April 8. 1830. 'further ordered, that the appellant do pay to the respondent the 'sum of L. 269 for costs; and it is declared, that this House 'awards such costs in lieu of such suspension.'

Appellant's Authorities.—44. Geo. III. (Local Act); 4. Geo. IV. c. 49. Darby, Feb. 10. 1786, (F. C.) M'Intosh, Nov. 18. 1815, (F. C.); affirmed in House of Lords, March 9. 1819; (1. Bligh, 272.) Murray, Dec. 15. 1824; (3. S. & D. 401.)

Respondent's Authorities.—A. S. March 6. 1783. A. S. Feb. 4. 1786. Seller and Thomson, Feb. 11. 1809, (F. C.) Campbell, July 10. 1824, (3. S. & D. 245.) Adam, July 5. 1824, (S. & D.'s Justiciary Reports, p. 119.) M'Millan, Dec. 10. 1825, (4. S. & D. 297.) Erston, (ibid. 299.)

MONCREIFF, WEBSTER, and THOMSON—RICHARDSON and CONNELL,—Solicitors.

No. 21.

SIR ALEXANDER INGLIS COCHRANE, Appellant.
Lushington—Brown.

DR DAVID RAMSAY, Respondent.—*Murray—Keay.*

Service.—Held, (reversing the judgment of the Court of Session), that a general service to an ancestor, where there has been a prior general service by another party to the same ancestor, is incompetent.

April 29. 1830.

2D DIVISION. Lord Mackenzie.

ALEXANDER INGLIS of Murdieston, in 1719, executed a deed of entail of that estate in favour of Alexander Hamilton; whom failing, to certain substitutes nominatim; whom failing, 'to the 'eldest lawful son of William Inglis, son to the deceased Natha- 'niel Inglis, chyrurgeon in Kirkaldy, my brother, and the heirs- 'male of his body; which failing, to his other lawful sons, and the 'heirs-male of their bodies successive, one after another;' whom failing, the heirs-female of the institute, and of the first substitute; 'which failing, to the heirs-male procreate, or to be procreate, 'lawful, betwixt William Sheoch, shore-grieve at Clackmannan, 'and Catherine Inglis, his spouse, daughter to the said umquhill 'Nathaniel Inglis; which all failing, to my own nearest and law- 'ful heirs and assignees whatsomever: and failing of heirs-male, 'I hereby declare that it shall be leisome or lawful for the eldest 'daughter or heir-female to succeed without division.' Alexander Hamilton, the institute, succeeded, and made up titles under the deed of 1719. His sons, Alexander, Gavin, Walter, and James, successively succeeded. The two former made up titles under the entail; but James executed, in 1802, a new deed of entail in

favour of a different line of substitutes. The first person called (Colonel James Hamilton) having died without issue, the succession opened to the next substitute under the new entail, Sir Alexander Inglis Cochrane, who, having made up titles, entered into possession in 1815. April 29. 1830.

In the meanwhile William Inglis, the son of Nathaniel, had expede in 1720 a general service as heir of his uncle Alexander, the entailer.

Dr Ramsay, alleging that he was great-grandson of Catherine Inglis, daughter of Nathaniel, and spouse of William Sheoch, and that, as such, he was the substitute entitled to succeed under the old entail; and conceiving that James Hamilton had no power to alter the destination, granted, with the view of trying this question and the validity of his claim, a trust-bond for L. 15,000 to his agent, George Dunlop, W. S., whereon the latter raised an adjudication of the estate, and got decree.* Thereafter Dr Ramsay obtained a general service as nearest lawful eldest heir-portioner in general of Alexander Inglis the entailer, to whom William had been previously served. In that character he raised an action of reduction improbation, and declarator, against Sir Alexander Inglis Cochrane, and the other heirs under the new entail, to have it found that the succession of the estate of Murdieston had opened to him, and concluding for reduction of the new entail, and of Sir Alexander Inglis Cochrane's special service under it. Sir Alexander then raised an action of reduction of Dr Ramsay's general service, inter alia, because 'a general service as heir-por-'tioner, or eldest heir-portioner to the said Alexander Inglis, by 'the defender, or any other person, at this day, is altogether in-'competent; William Inglis, the eldest son of the said Nathaniel 'Inglis, (through which Nathaniel the defender pretends to con-'nect himself with Alexander), having many years ago, indeed so

