[18th August, 1843.]

JAMES FOGO, Esq. Appellant.

DAVID FOGO, Esq. Respondent.

Tailzie — Titles. — A conveyance of lands was made to A, and the heirs of his body, whom failing, to B, and the heirs of her body, but was never delivered by the granter. A died in the lifetime of the granter, without heirs; B, on the death of the granter, expede a service as heir of provision to A, and executed an entail of the lands, — *held*, that on the death of the granter, the right to the lands vested in B, and that, whether she were to be viewed as conditional institute, or substitute, under the original conveyance, such personal right entitled her to execute the entail.

Ibid. — *Held*, that a party, taking as conditional institute, does not, on failure of the *nominatim* institute, require to have his right declared by decree in order to make his title effective.

Ibid. — Whether a party disponed to *nominatim*, on failure of a prior *nominatim* disponee, becomes, on the failure of the prior disponee in the life of the granter, conditional institute, or remains a substitute, as at first intended, *query*.

ON the 25th September, 1769, Elizabeth Fogo disponed her lands of Row to and in favour of "James Russell, her cousin-"german, and the heirs whomsoever of the body of the said "James Russell; whom failing, to Agnes Russell, and the heirs "whomsoever of her body; whom failing, to Isobel Russell, and "the heirs whomsoever of her body; whom failing, to Catherine "Russell, and the heirs whomsoever of her body; whom failing, "to James Fogo and the heirs whomsoever of his body; whom "all failing, to the said James Fogo, his nearest and lawful "heirs and assignees whomsoever."

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This disposition reserved the granter's liferent in the lands, with power to revoke and to sell the lands, or burden them with debt, and contained an obligation to infeft, procuratory of resignation, and precept of sasine in common form, and a declaration in these terms: — "In case these presents shall not be "revoked or altered by a writ under my own hand, or the said "lands and estate otherwise disponed of, and settled by a deed "contrary hereto, granted by me, then, albeit these presents be "found lying by me, or in the custody of another person at my "death, yet the same shall be as sufficient and valid to all "intents and purposes, as if a delivered evident at the date "hereof, notwithstanding of any law or practice to the "contrary."

Elizabeth Fogo, the granter of this disposition, died in 1777, without having ever revoked or altered it, or having ever delivered it to any of the parties in whose favour it was made.

James and Agnes Russell, the two parties first disponed to, both died in the lifetime of Elizabeth Fogo, without leaving any heirs of their bodies, and on the death of Elizabeth Fogo, Isobel Russell, the next party conveyed to, entered into possession of the lands, but without making up any title in herself until the year 1805.

In that year, Isobel Russell expede a service as heiress of provision to James Russell, and then expede a charter of resignation upon the procuratory in Elizabeth Fogo's disposition, upon which she was infeft in September, 1805, and she continued to possess the lands upon this title until her death, which took place in 1825.

Isobel left at her death a disposition and deed of entail, which had been executed by her in the year 1811, whereby she conveyed the lands to herself in liferent, and her sister Catherine Russell in fee; whom failing, the heirs of her body; whom failing, to George Craig, and the heirs of his body; whom failing, to

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David Mathie, (who afterwards assumed the name of Fogo, and was the respondent in the appeal,) and the heirs of his body, and a series of substitutes.

Upon the death of Isobel Russell, her sister Catherine took infeftment upon Isobel's deed of 1811, and entered into possession of the lands. Catherine died without heirs of her body, and George Craig thereupon expede a service as heir of tailzie and provision to Catherine Russell in January, 1827, and procured a crown charter of resignation, on which he was infeft, and he otherwise granted several deeds in his own favour for completing his title.

George Craig also died without heirs of his body, and then the respondent, David Fogo, expede a service as next substitute under the entail of 1811, and obtained a precept from chancery, on which he was infeft in June, 1830.

