

EARL of WINCHELSEA, and Others, Trustees of LADY ESSEX No. 39.  
KER, Appellants.

Honourable HENRIETTA BELLENDEN, and Others, Respondents.

*Service—Competition.*—The proprietor of certain lands having disposed them to a trustee for purposes expressed in a relative deed of instructions; and his two heirs-portioners A and B having, on his death, granted a trust-bond, on which an adjudication was led, and which was thereafter assigned to these heirs; and they having got a decree, reducing the deed of instructions, and ordaining the trustee to convey to them; and he having disposed to them, with procuratory and precept, on the latter of which they were infeft; and one of them, A, having died, and the other, B, having obtained a general service as heir of A, and expedite a charter of resignation and confirmation on the procuratory, and been infeft; and B having died, after executing a deed of settlement in favour of trustees, conveying all her rights, and binding herself and her heir to give them an effectual title; and her trustees having thereupon obtained a charter of adjudication, and been infeft; and the heirs-portioners of line, both of A and B, having expedite a special service to B, and obtained themselves infeft in the superiority of the whole subjects; and thereupon granted to themselves a precept of clare constat as heirs of A, and been infeft;—Held, in a competition, (amending the judgment of the Court of Session), 1. That the general service and charter of resignation could only vest in B the superiority of her own and A's share of the lands; and therefore, as A remained vested in the fee of the dominium utile of her share, her heirs were preferable to the trustees of B; and, 2. That although B's general service conveyed to her A's personal right to the adjudication, yet as B had not made up titles to A's share of the lands, the charter of adjudication expedite by B's trustees could not exclude the heir of A.

LADIES ESSEX and MARY KER were the sisters of John Duke of Roxburghe, who, besides the estate of Roxburghe, possessed various lands, some of which were destined to his heirs of line, and others to the heirs of the entailed estate. On the 5th November 1803, his Grace executed a trust-disposition and deed of settlement, by which he disposed ' to John Wauchope and James Dundas, clerks to the signet, and to any other person or persons whom ' I shall hereafter name and appoint by a writing under my hand, ' or who shall be assumed in virtue of the powers after-written, ' as trustees for executing the trust hereby created, and to the ' survivors or survivor of the said trustees named or to be named ' by me, or who shall be assumed as said is, and who shall ' accept hereof, &c. all and sundry lands and heritages, &c. ' whether in England or Scotland, presently belonging or which ' shall happen to belong to me at my decease, free and unlimited ' by any entail, and at my absolute gift and disposal, by disposi-

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1ST DIVISION.  
Lord Meadowbank.

June 17. 1825. 'tion, adjudication,' &c. After providing for the payment of debts and legacies, he appointed his trustees to dispose of the residue, 'in favour of such person or persons, or for such uses and purposes, as I have directed or shall direct, by any deed, missive, memorandum, or other writing executed or to be executed by me for that effect, at any time of my life, and even on deathbed,' &c. On the 19th March 1804, the Duke executed a deed of instructions, by which, after appointing his trustees to pay certain legacies, he directed them 'to invest the whole residue and remainder of my funds in the public funds, or upon real security in Scotland, the dividends or interests whereof they are to pay over yearly to the said Lady Essex Ker and Lady Mary Ker, equally between them, and, failing either of them, to the survivor, during their lives, or that of the survivor; and upon the death of the survivor, I then appoint my trustees to pay over the residue and remainder of my fortune to the persons, and by the proportions after mentioned, viz. to the Reverend Charles Baillie, second son of the late Mr George Baillie of Mellerstone, one-half of the said free residue; to Sir John Scott of Ancrum, Baronet, one-fourth thereof; and to Sir Henry Hay Macdougall of Mackerston, Baronet, the other fourth part thereof.' His Grace was at this time on deathbed, and accordingly he died on the following day. Ladies Essex and Mary Ker, being desirous to set aside this disposition of the property destined to them, executed on the 19th June thereafter a trust-bond for L. 100,000 in favour of the Earl of Winchelsea, with the view of making up titles by adjudication. On the 9th of August his Lordship raised and executed letters of special and general charge against the ladies, charging them to enter themselves heirs-portioners of line and of provision in special and in general to their brother. At the same time they brought an action of reduction against the Duke's trustees of the deed of instructions, on the head of deathbed; and, founding on the trust-deed, they concluded that the trustees should be prohibited from selling the lands, and 'that they should be ordained to divest themselves of the lands in favour of the pursuers, Ladies Essex and Mary Ker.' Mr Wauchope had alone accepted, and on the 22d and 23d of April 1805, he took infestment on the trust-deed, which was recorded on the 6th of May. On the 17th of that month decree of adjudication was pronounced, in virtue of the trust-bond in favour of Lord Winchelsea, and on the 14th June the abbreviate was recorded.

