[Mor. App. Service of Heirs, No. 2.]

1810.

ANDREW BLANE, W.S., Trustee for SIR ANDREW CATHCART, . . } *Appellant;*
ARCHIBALD, EARL OF CASSILLIS, and Others, *Respondents.*

BLANE *v.* THE EARL OF CASSILLIS, &c.

House of Lords, 9th May 1810.

GENERAL SERVICE.—The question was, whether a general service could establish in Earl David the character of heir of provision to his brother, so as to connect him with the deed 1748? The Court of Session, under a remit from the House of Lords to reconsider the question, altered their former judgment as to the effect of this service of 1776, and found that it was not a service as heir of provision to connect Earl David with the deed 1748, or any similar deed; and, therefore, that the lands specially mentioned in the interlocutor were not carried by that service. But, 2. In regard to the other lands specially mentioned in the interlocutor, the Court found that no remit having been made as to them, they adhered to their former interlocutor. The first point being in favour of the appellant, no appeal was brought as to it, but he brought an appeal on the second point, contending that these lands fell under the remit. Held that it was not the intention of the House, by their remit to the Court of Session, to authorize the Court to review their interlocutors in regard to those lands, and, therefore, appeal dismissed.

The particulars of this case are reported at page 1 of this volume.

The House of Lords affirmed the judgment of the Court of Session, in so far as related to the lands in the charter of 1774, but *quoad ultra* remitted back to the Court of Session "to review all the interlocutors, as 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 Port-"mark and Polmeadow, the tenements in Maybole, and "teinds conveyed by Crawford 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 aforesaid "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 there-"upon as to the Court shall seem meet."

In terms of this remit, the Court of Session resumed consideration of the question, and ordered parties to give in

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mutual memorials upon the points in the cause remitted for reconsideration. These memorials having been given in, and debate had thereon, the Court pronounced this interlocutor :—" The Lords having advised the mutual memorials " for the parties, they find that Earl David's general service " in 1776 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 suffi- " cient to carry the subjects which were specially provided " by any such deed, and were not contained in the charter " 1774, or in any other title deed or charter of a similar " nature: Find that this description applies to the lands of " Enoch and Little Enoch, the lands of Portmark and Pol- " meadow, the tenements in Maybole, and the teinds con- " veyed by Crauford of Ardmillan, and that they were not " carried by the general service; therefore sustain the " reasons of reduction as to these subjects, and so far alter " their interlocutor of 16th November 1802; repel the de- " fences, and reduce, decern and declare, in terms of the " summons; but with regard to the lands of M'Gowanstone, " Mill of Drumgirloch, Dunnymuck, Whitestone, Pennyglen, " Barony of Greenan and lands of Balvaird; find that the " order of the House of Lords contains no special remit as " to these lands, nor has the pursuer sufficiently made out " that they fall under the general remit, or at any rate, that " the interlocutors formerly pronounced as to these lands " ought to be altered; and thereforo adhere to the said in- " terlocutors, and decern."

This interlocutor thus held that the appellant's challenge was good as to the lands called the Pendicles. But he was not content with this success, and therefore insisted further as to the other lands.

Both parties reclaimed. The respondents prayed to alter this interlocutor, and to assoilzie from the conclusions of the action, in terms of the former judgments pronounced by the Court. The appellant, on the other hand, contended in his petition, that the interlocutor was much too favourable for the respondents; and he endeavoured to establish the three following propositions, 1. That the order of the House of Lords contained a remit as to the whole lands and subjects in dispute, excepting those contained in the charter 1774, and similar titles; consequently, that the remit embraced the lands of M'Gowanstone, Mill of Drumgirloch, Dunnymuck, Whitestone, Pennyglen, Barony of Greenan, and lands of Balvaird.

2. That the last recited interlocutor of the Court below, and the interlocutors formerly pronounced in the cause, with respect to the several lands just enumerated, ought to be altered, and the reasons of reduction sustained as to these lands, in regard that the same are not contained in the charter 1774, or similar titles, and that David, Earl of Cassillis, made up no regular titles thereto.

3. That in case their Lordships still remained of opinion that the titles made up by Earl David appeared sufficient to vest the said lands and subjects in his person, the appellant was entitled to show further, by writings in the hands of the respondents, or under their power, that Earl David lay under limitations and prohibitions, which disabled him from alienating those subjects, to the prejudice of the heirs called by the disposition 1748, and that therefore the Court should grant letters of incident diligence against havers, for recovering all deeds of settlement and other writings calculated to instruct this fact. After answers were given in, the Court finally pronounced interlocutors adhering, and refusing the prayer of both petitions. Nov. 24, 1807.

