1758. *June* 30. JAMES HAY, of Linplum, *against* LORD CHARLES HAY.

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Service, whether necessary in the situation of this case? Service as heir of provision in general.

SIR JAMES HAY of Linplum, in the year 1685, disponed his estate of Bara, in his son John Hay's contract of marriage, " to the said John Hay, and the heirs-male of the marriage; whom failing, to the heirs-male of any other marriage; whom failing, to Sir James Hay himself, and the heirs-male of his body; whom failing, to the heirs whatsoever to be procreated of the said John Hay's body," &c.

The said John Hay having died in the year 1686, leaving issue of the marriage one daughter Margaret Hay, Sir James re-entered to the possession of the estate, in which no infeftment had been taken, either upon the procuratory of resignation or precept of sasine, in the contract of marriage. Sir James made up no proper title as substitute to his son in the contract; but in the year 1699, he, with the concurrence of his son Robert Hay, executed a settlement of these lands, as well as of his other estate, in favour of himself in liferent, " and his son Robert, and the heirs-male of his body, in fee; whom failing, to the Marquis of Tweeddale," &c. After Sir James's death, in the year 1704, his son Sir Robert entered into possession of the lands of Bara, and continued in it during his life, in virtue of his apparency, without making up any titles. In 1748, having no issue, he executed a settlement to himself and his sister Margaret, in liferent, and to the second son of John Marquis of Tweeddale, and the heirs-male of his body, in fee; whom failing, to the other younger sons of the Marquis successively, and the heirs-male of their respective bodies; whom failing, to Lord Charles Hay, immediate younger brother of the Marquis, and the heirs-male of his body," &c.

The said Margaret Hay, the only daughter of John Hay, who was married to Lord William Hay, upon the death of Sir Robert, in 1751, obtained herself served and retoured heir of provission to her father in terms of the contract 1685, on the supposition that she, as heir whatsoever of the body of the said John Hay, was thereby entitled to the succession of the lands of Bara, to which neither her grandfather Sir James, nor her uncle Sir Robert, had made up any titles; and who, consequently, had no power, by their after settlements, to alter the destination made in her favour by the contract 1685: And having thus established a title to the unexecuted procuratory and precept contained in the contract of marriage, she expede an infeftment, and brought a process of mails and duties against the tenants of the lands; and thereafter conveyed her right to her son James Hay, the pursuer.

In this process compearance was made for Lord Charles Hay, who claimed under the settlement made by Sir Robert in the year 1748, which, as well as the settlement made by Sir James in the year 1699, he endeavoured to support. And

Pleaded, 1*mo*, That Sir James Hay, by surviving his son John, had sufficient right to the lands, as nearest substitute by the contract 1685, without the necessity of a service: That although the contract of marriage 1685, vested a personal right to the lands in favour of John Hay, and the heirs thereby called; yet as this right was never completed by infeftment in his person, the consequence was, that

No. 12. Sir James his father remained vested in the feudal right of the whole estate, subject indeed to the personal right in favour of John Hay and his heirs of provision; but as that personal right devolved upon Sir James himself, as heir of provision upon the failure of John and his issue-male, it was thereby absorbed in the real and feudal right, which had remained in Sir James; whereby he became both creditor and debtor in the personal obligation to provide the lands to the heirs called by the contract of marriage; and the procuratory and precept he had granted for carrying that obligation into execution returned upon himself, and could be of no use, because he was before duly vested and seised in the lands; so that the personal right which was in John Hay by the contract was extinguished in the person of Sir James, *confusione;* and the real right being freed of that burden, became a full and absolute right of fee in Sir James; and there was no necessity for him to take up that personal right by a general service, and pass a second infeftment thereon; because this could never have established his right more fully than the infeftment and feudal investiture which was before in his person; and therefore any disposition granted by him, whether gratuitous or onerous, must stand good, because he was unlimited liar in possession and enjoyment of the estate. And so this point was expressly determined in the case of Johnston of Elsishiels, in 1736, (see APPENDIX); which judgment was affirmed in the House of Peers. The general and fixed principle upon which that case was judged, must also be decisive of the present question, viz. That where a person has it in his power to make up two or more titles to the same estate, he may establish the right in his own person by any of those titles he pleases; and no succeeding heir can quarrel his predecessor's having made up his title in that manner, or pretend to take up the separate right or title to the estate which he had neglected. Now, although Sir James Hay could have made up his title to the personal right, which had been given to his son, by a general service, yet as he did not choose that method, it cannot now be challenged, because it was a privilege competent to him by law, either to complete his title upon the personal right, or to rest upon his real right of fee, freed and disincumbered of the personal right, which had returned to him. And the decisions in the cases of the Earl of Kincardine, and more lately of the creditors of Easterfearn in the year 1751, were governed by the same rules. See APPENDIX.

