[1st *August* 1839.]

(Appeal from the Court of Session, Scotland.)

(No. 27.) MRS. CATHERINE CAMERON LOGAN or GILL, residing at Hillend near Airdrie, Widow of the deceased Captain Henry Gill, sometime of the 50th Regiment of Foot, Appellant.

[*John Miller — W. Dauney.*]

MARGARET LOGAN, only child and nearest and lawful heiress of line and of tailzie and provision of the deceased John Maxwell Logan, Esquire, of Fingalton, and her Trustees and Tutors, Respondents.

[*A. M'Neill — G. Robinson.*]

Entail—Institute—Life-rent and Fee—Service.—A party, by deed of entail, disponed his lands "to and in favour of M. "in liferent only, during her lifetime after me, and to the "second son to be lawfully procreated of her (M.'s) body, "and the heirs to be lawfully procreated of his body, "whom failing," to other parties "heritably and irredeem- "ably." The deed provided that "the second son of the "said M., and the other heirs substitutes," should bear the entailer's name and arms; the cardinal prohibitions, and relative irritant and resolutive clauses, were directed against "the said M., or any of the heirs aforesaid." J., the second son of M., was not born till some time after the entailer's death. Upon his attaining majority he expede a general service as nearest and lawful heir of entail and provision to the entailer, and a title was completed in favour of M. in life-rent only, and himself in fee. In a question betwixt J. and a substitute heir,—Held (affirming the judgment of the Court of Session), 1. that

the fetters had not been effectually imposed on J. the institute.

Held, 2. that if a party be, by the terms of a deed of entail, the first beneficial taker of the fee, he is the institute, although, by the conception of the destination, the fee would appear to be in pendente between the death of the entailer and his birth, without supposing a fiduciary fee in a party having a previous life-rent.

Held, 3. that a party who is institute by the terms of an entail does not, by expeding a service as heir of tailzie and provision to the entailer, and making up his title under the entail, debar himself from pursuing a declarator of his immunity as institute from the fetters of the entail.

1st Division.

Ld. Ordinary Corehouse.

BY disposition and deed of entail, dated 14th February 1793, and recorded in the register of tailzies 14th November 1819, John Maxwell esq., of Fingalton, on the narrative of the love and regard which he bore to Mrs. Margaret Baird, his spouse, "and for the affection "I have for Mrs. Margaret Mitchell, spouse of Walter "Logan junior, merchant in Glasgow, who lived in "my family from her infancy to her marriage, and it "being always my intention that she should succeed me "in my estate after my death, and for many other "good causes and considerations me hereto moving," under the provisions, conditions, reservation, and power and faculty therein mentioned, gave, granted, assigned, and disponed from him, and all others his heirs and successors, "to and in favour of the said Margaret "Mitchell, in life-rent only, during her lifetime after "me, and to the second son to be lawfully pro-"created of her body, and thē heirs to be lawfully pro-"created of his body; whom failing, other substitutes, "heritably and irredeemably, all and whole," the estate of Fingalton, therein particularly described:

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" But providing and declaring, as it is hereby expressly " provided and declared, that the second lawful son of " the said Margaret Mitchell, and the heirs of his body, " and the whole other heirs substituted by this deed, " whether male or female, and the descendants of their " bodies succeeding to the foresaid lands and estate, " and teinds thereof foresaid, according to the foresaid " destination, shall be holden and obliged to assume, " and constantly retain, use and bear the sirname, arms " and designation of Maxwell of Fingalton," &c. Then followed a prohibitory clause. The irritant and resolutive clauses provided that in case the " said Margaret " Mitchell, or any of the heirs hereby called to the suc- " cession," shall do in the contrary, &c., the acts and deeds should be null, and the right of the party forfeited.

John Maxwell, the entailer, died in the year 1793, and Mrs. Margaret Mitchell or Logan entered into possession of the estate. John Maxwell Logan, second son of the said Mrs. Margaret Mitchell and the said Walter Logan, was not born till some time after the death of the entailer; but in 1816, upon his attaining majority, titles were made up in his person under the entail.