In 1838, James Fogo, as eldest surviving son of James Fogo, called to the succession by the deed of 1769, after failure of Catherine Russell and the heirs of her body, and heir served and retoured to his father, brought an action against David Fogo, and the other substitutes called by the entail of 1811, in which he sought to have that entail, and all the titles made up under it, reduced and set aside, upon the ground that the service expede by Isobel Russell, as heiress of provision to her brother, James Russell, was inept, inasmuch as no right had ever vested in James Russell, so as to be transmissible, and therefore the entail was *ultra vires* of Isobel; and also to have it declared, that upon the death of Catherine Russell and of the pursuer's father, the right of succession opened to the pursuer, and that he was entitled to make up titles to the lands, with consequential conclusions for delivery of possession to him by the defender, David Fogo.

The respondent alone appeared to this action as defender, and pleaded in defence, that the immediate predecessor of Elizabeth

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Fogo had died, either leaving, or as supposed to have left, considerable debts, and in particular, a debt of L.400 heritably secured over the lands of Row. That James Russell had undertaken to relieve Elizabeth Fogo of all these debts, and of the expense of certain inclosures, and that in consequence, she had agreed to discharge the power of revocation reserved in her deed of 1769, so as to vest the lands in James Russell absolutely.

This arrangement, the defender pleaded, had been carried into effect by a deed executed by Elizabeth Fogo in 1771, whereby she disponed the lands of Row "heritably and irre-" deemably" to James Russell, and the same series of heirs as in the deed of 1769, and bound herself to execute "all deeds " necessary," in favour of James Russell, "for divesting her of, " and infefting him" in, the lands, and whereby Russell, on the other part, bound himself to relieve her of the debts and expense above mentioned.

Upon these facts, the pursuer (appellant) pleaded,

" I. The disposition of September 1769, being an undelivered " and *mortis causa* deed, and James Russell, the apparent " institute, having predeceased the granter, without issue, it was " incompetent and inept for his sister, Isobel Russell, after the " death of Elizabeth or Betty Fogo in 1777, to expede a service " as heir of provision to the said James Russell.

" II. The whole subsequent title depends on the validity and " efficiency of this service to transfer the right to the lands " under the said disposition, to Isobel Russell; and the title by " which Isobel Russell attempted to connect herself with the " lands, and with the disposition of 1769, being inept, the whole " of the writings sought to be reduced in the summons must be " set aside, as flowing *a non habente potestatem.*

" III. No other original title to the lands than the disposition " of 1769 being at present in question, any plea founded by the " defender on the pretended contract of 1771, or on any deed

" or right which might have been completed under it, must be " disregarded; and besides, the said pretended contract is cut " off by the negative prescription.

" IV. Isobel Russell never having completed any feudal title " to the lands of Row, the deed of entail executed by her, " and all that has followed under it, must be reduced and set " aside."

The defender, (respondent,) on the other hand, pleaded.

" I. The general service, as heir of line to his father, libelled " by the pursuer, affords no title to pursue the present action, " and no other sufficient title is either libelled or shewn by him. " The only title under which the pursuer could insist in an " action for enforcing the deed of 1769, as a deed operating in " his own favour, would be a service as heir of provision under " that deed.

" II. The challenge now brought of the feudal title which " was made up by Isobel Russell is entirely groundless, inas- " much as the deed of 1769 must be held to have been a " *delivered* deed in James Russell's favour, and a proper personal " right to have been vested thereby in James Russell, which was " rightly taken up by service as heir of provision to James " Russell, and the title following on that service is a valid title.

" III. At any rate, on the assumption that no right was " vested in James Russell, Isobel Russell was in that case con- " ditional institute in the deed, and was entitled, as such, to " execute the procuratory of resignation in the deed, on evidence " of the persons previously called having failed. This fact she " duly and competently instructed by her service as heir of pro- " vision to James Russell, and the charter of resignation granted " in her favour on this evidence, and the feudal investigation " followed on it, are valid and unchallengeable.

" IV. In any event, the pursuer could not take up the lands, " except by service to Isobel Russell; who, on the principles on

" which his own case proceeds, was conditional institute under " the deed of 1769, and he could not so serve without becoming " bound to fulfil to the defender the very deed of entail of Isobel " Russell which he now brings under challenge. This of itself " forms a sufficient plea to exclude the present action.

" V. The feudal title in Isobel Russell's person being un- " challengeable at the pursuer's instance, the deed of entail " executed by her, and the titles following on that entail, are " incapable of being impeached by the pursuer; and the whole " of the present reduction falls to the ground."

