rather, as he says, a brieve of inquest, in the character of heir of tailzie, might authorize a service as heir male; the reverse did not hold, for the reason assigned by him.

"There is another kind of service of a general description, under which an heir may be served, and which requires to be attended to. He may take out a brieve to be served *tanquam legitimus propinquior hæres* to his predecessor, without saying whether *linea*, *masculus*, *provisionis*, &c. This lays the foundation for argument upon the import of such a general phrase, in the same way as often happens with respect to heirs whatsoever, or heirs or assignees whatsoever, in a deed. The most proper signification of any such phrase is, that it denotes the heir at law, *i. e.* the heir *ab intestato* whom the law itself calls to the succession, independent of any act or deed. But the term heirs whatsoever has, in many instances, been found pliable *secundum subjectam materiam*, so as to denote other heirs, and sometimes even nearest of kin. In the same way, there is room for argument, that *legitimus et propinquior hæres*, although, in its most proper signification, denotes the heir at law, *i. e.* heir of line, yet it may, in particular circumstances, be construed to denote, or to include other heirs.

"Suppose a middle brother dies, and both his older and younger brother are served in the same precise terms, *tanquam legitimus et propinquior hæres*, without adding either of line or conquest, it is thought that both services would be good, the one to carry the ancient heritage, and the other the conquest.

"A special service of this kind *tanquam legitimus et propinquior hæres* to the deceased in certain lands, must always be construed as applying to the investiture. A precept of *clare constat* the same. A general special service the same; for the very object in view is to connect the claimant with a particular subject, and with the line or character of heirship described in the deed referred to.

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"This will account for some of the decisions relied on by the petitioner, particularly the case of the Earl of Dalhousie, which was a special service. See Ratio Decidendi, Dict. vol. ii. p. 365. The late case of Calderwood Durham was of the same kind. See also President Dalrymple, 29th November 1716. Action, where it was disputed, whether a special service would be held as a service in the character of heir of line?

"The case of Haldane was attended with more difficulty, as being a mere general service, not referring to any subject or to any deed; but it was determined upon a similar principle, namely, that *legitimus et propinquior hæres* were of pliable signification, denoting in a general service every heir at law, and that an eldest son serving to his father, being *ex necessitate juris*, both heir of line and heir male to his father, these general words *legitimus et propinquior hæres* necessarily included both. A son cannot be heir of line to his father without being also heir male, and therefore *legitimus et propinquior hæres* to his father, cannot be restricted so as to denote heir of line only, for it necessarily imports heir male as well as heir of line. Had the service been *tanquam legitimus et propinquior hæres lineæ*, this would have clearly denoted that he did not choose to claim or to be served as heir male, or, *vice versa*, had it been as heir male, this could not have included heir of line; but *legitimus et propinquior hæres*, was virtually and necessarily a service in both characters, and entitled him to succeed to whatever rights were devised, either to the one line of heirship or to the other.

Livingstone *v.* Menzies, Jan. 12, 1706, Forbes' Dec.

"As to the case of Livingstone, the state of it given by Forbes is most indistinct; and it is remarkable, that although Fountainhall wrote at the same period, and gives us a decision of the very same date, 22d January 1706, yet the case of Livingstone is not to be found there of that date; but we have that same case in Fountainhall, of date 13th December 1705, and likewise of three other dates, 25th Feb. 17th June, and 31st December 1707, but in none of them is it said, that any such point was determined as is contained in Forbes, from which it is highly probable that Forbes was in some mistake about the matter. Indeed his statement is so inaccurate that nothing can be made of it. He does not recite the precise words or tenor of the brieve, or of the retour. In one part, he says, Alexander was served heir general of line to his father; in another part he says, Alexander being served heir general and special of line, as eldest son to his father, had established in his person all that could belong to him by that propinquity, in the same manner as a special service includes the general. He further says, that even without a service, Alexander had a right to the obligation in his favour by the contract of marriage; and, without giving the words of the decision, he concludes with saying, that the Lords found, 'that Alexander's general retour, as heir of line to his father, gave 'him the benefit of the provision contained in the said contract, and

'enabled him to dispone in favour of his brother.' If the right were such as to pass without any service at all, there could be no doubt as to the result; or if it was a general special service, or both a general and special service, the decision was of course the same with that of Lord Dalhousie; or if the words were *legitimus et propinquior hæres* in general, without specifying heir of line, it was similar to the case of Haldane. But if it was a mere general service as heir of line, and if this was found sufficient to carry a provision in favour of the heir of a particular marriage, which would not have been otherwise carried, this would have been a decision so entirely new, and against all former principle, that it could not possibly have escaped Lord Fountainhall, who was so full and so accurate an observer of every decision which had passed at the period, and particularly as he has handed down to us no less than four decisions in that same competition.

"Lord Kaimes, who notices the decision in the second volume of the Dictionary, p. 345, seems to consider the after case of Edgar *v.* Maxwell in 1738, as an alteration of the principle laid down.