In 1834 John Maxwell Logan, and also his sister Mrs. Gill, and other substitute heirs, brought mutual declarators to ascertain his rights under the entail. The summons by the substitute heirs (signeted 20th March 1834), set forth that John Maxwell Logan had " made " up titles to the said estate as the institute or first per- " son called by the said deed, and has possessed the same " as such, along with his mother, for a number of years," and concluded that it ought and should be found and declared, by decree, &c., that according to the true spirit,

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intent, and meaning of the said entail, as well as the sound and true legal construction of the expressions therein contained, the whole provisions, declarations, restrictions, and fetters thereof, apply to the said John Maxwell Logan, defender, as institute or first person called under the said entail, and that the said John Maxwell Logan has no right to sell, alienate, dispone, or otherwise burden the said estate, whereby the same may be evicted from the said series of heirs called to the succession thereof. The statement in John Maxwell Logan's summons (signeted 21st March 1834) was almost in terms the same as in the other summons, but containing ane converso conclusion. A supplementary summons, calling the whole heirs substitutes, and containing similar statements and conclusions, was afterwards brought by John Maxwell Logan.

In their condescendence the substitute heirs set out the terms of the service and of the deeds constituting John Maxwell Logan's title, which were in comformity with the terms of the entail; and the two following pleas in law were stated by them on the record:—

1. From the peculiar structure and terms of the deed of tailzie libelled on, the pursuer, Mr. Maxwell Logan, is not a proper institute in the conveyance. On the contrary, as he was not in existence at the date of the tailzie, his mother, Mrs. Margaret Mitchell or Logan, was the fiduciary fiar to whom the estate was in the first instance conveyed; and the fetters being applied to her expressly, and her successors, necessarily applied to John Maxwell Logan.

2. His proper character under the tailzie in question is that of an heir; and having made up a title to the estate by service, and been retoured, "proximus et

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" legitimus hæres talliæ et provisionis demortui Joannis " Maxwell," he cannot, while that title subsists, maintain that he is not an heir, or maintain any plea inconsistent with that character.

The Lord Ordinary ordered cases, and thereafter pronounced the following interlocutor, adding a note:—

" 27th May 1836.—The Lord Ordinary having con-
" sidered the revised cases for the parties, with the
" record, productions, and whole process, in the action
" and supplementary action at the instance of John
" Maxwell Logan, decerns in terms of the conclusions
" of the libels; and in the action at the instance of
" Mrs. Catherine Cameron Logan or Gill, assoilzies the
" defender, and decerns; and in these conjoined actions,
" finds the said John Maxwell Logan entitled to ex-
" penses, and remits to the auditor to tax the account
" thereof when lodged, and to report."

" *Note.*—The Lord Ordinary hopes that it is no
" longer necessary to state the grounds of a judgment
" finding that the fetters of an entail, imposed upon
" heirs only, do not bind the institute. If it be, no
" point in the law of Scotland can be held as settled.
" The attempt to show that John Maxwell Logan is
" not the institute, but an heir of entail, it is thought,
" has entirely failed. The estate is conveyed to his
" mother in life-rent, for her life-rent use only, and to
" her second son; the fee vested in the second son,
" John M. Logan, ipso jure, as soon as he came into
" existence as institute. No fee could be transmitted
" to him from his mother; if he served heir to her, it
" was for the purpose not of acquiring, but of declaring
" a right to the estate. None of the decisions cited by
" the substitute heirs bear upon the case."

The appellant reclaimed, and pointed out a mistake in the Lord Ordinary's note as to John's service to his mother instead of the entailer. The Court pronounced the following interlocutor:—

Judgment of Court, 20th Dec. 1836.

" 20th December 1836.—The Lords having advised " this reclaiming note, and heard counsel, recal the " interlocutor reclaimed against, in so far as it finds " expenses due to Mr. Logan; quoad ultra, adhere to " the said interlocutor, and refuse the desire of the " reclaiming note, and find that the expense of this " process must be paid from the entailed estate of the " pursuer, John Maxwell Logan; appoint the account " of expenses incurred by the said George Logan and " others to be given in, and remit the same to the " auditor to tax the same, and report."