The Lord Ordinary ordered cases, and upon advising these pleadings, pronounced the following interlocutor upon the 1st November, 1839, adding a note of great length, which will be found 2 *D. B.* and *M.* 651.

" Finds, that Mrs Elizabeth Fogo, the common predecessor " of the parties, executed the deed of settlement libelled on in " 1769, whereby she disponed and conveyed the lands of Row " and others, to and in favour of James Russell, and the heirs " whatsoever of his body; whom failing, to Agnes Russell, and " the heirs of her body; whom failing, to Isobel Russell, (the " maker of the tailzie under reduction,) and the heirs of her " body; whom failing, to the other heirs and substitutes set " forth in the said deed: Finds, that by this deed, the granter " not only reserved her own liferent, but ample powers to " burden, contract debt, and alienate the estate, as well as to " alter and innovate the premises in whole or in part: Finds no " proof adduced or offered in this process to shew, either that " the said deed was *delivered* prior to the granter's death, or " that any of the parties called to the succession acquired any " onerous and irrevocable right in the lands under the said " settlement, during Mrs Elizabeth Fogo's life: Finds it " admitted on record, that on Elizabeth Fogo's death in 1777, " the said Isobel Russell entered into actual possession of the

" said lands, which she retained for thirty-eight years or thereby ;
" while it is farther established, by express findings in the retour
" of her general service in 1805, the extract of which is pro-
" duced, that both the said James Russell and Agnes Russell,
" the two persons instituted by the said Elizabeth Fogo in the
" said destination, died without heirs of their body: Finds it
" thus legitimately proved, that the said Isobel Russell was
" entitled to claim and possess the lands conveyed by the said
" Elizabeth Fogo under the said disposition, as conditional
" institute therein; and that although the said service was
" unnecessary, and insufficient to carry any right to Isobel, yet
" that it affords collateral evidence, sustained in sundry cases of
" high authority in the law and practice of Scotland, as compe-
" tent to shew the failure of the disponees first instituted, and of
" Isobel's right to the character of conditional institute under
" Elizabeth Fogo's settlement: Finds, that the destination in the
" said settlement of Elizabeth Fogo, not being fenced with any
" prohibitory, irritant, and resolutive clauses, against alienations,
" or altering the order of succession, the said Isobel Russell was
" entitled, after entering into possession, to dispone the lands,
" or assign her right thereto, under such conditions as she
" thought proper: Finds, that as the defender is in possession
" under a tailzie executed by the said Isobel Russell, long after
" she had been in possession as aforesaid, in favour of the defen-
" der and other substitutes, neither his personal right nor
" his feudal title to the said lands can now be impugned by
" any postponed substitute-heir under Elizabeth Fogo's
" settlement; therefore sustains the third, fourth, and fifth
" pleas urged for the defender: Finds, that the pursuer has no
" title to disturb the titles made up by the said Isobel Russell,
" and on that ground, assoilzies the defender from the whole
" conclusions of this action, and decerns: Finds the defender

" entitled to expenses, and remits the account thereof, when " lodged, to the auditor to tax and report."

The pursuer (appellant) reclaimed against this interlocutor, and the Court, (First Division,) on the 25th February, 1840, pronounced the following interlocutor: — " The Lords, having " advised the reclaiming notes, and heard counsel for the " parties, recall the several findings of the Lord Ordinary's " interlocutor reclaimed against, and find, that the personal " right under the deed of settlement, executed by Mrs Elizabeth " Fogo in 1769, vested in Isobel Russel, the entailer, as dis- " ponee and institute under that deed, in consequence of James " Russell and Agnes Russell having predeceased the said " Elizabeth Fogo: Farther, Find, that in virtue of the personal " right so vested in her, the said Isobel Russell had full power " and capacity to execute the deed of entail now under reduc- " tion: Therefore adhere to the interlocutor reclaimed against, " in so far as it assoilzies the defender, and finds expenses due " to him; assoilzie the defender accordingly from the whole " conclusions of the action, and decern: of new, find the " defender entitled to the expense incurred previous to the date " of the Lord Ordinary's interlocutor; but find no farther " expenses due, and remit the account of the said expenses to " the auditor to tax the same and report."