"The case of Haldane is truly not against the principle, when duly attended to and understood, yet is so far important that it seems to give some opening to loose reasoning upon the subject, perhaps it would have been better that the term *legitimus et propinquior hæres*, had, in all circumstances, been construed to denote heir of line only, in the same way, as many questions would have been avoided had the same construction been given to *heirs whatsoever*. Lawyers are apt to reason too much from analogy, and when once the smallest chink is open, every endeavour is used to make the breach gradually wider. But in no case has it ever yet been found, or so much as argued, till the present occurred, that a general service, under the technical description of heir male and of line, was in any respect tantamount to a service as heir of provision, to the effect of taking up special subjects contained in a destination to particular substitute heirs, not called under the general characters.

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Unreported.

"The recent case of Colvin is a decision in point to the contrary, and it would be doing injustice to the memory of the late Justice Clerk, who gave a clear opinion for that decision, and noticed that it was different from the case of Haldane, to suppose that he had altered his opinion, when, as Ordinary in the Outer House, upon too hasty a consideration of this cause, he pronounced the first interlocutor, which has since been varied by the Court. He was at that time in a bad state of health, and having left the Court altogether soon after, he had no opportunity of reconsidering the case, with all the lights which have since been thrown upon it, from which he would clearly have seen that the present case was as different from that of Haldane, as he himself had declared Colvin's to be.

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" The petitioner seems desirous that the Court should adopt a very short system as to this matter of service; for he says, it is enough that A. B. is found, either by an inquest, or even by a decree of declarator of this Court, to be the son of C. D., without any other adjection or quality of heirship.

" If the object of a service was merely to prove *identity*, and not to establish *representation*; or to transmit from the dead to the living, this would certainly be true. If the person whose identity is to be established be an institute, he has no occasion for a service; and it is enough for him to bring such proof as may be necessary, in any action or cause where his title is called in question. If he be an heir, he may bring that proof in the service itself, *e. g.* he may be called under some general description, such as is alluded to in p. 17. or such as frequently happens where the descendents of such a person are called; for the claimant must prove that he is descended of that person; but still he must claim, as an heir to the person whose succession he is taking up, and the doctrine of proving identity alone, is adverse to every principle of the law as to services.

" Cases may be figured, where a service is impracticable, and then recourse must be had to a declaratory process before the supreme Court for supplying the defect; but still, this is nothing to the general rule, especially as, even there, some form is necessary to connect the heir with the ancestor, as with the subject in question.

" The reason why a special service includes a general one of the same kind, is not what the petitioner supposes. that the Court goes upon any loose idea of equivalents, but that a special service is truly a general service, the brieve and retour being one and the same as to both, without the addition only of certain forms in the special service, to connect the claimant with the ancestor's infeftment in a particular subject. It begins with that which constitutes a general service, and concludes with the necessary form of a special one.

" In short, in every case, and in all circumstances, a service is necessary to carry heritable succession; and it is scarcely to be held as an exception from this rule, that where the heir declines to serve, a creditor, either of an ancestor or heir, may, by express statute, supply this want, by a charge or charges to enter, and by an adjudication proceeding thereon, which is a remedy very properly introduced by positive law, in certain circumstances, and is an additional proof in favour of a general rule.

" It is equally clear that the nature of the service, and the character under which the claimant means to connect himself, must be precisely defined, for this plain reason, that one may choose to represent his ancestor in a particular character, and reject his succession in any other character. Even the eldest son may choose to be heir of tailzie or provision to his father, without assuming the character of heir of line or heir male; though these are also in him by law, or, *vice versa*, he may choose to be heir at law, or heir

male without being heir of tailzie or provision ; nay, he may have it in view to challenge any tailzie or provision executed by his father, and to make up a title by service, as heir of line, &c., for that very purpose. To challenge his father's deeds, on the head of fraud or incapacity, requires a title ; but, were he to make up that title under the deed itself, his challenge would be barred.

" When the petitioner says that there is proof on the record of Earl David's service, that he is the very person who is heir of tailzie or provision, under the settlement 1748, he means only to state a fact which is not disputed, viz. that he *might have served* heir of tailzie and provision under that deed, if he had been so inclined ; but as he never actually did so, on the contrary seems carefully to have avoided it, the argument is inconclusive."

Vide President's Campbell's Session Papers, Vol. 107.

The other Judges remained of opinion as before, but, as to the alteration of the interlocutor, there is the following note on Lord Meadowbank's Session Papers, written by his Lordship.

16th November 1802.

" The interlocutor altered ; but there were seven to seven Judges. The Lord President was for the former interlocutor, but, having no vote, the judgment was altered. Lord Glenlee did not vote, being one of the trustees for Lord Cassillis."

Against the interlocutor last pronounced, the present appeal was brought by the appellant to the House of Lords.