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* Before adopting this measure, Dr Ramsay had, in 1818, executed a disposition of the estate of Murdieston in favour of Mr Dunlop, and his heirs and assignees, qualified by a back-bond; and he was thereafter served heir of line in general of Alexander Inglis of Murdieston. Mr Dunlop, founding on this service, raised an action of reduction of Sir Alexander Inglis Cochrane's titles to Murdieston, and was met by a counter-action of reduction of Dr Ramsay's service. The Court, 'in respect that it 'is evident that the proof adduced did not authorize the verdict of the jury,' reduced. Dr Ramsay had also taken out a brieve for serving himself heir of provision to Alexander Inglis; but on advocation of the brieve to the Court of Session, he abandoned it. In the meanwhile Mr Dunlop had raised an action of adjudication *in implement* of the disposition; but the Court dismissed the adjudication as incompetent, and the House of Lords (31st March 1824) affirmed the judgment, with L. 100 costs. See 1. Shaw's Appeal Cases, p. 115.

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'far back as the year 1720, been served heir to his uncle Alex-
'ander by a general service, as appears from his retour in the pub-
'lic records; and of course there was no room thereafter for any
'other person being served heir of Alexander by a general service;
'and the defender's pretended service, as heir to Alexander, is
'therefore on this ground alone, were it liable to no other objec-
'tions, palpably null, and must be reduced and set aside.'

The Lord Ordinary having, in respect of the case of Carmichael *v.* Carmichael, and opinions said to have been given adverse to it, reported the cause, the Court appointed mutual memorials 'on the question, whether, after a title by a general 'service having been expede by William Inglis, nephew of Alex-'ander Inglis of Murdieston, as nearest and lawful heir to his 'uncle, a subsequent general service of any person, as eldest heir-'portioner to the said Alexander Inglis, is a competent title?' On advising these memorials, the Judges being equally divided, the other Judges were consulted, and the result was a judgment, finding, 'that the general service of Dr David Ramsay, defen-'der, as an heir-portioner of Alexander Inglis of Murdieston, is 'a competent and regular proceeding, notwithstanding the pre-'vious general service of William Inglis as heir to the same an-'cestor.'*

Sir Alexander Inglis Cochrane appealed.

Appellant.—In the law of Scotland there is no ipso jure transmission of rights by mere survivance,—the maxim quod mortuus sasit vivum, being utterly rejected. After the death of a proprietor of lands, the estate remains in hæreditate jacente of the deceased, and the heir entitled to succeed is only an heir-apparent, until he makes a formal additio hæreditatis by service and retour, or by precept of clare constat. The effect of this additio is, that the heir becomes in law eadem persona cum defuncto. Where the rights have been followed by infeftment, the service is special: Where the rights have not been followed by, or require no sasine, the service is general; and by it every such right is carried out of the party served to, and is passed to the heir serving. The consequence is, that there cannot be more than one general service to the same individual, for nothing is left to be the subject of a

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* Lords President, Justice-Clerk, Glenlee, Craigie, and Cringletie, were for Sir Alexander; Lords Balgray, Gillies, Pitmilly, Alloway, Mackenzie, and Medwyn, were for Dr Ramsay. See the Opinions, 6. Shaw and Dunlop, 751.

second general service. Dr Ramsay's service is therefore inept, as the party to whom he was served had been already served to by a previous heir.

The respondent endeavours to escape from this conclusion by contending, that, whether there are rights to be carried or not, a general service may be resorted to by heirs in succession, for the purpose of proving their respective propinquity to the deceased. This is inconsistent with the nature and object of the general service. The question put in a general service is not as to propinquity, but as to the right to inherit; although, no doubt, in ascertaining the right to inherit, it may be necessary to inquire as to the propinquity. It may, and often does happen, that the party who served is not so near in blood as another person; but still the party served has his right of inheriting declared, and is retoured as propinquior hæres. Thus a stranger in blood may be called in an entail, yet he will be retoured 'legitimus et propinquior hæres 'talliæ,' &c. No doubt a special service includes a general one, and there may be more than one special service to the same party; but that is only where there has not been infeftment taken on the special service; for, to operate as a special service, the jury must inquire who was the party last vest and seized; and therefore the second party serving passes over the person who took the previous special service, but did not follow it out with infeftment, and serves to the person last vest and seized. The second special service, however, would not carry the rights which are capable of being taken up by a general service; for these have been taken away already by the general service included in the first special service. The case of Carmichael did not afford termini habiles for deciding the present question, and no judgment was pronounced in it to that effect.

