who has established in himself a title by the positive prescription; and the appellant has no such title in him in this case.

3. The appellant, in a lease, in which he was a party, made subsequently to the death of the late Mr John Lumsdaine, recognized and acknowledged the entail in 1753 to be valid and effectual in favour of his brother, the substitute-heir then entitled to possession; and, according to that recognition and acknowledgment, General Balfour is now the heir entitled to take under the entail.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *David Cathcart, James Moncrieff.*

For the Respondent, *Sir Saml. Romilly, John Clerk, W. G. Adam.*

[Fac. Coll., vol. xvi., p. 17.]

Miss MARGARET CARMICHAEL, only child of the late Sir John Gibson Carmichael of Skirling, Bart., and her Tutors and Curators, ... } *Appellants;*

SIR THOMAS GIBSON CARMICHAEL of Skirling, Bart., ... *Respondent.*

House of Lords, 15th May 1816.

TAILZIE—SERVICE—PASSIVE TITLE.—1st, A party possessing an estate on apparency, executed an entail, in which there was an obligation binding his heirs, "to fulfil and perform the whole obligations prestable by me at my death." Held, that though he could not make an effectual entail on apparency, yet that the obligation in the said entail descended, and was a ground to compel the heir of line to implement the conditions of the entail, and to make up proper titles, in terms thereof; and, 2d, That this obligation was onerous, and transmitted in terms of the Act 1695, c. 14, against the heir passing by and serving to the ancestor last infeft.

The late James Carmichael, W.S., died proprietor of the estate of Easter Hailes. He was succeeded by his brother, the Earl of Hyndford, who was served and retoured heir in gene-

1816.

CARMICHAEL, &c. v. CARMICHAEL.

ral to him in January 1782. The Earl of Hyndford did not make up any feudal title to the lands of Easter Hailes, but, possessing on apparency, suffered the estate to remain *in hæreditate jacente* of the deceased.

In 1784, the Earl executed an entail, comprehending various estates, in which he was feudally infeft. He also included the estate of Easter Hailes, in which he was not infeft.

The appellant contended that, while in a state of apparency, the entailer could not make a valid entail of the Easter Hailes estate, and that as to that estate, it flowed *a non domino*, and, therefore, could have no validity.

There was an obligation in the entail, which the respondent specially founded on, as entirely superseding the appellant's claim, to this effect: "Declaring always, as it is hereby specially "provided and declared, and by acceptance hereof, the said "Alexander Gibson and his heirs male, whom failing, the "other persons substituted to him, as aforesaid, shall be bound "and obliged to satisfy and pay all my just and lawful debts "and funeral charges. Item, to fulfil and perform the *whole* "*obligations* prestable by me at my death." "Also, to make "payment of such sums and legacies as I shall think proper to "leave and bequeath." He left £10,000 in legacies, declaring that his moveable estate should be first liable, and failing it to pay the legacies, his entailed estate should be liable.

Sir John Carmichael succeeded the Earl as heir of tailzie. He completed his title as heir of entail, and of course took upon him the conditions and clauses in favour of third parties contained in that entail, whatever they were. Sir John also executed an ante-nuptial contract of marriage, and became bound to settle the whole estates comprehended in Lord Hyndford's entail, on the eldest son of the marriage, whom failing, upon the other substitutes in that entail, including the estate of Easter Hailes.

The appellant was the only surviving child and daughter of Sir John, and claimed as heir at law and of line of James Carmichael, W.S., her great granduncle, and passing by her own father, expede a general service to him.

The respondent succeeded to Sir John as heir of entail, and was served heir male of tailzie, and provision to his brother.

The present action having been raised by the appellant, it was met by one on the part of the respondent, to have it found that she was liable for the onerous deeds and obligations of her father, who was, at least, apparent heir, more

than three years in possession of the estate of Hailes, and bound to make up a proper title, in her person, in terms of the Act 1695, c. 24, to the said Easter Hailes, and re-convey the same to the respondent.

In law the respondent pleaded, that where a person accepts or takes benefit from a deed of settlement of any kind, which contains conditions and clauses in favour of third parties, and makes the same the title of his possession, he becomes personally liable to conform and make effectual the settlement in all its parts, so far as he has the power of doing it, and is completely barred from attempting any thing to defeat or counteract the settlement, or any part thereof. He may repudiate the settlement, if he chooses, *in toto*, but he cannot be allowed to accept of a part, and at the same time to shake himself loose of all the rest, and even to take steps for defeating it, and rendering it ineffectual.