Answered for the pursuer, There is nothing better established in the law of this country, than the method of transmitting rights from the dead to the living. The rules of transmission apply, not only to real rights that are completed in a feudal manner, by infeftment in the person of a defunct, but also to personal rights to lands which were not completed at the time of his decease. A general service is as necessary to establish a title to the one, as a special service is to the other. It would be equally dangerous to infringe this fixed rule, or to admit the contrary maxim. *Mortuus sasit vivum*, in the one case as in the other. These are fundamental principles of the law of Scotland, That no estate can transmit *ipso jure*, from the dead to the living; and, That there must be a service either spe-

cial or general, or what is equivalent, *secundum subjectam materiam*, to transfer that right which was in the defunct to the person of the heir. An apparent heir has no right to the personal or real rights that were in his predecessor before he serves, more than if they belonged to a stranger. As a conveyance is necessary to transmit them from the one, a service is equally necessary to transmit them from the other. It was upon this solid ground that the decision proceeded in the noted case of the Earl of Dundonald, No. 3. p. 1262. *voce* BASE INFEFTMENT; and the principles established by that solemn judgment apply directly to the present case, where the lands in question were, by the contract 1685, conveyed to John Hay the son; and, failing him, to a certain series of heirs; on whom therefore it was incumbent, as on all other heirs, to make up a title by service. Sir James Hay was evidently denuded of the property or fee of these lands by the contract of marriage in favour of his son, which could never possibly revest in his person *ipso facto* without a service, which was necessary, in order to cognosce the failure of the nearer heirs, and to connect the right of the surviving heir by evidence on record, or without some formal act of the law to take that estate out of the *hereditas jacens* of his son. It is impossible in law, that an heir apparent, by any title he can make up to lands, can repudiate, extinguish, or consolidate an infeftment in the person of his predecessor, until he establishes a right to it by service. And upon the same principles, it is equally impossible, that he can repudiate or extinguish *confusione* a personal right granted to his predecessor, without making up a title to it. The same defect applies in both cases, that the right was not taken up by the apparent heir, and cannot be extinguished or defeated by any deed of a party who never had it in his person. As therefore the right to these lands, which was given to John, was never afterwards taken up by Sir James, it is plain he had no power to make a second disposition thereof, to the prejudice of the pursuer's mother, who has now established the only proper and complete title to these lands by her service and infeftment. No. 12.

The decision in the case of Elsishiels, founded on by the defender, does not apply, and is different from the present case in many particulars. Nor was it any way intended, by the judgment given in that case, to reverse the principles established in that of Dundonald; as is clear from an after judgment of the Court, pronounced in a question between the same parties, 29th July, 1743. And in other cases, the same principles have uniformly taken place; January 18, 1742, Menzies of Coulterallers, and February 23, 1757, Porteous of Carmacoup *contra* Bell of Crurie. See APPENDIX.

"The Lords found, That a general service of Sir James Hay, as heir to his son John, was necessary for properly vesting the right of the lands of Bara in Sir James, and to empower Sir James to convey these lands to his son Sir Robert, by the settlement 1699."

In the next place, it was pleaded for the defender, That supposing it should be held to have been necessary for Sir James Hay to have served heir of provi-

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sion in general to his son John, in order to vest in him a proper title to the personal right of the contract of marriage, he had accordingly complied with that form, and had obtained himself served and retoured heir of tailzie and provision to his son John; as appears from the retour of his service before the bailies of the Canongate, dated 10th February, 1694, produced in process. The words of the retour are "Qui jurati dicunt, quod quondam Joannes Hay de Linplum, Militis Baronetti, latoris præsentium, obiit ad fidem et pacem S. D. N. Regis; et quod dictus Dominus Jacobus Hay est legitimus et propinquior heres talliæ et provisionis ejusdem quondam Joannis Hay, sui filii; et quod est legitimæ ætatis. In cujus rei testimonium," &c.

Objected by the pursuer to this service, That the retour had no relation to the contract of marriage 1685, nor to any of the subjects therein contained; and therefore could not be a title to the destination in that contract, nor be any evidence, that the jury had cognosced the failure of the intermediate heirs, who were called to the succession in virtue thereof: And that, in respect of uncertainty, it could not import a cognition of Sir James Hay's being heir of provision to his son in this particular estate, or by virtue of this particular deed of settlement.