Respondent.—The general service was long since introduced to ascertain the character of heir, when a special service could not be resorted to conveniently or with safety to the party serving. Probably, if a plan to accomplish this object had been adopted at a later period, a mere declarator of propinquity would have been preferred; but the minds of men and of Judges were then biassed in favour of the feudal laws and feudal forms. Certain rights followed from this declarator of propinquity, but the primary object of the service was to prove the relationship—the fact from which these legal consequences followed. If the appellant's views are correct, there is no form of process by which the right of blood, a right which may be of the most valuable kind, can be judicially established. Regarding a general service in the above light, it is of

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no consequence, whether or not the rights of the party served to have been previously taken out of him by an earlier general service, for still the second general service will have the effect of ascertaining the jus sanguinis. It does not follow, that because William was served to Alexander, there could not be another heir to Alexander at a later period. No doubt, while William lived, there could not be another service; but William's character of heir to Alexander died with William, and, on his death, could be taken up by the party nearest related. That a nearer heir existed at a former period, and expede a service to the same ancestor, cannot prevent the inquest from returning an answer to the head of the brieve directing them to say who is now the ancestor's nearest and lawful heir. If the appellant's objection were well founded, it would be applicable equally to special services; but such a proposition was never heard of in conveyancing. If a person has served in special, and dies before completing his title, the next heir does not serve to him, but to the party last infeft; that is, he must serve heir of line to the very same ancestor to whom a service of exactly the same kind was formerly expede. But as a special service includes a general, there exist in every such case two general services to the same ancestor,—the very combination which the appellant describes as incompetent, and contrary to principle and practice. Accordingly, the competency of such a service was recognized in the case of Carmichael. It is a mere fallacy to say that the respondent ought to serve to William, and that thereby he will prove himself heir of line of Alexander; for there are cases in which a service as heir to the person last serving, will not prove that the party served is heir also to the original ancestor. Thus, if William had a sister by the full blood, and a brother consanguinean, the descendant of the sister would be the heir of line of William, while the descendant of the brother would be the heir of line of Alexander; and although the former would be entitled to serve to William, the latter is as clearly entitled to serve to Alexander.

Lord Wynford.—My Lords, This is an action of reduction, which was brought to reduce a general service which had been obtained by the respondent to one Alexander Inglis of Murdieston.—(His Lordship here stated the circumstances of the case, and then proceeded.)—Your Lordships will observe, that the interest to be recovered was an interest in reversion; and that, previous to the service sought to be set aside, one William Inglis had obtained a general service to Alexander Inglis. There are two questions for your Lordships' determination,—first, Whether, after the reversionary interest in the estate was taken out of Alexander Inglis, by the general service which William Inglis

had obtained, the general service obtained by the respondent was valid? Secondly, If this second service to the same ancestor could not be supported as a service, whether it might stand as evidence of the propinquity of the respondent's relationship to the creator of the entail?