The Second Division pronounced this interlocutor, which was unanimous: "Find that the late Sir John Gibson "Carmichael, by his acceptance of the estates of Skirling "and others, under the entail executed by the late John, "Earl of Hyndford, his granduncle, by the measures taken "by him in pursuance of that acceptance, and also by the "representation he incurred generally to the said Earl, con- "tracted a valid and onerous obligation to make up proper "and effectual titles to the estate of Easter Hailes, and to "subject the same to an entail, in the terms of that executed "by the Earl of Hyndford, of the estates of Skirling and "others; and that this obligation will descend on the pursuer, "the daughter and heir of line of the said Sir John Gibson "Carmichael, in virtue of the statute 1695, c. 24, whenever "she enters heir on the estate of Easter Hailes, to her great- "granduncle, James Carmichael: Find that the said Sir "John Gibson Carmichael endeavoured to implement the said "obligation, but that the titles expede for the purpose, labour "under defects which expose them to reduction at the in- "stance of the heir of James Carmichael, and that the de- "fender, Sir Thomas Gibson Carmichael, as heir under Lord "Hyndford's entail, is now in possession of the estate of "Easter Hailes, in right of the investitures thus expede: "Find that at common law the general service expede by the "pursuer to James Carmichael, affords her a sufficient title "in point of form, to challenge the present investiture in "favour of the said Sir Thomas Gibson Carmichael, and the "heirs of entail; but find, that as this title is only inchoated

June 27, and July 7 1809.

1816.

CARMICHAEL, &C. *v.* CARMICHAEL.

" and intentative, and in some respects defeasible, so it affords " no security to the defender against subsequent challenges, " unless it is completed by an entry to the lands; and that it " carries no force sufficient to cut down the existing investi- " ture, except as it may become perfected by such entry; " and also find, that it is supported by no just and equitable " interest, that can authorize the depriving Sir Thomas Gib- " son Carmichael, and the heirs of entail, the creditors under " her father's obligation, of the titles of possession, which " they at present enjoy, unless employed for the just purpose " of entering, and so undertaking and implementing that " obligation. Therefore, on the whole, find, that the inves- " titure of the defender under challenge, cannot stand in the " way of the pursuer's entering to the lands and estate of " Easter Hailes; and declare it in so far ineffectual, and " reduce and decern to this extent accordingly; but find " and declare that the said infeftment and investiture chal- " lenged, must remain a valid and effectual title to the said " Sir Thomas Gibson Carmichael, and the heirs of entail in " their order, over the lands of Easter Hailes, aye and until " the pursuer enters thereon: and find, that on her so enter- " ing, she must surrender and convey the same, in competent " form, to the defender and the other heirs of entail of the " said John, Earl of Hyndford, and that in terms of the said " entail, and under the whole provisions, conditions, and " fetters therein expressed; and they decern accordingly; but " supersede extract till the first box day in the ensuing vaca- " tion; and, if a full reclaiming petition shall then be boxed, " supersede extract until the same be disposed of." On re-

Nov. 15, 1810. claiming petition, the Court again unanimously adhered.*

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* Opinions of the judges:—

LORD GLENLEE said,—" It was impossible to resist the conviction that this lady's father had come under a full obligation to implement the entail. And she, passing over her father, to take up an estate from a more remote ancestor, was bound to fulfil it."

LORD MEADOWBANK.—" As to the merits of the question, Sir John received the entailed estate as a gift, to which there was added a condition. Having taken the gift, he became bound to fulfil the condition. The trammels of the entail might have been disputed by him, but the condition could not. Sir John became bound by the contract *do ut facias*."

The other judges concurred in these opinions, and the judgment was therefore unanimous. *Vide*, also opinions in the Faculty col-

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The appellant being the heir-apparent, and being served heir in general to James Carmichael in the estate of Easter Hailes, has a sufficient title to pursue in a reduction of the titles on which the respondent pretends right to that estate, and, indeed, the only title that an heir apparent, pursuing a reduction of an infeftment subsequent to that of his ancestor, could make up by service, since a special service on his part would be liable to the objection, that his ancestor was not the last infeft, agreeably to the style of the brief, claim, and verdict, in such special service.

In support of this proposition it may be observed, in the first place, that the general service to James Carmichael by the Earl of Hyndford, could form no objection to the general service of the appellant. A general service to a person dying infeft in heritable subjects, if not followed by special service and infeftment, has no effect whatever upon the situation of an heir subsequent to the person serving generally. It confers, indeed, a title to set aside such impediments as may obstruct an entry by special service and infeftment. But if the person who uses the general service dies, without proceeding to enter, his general service flies off, as if it had never existed, and the next heir intending to take up the subject, must connect himself with the person last vest and seised, without regard to the incomplete and ineffectual act of the intermediate heir. In heritable subjects which are not strictly feudal, that is, which do not admit of infeftment, the rule is different, as they are effectually transmitted by general service alone, but in regard to such there is no question here.