Pleaded for the Appellant.—1. The settlement executed by Sir Thomas Kennedy, afterwards Earl of Cassillis, in the year 1748, of the whole lands and estate then belonging to him, or which he should afterwards acquire, was meant and intended to be, and did remain at his death, the settlement ruling the destination of all his lands and estates except the entailed estates belonging to him as Earl of Cassillis. 2. Earl David's service, as heir male, and of line to his brother Thomas, Earl of Cassillis, did not vest in him the character of heir of provision under the said disposition or deed of entail executed in 1748 ; but Sir A. Cathcart is now heir of provision therein, and entitled to take up the possession to the whole lands and estates now in question in that character. 3. The settlement executed in the year 1748 was not meant nor intended to be, nor was in any shape, effectually altered by the procuratory of resignation and charter 1774, which destined a part of these lands to Earl Thomas, and his heirs and assignees, or by other destination for temporary

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purposes, of other parts of his estates, in similar terms; but the same must be construed in conformity to the destination of the lands contained in the previous settlement, and that therefore the estate could only be taken up by a service as heir of provision under the deed 1748. Or at least, 2dly, That though the heir at law might be entitled to take up the estate under the destination to heirs and assignees, yet he could only do so to the effect of disponing it to the heirs of provision in the deed 1748, in the order in which they were called; and that he had it not in his power to alter the destination by any gratuitous deed which he might think proper to execute, to the prejudice of the heirs of provision, or any of them. 4. Although Earl David had completed the most formal and unexceptionable titles, in the proper character as heir of tailzie and provision, still he could not have altered the order of the succession, because the disposition and entail of 1748, and all the subsequent titles of Earl Thomas founded thereon, implied a prohibition to alter the order of succession thereby established.

Pleaded for the Respondents.—1. The titles of David, Earl of Cassillis, were perfectly regular and formal; and as he had the estate of Culzean and other lands in which he succeeded to his brother Thomas, Earl of Cassillis, free from any entail or limitation whatever, so that he could alter any destination, and leave them to whom he pleased, he had the most ample power to execute the settlement of 1783 and 1790 in favour of the respondent. 2. In particular, Earl David made up a complete and unexceptionable title to the lands contained in the crown charter 1774 granted to Earl Thomas, and his heirs and assignees whomsoever, and all lands and rights under a similar destination, by his general service in 1776. For even supposing that the destination 1774 was not to be held an alteration of the destination 1748, which it certainly was, yet as that destination *de forma* was to heirs whatsoever, so it must have been regularly taken up by service in the precise same terms. And even supposing that such a destination and service could have implied (which it did not) an obligation upon the heir to hold these lands, taken up by that service, under the conditions of the former destination, yet, Earl David having thus completed the title in the very terms of the destination, whatever it was, was entitled to alter it, against which there was no prohibition whatever. And he accordingly did alter it, by the deeds he executed in 1783 and 1790. The appel-

lant, at one stage of the cause, argued, that there was an implied prohibition in the deed 1748, sufficient to prevent Earl David from altering the order of succession; but this being untenable, seemed to be afterwards abandoned, as all the judges concurred in considering it as destitute of the slightest foundation. 3. The service of David, Earl of Cassillis, in 1776, completely connected him with the deed 1748, executed by Thomas, Earl of Cassillis, by which the lands were settled upon Earl Thomas and the heirs male of his body; whom failing, upon David Kennedy, his only brother german, and the heirs male of his body; whom failing, upon Mr. David Kennedy, his uncle, &c. Thus David Kennedy was called to the succession by name, sirname, and designation, as David Kennedy, the only brother german of Thomas, Earl of Cassillis, the disponer, upon the failure of Earl Thomas and his male issue; and the service of Earl David was in the precise words of that settlement: "Qui jurati "dicunt, quod quondam Thomas Comes de Cassillis unicus "frater germanus Davidis, nunc Comitis de Cassillis, latoris "præsentium, obiit ad fidem et pacem, S. D. N. regis absque "hæredibus ex suo corpore legitime procreatis. Et quod "dictus David Comes de Cassillis est legitimus et propin-"quior hæres masculus et lineæ dicti quondam Thomæ "Comitis de Cassillis, suifratris germani."

This service, with the most absolute certainty, demonstrates that Earl David was the heir of that investiture. It proved, 1st, That Earl Thomas had died without issue; 2d, That Earl David was the heir male; 3d, That he was the heir of line of Earl Thomas; and, 4th, That Earl Thomas was the only brother german of Earl David, or, which was the same thing, that Earl David was the only brother german of Earl Thomas, being the precise description under which he is called by the deed 1748; and therefore the service is precisely applicable to that deed, and necessarily establish him to be the heir under that deed. And the whole train of decisions in the Court of Session, ever since the statute 1693, c. 25, since which period general services were chiefly used, have uniformly proceeded on the principle of giving effect to services which *in græmio*, or *per se*, establish that the person served is the heir of the investiture, although the technical description under which he is heir, such as heir male, or heir of provision, be omitted, refusing, on the other hand, to give effect to services which do not *per se*, and without having recourse to other evidence, establish