An appeal was taken against these interlocutors, which was heard at great length in June, 1841, when the cause was remitted to the Court of Session, in the terms which will be found in 2 *Rob.* 445.

In consequence of this remit, very elaborate opinions were delivered by the Court below, which are of too great length to be repeated here, but will be found in 4 *B. M.* and *D.* 1063.

In these opinions, the Judges *unanimously* held, that no right remained in Elizabeth Fogo; but great difference of opinion was

shewn in regard to the particular character in which Isobel Russell took under the deed of 1769. *Six* of the Judges were of opinion that she took as conditional institute, and that as such, the personal right passed from Elizabeth Fogo to her. *Four*, that she took as a substitute, the personal right having passed to James Russell. *One*, that she might, at her option, take either as institute or substitute; and the remaining Judge, (*Lord Jeffrey*, being absent from indisposition,) that she might take either as substitute or as conditional institute, to be determined, *ex eventu*, by James Russell's (the institute's) survivance or predecease of Elizabeth Fogo. But all the Judges concurred in holding, that in whatever character Isobel Russell took, she had a good completed feudal title; those of them who held she was a conditional institute, considering that she was entitled, *de plano*, to use the procuratory and precept, and to take infeftment under the deed of 1769; or that, if she were to be viewed as a substitute, (in which all the other Judges concurred,) then the service expede to James carried the personal right which was in him; and they all likewise concurred in holding, that in no view could declarator have been necessary, as it could neither give nor carry any right, and was useful only as an authoritative means of evidence of the failure of prior parties.

Mr Solicitor-General and Mr Kindersley, for appellant. — The remit by this House has not produced the result that was desired; but, on the contrary, has brought out greater difference of opinion; and being upon a question involving the ordinary principles of conveyancing, it is impossible that the judgment can stand without causing the greatest doubt and uncertainty in the profession; for, though the Judges all concur in holding that the action is not maintainable, there is no one principle upon which they arrive at the conclusion in which they are all agreed. We maintain two points, — 1st, That the service by Isobel

Russell to James Russell was altogether inept; and 2d, That Isobel, under her personal right, had no power to execute the deed of entail of 1811.

By the terms of the destination in the deed 1769, James Russell was institute, and had he survived Elizabeth Fogo, the granter, he would have taken in that character; and in such case, service to him by Isobel would have been a *habile* mode of making up her title; but, inasmuch as James Russell predeceased Elizabeth Fogo, and the deed of 1769 was a *mortis causa* deed, which had never been delivered, and, for aught that appears, may never have been even known to James Russell, the right in the land remained in Elizabeth Fogo until her death, and upon that event, became part of her *hæreditas jacens*; for if no right vested in James Russell in her lifetime, still less could it do so upon her death, at which time he had long predeceased. The feudal fee was in Elizabeth Fogo, by virtue of her infeftment; and the personal right was also in her, as it had never been parted with. Elizabeth Fogo, then, being the person last vested in the right, Isobel Russell's service should have been to her, and not to James Russel; and having been to James, carried no right. That was found in Gordon *v.* Gordon, *Mor.* 14368.

[*Lord Brougham.* — In that case there was no institute ever *in esse*; no heirs of the body ever came into existence.]

That case went upon this, that the title remained in the granter, as we maintain it did in this; there is no difference between the two cases.

In Peacock *v.* Glen, 4 *S.* and *D.* 742, Beattie, no doubt, had a good personal title; but the question was, whether he had power to grant an heritable bond, not having served heir to his uncle, who had reserved the fee to himself? That case is a distinct authority that a party having a mere personal right had no authority to affect the land.

[*Lord Cottenham.* — As I understand, the Judges say, if the

party be institute, his personal right may do; but none of them say that such a right in a substitute would do. James Beattie was treated as a substitute.]

No doubt; and it is difficult to find any distinction between the destination in that case and in this. To be sure, no children of the body ever were in existence, while here the first disponee was once in existence, though he died before the granter; but this is a difference without a distinction, if what Lord Moncrieff says be attended to. See 9 *S.* and *D.* 916.