Upon the first question I have to state to your Lordships, that as this was an estate in reversion, of which there could be no infeftment, all the interest that was in Alexander Inglis passed by the general service to William Inglis. A service to Alexander Inglis, after William Inglis had served heir to him, could have no effect, for there was no estate remaining in Alexander Inglis on which such service could operate. It appears to me, therefore, in principle, that this second service must be a nullity. The Scotch reports do not contain any decided case on this point, but my Lord Stair, in a passage to which I shall presently have occasion to refer your Lordships, mentions a decision which applies directly to it. But there are two Acts of Parliament, and the opinions of three of the most eminent writers on Scotch law, which will assist your Lordships in forming your opinion. By a Scotch statute of the year 1594,* if a man kills a father or mother, from whom he would have inherited property, he forfeits, by the unnatural murder that he has committed, his inheritance; and two statutes direct, that the next heir shall not serve heir to him. The exception so properly made by this statute, proves the general rule to be the same in Scotland as it is in England; namely, that a claimant to an estate must shew himself to be the heir of the person who was last seized. Now William Inglis, and not Alexander, was the person who, by the operation of the first general service, was last seized of this reversion. The only difference between the law of England and Scotland is, that we have no hæreditas jacens. The estate with us passes instantly on the death of the ancestor to the heir: In Scotland, a service is required to pass what was left on the death of the ancestor to the heir; but when the estate has been conveyed by the proper service, the rule as to the person from whom a claimant is to derive his title, is the same in both parts of the kingdom. The whole tenor of the statute of entail shews, that a claimant should serve heir to the person in whom the estate was last vested, and not to the creator of the entail, or to any remote ancestor through whom an estate has descended. Lord Stair, B. iii. tit. v. § 25. says, 'The general service 'of heirs being retoured, doth so establish rights not having infeft-'ment, (as dispositions, heritable bonds, reversions, apprisings, and 'adjudications in the person of the heirs served), as that no posterior 'heirs can have a right thereto, unless they be served heirs to the 'person last served heir, though the right stood in the name of the 'first acquirer, and not of the last heir;—as an heritable bond or rever-'sion remaining in the name of a father to whom his eldest son was 'served heir generally, who dying without issue, the second brother

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* c. 220. or 224.

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'must be served heir to his brother, and not to his father, therein.' Lord Bankton, B. iii. tit. v. § 21. says, 'Heritable rights, whereon 'infeftment did not follow, are conveyed by a general service, which 'fully carries and states the right in the heir's person that was in the 'deceased, in such manner, that although he die before he perfects 'the right in his own person by infeftment, the next heir must serve 'to him.' Erskine, B. iii. tit. viii. § 78. says, 'A general service 'carries to the heir a complete right to all the heritable subjects in 'which the ancestor had not taken sasine, though he has not esta-'blished a right to that in his own person by sasine. For, seeing all 'personal rights are sua natura transmissible inter vivos by the owner 'to the grantee by simple assignation without sasine, they must also 'be effectually transmitted from the deceased to his heir by a service, 'which is the legal method of conveyance from the dead to the living. 'From hence it follows, that if the heir thus served should die be-'fore he had infeft himself in these rights, his heir, if he wants to 'carry them, must serve heir to the last deceased, because they were 'last vested in him.' Lord Stair says, that his opinion was founded on that of the Judges in the case of Rollo or Rollock. The case of Carmichael *v.* Carmichael has been referred to, as a case the judgment in which impugns these authorities. But the Lord President says, in his judgment in the Court below, that this point was not decided in that case. If your Lordships look at the conclusion of the report in that case, you will be of opinion that the Lord President is correct; for all that the Court seem to have decided was, that the party claiming could only take as a trustee for persons who had a better and a more equitable title than himself. It has also been insisted, that the works of Mr Erskine and Lord Bankton contain passages which are inconsistent with those which I have quoted to your Lordships; that the former says, 'A general service is competent to the heir alone, and 'has no relation to any special subject;' and the latter says, that 'a 'general service of an heir of line, which bears no reference to any 'particular subject or right, may take place when nothing is carried 'thereby.' I cannot discover such an inconsistency between these passages and those to which I before referred, as destroys the authority of the former. But it is not pretended that Lord Stair is chargeable with inconsistency, or met by any authority that impugns his opinion on this question, as to the case relating to a service obtained by a daughter, who, it was afterwards found, had a brother who was the heir. It was an inquiry, how a service of heir by a person who was not heir was to be got rid of, and not as to what is the effect of a service obtained by the person who was heir at the time that such service was obtained. Lord Medwyn, in the Court below, referred to several cases of Peerage, in which there had been services to very remote ancestors. There is no objection to service to a remote ancestor, provided there has been no service to any intermediate ancestor. We have only a very loose note of those cases, and I am not

satisfied that in any one of these cases there had been any previous service. I therefore humbly submit to your Lordships, that the balance of authority proves, that the service sought in this case to be reduced cannot be supported as a legal service.