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that the heir served is the heir of the investiture. A multitude of such cases have been stated; and it is most material to observe, not only that the principle maintained by the respondent is supported by these cases, where, in circumstances similar to the present, such services have been found to be effectual; but even by those cases in which the service was not found sufficient, because, in one and all these last cases, the service did not necessarily show, as in others, that the person served was necessarily and absolutely the heir of the investiture. 4th, The title of Earl David to the property, or *dominium utile* of the lands of *Greenan*, *Balvaird*, and *Whitestone*, in which Earl Thomas died infeft, is, if possible, still clearer, since his title to these lands was completed by precept of *clare constat*, being equivalent to a special service, and relating expressly to the prior investiture. 5th, There was a complete consolidation of the property and superiority of the lands of *Mackgowanston and others*, by the measures adopted by Earl Thomas, as already explained. But, further, Earl David had a complete right both to the property and superiority, supposing them to be separate estates; and, besides, both property and superiority had been possessed far beyond the years of prescription, upon a charter from the crown, which included them both, and to which Earl Thomas and Earl David had a complete right. 6th, With regard to the purchases made by Earl Thomas, upon which he had taken infeftment, and to which Earl David, it is said, had made up no title whatever, viz. the lands of Enoch and Little Enoch, the lands of Portmark and Polmeadow, the tenements of Maybole, and the teinds conveyed by Crauford of Ardmillan, as mentioned in the interlocutor of the Court of Session, 7th July 1801; they were also carried by Earl Thomas' general conveyance to himself, and the heirs male of his body; whom failing, to his only brother german, Earl David, and the heirs male of his body, &c.; and by Earl David's service in 1776, as connecting himself with that deed.

After hearing counsel,

THE LORD CHANCELLOR ELDON, said,

"MY LORDS,*

"This is a case of the very greatest importance. In the description of it, all the learning that could be brought to bear on the subject has been drawn out, great industry has been shown, and all the

* Taken partly by Mr. Nolan, counsel, and partly by Mr. Robertson, the solicitor in the cause.

exertions of great talents on one side and on the other have been exhibited. It has also been repeatedly and anxiously considered by the learned Judges in the Court below, and, with great difference of opinion, even among those for whose opinion I have great respect.

"This cause contains that species of question which is to be most delicately touched in this House, where so few of the profession of the law at present have seats, and when, of these, so few are able to attend. This case depends altogether upon the forms of title in conveyancing. In that science, forms are the vital essence of, and the security of property.

"The most striking industry and talents have been displayed in this case at your Lordships' bar, during a hearing of a great many days. Attending to all these circumstances, we cannot venture to decide immediately, in a case of this nicety and importance.

"There are some points in the judgment on which I entertain considerable doubt; and the Court has not given an opinion on many of the points which have been discussed.

"First, it was said in the interlocutor of Lord Braxfield, Justice Clerk, that the deed, 1748, was alterable: as to this, I entertain no doubt whatever, but consider this to be sound law.

"Another point on which there was great difference of opinion, is, whether the deed of 1748 was altered by the charter 1774. If I were bound to give an opinion as to this, my mind rests in no doubt with regard to it: but this is not the place in which it ought to be decided. It has not been decided in the Court below; and your Lordships have no original jurisdiction.

"I will, however, go the length at present of saying, that my opinion leans much to the opinion of the Court, that the service in 1776 is sufficient to connect with the charter 1774; but on these I reserve myself till a future occasion.

"On the other important point in the cause, I have very great doubt indeed. If the service in 1776 is sufficient to connect with these lands through the deed 1748, nine-tenths of the legal propositions on that subject would find their way with great difficulty to the mind of an English lawyer. It is difficult to persuade him, that the finding of a jury can be a finding upon any point but what is put in issue before them; because, with us, a jury can decide nothing but what is distinctly put before them for decision.

"But a case of this kind must be looked to with great caution. Here the forms of Scotch proceeding are in question; and it is impossible to deny, that many cases may be represented as decisions of something more than they really possess or contain—at least there is a plausible ground of argument as to this.

"Upon this case there are two questions; first, Is *that* the law of the case which is contained in the last interlocutor of the Court, that Earl David's service in 1776 necessarily established him to be the heir under the settlement 1748, and vested in him the personal right to the subjects thereby conveyed to him?

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"2d, Does it necessarily appear, on comparing the service with the deed of 1748, that Earl David was the heir of provision in that deed?

"If the law be such as is laid down in these interlocutors, considering how much laxity there is in the law, let us see if there is not the same laxity in the point of fact. On this, therefore, we will have to consider the fact, if it appears necessarily, by the service 1776, that Earl David was heir under the deed 1748; and the question of law will have to be thoroughly sifted before coming to a determination hereon.

"I have said so much, not to show a decided opinion on either of the important points in this cause, but to serve as a reason for the motion which I shall submit to you, that the further consideration of this cause should be put off till this day fortnight; and I pledge myself that it shall not be delayed longer:—so much is due to the anxiety of the parties, the weight of the arguments adduced, and the great importance of the cause, that I may safely avow that I feel some reluctance to come to a decision in a case of this nature, without time to deliberate; and, feeling such reluctance, I consider that I ought to bind myself by a pledge to be prepared to give my opinion hereon within a limited time."

"I therefore move that the further consideration of this cause should be put off till this day fortnight."—This motion carried.

21*st May* 1801.

Culzean Cause resumed.

THE LORD CHANCELLOR ELDON said,

"My Lords,

"It is not necessary at present to repeat the considerations which I formerly urged to recommend this great and weighty cause to your particular attention. I shall proceed now to state the grounds of the opinion which I have formed, and to offer for your Lordships' acceptance what appears to me to be the decision proper to come to in this case.