2d, The appellant's title, therefore, to sue being established, the merits of this reduction are perfectly clear. The titles of the respondent are manifestly bad; the Earl of Hyndford not having made up any title to the estate of Easter Hailes, could not effectually convey it by his entail. It was by the law of Scotland, not his property, and the entail, in regard to it flowing *a non domino*, was void. The entail being ineffectual, the precept of *clare constat*, granted to Sir John Gibson Carmichael, and the other titles of the respondent, are inept. These titles must, therefore, be reduced, and then the

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lection. The above is taken from Hume's Collection of Session Papers.

1816.

CARMICHAEL, &c. *v.* CARMICHAEL.

respondent has no right whatever of property or possession of the estate of Easter Hailes; his situation is just that of a mere stranger, having intruded into the possession, who must relinquish it to the heir-apparent of the person last infeft.

3d, Sir John Gibson Carmichael did *not* contract an onerous obligation to execute a subsidiary entail of the estate of Easter Hailes, in terms of the entail executed by the Earl of Hyndford. His obligation is said to have been incurred, 1st, By incurring a universal representation of the Earl, and thereby becoming liable to an obligation on his general representation to entail Easter Hailes; 2dly, By accepting the entailed estate, and other property of the Earl, under conditions imposing the obligation. 3dly, By homologating the entail of the Earl. The first proposition implies two things, 1st, That the Earl bound his general representatives to execute a subsidiary entail of Easter Hailes; 2d, That Sir John Gibson Carmichael incurred a general representation of the Earl. Both of these are erroneous. The first of these questions is, whether, in general, an entail of a subject held in apparency, creates an obligation upon the general representative of the entailer to acquire the estate, and execute a subsidiary entail of it? On this point it was submitted that there was no evidence, that in general a *legatum rei alienæ*, even although *res hæredis* ever was held sufficient in the law of Scotland, to constitute an obligation on the general representative of the testator to acquire and convey the thing. No authority or case to that effect has been quoted; and there appears nothing to exclude the operation of the general rule, that gratuitous deeds bear no warrandice, but convey the right *tantum et tale* as the donor or testator had it, and must be held *pro non scripto*, if he had no right to it, or no right of conveying it. But even if such authority could be quoted, that would not be sufficient to prove that an entail of a subject held in apparency, could have such effect. For, 1st, A testator legating *res aliena*, or *res hæredis* must naturally be presumed to have had in view, that the thing was not his own property, and to have executed the legacy *in that view*. For what, it may be asked, should make him think a thing his own, which belonged entirely to another person, and with which he had no connection? But an entailer conveying a subject to which he had not made up titles, may very easily be supposed to have understood that he had power to convey it, and to have conveyed it entirely in that view. For such mistakes regard abstruse matters in law, and are very

common. And farther, it is plain, that if he had known or contemplated his want of power, he would have cured it by making up titles himself. It is natural and reasonable, therefore, to think, that in this last case, the entailer had no contemplation whatever of his own want of power, and did not at all intend to constitute any obligation on his representative in that view. But if that be supposed, then, even independently of the strict constitution of deeds of entail, the entail of a subject in apparency can constitute no obligation on the representatives of the entailer *quia quod potuit non valuit.* 2dly, An obligation to entail is liable to the strictest construction by the law of Scotland. Supposing, therefore, that an entailer, of a subject held in apparency, could be viewed as having intention to constitute an obligation on his representatives; yet effect could not be given to such intention from want of certain and explicit expression. His deed must be strictly construed, and the maxim must apply *quod voluit non fecit.*

4. Besides, Sir John Gibson Carmichael did not incur a universal representation of the Earl by accepting the entailed estate of Skirling and other property of the Earl. He did not incur an obligation to execute an entail of Easter Hailes estate, and if such an obligation could be construed against him, it was only *in valorem* of the funds received by him. But all these the appellant offers to prove, were expended in paying legacies and debts of the entailer which it is not denied were preferable to any claim under the obligation to entail.