In Colquhoun *v.* Colquhoun, 8 *F. C.* 599, Robert Colquhoun was the heir of the second *nominatim* disponee; and, whatever authority that case may afford in other respects, the opinion of the majority of the consulted Judges is distinct, that as James, the first disponee, died in the life of the disponer, and no delivery of the deed had occurred in the life of James, service to him carried nothing.

In Colquhoun *v.* Colquhoun, the grounds of the decision in Gordon *v.* Gordon were misapprehended; but that misapprehension was removed in Anderson *v.* Anderson, 10 *S.* 701, where it was shewn that the decision went upon the assumption that the fee remained in the granter of the deed; and Peacock *v.* Glen was decided upon this understanding of the case.

In Denniston *v.* Crichton, 5th February, 1824, the authority of Gordon's case was disregarded; but there the granter of the deed had not reserved any powers as a proprietor in fee-simple, so that he plainly was denuded.

Though in Gordon's case the conveyance was to the heirs-male of the body of the granter; and in Peacock's, to the heirs of the body of the granter, that cannot make any substantial difference between these cases and the present; for the heir in either of these cases would not the less be an institute, that he was not expressly named; and yet, inasmuch as they failed, as James Russell did in this case, it was held, that the first taker under the

deed should have made up his title by service to the granter. If the heirs, then, in these cases would have been institutes had they ever come into existence, though not called *nominatim*, and those called after them were obliged to pass them by, because they never came into existence; the case must be the same where the party first called, though he once existed, has ceased to do so when the destination opens to him. In either case there was no one to take as first disponee, and the opinion of the majority of the judges is distinct, that the parties thus failing take nothing under the deed which can be, or requires to be, taken out of them by service.

If Isobel Russell is to be viewed as institute, because the party named institute by the deed had ceased to exist, would she have been bound by fetters of entail directed against substitutes, but not against the party institute, *ex facie* of the deed?

[*Lord Campbell.* — Who is to be bound by the fetters, must arise, *ex facie* of the deed, not *ex eventu*.

Lord Cottenham. — If James had survived the granter, Isobel would have been bound by the fetters; but if he died, living the granter, the fetters would have been discharged.]

Exactly; and so in this view the question becomes most serious. If Isobel, and all before her, had died, living the granter, and she had left a son, could he, by possibility, have been institute; and yet, on the principle of the decision, he must be; and he, and every one entitled to take on failure of the institute, *ex facie* of the deed, as the first disponee in existence, would be entitled to evacuate the fetters, though directed against them *nominatim* perhaps.

But even if Isobel were held to be a conditional institute, upon the authority of the opinion given by the majority of the Judges in Colquhoun *v.* Colquhoun, she should have brought a declarator to establish her right as such. She was not entitled, *de plano*, to use the procuratory or precept, in which James

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Russell was the only party named. She ought to have cleared her title by shewing the failure of the parties previously called, upon the condition of which failure her right depended. This effect, it is said, was accomplished by her service to James; but a service is a proceeding entirely *ex parte*, and never can be used for the discovery of a fact. If entitled as a substitute, the party's right is in a sense vested, that no one can interfere with it, and yet he can neither take infeftment nor dispone without expeding a service; so, also, if he is entitled as conditional institute, must he clear his title by declarator before he can exercise the right which the deed gives him.

On the whole, if Isobel Russell be viewed as a substitute, service was necessary to complete her right; and that service, according to the authority in the cases of Gordon and Peacock, should have been to Elizabeth Fogo; but having been to James Russell, her personal title was bad, and could not be the basis of a good feudal title, and so the entail of 1811 is inept. If, on the other hand, Isobel Russell be viewed as conditional institute, declarator was necessary to complete her personal right; and here, again, her feudal title was defective, and the entail inept.

Mr Pemberton and Mr Anderson, for the respondent, were heard at great length.

Lord Cottenham. — When this case was last before the House, it did not appear so clearly as it does now, that the title of the defendant was good as against the claim of the pursuer, in any way of viewing it, and whatever might be the right conclusion upon the question of the feudal title, as to which great difference of opinion has been entertained by the Judges of the Court of Session. It was supposed that the case of Peacock threw some difficulty in the way of the defender's title, so far as it depended upon the personal right of Isobel Russell; and if

that supposition had proved to be correct, it might have become necessary to come to some decision as to the controverted question, whether Isabel was to be considered as a conditional institute, or a substitute; and, as depending upon that, whether her service to James was effectual.