"It is unnecessary to trouble you to go further back, in considering this cause, than the 2d Jan. 1748, when Sir Thomas Kennedy of Culzean, who had succeeded his brother Sir John, executed a settlement of the estates. This deed proceeds upon the recital of the regard which Sir Thomas had for the preservation of his family; it attached not only on those lands which belonged to him at the time, but on those which he should afterwards acquire. It contains an obligation on the persons called to the succession, to bear the name and arms of Kennedy; and another clause, by which he obliged his heirs at law to execute all other deeds proper for the legal conveyance of the estates in favour of his heirs of provision.

"This deed made some alterations in the prior limitations of the estate; but it is not material to notice these, for the appellant, as trustee of Sir Andrew Cathcart, if the limitations of the deed 1748 still subsist, is clearly entitled to claim under these limitations.

"I don't detain you, to state particularly all the instruments executed by Sir Thomas Kennedy and others, till 1774, when he obtained a charter from the crown, of great part of his estates, to himself, his heirs, and assignees. On this charter a great deal of discussion has taken place, as to whether it was to heirs and assignees, in the common meaning of these words; or whether they were to be considered as of a flexible meaning. It was said that this charter was obtained purely for political objects; but that, subject to these objects, Sir Thomas had the estate, with remainder, (if I may so apply the term of the English law), to the heirs of the deed 1748. *Ex facie*, however, the charter was taken to Sir Thomas, his heirs and assignees.

"Previously to the passing of this charter, Sir Thomas had purchased other estates, which fell under the limitations of this deed 1748, and were not included in the charter 1774.

"Sir Thomas Kennedy died in 1775. We all know, in point of fact, (I mean to say this without confining it to what is judicially instructed by retours or otherwise, that he left no lawful issue). Previous to his death, we know also as a fact, that he had become Earl of Cassillis. This title descended to David, Earl of Cassillis; and we know, (though whether we know it judicially or not may be a question,) that Earl David was the person in the destination of the deed 1748 mentioned by the name of David Kennedy.

"I must call your attention to the manner of serving Sir Thomas, as heir to his brother Sir John, in 1747. (Here his Lordship read the particulars of Sir Thomas' service.) Observe, that there was here a finding of the inquest in express terms, that Sir Thomas was nearest and lawful heir of line, heir male, and heir of provision to his father and to his brother Sir John. On this service, there is no room for that species of reasoning, which applies to the present case, where it is admitted, on all hands, that there is a service of heir male and heir of line, but denied that there is a service as heir of provision.

"It became necessary, as your Lordships know, for Earl David to take up the lands, which had been his brother's, out of his *hæreditas jascens*, by a form termed a service. When I speak of forms in conveyancing, I must notice that I think these of the very essence of the law. Applying such principles, as we do in this country, in inquiring into the validity of instruments, we are to look as narrowly to forms as we do to the meaning of the instruments, when we have found the forms to be valid. I don't think the less of this question, that it is one of form; these are to be strictly adhered to.

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" After the death of Earl Thomas, David sued out a brieve from Chancery in Scotland, to be served his heir. I wish to notice the particulars of this proceeding of a retour. It appears to me, that, attending to the forms of services, they are, strictly speaking, a species of judicial inquiry, in which the jury decide of certain facts. In our end of the island, if a jury were to go, in their inquiries, beyond what was referred to them by the king's writ, their decision would go for nothing. It would be understood to have so much effect only as was entrusted to them, and that every thing else was surplusage.

" I must admit, however, that I know not how to apply this strict rule to all the decided cases which have been quoted to us; for it appears from some of these, that if the fact found by the jury demonstrates the truth of another fact, with which it was pregnant, it has been held that the finding of the jury was not only what they had said expressly, but that it included also what was implied in the fact so found expressly.

" After taking out the brieve, Earl David gave in his claim to the *Goodmen of Inquest*, in these terms. (Here his Lordship read the same.) Observe here, that he claims 'to be the nearest and lawful heir male and of line in general' to Earl Thomas, his brother german. In the first part of the claim, Thomas is styled his *only brother german;* but this was only descriptive of Earl Thomas, the claim for the service was as I have stated.

" To an English lawyer, I should have said that the meaning of the claim, if made in this country, was, to serve Earl David heir male, and heir of line to his brother; not to serve him only *brother german* to Thomas, Earl of Cassillis, but heir male and heir of line to his said deceased brother.

(Here his Lordship read the further proceedings in the service.)

" The evidence, therefore, is affirmatively on the brieve and claim, and that Thomas, Earl of Cassillis, died without lawful issue of his body. The jury find, that Earl David is 'nearest and lawful heir 'male and of line in general' to Earl Thomas, his brother german, conform to the brieve, claim, and instructions thereof, on all points. But, according to all English construction, the act of the jury would be clearly a service and cognition of Earl David, not as brother german, but as heir male and of line to Earl Thomas, the other fact being the medium of proof by which they arrive at this conclusion.

" When I say this, I mean a construction unprejudiced by the decisions. After giving all the attention in my power to the argument in the Court below, and to the decided cases, it appears to me (unless there be an exception as to heirs of provision,) that the Court have gone the length of saying this, that if the finding of this Inquest necessarily established the character of the person served, if the cognition of one title necessarily amounted to the cognition of another, this has been considered by the Court as a service in that other character.