In the mean while, the litigation had been going on in the ac-

tion by the Ladies Ker, in which the Court, on the 8th of July <sup>24</sup> June 17. 1825. 1806, pronounced this judgment:—‘ The Lords reduce, decern, and declare, in terms of the pursuers’ libel, in so far as relates to the whole heritable subjects conveyed by the trust-deed, dated the 5th day of November 1803, and descendible to the pursuers as heirs alioqui successuræ under the titles thereof, which stood in the person of John Duke of Roxburghe, exclusive of the mortis causa settlements executed by his Grace, and decern and declare accordingly; but in so far as regards the heritable property conveyed by the said trust-deed, and descendible to the Duke’s heirs-male by the titles thereof, remit to the Lord Ordinary to hear parties’ procurators, and to proceed otherwise in the cause as to his Lordship may seem proper.’ Both parties having reclaimed, the Court, on the 26th November, adhered; but ‘ remitted to the Lord Ordinary to hear parties farther upon the declaratory conclusions of the libel, and other prayers of the petition; and to proceed and determine therein as to his Lordship shall seem proper.’ An appeal having been taken against these interlocutors, they were affirmed by the House of Lords in February 1812. On the 3d of July thereafter, the Ladies Ker obtained from Lord Winchelsea a conveyance of the adjudication on the trust-bond, and to the lands therein contained: but during their lives nothing farther was done upon it.

On the return of the case to the Court of Session, the Lord Ordinary appointed Mr Wauchope, the Duke’s trustee, to state in a condescence, first, The lands which were held under destinations exclusive of the rights of the pursuers, as heirs of line: secondly, The lands in the parish of Kelso, which, according to the view of Mr Wauchope, were so affected by a power of purchase in favour of the heirs of entail, as to bar the rights of the Ladies Ker as heirs of the investiture: and, thirdly, ‘ The lands that are admitted to belong to the pursuers, under the final interlocutors of this Court and the House of Lords, and which the defender contends he is entitled to keep possession and management of, as trustee for the said John Duke of Roxburghe, until certain annuities are expired; what the rental of these lands are, and the extent of annuities or burdens thereon; and what objections he has to dispoise and convey these to the pursuers, the legal heirs, under the burden of what may affect these lands, or whether any of them attach upon, or have been paid out of the arrears of rent, or other property left by the said

June 17. 1825: 'John Duke of Roxburghe.' This order having been obeyed, the Court, on 20th November and 13th December 1813, 'decerned and declared, that the defenders were bound to execute, 'quam primum, in favour of the pursuers, the said Ladies Essex and Mary Ker, proper conveyances of the whole lands in article third of said condescendence; and decerned and ordained the defenders to execute the aforesaid conveyances in favour of the pursuers, the said Ladies Essex and Mary Ker, accordingly.' Accordingly, on the 11th January 1815, Mr Wauchope executed a disposition in favour of the ladies, containing an obligation to infest either a me vel de me, and procuratory and precept, on the latter of which infestment was taken on the 3d and 4th of March, and the sasine recorded on the 30th of the same month. Under this title they borrowed sums of money, and particularly L.6000 on the 30th December 1817, for which they granted an heritable bond, on which infestment followed. Thereafter, Lady Mary died intestate, and her sister Lady Essex thereupon obtained a general service as her heir. She then expedite a Crown charter of resignation and confirmation, proceeding on the procuratory granted by Mr Wauchope, and which contained also a confirmation of the trust-deed and sasine in favour of that gentleman. Upon the precept in that charter Lady Essex was infest, on 17th December 1818, and her sasine duly recorded. In March 1819 she granted a trust-disposition in favour of the appellants, of 'all and sundry lands and heritages whatsoever, 'belonging to me, or to which I shall or may have right, situated 'or being in that part of Great Britain called Scotland, with the 'whole parts and pertinents thereof, and all my right and title to, 'and interest in the same, and the rents thereof; hereby binding 'and obliging me and my heirs to make up complete titles to the 'said lands and heritages, if necessary, and to convey the same in 'all form to the persons above mentioned, and their foresaids, 'for the purpose herein after mentioned.' In the month of August following she executed a relative testament; and the effect of the two deeds was to exclude from her succession her heirs-at-law. She died soon thereafter; and her trustees, the appellants, thereupon charged the respondents, the Honourable Henrietta Bellenden, John Bellenden Ker, and John Bulteel, (who were the heirs-portioners of the two ladies), to enter heirs in special to Lady Essex, and raised an action of constitution against them, concluding that they should be ordained to make up titles to the whole estates which had been vested in the ladies, and convey the same to the trustees of Lady Essex. In February