In order, therefore, to secure the means of coming to a conclusion, upon the return of the remit, the House was desirous of procuring the opinions of the learned Judges upon the feudal title of Isobell Russell, as well as upon her personal right.

I cannot but regret, that this requisition in the remit should have occasioned much additional, and, as it now appears, unnecessary trouble to the learned Judges, although it has been the means of eliciting much valuable learning, and many important observations, upon a point of much doubt, which cannot but be highly useful when it shall be necessary to pronounce a decision upon that subject. It is not necessary to do so for the purpose of deciding this case, and it would therefore be, in my opinion, very inexpedient to express any decided opinion upon it. If, indeed, any opinion so expressed could have the effect of a judgment of this House, and so become binding for the future, it might be very convenient to establish a rule to regulate the conduct of the profession in all cases which may hereafter arise; but it might be of dangerous consequence to existing cases, and might possibly affect titles which have hitherto been thought secure: but no opinion so expressed would have the effect of a judgment of this House, or would be of more weight than might be thought due to the opinion of the individual Peer who might express it; but it might, and probably would, raise doubts, without the power to solve them, and encourage litigation in existing cases, without establishing any rule for those which may hereafter arise. I shall therefore confine the few observations I propose making, to explaining the grounds upon which it appears to me that judgment must be given in favour of the defender, whether

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Isobel Russell ought to be considered as a conditional institute, or as a substitute.

It seems to be quite certain, that the fee did not remain in Elizabeth Fogo, but that, upon her death, the right vested in Isobel Russell, by the predecease of those who stood before her in the succession; and that the only question is, whether she took as substitute, James Russell, who died before her, being the institute; or whether, she being the party to take upon the death of Elizabeth, is to be considered as conditional institute. But all the Judges concur in this, that whatever may be the more correct character of her title, the personal right in her was complete and sufficient to enable her to dispose of the estate as she did; and under which the defender claims, and thereby effectually to deprive the pursuer of all right. If James was properly the institute, and Isobel a substitute, then Isobel's personal right was, upon the death of Elizabeth Fogo, complete, and was properly feudalized by her service to James; or, at all events, her personal right was sufficient to enable her to give to the defender an effective title, as against the pursuer. If, on the other hand, Isobel was properly a conditional institute, then also her personal title was equally valid and effectual against the claim of the pursuer. There does not seem to be sufficient of authority, or any thing of principle, to justify the idea, that she ought to have obtained a declarator of her right; or any ground for contending, that if such a proceeding was proper, the omission of it, or the delay in applying for it, could entitle the pursuer to the relief he prays. The title to the declarator must be founded upon a right to the estate.

Finding, therefore, that upon either of the two supposable positions of Isobel's title she was by law enabled to confer upon the defender a good title as against the pursuer, the interlocutor appealed from, so far as it assoilzies the defender, must be affirmed; but for the reasons before given, it appears to me to

be unnecessary to express opinions which are not required for the adjudication of the rights of the parties. I therefore think, that so much of the interlocutor of the Lord Ordinary, as states the judgment to be founded upon the feudal title of Isobel, was properly recalled.

It seems to have been thought by some of the consulted Judges, that the Inner House intended to act upon this principle, and to have therefore recalled the findings in law of the Lord Ordinary, and did not propose to express any opinion of their own upon the position of Isobel's title. If such was their intention, this interlocutor does not, I think, carry it out, and being of opinion, that such would have been the right course to have pursued, and to avoid all doubt upon that head, I suggest to your Lordships to vary the interlocutor of the Inner House by cancelling the findings in point of law, and substituting these words: — " It appearing, that in whatever character Isobel " Russell became entitled to the estate in question, she had full " power to dispose of the same, as she did dispose thereof, and that " the title of the defenders deduced therefrom is a good and valid " title as against the claims of the pursuer," and to affirm the rest.