Against the interlocutor of 10th Feb. 1807, in so far as it was complained of by his reclaiming petition, and from the said interlocutor of 24th Nov. 1807 adhering thereto, the appellant brought his appeal on the 27th Jan. 1808.

Pleaded for the Appellant.—1. The judgment of the House of Lords consists of two distinct parts:—1st, That which affirms the interlocutors appealed from, to a certain specified extent; 2d, That which remits back the cause to the Court of Session for further consideration. It is clear that the judgment must be held to have embraced the whole cause which was carried to appeal; for to say that it did not, is in other words to maintain, that besides the part affirmed, and the part remitted, there was a part still left depending in the House of Lords. If it embraced the whole cause, it necessarily followed that the interlocutors of the Court below, in as far as they were not affirmed, fell under the remit. And the question, therefore, came to be, To what extent did the affirmance go?

In regard to this, the words and meaning of the judgment were thought to be clear. It is ordered and adjudged "That all the interlocutors appealed from in the said ap-" peal, 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." The affirmance

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then extends to " the lands and subjects contained in the " charter of 1774, or any similar titles; but it extends no further. It thus became matter for inquiry, what lands and subjects which are not contained in the charter 1774, or in similar titles, the respondents cannot plead an affirmance.

2. With regard to the expression " similar titles," the meaning does not seem to admit of any doubt. It means titles having the same destination as the charter 1774, to heirs and assignees, and remaining personal at the death of Earl Thomas, so as to admit of being carried by a general service in favour of Earl David, as nearest and lawful heir of line of his brother. It was because the charter 1774 was conceived in favour of heirs and assignees, and remained personal at the death of Earl Thomas, that it was held to be carried by the general service which Earl David exped-ed in 1776, as is plain from the expression employed in the interlocutor of date 16th Jan. 1800; the same service would, of course, carry any other personal rights which stood de-vised to the heirs and assignees of Earl Thomas, but could carry no rights or titles of any other description. And as the argument in the House of Lords was confined to two great questions, Whether the general service in 1776 was sufficient to vest Earl David with the character of heir of provision to his brother, so as to connect him with the deed 1748; and, Whether the charter 1774 operated any altera-tion of that deed? no attention was paid to subordinate questions, so as to distinguish whether, in fact, there were or were not, other lands and subjects, which might be car-ried by the general service 1776, by reason of their being contained in title-deeds similar to the charter 1774. If there were any such, there could be no doubt that the interlocutors appealed from, as to the lands contained in those titles, fell to be affirmed, upon the same principles that had been applied to the charter 1774. So far with respect to the *affirmed* part of the judgment, the most im-portant in this question. But, in regard to the other part, which regards that remitted, it proceeds thus: " It is fur-
" ther ordered, that the cause be remitted back to the Court
" of Session, to review all the interlocutors, as 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 in May-
" bole, the teinds conveyed by Crauford 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 afore-*
" *said 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 to the Court shall seem meet."

If, then, there are any lands or subjects not ruled by the affirmance, that is to say, any lands or subjects besides those contained in the charter 1774, and similar titles, it was submitted to be quite clear that they all fell under the remit, and that Sir Andrew Cathcart's claim to such lands and subjects remained entire. Such are the lands of M'Gowanstone, Mill of Drumgirloch, Dunnymuck, Whitestone, Pennyglen, Barony of Greenan, lands of Balvaird, as not contained in the charter 1774, or in any similar titles; and David, Earl of Cassillis, made up no regular titles to these lands, sufficient to vest them in his person. And the appellant has a right by law to show further, by writings in the hands of the respondents, that Earl David lay under limitations and prohibitions, which disabled him from alienating those subjects.