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1821 these trustees obtained a charter of adjudication, proceeding on the decree of adjudication in virtue of the trust-bond, on which they were infeft on the 7th March. The respondents then brought an action of exhibition of the titles ad deliberandum, on which, having recovered the titles, they got themselves served on 30th April 1821, 'as heirs-portioners of line' of the deceased Lady Essex Ker, upon the retour of which a precept from Chancery was directed, by virtue of which they were infeft on the 10th May. On the assumption that they were thus vested in the superiority of the lands, they granted a precept of clare constat for infefting themselves as heirs-portioners of line of Lady Mary in the dominium utile of that half, and were infeft on the 19th June. A question then arose, whether they or the trustees of Lady Essex Ker had right to the pro indiviso half of the dominium utile which had belonged to Lady Mary; or whether their title to it was not either vested in the trustees of Lady Essex, or if not, whether the respondents, by serving heirs to Lady Essex, were not under an obligation to convey to them that property. On the part of the respondents it was alleged, that as Lady Mary had been feudally vested, in virtue of the sasine taken on the precept granted by Mr Wauchope, and as Lady Essex had merely obtained a general service to her, it could not have the effect to take the feudal right out of Lady Mary: that although, no doubt, Lady Essex had executed the procuratory in Mr Wauchope's disposition, and expedite a charter of resignation and confirmation, yet this could only vest in her the *superiority*, and not the dominium utile; and therefore, as they had taken up the superiority by means of their service, and obtained themselves infeft upon the precept of clare, their right to the Lady Mary's half of the dominium utile had been effectually vested in them. On the other hand, the trustees maintained, that as the ladies had two titles, viz. the adjudication and the disposition from Mr Wauchope, they must be held as possessing on both of these titles: that by the general service of Lady Essex, she had acquired the personal right in the adjudication belonging to Lady Mary, which right she had transmitted to them by her trust-deed, and therefore the charter of adjudication, and infeftment in their favour, gave them a preferable right to the respondents: that, at all events, as the respondents, by serving heirs to Lady Essex, represented her, and as she by her trust-deed had bound herself and her heirs to give an effectual title to all the subjects to which she had right, and as by the general service she had acquired the personal right under the adjudication belonging to Lady Mary, the

June 17. 1825. respondents were bound to convey the subjects to the appellants. To try this question, a multiplepinding was brought in name of the tenants of the whole subjects, and the case having been reported upon informations by Lord Meadowbank,—

*Lord Hermand* observed,—This is a case in apicibus juris. Law is a deep well, and although I have been engaged in the study and practice of it for so many years, yet I have not got to the bottom of it. This is a question of infinite importance in conveyancing, and involves so much difficulty, that, if I could with propriety avoid giving an opinion, I would do so; but I cannot. The Ladies Ker began by making up their titles by means of a trust-bond. It is true that there was a disposition by Mr Wauchope to them. But he was a mere trustee of the Duke of Roxburghe, in whom the substantial right remained vested. On the indefinite precept sasine was taken, which, as a public infeftment, was null until confirmed. On the death of Lady Mary, it is true that her sister got a general service, which, no doubt, could not transmit a feudal right, but it had the effect to transfer the personal right under the adjudication. On this Lady Essex unquestionably could have expedite a charter of adjudication, which it is not disputed would have vested in her Lady Mary's share. It is said, however, that she is dead. This, however, is of no importance to the question, because she lives in the persons of her trustees, who obtained a charter of adjudication and infeftment prior to the titles made up by the respondents. Besides, the respondents are liable, as the representatives of Lady Essex, to denude in favour of her trustees.