Mrs. Gill appealed; and John Maxwell Logan having died, appearance was made for his infant daughter and representative as respondent.

Appellant's Argument.

Appellant.—If John Maxwell Logan was the institute under this entail, the respondents were clearly entitled to found on the Duntreath class of cases. But the question raised is, whether he is not an heir, and must necessarily take as such? and in reference to this question there are two points to be made for the appellant, both depending upon nice and difficult questions of law.

1. Was John the insitute or an heir? The disposition was to Mrs. Mitchell in life-rent, and to her second son and a series of other heirs; John the second son not having been born at the death of the entailer, the fee necessarily devolved on some party, as it could not remain in pendente. The institute has been always

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Appellant's Argument.

understood to mean the party to whom the fee of the estate first passes. It may be that the entailer intended to make the second son of Margaret Mitchell the first beneficial taker; the expressions used by him denote that intention. But, while the intention is clear, it is necessary, in order to effectuate that intention, that there should be due conformity with the legal mode of transference; in order to this it must necessarily be assumed that the fee passed to Margaret Mitchell at the death of the entailer, otherwise, contrary to an acknowledged maxim of law, the fee would be in pendente from the death of the entailer to the birth of her second son. Either then Margaret Mitchell was the first taker of the fee, in other words the institute, or the bequest in favour of her second son is void. When a conveyance is made to a party in life-rent, and his children nascituris in fee, the fee is held to be vested absolutely in the parent as the only mode of excluding the heir at law. Hence it is necessary, in order to impose a trust upon the life-renter, to use the words "in life-rent only." But this limitation applying only to the beneficial enjoyment, the legal fee is in the life-renter as much in the one case as in the other; the life-renter is, equally in both, the first taker of the fee. See Lord Corehouse's opinion in Mein v. Taylor [1], which appears to be directly at variance with his Lordship's views in the present case, and which is submitted to be the correct statement of the law as established in Wellwood v. Wellwood, 23d February 1763 [2], Dundas v. Dundas, 2d January 1823.[3] The case of Newlands [4] does not

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[1] 5 S. & D. 781. (new ed. 729.)
[2] Mor. 15463.
[3] 2 S. & D. 145. (new ed. 133.)
[4] Mor. 4289.

meet the difficulty in the present case, for there the children were in existence at the death of the testator.

2. That it is only in the character of heir of entail, as distinguished from the institute, John Maxwell Logan could acquire a title to the estate, is proved by the manner in which he made up his title. As institute he did not require a service to entitle him to take up the procuratory; unless he was heir of entail he has not acquired a title to the estate at all.

Erskine[1] explains, as to making up titles, that substitute heirs cannot take up the succession as heirs of the disponer, but must succeed as heirs of the disponee. In the Seaforth case the party claiming to be institute had completed her title by service as heir, and feeling the importance of the step, afterwards attempted to disregard that service. Although the decision did not depend upon that service, still the mode of completing the title was held properly to weigh with the judges, as is plain from Lord Glenlee's opinion at the advising, on 24th November 1818. The title in John being that of heir, he could not by this process get quit of that title and assert a different character.[2] [The *Lord Chancellor* directed the attention of the appellant to the terms of her own summons, which set forth the legal character of John, as that of institute, both parties indeed so stating the fact, and asking a declaratory

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[1] Ersk. b. iii. tit. 8. s. 31.

[2] (*Effect of Service.*)—Ersk. b. 3. tit. 8. sec. 63. and 73.; 2 Bell's Illustrations, 427; Bell's Princip. 781; Ersk. b. 3. tit. 8. sec. 31.; Blackwood, Kilk v. Sasine, Mor. 14327; Ayton v. Ayton, 7th July 1784, Mor. 9732; Peacock v. Glen, 22d June 1826, F. C., and S. & D.; Colquhoun v. Colquhoun, in the House of Lords, 17th Feb. 1831, 5 W. & S., and in C. of S., 8th July 1831, Fac. Coll., and S & D.; M'Kenzie v. M'Kenzie, 24th Nov. 1818, F. C., Lord Glenlee's Opinion therein.