And in support of this objection, it was pleaded, That a service of one as heir of tailzie and provision in general, was absurd and anomalous. The law knows of no such general character of heirs; nor did ever any man make a destination to heirs of provision in general. The general heirs of line, of conquest, and heirs-male, point out clearly, by their services, what rights they intend to take, viz. all rights destined to these respective characters of heirs, of each of which there can be but one; but a general heir of provision, a character unknown in the law, is so uncertain, that it is impossible to determine what rights are taken, or intended to be taken, by such a service. An heir of provision can exist only by his connection with the particular subject which is provided to him; and his service ought to be a complete deed in itself, so as precisely to determine the particular succession intended to be taken by it, and to certify, that the party served was called to the succession by a special deed, and that all the preceding heirs were extinct. In the present case, neither the subject to which, nor the deed by which Sir James was to succeed, are mentioned; and there may have been twenty different deeds under which Sir James was called to succeed to his son, and as many separate subjects in which that succession might have taken place. The method therefore which has been followed in expeding these services, for these fifty years past, has been, by referring to the particular subject which is intended to be carried, or to the particular deed containing the provision; agreeable to the opinion laid down by Lord Stair, B. 3. Tit. 4. § 33. And on these principles, the court determined a similar case, 21st July 1738, Edgar *contra* Maxwell, *voce* REPRESENTATION. And although it appears, from a search into the records of chancery, that there are a great number of retours, especially in former times, precisely in the same terms with the one now under challenge; yet it will not follow from thence, that the blunders of negligent or ignorant people should

get the better of the law, and form a rule to destroy the law. Uniform inveterate custom may make law in many cases; but such erroneous services are neither supported by the general practice, nor conformable to the principles of law; and therefore ought to be held as errors and deviations from the right path, and as such to be set aside. No. 12.

Answered for the defender, 1*mo*, The retour in question is agreeable to the general practice of the time when it was made; and the rights of the subjects founded upon consuetude, even though erroneous, ought not to be cut down, *post tantum temporis*, upon new opinions, or abstract notions of the principles of law. It appears from a search into the records, that, previous to the year 1704, there are no less than 185 general services of heirs of tailzie and provision, which do not refer to any particular deed; and there is also a considerable number in the same terms since that period; and although a contrary practice has generally prevailed of late years, yet that alteration in the practice can be no just ground for reducing so many prior services, which were expeded according to the general and received opinion of the nation at the time. A decision of that kind might have very fatal consequences to a great part of the property of the nation. 2*do*, The retour, in this case, affords sufficient legal evidence, that a deed of provision was produced before the jury, which proved, that Sir James Hay, the claimer, was nearest heir of tailzie and provision to his son John; and the objection of uncertainty is fully obviated by production of the contract 1685, which shows his real title to that character: and as no other deed, by which Sir James could be served heir of tailzie and provision to his son, is alleged or specified by the pursuer, the presumption of law and reason is, that this contract of marriage was the deed upon which the jury returned their verdict. The principal service, as signed by the chancellor, is also produced in process, and appears to be in the same terms with the retour; but there are subjoined to it the following words, also signed: "Whereupon Mr James Brown, writer in Edinburgh, as procurator for the party, by virtue of the contract of marriage betwixt John Hay, younger of Linplum, and Mrs Jean Foulis, dated 4th July, 1685, takes instruments, &c." These words, though inaccurately expressed, afford the most satisfying evidence, that the service was by virtue of the contract, and proceeded upon production thereof before the inquest; and therefore, without supposing that the fifteen sworn men of the inquest had perjured themselves, and retoured falsely, or without evidence, it is impossible to imagine that the deed 1685 was not produced before the jury, and made the foundation of their verdict. 3*tio*, In the only instance in which this objection was moved to a retour in the same circumstances, it was almost unanimously overruled by the court, in the case of Major Forbes *contra* Mrs Maitland of Pitrichie in 1752; and that judgment was affirmed by the House of Peers. See APPENDIX.

"The Lords sustained the service of Sir James Hay, as heir of tailzie and provision to his son John Hay; and therefore sustained the titles in the person of Lord Charles Hay, and preferred him to the mails and duties of the lands of Bara."

Act. *A. Pringle, Lockhart, Ferguson.* Alt. *Miller, R. Dundas.* Clerk, *Gibson.*

G. C. *Fol. Dic. v. 4. p. 267. Fac. Coll. No. 114. p. 204.*