"Independently of all the decisions upon this subject, and of all that occurs to the mind of a lawyer, taught caution in reviewing questions from a Court, which he is bound always to respect, and particularly in cases which have relation to the titles of landed property in Scotland; and in a case like this, to which attention so extraordinary has been paid, if no case had been decided bearing upon this subject, I do not think that a mind misled, perhaps as mine must be, by English decisions, could doubt that this was not a service as heir of provision. But whatever your Lordships might have thought of such a case, if it had come originally before you, you will take care not to decide it on any principle that may endanger the titles of landed estates in Scotland.

"The very large property at stake in the present cause, and the great importance, in every point of view, of the question at issue, have led into all the litigation that has taken place. Two principal questions were brought forward here, involving other questions, some of which were fully canvassed in the Court below; others of them were treated but not decided in that Court, and there may not be occasion to decide them here.

"The first question was, Whether the service of Earl David, which I have particularly stated, did so connect him with the lands contained in the deed of 1748, which were also contained in the charter 1774, as to enable him, under that charter, to say that he was heir of provision as to these lands, under the deed 1748? Or, whether, by the service expeded, and acts done by Earl David, an obstacle was not put in the way of his conveying the lands, the succession to which was regulated by the deed 1748, but which lands were not contained in the charter 1774.

"This depends upon the language of the first and last interlocutors appealed from. The first interlocutor lays down the position, that Earl David's service, as heir male and of line to his brother Earl Thomas, necessarily established him to be heir under the settlement 1748; this is very cautiously expressed. The same principle, and expressed in similar language, occurs in the last interlocutor, finding that Earl David's general service, '*tanquam legitimus et propinquior hæres masculus et lineæ* of his only brother german, 'Earl Thomas, necessarily established him to be the heir under the 'settlement 1748, and vested in him the personal right to the subjects thereby conveyed to him.'

"The Lord Justice Clerk also, in the first interlocutor, laid down a proposition, into which, or the propriety of affirming that interlocutor upon that point, I entertain no doubt, namely, that the settlement 1748, was alterable at pleasure. It was a proposition involved in the course of the argument, whether, if Earl David had made up the most unquestionable titles, he could gratuitously have altered the deed 1748. With reference to this, I shall only say a

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single word. Attending to the doctrines laid down by this House, and by the Court of Session, on the import of prohibitory, irritant, and resolutive clauses, I cannot entertain any doubt of Earl David's right to alter, provided he made up proper titles to the property.

" The Court of Session has varied extremely in opinion, Whether Earl David's service was to operate as a service as heir of provision or not? or, in other language, whether or not it necessarily established him to be heir under the deed 1748? Upon this part of the case I feel myself in very considerable doubt indeed.

" The other question, as to the import of the charter 1774, is of a different kind. By that charter, the lands are expressly limited on the face of it to Earl Thomas, his heirs and assignees. Earl David certainly made up a title as heir, in terms of that charter, and we know that, in point of fact, he was also the person called by the deed 1748. Upon going through all the reasoning upon this subject, and a very laborious investigation with regard to it, it does appear to me, that what is laid down with regard to it in the interlocutors of the 15th and 16th of January 1801 is right. The construction of that interlocutor is, that if the service of 1776 was sufficient in point of form to connect Earl David with the lands contained in that charter, it was also sufficient in law. I submit it, therefore, as my opinion, that this title was good as against those claiming under the deed 1748.

" It is on the other part of the case that my difficulties chiefly lie, namely, whether Earl David's service, as heir male and heir of line, necessarily established him to be also heir of provision under the deed 1748. The proposition comes to this, that under such a writ as was sued out, and such a claim as was made in this case, and the jury having, under that claim, found him to be heir male and heir of line in general to Thomas, Earl of Cassillis, his brother german, it is to be held that such service implied also that he was heir of provision to him under the deed 1748.

" On considering the effect of retours, as decrees, as conveyances, their operation as charging the person served with passive titles, their effect as to the law of prescription, the services that must be made up to enable a person in certain cases to bring actions of reduction, and, in general, as affected by all the doctrines which have been so elaborately explained to us, difficulties occur worthy of great attention. It is difficult to reconcile one's mind to this, that when a jury are called upon to serve a man heir for one purpose, they shall be held, for all active as well as passive purposes, to have cognosced him heir in a character which he did not claim.

" We are not, however, to consider this question in the abstract, but must take into view the decisions that bear upon it. It appears to me, that some of these decisions are contradictory to others; and

from them the positive and negative of the same propositions may be inferred.

"If I were obliged to address myself to decide this point at present, I should feel more doubt and difficulty than I have felt on any similar occasion. Considering this to be one of the most important cases, in regard to thesecurity of titles to landed estates in Scotland, that can exist, (though, from the protracted litigation, it is desirable that it were finally decided), I am disposed to desire that the Court should look at this part of the cause again. Were I not influenced by the reasons which incline me to withhold my opinion on this part of the case, I should say that I think it *very* questionable indeed, if it be established by the service 1776, that Earl David was heir of provision under the deed 1748.