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finding by the Court how far, as institute, he was fettered by the entail.] The appellant referred to the pleas in law upon the record as raising the points now argued.

Respondents Argument.

Respondents.—In the mutual declarators, both parties, in the subsumption and conclusions of their summonses, set forth that John was the institute, and asked the Court to declare whether the fetters of the entail were effectually imposed on him. The present case is clearly within the rule settled in the Duntreath case, and recognized in the series of decisions[1] commencing with the case of Findrassie in 1752, and ending with that of M'Gregor Murray, affirmed in the House of Lords in 1838.

The term "institute" clearly applies to the party who first takes beneficially. A mere supposition or

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[1] (*Duntreath Class of Cases.*)—(Findrassie Case) Leslie v. Leslies, 24th July and 5th Dec. 1752; Elch., voce Tailzie, No. 49; (Randaston) Erskine v. Hay Balfour, 14th Feb. 1758, Mor. 4406; (Duntreath) Edmonstoune v. Edmonstoune, as reversed by House of Lords, temp. Lord Mansfield, 15th April 1771, Mor. 4409; (Gordonstoune) Gordon v. Lindsay Hay, 8th July 1777, Mor. 15462, and App. 1. Tailzie, No. 2; Kinloch v. Rochied, (Inverleith and Darnchester,) as reversed by House of Lords, 22d March 1790, temp. Lord Thurlow, C. (Lords Journals, vol. 38. p. 569, and cited in Baron Hume's Lect.); Gordon v. M'Culloch, 23d Feb. 1791, Mor. 15465; Sir C. Preston v. Wellwood, 23d Feb. 1791, Mor. 15463; same case, 31st May 1797, F. C. & Mor. 15466 (subject to observation per Lord Brougham, in 1 Sh. & M'L. 46); Marchioness of Tichfield v. Cumming, 22d May 1798, Mor. 15467, affirmed 20th June 1800; Miller v. Cathcart, 12th Feb. 1799, Mor. 15471; (Culdares) Menzies v. Menzies, 25th June 1785, F. C., Mor. 15436, 18th Jan. 1803, and affirmed 20th July 1811 per Lord Eldon; (Baldastard) Steel v. Steel, 12th May 1814, F. C., affirmed 24th June 1817, 5 Dow, 72; Murray v. Elibank, 2d July 1833, F. C., affirmed 19th March 1835, 1 Sh. & M'L. 1; (Herbertshire) Morehead v. Morehead, as reversed, 31st March 1835, 1 Sh. & M'L. 29; Brown v. M'Gregor Murray 11th March 1837, F. C., affirmed 12th Feb. 1838, 3 Sh. & M'L. 84.

fiction, to satisfy a technical rule, cannot alter the character imposed upon the donee by the will of the disponer, particularly as the only object in resorting to such a fiction is to give his intention effect. In the present case, as it was clearly the will of the entailer that the second son of Margaret Mitchell should be the first actual taker under the deed, the fiction or supposition of a fiduciary fee, if brought into operation at all, must be so, not to destroy but to effectuate that intention. But the current of authorities[1] clearly establishes that this technical difficulty, if it ever existed, no longer exists in the law.