5. Supposing Sir John Gibson Carmichael was liable in an obligation to entail Easter Hailes, yet that obligation could not effectually pass against the appellant by the statute 1695, c. 24, even if the appellant had entered to the estate of Easter Hailes. The appellant is said to represent her father. But it is an undeniable fact that Sir Thomas Gibson Carmichael likewise represents the appellant's father, as heir in the entailed estate of Skirling, and although this representation may not subject him or the entailed estate, for Sir John's proper debts, yet it does most assuredly subject him to all debts and obligations flowing from the entailer. Now, the obligation in question is evidently of this last description, having been created by the entailer, and by him imposed upon himself and the whole aggregate body of heirs of entail. They are, therefore, the proper debtors in it. It is sufficient, therefore, to state that in regard to any obligation originating with the entailer, Sir Thomas Gibson Carmichael, the heir of entail now in

1816.

CARMICHAEL, &C. *v.* CARMICHAEL.

possession, must be held as representing the late Sir John Gibson Carmichael.

Pleaded for the Respondent.—1. The general service of the appellant does not afford a sufficient title to deprive the respondent of the possession of the estate of Easter Hailes, unless it be followed up by a special service, as heir of James Carmichael, which would be altogether unavailing to the appellant.

2. Whenever she expedes a special service, which the respondent, as superior of the lands, could at any time compel her to do, she must immediately become liable to implement the onerous obligations incumbent upon her father, Sir John Gibson Carmichael, an intervening heir more than three years in possession, in terms of the Act 1695, c. 24. Now, Sir John was under an onerous obligation to make up a title to this estate, and convey it in terms of the entail.

3. He took up the whole estates, including Easter Hailes, provided to him by the Earl of Hyndford, under the entail executed by his Lordship in 1784, made up his titles as heir of tailzie, and possessed the estates under the entail for sixteen years; and he further, intromitted with the whole remaining property of the Earl, heritable as well as moveable, in virtue of a general disposition and conveyance executed by the Earl of the same date with the entail, which deeds were granted in his favour, under the positive condition imposed upon him by the granter, that he should hold these estates under the entail, that he should use every right or title which he might acquire thereto, in corroboration of the entail, and generally, that he should fulfil all the obligations prestable by the Earl at the time of his death, one of which was to entail the estate in question.

4. Sir John, having thus made his election, having accordingly, in his contract of marriage in 1779, come under an obligation to settle this estate in terms of the entail, having afterwards, in 1800, granted a procuratory of resignation, including this estate of Hailes, to the heirs called to the succession by the entail, and having, in short, *approbated* that deed in so many ways, was not entitled to *reprobate* it, by afterwards insisting on a reduction of the entail so far as regarded this estate.

5. The appellant is in this respect, in no better situation than her father: for, by passing by her immediate ancestor, who was more than three years in possession of the estate, she becomes immediately liable to all the onerous obligations

incumbent upon him, and, therefore, were she to succeed in reducing the present investiture so as to obtain possession of the estate, she is bound immediately thereafter to reconvey the estate to the respondent as heir of entail, under the conditions, provisions, and restrictions imposed by that deed, upon the maxim, *quia frustra petis quod mox es restituturus*. The appellant has, therefore, no interest to insist in the present action.

After hearing counsel,

It was ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For the Appellant, *J. H. Mackenzie, Fra. Horner.*

For the Respondent, *Wm. Adam, Sir Saml. Romilly, John Clerk, John Jardine.*

WILLIAM CUNINGHAME BOUNTINE CUNINGHAME GRAHAM, Esq. of Gartmore, Finlayson, and Ardoch, and ÆNEAS MORRISON, Writer, Greenock, Tacksman of the Fishings, . - - - } *Appellants;*

JOHN DIXON, Esq., present Provost of the Royal Burgh of Dumbarton, and the other Magistrates and Councillors of Dumbarton, for themselves, and as representing the Community thereof, - - } *Respondents.*

(Et è contra).

House of Lords, 19th June 1816.

SALMON FISHINGS—YAIRS—STAKE NETS.—(1.) In a dispute raised by mutual declarators as to the rights of salmon fishings, Held that both parties had established a right to a salmon fishing. (2.) The appellant's title bore reference to the fishings in these words: "cum piscatione de lie yair de Ardoch," and nothing was said about stake nets in the other's right, and stake net fishing being claimed by both parties, the appellants contending that yairs necessarily included and meant a stake net fishing. Held that neither party was entitled to establish any species of stake net fishing within the bounds in question. Affirmed on appeal.

The royal burgh of Dumbarton holds grants from the Crown of the salmon fishings of Clyde, from the mouth of the Kelvin, which is situated about ten miles above Dumbarton to the head of Loch Long, about twenty miles below Dumbarton. The burgh has likewise a royal grant of the