"The reasons which principally restrain me from deciding, are of this nature. I have looked very narrowly into the cases; and I find that in some of them the implication goes farther than the special finding in the service. But *what* I find in the cases is not the *ground* of all my doubts. *Another reason* which induces me to decline giving a decision hastily, is this, that from what I see in these cases, I am not prepared to state any opinion as to the evidence which the Court of Session looks to in these retours. Does it look at the retours alone? or does it look at the whole of the record? Both the one and the other were asserted here. Another question also is, What is the record? It was said that the retour alone was the record. This appeared something whimsical to an English lawyer. Here the writ, and all the proceedings upon it, would form the record. If a jury here were, in their finding, to go beyond the brieve, all beyond it would go for surplusage. If forty other different facts appeared in the verdict, we should only look at those as the medium of proof. I am not sure, therefore, that any view of this case that I might take, might not trench on the rules of evidence laid down in Scotland as to the titles of landed estates in retours.

"It was said, that you must look at the deed 1748 to understand the import of the retour. I am afraid, it has been clearly shown to us from the bar, that a person may be served heir of provision, without its appearing from the retour under what deed of provision he was so served. In one of the decisions, it is said, that no cases of this sort could be produced. It was said, to challenge all dispute, that if a person was served heir of provision, he would be entitled to take under all deeds of provision.

"It was said, that you may go a great deal further, and look at other deeds to explain the import of the retour; I doubt this extremely: I think either that the retour alone can be looked to, or the retour and the deed of provision, and that you cannot go to other deeds.

"Cases of different kinds (as I noticed before), have been decid-

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ed upon this. In some of these it is denied that the service is to be confined to the general finding, if another character is necessarily involved in that finding. I allude to one instance of this, the case of Livingston *v.* Menzies, mentioned on the 18th page of the respondent's case. (Here his Lordship read the particulars of this case). A person here was served heir of line of his father, though *prima facie* only so served heir of line, yet it is stated, that this was also necessarily a service as heir male to his father. We should consider this rather as an inference arising from the other fact. But the Court went a step farther, and found this to be a service as heir of provision in a certain contract of marriage. This is allowed to be erroneous; for there was nothing to show that the contract might not have related to a second marriage.

"On this case, I ask this question;—if the contract of marriage had been to be the contract on a first marriage, would the service of the son, as heir of line to his father, prove him to be heir of provision, under the contract of marriage? If the retour was to be construed by looking at the contract of marriage, it would appear that the person was heir of that contract.

"The Court, perhaps, a little puzzled with all the cases which have been decided upon this point, appear to have come to a different decision in the late case of Colvin *v.* Alison. It was stated that this being a general service, it could not connect with a right cloth-

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ed with infeftment. But I don't enter into that point. (Here his Lordship read and commented upon the case, from the appellant's printed case.)

"I am not discussing at present if these cases are well or ill decided; but I wish to apply a few short words to them; because a certain part of the property depends upon this, that Earl David's service in 1776, necessarily established him to be heir under the deed of 1748. There may be, nay, there must be, a great difference between the impression made on the mind of an English lawyer by a case like this, and the impression made on the mind of an able Scotch judge; looking attentively to all the cases, with extensive information with regard to them, in which principles familiar to us, may be overlooked.

"With this preface, and speaking as an English lawyer, I may state, that I should have no difficulty in deciding, that the retour of Earl David's service in 1776, if this had been done by an English jury, and on English principles, did not at all apply to the deed of 1748. It appears to me, further, that if the decided cases are applied in aid of principles, and an examination is made of them, if, on comparing the deed 1748 with the retour, from a comparison of the two, it does by no means necessarily follow that Earl David was heir of provision under that deed.

"In the deed 1748, the granter of it is styled Sir Thomas Kennedy of Culzean, Bart.: and the person first called is David Ken-

nedy, *his only brother germ̃an.* Put the case that Sir Thomas had been mistaken as to this, and that he had then alive another brother, older than David, settled in America or elsewhere, who might have been alive, though then considered by Sir Thomas as dead;— this fact would not have affected the validity of the limitation to David Kennedy, even though the granter of the deed had been mistaken in describing David Kennedy as his only brother german, that description was not of the essence of the taking character.

"In the present service, an individual goes before a jury, who, on principle, are to be held as completely ignorant of the facts to be established before them, as any other persons not of the Inquest can be. He tells the jury that he is David, Earl of Cassillis, and that he wishes to be cognosced heir male and heir of line of Thomas, Earl of Cassillis, of whom he says not one word more, than that he was his only brother german, and died without heirs lawfully procreate of his body. These facts established, were only as the medium of proof by which the jury were to arrive at the conclusion that Earl David was heir male and of line to Earl Thomas. If the deed of 1748 had been laid before them, it could only have been also as a medium of evidence.

"The jury, in their verdict, say that David, Earl of Cassillis, is nearest and lawful *heir male and of line in general* to Thomas, Earl of Cassillis, his brother german. If the Court of Session, in such a case, takes as judicially established, what the jury has said not one word about,—if such be their practice, it ought to be adhered to.