Pleaded by the Respondents.—The remit could not include, and was not meant to include, more than the lands and subjects therein specially mentioned, because neither the words of the remit, nor the intention of your Lordships, authorized the Court of Session to review their former judgments, except with regard to the effect of the service 1776 as to the lands of Enoch and Little Enoch, and lands of Portmark and Polmeadow, the tenements in Maybole, the teinds conveyed by Crauford of Ardmillan, or as to any other lands or subjects, and to hear the parties again, as to the effect of the said service, as to the said lands, and as to the right to the said lands and subjects. The Court, therefore, most properly found that there was no special remit as to the lands in question, since they were neither specified in the remit, nor had the service 1776 any effect whatever upon the question, which the appellant again endeavoured to stir, as to these lands. But, even supposing it had been competent for the Court of Session to reconsider those questions, the Court most properly found there was no ground whatever for altering their former judgment, because, as to the question of consolidation, independent of the merits of that question being clearly with the respondents, it could not in any view have affected the right of Earl David to convey these lands, since, at all events, he had a

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right to these lands, in virtue of a crown charter and infeftment, upon which forty years' possession had followed: and also, supposing that the property and superiority had remained separate, yet he had a right to each; and as he conveyed every right that was in him to the respondent, so he has a complete right and title to all the lands belonging to Earl David, property and superiority. With regard to the lands of Greenan and others, Earl David's title was completed by precept of *clare constat*, which is equivalent to a special service, bearing an express reference to the former investiture, and granted to him in the very terms in which he was called by the former investiture, and as the *heir in those lands.* And with regard to the superiorities of these lands, they are completely decided by the affirmance of your Lordships, declaring "that all the interlocutors com-"plained of in the said appeal, so far as the same relate to the "lands and subjects contained in the charter of 1774, or any "similar titles, be, and the same are hereby affirmed." Now part of these superiorities is not only contained in the charter 1774, which was granted to Earl Thomas, and his heirs and assignees, but all the other superiorities stood upon similar titles to Earl Thomas, and his heirs and assignees; and it has been correctly adjudged that Earl David took up all such rights by his service 1776. And, finally, that the demand for the production of further writings is most incompetent and absurd, after a litigation of sixteen years, and after the fullest production which has perhaps been made in any cause.

After hearing counsel, it was

Ordered and adjudged that it was not the intention of this House, in its order of 24th May 1805, either specially or generally, to remit to the Court of Session to review their interlocutor with regard to the lands of M'Gowanstone, Mill of Drumgirloch, Dunnymuck, Whitestone, Pennyglen, Barony of Greenan, and lands of Balvaird, and that the Court of Session were not authorized to review the interlocutors with relation thereto, by the said order of this House; and that such parts, therefore, of the said interlocutors of the Court of Session of 10th Feb. and 24th Nov. 1807, as have relation thereto, being unauthorized by the remit of this House, are null and void, (being the parts of the interlocutors which are unfavourable to the appellant Blane, and as such complained of in his appeal);

and, with this finding and declaration, it is ordered and adjudged that the appeal be dismissed.

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STILL, &c. *v.* THE MAGISTRATES OF ABERDEEN, &c.

For Appellant, *Sir Samuel Romilly, Mathew Ross, John Clerk, Thos. W. Baird.*

For Respondents, *David Boyle, Wm. Adam, Henry Erskine, Ad. Gillies.*

[Mor. App. "Jurisdiction, No. 10."]

ALEXANDER STILL, JAMES WATT, JAMES KEITH, ALEXANDER DAVIDSON, and GEO. WILLIAMSON, Fleshers in Aberdeen, for themselves and the whole other Fleshers of Aberdeen, . . } *Appellants;*

THE MAGISTRATES AND TOWN COUNCIL of Aberdeen, and ROBERT BRUCE and ALEXANDER BREMNER, their Tacksmen of the Weigh-House Customs, . . } *Respondents.*

House of Lords, 16th June 1810.

TOWN DUES—JURISDICTION—CHARTERS—USAGE.—The Magistrates of Aberdeen were in the practice of exacting a duty in their City Weigh-House, on all tallow, butter and cheese brought into the market. The question here was, Whether this regulation, in reference to tallow, included refined tallow as well as tallow in the rough, and was to be exacted from freemen? Held, in the Court of Session, that it referred to tallow refined as well as unrefined, and to freemen as well as unfreemen. In the House of Lords, remitted for reconsideration, with special findings.

The question in this case was about the right of the Magistrates of Aberdeen, and their tacksmen, to impose city weigh dues on the fleshers, although they did not carry their tallow in a refined state to the market, but sold it to the chandlers in the rough, without resorting either to city weigh-house or the market. It arose out of the following circumstances:—

The town of Aberdeen had a public weigh-house, to which those, by the regulations of the burgh, who frequented the markets behoved to carry their goods, for the purpose of having them weighed, on payment of certain small duties to the magistrates or their tacksmen.

The magistrates were in the practice of making and publishing regulations and tables, from time to time, in regard