*Lord Balgray*.—I am of a different opinion. Observe the situation in which Lady Mary's title stood. By the adjudication she had a personal right to the lands. By Mr Wauchope's disposition, with procuratory and precept, she could make up titles so as to create either a public or a base right. She resorted to the latter. Sasine was taken upon the precept, and consequently she was feudally vested in the fee of the dominium utile. Now it is an undoubted rule of feudal law, that unless proper means are adopted to take an infeftment out of a person who has been feudally vested, the property will remain in hæreditate jacente. But what did Lady Essex Ker do? She got a general service, which it will not be pretended could take the feudal fee out of Lady Mary. It no doubt conveyed to her Lady Mary's right to the procuratory, and to the adjudication; and in virtue of the procuratory she might have resigned ad remanentiam in her own hands, or expedite a charter on the adjudication, and got

herself infest; but she neither did the one nor the other. The question therefore is, where was the feudal fee when Lady Essex died? was it in her, or in hæreditate jacente of Lady Mary? If in Lady Essex, then it belongs to her trustees. If not, then it remained in hæreditate jacente of Lady Mary, and belongs to her heirs. Now it is impossible to hold that the fee was transmitted to Lady Essex, because the general service could not have that effect. If so, then it remains in hæreditate jacente of Lady Mary, and consequently, as the respondents are her heirs, they are preferable to the trustees of Lady Essex. There is no doubt some difficulty, from the respondents having served heirs to Lady Essex. But as that was for a particular purpose, I think the service might be reduced, and that a reduction is necessary. I may also observe, that I do not concur in Mr Robert Bell's doctrine founded on by the trustees. June 17. 1825.

*Lord Gillies.*—I think Mr Bell's doctrine is satisfactorily answered in the respondents' information. On the first part of the case I have no difficulty. There were two separate estates created, in one of which Lady Mary was infest, and Lady Essex in the other. My difficulty chiefly is, as to whether an adjudication in implement might not be led against the respondents. In regard to the first part of the case, the ladies had two different titles to the estate; one founded on the adjudication, and the other on the disposition from Mr Wauchope. On the adjudication nothing followed; but on the disposition infestment was taken. Lady Mary died, and Lady Essex obtained a general service to her. This, no doubt, carried the personal right to the adjudication and to the procuratory in Mr Wauchope's disposition; but it could not take the feudal fee out of Lady Mary, and therefore it remains in hæreditate jacente of her. Lady Essex then grants a disposition to trustees; but as the fee remained in hæreditate jacente of Lady Mary, Lady Essex could have no title to convey it to them. It is said, however, that she conveyed the personal right under the adjudication; and there can be no doubt that, if she had thought fit, she might have made up a good title under the adjudication; but she did not do so, and her trustees have no right except through her; so that if she had no right vested in her, it is impossible that her trustees can have any. There is, however, some difficulty arising from the respondents' service; but this may be obviated in the way suggested by Lord Balgray.

*Lords President and Succoth* concurred.

The Court, therefore, on the 17th January 1823, 'preferred

June 17. 1825. ' the heirs of line of the deceased Lady Mary Ker to the fund in  
' medio, and remitted to the Lord Ordinary to proceed accord-  
' ingly.' And to this judgment they adhered on the 6th June  
thereafter, on advising a petition and answers.\*

Lady Essex Ker's trustees appealed, and, besides repeating their argument in the Court of Session, they contended, that the interlocutor was plainly erroneous, in so far as it preferred the respondents to the whole fund in medio, seeing that it consisted of the rents not only of Lady Mary's share, but of those of Lady Essex. This being admitted by the respondents to be an error, the House of Lords ' ordered and adjudged, that the interlocutor  
' of the 17th of January 1823, complained of, be altered, by add-  
' ing after the words "in medio" these words, "so far as the  
' same is constituted of the rents arising from Lady Mary Ker's  
' pro indiviso half of the lands conveyed to her and Lady Essex  
' Ker by Mr Wauchope's disposition :'" And it is further ordered  
' and adjudged, that with this alteration the said interlocutor, and  
' the interlocutor of 6th June 1823, also complained of, be affirm-  
' ed: And it is further ordered, that the cause be remitted back  
' to the Court of Session to do therein as shall be consistent with  
' this judgment, and as shall be just.'

LORD GIFFORD.—My Lords, I will beg to call your Lordships' attention to a case, in which the Earl of Winchelsea and Nottingham, and Sir Robert William Vaughan, Bart. the trustees of Lady Essex Ker, deceased, who was the daughter of Robert Duke of Roxburghe, are appellants; and the Honourable Henrietta Bellenden, John Bellenden Ker, and John Bulteel, Esq. heirs-portioners of line of the deceased Lady Essex Ker, and of the deceased Lady Mary Ker, are the respondents.