Lord Braxfield, J. C., in the case of Gerran v. Alexander, 14th June 1781[2], held, 1. that a fee may be in pendente, and that there was no necessitas juris to uphold a contrary presumption; 2. that the intention of the disponer was the paramount principle to be looked to in fixing the character of the disponee; and, 3, that even if the rule that a fee cannot be in pendente remained in force, the principle was met by supposing a fiduciary fee in the parent till the child was born, the institution of the heir then clearly taking effect. Thus the Court had been prepared to find authoritatively, as was done in the leading case of Newlands, 9th July 1794[3], affirmed on appeal tempore Lord Loughborough, C.[4], that the fee was clearly vested in

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[1] (*Question of Institute or Heir.*)—Ersk. b. 2. tit. 1. sec. 4.; Stew. Ans., voce Fiar; Dirl., voce Fiar, Nos. 9. & 10.; Kam. Sel. Dec. 169; Forbes v. Forbes, 3d Aug. 1756, Mor. 14859; Gerran v. Alexander, 14th June 1781, Mor. 4402; Newlands, 9th July 1794, Mor. 4289, affirmed on appeal; Thomson v. Thomson, 1812, 1 Dow, 417; Harvey v. Donald, 26th May 1815, F. C.; Ersk. b. 2. tit. 9. sec. 41.; Craig, lib. 2., dieg. 22., sec. 21.; Bell's (W.) Digest, voce Special Service.

[2] Mor. 4402. [3] Mor. 4289. [4] Mor. 4291.

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the children; and the same was held by Lord Eldon, C., affirming, in 1812, the case of Thomson v. Thomson[1], decided below, of even date with the case of Newlands, but which had stood over; and, finally, the Court, in Harvey v. Donald, 26th May 1815[2], disposed of the difficulty now raised by the appellant as to the children, the disponees, not being born when the succession opened; it being held that the case of Newlands had settled a general rule, applicable alike whether the children were born at the death of the disponer or not. But esto, that it was necessary to suppose a fiduciary fee in the parent till the birth of the child, and so Lord Corehouse probably thought; still the character of institute impressed on the fiar by the will of the disponer remained unchanged.

Besides, a life-rentrix, as fiduciary fiar, was in no respect in the situation of an absolute fiar, institute, or first taker under the deed. She held the property, not for her own absolute use, but for the use of another. No doubt as life-rentrix she was in many respects interim domina of the subject, and saved from casualty of ward and non-entry, and accordingly in the brieve in a special service, the seventh head of inquiry was,—In whose hands the fee has been since the death of the ancestor? This is no farther answered than to prove life-rents where they have existed, as they exclude non-entry while they last. So that the appellant had overlooked important authorities, and had relied on the case of Lord Dundas, which, from the very short report of it, appeared to have been one of those amicable suits now discouraged by the court, where those acting

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[1] 1 Dow, 417.

[2] Fac. Coll.

for Lord Dundas had thought fit to consult the court upon the accuracy of the title completed in his Lordship's person. The objection started in the name of a substitute heir was, that a general service having been expede by Lord Dundas upon the supposition that the precept had been exhausted by the infeftment of the first Lord Dundas in life-rent merely, that must have been done on the footing of the first lord being a fiduciary fiar; but the court held the title valid,—in other words, considered the general service, by which Lord Dundas took nothing, to be immaterial.

2. As to the effect of John's service as heir; it is well known that a service is not confined to the case of an heir, as distinguished from a disponee or institute. Where a party is about to make up a title it may be equally necessary for him to establish his character of disponee as to establish his character of heir, and equally in the one case as in the other this may be done by service. In the present case, John Maxwell Logan was not named in the deed; it was proper that he should establish his character of second son before making use of the procuratory, and this was aptly done by service. If the procuratory might be used without this ceremony, à fortiori has it been used with it?

Apart from the technical distinction between an institute and an heir, the circumstance that the second son is specified in one provision of the deed, and omitted in the statutory clauses, is, according to the known rule of construction of entails, sufficient to shew that he is not restrained by them.

Besides, the question was as to John's powers under the deed, and therefore the objection of the appellant was not hujus loci, there being no question with a

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purchaser, nor, as in Lord Dundas's case, any opinion asked as to the accuracy of John's title.