This brings me to the second question, Should this service be permitted to stand as evidence of the propinquity of the relationship of the respondent to the entailer? The passage from Lord Bankton is relied upon as an authority for permitting it to stand for that purpose. All that Lord Bankton says is, that there may be general services although nothing passes,—there may be general services where there is no estate to pass, and then of course nothing can pass. This passage is no authority for showing that such services may be used as evidence of relationship. They are taken out for another purpose, namely, for the purpose of carrying the estate. I do not approve of taking a proceeding for one purpose, and using it for another. The industry of the bar has furnished us with no precedent of a service being used as evidence of relationship. As to the fact of relationship, a service of heir is evidence that is worthy of very little attention. These services are taken ex parte before an Under-Sheriff. There is no one present to cross-examine, or in any manner to sift the truth of the evidence on which the heirship is established. Under this unsatisfactory mode of proceeding, a complicated question of fact and law is found. In finding that a party is in that degree of propinquity to be the heir of the entailer, the jury are, under the direction of the Under-Sheriff, to decide on the legality of marriages, as well as the births of children, and the deaths of such persons as stood between the claimant and the deceased. I am sure no Court ought to pay any attention to the finding of a jury on such matters, conducted as the inquiries must be before juries who serve persons as heirs. I will never advise your Lordships to establish for the first time a precedent for serving heirs, for the purpose of making those services evidence in a question of pedigree. It may be said, that this reasoning tends to prove, that the service of a person as heir should in no case be admitted in an inquiry respecting the title to lands. But there must, according to the law of Scotland, be a service of heir to invest a claimant with a character to sue. It must be proved, therefore, that a claimant has been served as heir to the person under whom he claims, in order to shew that he has the character which entitled him to come into Court. It is not for me to say whether it is proper that this form should be continued as a part of the law of Scotland. It will be seen, however, that the inquiry, whether a man is heir to the person who was last served heir, is far less complicated, and much fitter for the tribunal before which it is made, than an inquiry whether a man be the heir of the creator of the entail who has been dead some hundreds of years. The greater number of descents that an estate has passed through, the more links that there are in the chain of pedigree,—the more the difficulty of the inquiry respecting heirship is

April 29. 1830. increased. Not only does the number of links in the chain increase the number of questions to be tried, but makes each question more difficult. The judgment of the Court below was only given by a majority of one Judge; the Lord President and the Lord Justice-Clerk were in the minority. This circumstance relieves me from the embarrassment which I otherwise should have felt when advising your Lordships to reverse the judgment of the Court of Session.

I humbly move your Lordships, that the interlocutor pronounced in the Court below be set aside, and that this case be sent back to the Court of Session, with directions to that Court to reduce the service of heir to Alexander Inglis, which has been obtained by the respondent.

The House of Lords accordingly 'ordered and adjudged, that 'the interlocutor complained of be reversed; and it is further 'ordered, that the cause be remitted back to the Court of Session, 'with instructions to the said Court to reduce the general service.'

Appellant's Authorities.—3. Ersk. 8. 36.; 3. Stair, 5. 8. 25.; 4. 35.; 3. Bank. 5. 1. 4. 21.; 3. Ersk. 8. 63. 78. Rollock, July 1636, (1. Brown's Synop. 217.) Duncan, Feb. 9. 1813, (F. C.); 2. Craig, 13. § 47.

Respondent's Authorities.—3. Ersk. 8. 63. 65.; 2. Bank. 326.; 3. Stair, 5. 35. 42.; 1503, c. 94. Carmichael, Nov. 15. 1810, (F. C.) Cuninghame, Feb. 27. 1812, (F. C.)

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL,—Solicitors.

No. 22. JAMES THOMSON, Appellant.—*Wetherell—Wilson.*

THOMAS FORRESTER, Respondent.—*Lushington—Dundas.*

Landlord and Tenant.—On a question of fact, relative to a tenant's liability for a year's rent, the House of Lords, (affirming the judgment of the Court of Session), held the tenant not to be liable.

June 18. 1830.

2D DIVISION. Lord Mackenzie.

FORRESTER held a lease of a farm from Balfour of Leys, (whose factor loco tutoris was James Thomson), for nineteen years from Whitsunday and Martinmas 1797. Among the subjects let were a mill and orchards; and from these Forrester was to remove at Whitsunday 1816, but not from the arable lands until the ensuing Michaelmas. Nearly five years after a settlement with Forrester, and his removal from the farm, a claim was made upon him by Thomson for the value of the fruit of the year 1816; and in an action the Sheriff of Perthshire and the Lord Ordinary