This alteration in the interlocutor would not protect the appellant against the costs of the appeal, if the other circumstances of the case were such as to make this a proper case for making the appellant pay costs; but, without in the least wishing to shake the wholesome rule, that an appellant who fails should generally be ordered to pay costs, I think that this case ought to be one of the few exceptions to the rule; for although there is a very general concurrence of opinion against the claim of the pursuer, there has been an evident difference as to the grounds upon which the conclusion has been founded.

I move your Lordships, therefore, that the interlocutor appealed from should be affirmed with the alteration I have suggested, and that there should not be any costs given of the appeal.

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Lord Campbell. — My Lords, after what has been suggested by my noble and learned friend, I will confine myself to a simple assent to the decree that he proposes. I confess, my Lords, that after a very attentive consideration of this case, I had formed an opinion which I was prepared to express, but from my sincere deference to what has fallen from my noble and learned friend, I abstain from doing so. I thought that we might possibly have laid down a rule that might be useful, and that, to prevent all possibility of its being called an *obiter dictum*, we might have inserted it in the judgment; but my noble and learned friend having a different opinion, I again say, with the utmost unaffected deference to his better opinion, I abstain from doing so. I will only add, that I entirely agree in the alteration which my noble and learned friend has proposed in the interlocutor.

Lord Brougham. — My Lords, I fully agree in what my noble and learned friend who has last addressed your Lordships has said. I agree with him, also, in adopting the course suggested by my other noble and learned friend, because I think it is a perfectly safe course. If we had gone beyond that, we should have done, in my opinion, an exceedingly good service to the Scotch law of real property, and to Scotch conveyancing. After studying this case with the greatest attention last session, I was prepared to give my opinion upon it, and had prepared a judgment taking this ground, and going farther than the case absolutely requires us to do, which, generally speaking, I freely admit, is not a good or wholesome course to take, and is in general much to be avoided. Nevertheless, I am aware of this, that it is a course expected from us by the Court below: they wish that we should take it into our own hands, there being a very great difference of opinion,—though not upon the point itself upon which the cause now under appeal turns, — but a very great difference of opinion on the grounds upon which they came to that decision, which have been severally adverted to by my noble and

learned friend, — a very great difference of opinion, consequently, upon some of the most important, most radical, most fundamental doctrines of the law of real property, upon which, not only the decisions of Courts, but the practice of conveyancers, must be regulated, and must depend; and I confess, that knowing that that is the most systematic and the most elaborate part of the Scotch law system of jurisprudence, upon which there is the most of learning, and the most of principle and of system, I have been moved with the greatest astonishment at finding some of the points which arose still to be so entirely *in dubio*, that one cannot well conceive how a system of conveyancying can exist, usefully and safely for titles, with so much doubt and discrepancy as appears to exist. We have, however, taken the safer course, which I do not at all object to. I defer to the opinion of the noble and learned Lord who moved the judgment. It is quite sufficient if one of the three Lords, who heard this case, is against going farther. If my noble and learned friend who has just spoken, had formed that opinion, and my noble and learned friend near me and myself had been for going farther, as we were rather expected and wished to do, I still should have said, that that was a sufficient ground for adopting the safer course which we are now taking, by going only to the extent we are now doing.

Whether or not it may be fit to have some declaratory act passed, or some measure taken, upon the subject, for clearing up these doubts, and settling the principle of conveyancing, is another question, and a question upon which I give no opinion, nor have I formed any; but I am quite sure we shall not do so, unless we hear that it is required by the profession, and by the Scotch Courts. Till then we must wait. All we do now, is to affirm the interlocutor, with the alteration suggested; and in that alteration I entirely agree.

With regard to the costs, while I fully concur in the general

rule, that the party failing being the appellant, should pay the costs, yet this, I think, is a case where there should be a deviation from the general rule.

Lord Campbell. — In the meantime, they must continue to make up their titles in three different ways.

Lord Brougham. — No doubt. And that is the mischief of it, and without knowing exactly in which way.

Mr Anderson. — I think this judgment will exclude one way.

Lord Brougham. — I can shew you another. It must be observed, that the opinion I had formed would not have gone to shake any thing that was established, but to shew that I do not comprehend how those principles had been established. If this had been *res integra*, it could not have been sanctioned; but that is not for discussion now.

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