John took nothing by his service that was not already vested in him. He could no more by a service alter his character as institute, than an heir could make himself institute by erroneously completing a title under the procuratory and precept, and without a service. A party may make up an imperfect title under a correct notion of his rights, or he may make up a perfect title under an erroneous idea as to his rights, and still his true character, whether as institute or heir, remain unchanged. The fact of a service having been expede was no criterion of the party being heir; although the fact of being an heir is the legal test and criterion of the necessity of a service. And truly the Court had in such cases held that the "form of making up the titles is of no conse-"quence," as in Henderson v. Henderson, 12th Nov. 1796[1]; and in M'Kenzie v. M'Kenzie, 24th Nov. 1818[2], the objection to the Lady Hood M'Kenzie's service as heir while she claimed as institute was so little regarded, that though noticed in the appeal cases it was not urged in the House of Lords, at least it did not enter into Lord Eldon's judgment. But in the pleadings in the Seaforth case reference was made to the Culdares case, in which the same question had been fully discussed, and an objection to the title to sue in respect of the party in possession having completed his title by service as an heir of tailzie, disregarded.

The Culdares case involved the question how far James Menzies was to be considered institute or heir, and the latter character was attempted to be attached to him in

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[1] Mor. 15442.

[2] Fac. Coll.

respect of a service expede as heir of tailzie. The first decision of the Court is reported under date 25th June 1785 [1], (the report, however, being confined to one branch of the argument). The cause, having been appealed, was remitted by the House of Lords on 30th June 1801, and the Court having by a judgment on 18th January 1803 adhered to their former interlocutor, the same was affirmed on appeal, 20th July 1811, (not reported) temp. Lord Eldon, C.

Respondents Argument.

LORD CHANCELLOR.—My Lords, in this case I think your Lordships cannot entertain any doubt of the propriety of the interlocutor which has been pronounced. This was a disposition by a deed of entail to Margaret Mitchell in life-rent, and to her second son, and he now claims the right to sell or dispose of the estate as he may think fit. Now, it is not contended to be doubtful that the institute is not bound by the fetters of this entail, as the fetters only apply to the heirs and not to the institute; and my Lords, it is clear that in this case the respondent John Maxwell Logan was institute. He is designated as such. He is the stock from whom the heirs substitutes are to proceed. It is manifest from the structure of the deed, that in imposing the burdens on Margaret Mitchell and the heirs, the entailer does not impose them upon the institute. For this unquestionably is law, that the clause imposing fetters must be construed strictly, and the Court must find in that clause express terms including the institute, which there are not here.

Ld. Chancellor's Speech.

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[1] Fac. Coll., and Mor. 15436.

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Then my Lords, there are two grounds upon which the case of the appellant is put; first of all it is contended that the fee cannot be in the second son, who was not in existence when the succession opened, but that it must be vested in Margaret Mitchell. Now, under that entail Margaret Mitchell is in terms the life-rentrix; and I do not see that it is material to consider where the fee is vested during the interval, since clearly Margaret Mitchell was only life-rentrix.

Then it is said, that John, the second son, has lost the right he now claims, by his having made up his title to the estate by service as heir of entail. We have no authority quoted for the purpose of shewing that the party is to lose his right, because of the terms of his service, and it would be a most extravagant result of a legal rule if it were so. There may be reasons, if it be at all doubtful whether his character is that of institute or substitute, why he should content himself with one character rather than another. But where is the authority, that having done so, he is to be excluded from contending for the construction of the entail which he now contends for. There are no authorities offered in support of that, and there are many authorities referred to by the respondent shewing the contrary. There is the case of Henderson v. Henderson [1], in particular, quite conclusive as to this.

And, moreover, when you come to look at the proceedings, namely, the summons on behalf of the present appellant, and the summons on behalf of John Maxwell Logan, those do not proceed upon any such ground.

[1] Mor. 15442.

They both asked the declaration of the Court as to the right of the parties upon the construction of the deed of entail. The Lord Ordinary and the Court unanimously came to the conclusion, that John Logan is not heir of entail, and that he is the institute, and not included within the fetters of the entail. It seems to me, there is no doubt raised as the propriety of that view, and therefore I shall move your Lordships to affirm the judgment. Probably the relationship of the parties would induce the respondent not to ask for costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed.

DEANS and DUNLOP—CALDWELL and SON,
Solicitors.