"Upon what principle can it be urged that this service is more than a service as heir male and heir of line? But it has been said, that if you push the principle to this extent, you will destroy many cases that have been so decided:—that many retours to heirs of provision exist, in which the particular deed of provision is not mentioned; and that an alteration of this judgment would endanger those former decided cases.

"This does not appear to me to be just reasoning. When a person is served heir of provision, and one or all the deeds of provision are not mentioned to be produced, my difficulty would be very different from what it is in the present case. When a jury find a person heir of provision, the law will connect him with all the deeds in which he is found to be heir of provision. The principle is, that the jury, by finding him heir of provision, have found that he was the very person mentioned in these deeds.

"But when, in a retour, a person is neither served heir of provision, nor heir in certain lands, it is extremely difficult for the Court to say, what the jury say nothing about; and to take judicial notice of what the Inquest takes no notice whatever.

"According to the case lately put, if Earl Thomas had another brother, older than Earl David, whom he supposed to be dead, when he executed the deed of provision 1748, this might have involved a great

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a monstrous difficulty, with regard to the service. After Earl David was served in the manner now in question, and with this medium of proof, his brother might then have come home, and have reduced the service, as heir male and heir of line. Thus he would have falsified the only facts on which it could be alleged that Earl David was heir of provision, for he would have proved that Earl David was not *unicus frater germanus* of Earl Thomas. Could it still have been maintained, in such a case, that the service was a good service as heir of provision under the deed of 1748?

"It was said that the words '*obiit sine haeredibus*,' &c. were equivocal, and that he might have had issue who had survived him, but who were dead at the time of the service. So far have these hypotheses been carried, in some cases, that the bare possibility of having issue, though it was known to every body that there was issue, has been started against going to the presumption in a case like the present.

"Mr. Clerk put another ingenious case, that as Earl Thomas had a power of revoking the deed of 1748, in whole or in part, he might have revoked it to the effect of striking Earl David out of it, and the remainder of the deed would still have been effectual. Earl David would still have been entitled to be served heir male and heir of line, as only brother german to Earl Thomas, and yet he would not have been his heir of provision, because he was struck out of the deed. It was clear, therefore, that Earl David might have possessed all the characters mentioned in the retour, and not have been heir of provision.

"There were other hypotheses put, but I shall not go into them, as they were not much discussed in the Court below. At this moment, I cannot bring my mind to think that Earl David was found heir of provision under the deed 1748; but I do not wish to decide upon it, as the whole bearings may be better known by others in Scotland.

"On the whole, I would offer a proposition, that the interlocutors are right as to the lands contained in the charter 1774. As to the lands not contained in that charter, so far as the right of the Earl of Cassillis thereto is sustained, I think it may be proper to remit this matter to the Court of Session, to call their attention again to the consideration of the topics which I have suggested—taking the retour, *per se*, as part of the record, connecting it with the deed of 1748, as far as its meaning can be legally collected from that deed; and then calling upon them to decide, not from what they know, but from what has been found by the Inquisition, whether or not Earl David was heir of the deed 1748. Entertaining much respect for the Court of Session, I think a remit on this point will give them room to consider the rules of law on a doubtful and difficult question.

"I must still request a few days to put into form what I may con-

ceive it expedient to propose to your Lordships as a fit judgment in this case."

It was ordered and adjudged, that all the interlocutors complained of in the appeal, so far as the same relate to the lands and subjects contained in the charter of 1774, or in any similar titles, be, and the same are hereby affirmed; and it is further ordered that the cause be remitted back to the Court of Session to review all the interlocutors, so far as they respect the effect of the service of Earl David in 1776, with regard to the lands of Enoch and Little Enoch, the lands of Portmark and Polmeadow, the tenements of Maybole, and teinds conveyed by Craufurd of Ardmillan, or any other lands or subjects, the title to which is in dispute in this cause, if any such there be, not ruled by the foresaid affirmance; and to hear the parties again as to the effect of the said service as to the said lands and teinds, and as to the right to the said lands and subjects, and to do thereupon as the Court shall seem meet.

For Appellant, *Sir Samuel Romilly, Cha. Hay, Math. Ross, John Clerk.*

For Respondents, *Wm. Adam, Ad. Rolland, H. Erskine, D. Cathcart.*

NOTE.—For subsequent appeal in same case, vide infra. Two later decisions are reported by Baron Hume, Ogilvy *v.* Ogilvy, 5th June 1817, Hume, p. 724, and the Duke of Queensberry *v.* The Earl of Wemyss, 21st Jan. 1819, Hume, p. 727, of great importance in this branch of law. The recent act 10 and 11 Vict. c. 47, regarding services, provides, that persons who claim to be served heir of provision in general or in special, the deed under which they so claim must be distinctly mentioned.

[Fac. Coll. Vol. xii. p. 408.]

JAMES ROCHEID of Inverleith, - - *Appellant;*

SIR ALEX. KINLOCH, Bart., and Others, - *Respondents.*

(*Et e contra.*)

House of Lords, 28th May 1805.

OBLIGATION TO ENTAIL—PRESCRIPTION—INTERRUPTION—MINORITY.—In executing a settlement in the form of an entail, a certain portion of the lady's estate was directed to be sold, and, after paying debts