My Lords,—The judgments appealed from to your Lordships' House, were pronounced in a competition for the rents of certain lands, which formerly belonged to Lady Mary Ker, against the appellants, the Earl of Winchelsea and Sir Robert William Vaughan, who were the trustees of the deceased Lady Essex Ker, who was possessed of these lands;—the respondents claiming to have a moiety as heirs-portioners of Lady Mary Ker, and the appellants claiming them as trustees of her sister.

My Lords,—It will be necessary for me to state to your Lordships the facts of this case, and the proceedings which have taken place.

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\* See 2. Shaw and Dunlop, No. 351.

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It appears that John Duke of Roxburghe, the brother of Ladies Essex and Mary Ker, possessed at his death various lands, which were at his own disposal, besides the estate of Roxburghe, which he held under a strict entail. Some of those lands were destined by him to his heirs of line, and others amongst the heirs of the entailed estate. In the year 1790 he executed a settlement in favour of his sisters, Ladies Essex and Mary Ker, disposing to them his whole disposable property, heritable and moveable, but under certain conditions, and the burden of all legacies and bequests which he had left or might leave to any person or persons, by any codicil, letter, or other writing whatsoever under his hand, expressive of his will and intention, even though executed on deathbed. In November 1803 he superseded that settlement by a trust-deed, comprehending his whole estate, heritable and moveable, not limited by entail, to be divided according to directions to be afterwards given by him; and by that trust-deed he disposed and conveyed to John Wauchope and James Dundas, clerks to the signet, and to any other person or persons whom he should thereafter name and appoint by a writing under his hand, or who should be assumed in virtue of the powers after-written, as trustees for executing the trust thereby created, and to the survivors or survivor of the trustees named or to be named by him, or who should be assumed as said is, and who should accept thereof, all and sundry lands and heritages, &c. whether in England or Scotland, previously belonging to, or which should happen to belong to him at his decease.

My Lords,—The deed then enumerated the various heritable subjects conveyed, and declared the purposes of the trust; which were, first, The payment of deathbed and funeral expenses: Secondly, The payment of his debts: Thirdly, The payment of legacies granted, or to be granted by the disponent: and then, with respect to the residue, he directed, that the whole residue, remainder, and surplus of his estate and effects, should be conveyed and made over, or applied and employed by his trustees or trustee acting for the time, to and in favour of such person or persons, or for such uses and purposes as he had directed, or should direct, by any deed, missive, memorandum, or other writing, executed, or to be executed by him for that effect, at any time of his life, and even on deathbed.

My Lords,—On the 19th of March 1804 the Duke executed a deed of instructions, as it is termed, by which he directed and appointed the trustees to pay various legacies, and, after payment of those legacies, to invest the whole residue and remainder of his funds in the public funds, or upon real security in Scotland, the dividends or interests whereof they were to pay over yearly to Lady Essex Ker and Lady Mary Ker, equally between them; and failing either of them, to the survivor during their lives, or that of the survivor; and, upon the death of the survivor, he then appointed his trustees to pay over

June 17. 1825. the residue and remainder of his fortune to the persons and by the proportions thereafter mentioned.

My Lords,—The Duke died on the following day, after executing that deed of instructions; and after his death, the Ladies Essex and Mary Ker challenged this deed upon two grounds; first, Incapacity, from illness, to execute any available deed; and, secondly, Deathbed, in so far as the deed of instructions affected heritage of which they were the nearest heirs.

My Lords,—A short time after his death, in August 1804, the Ladies Ker, with a view of completing their title, granted a trust-bond in favour of Lord Winchelsea, for the sum of L.100,000, upon which letters of general and special charge at his instance were raised and executed against them, as heirs-portioners to John Duke of Roxburghe, their brother, and decret of adjudication was obtained by the trustee, on the 17th of May 1805, of the whole unentailed lands belonging to the Duke.

My Lords,—I shall at present content myself with stating the facts, without making any comment on this proceeding, or others which afterwards took place. I will first of all state to your Lordships the facts and the proceedings of the Court of Session, and afterwards state to your Lordships the observations I have to make on the case. It appears that, previous to this decret of adjudication, namely, on the 22d and 23d April 1805, Mr Wauchope, who, as your Lordships will recollect, was a trustee of John Duke of Roxburghe, had taken infestment on the trust-deed. As I have stated to your Lordships, the Ladies Ker chose to challenge the deathbed disposition of John Duke of Roxburghe. The summons which they raised upon that occasion concluded for reduction only of the deed of instructions executed by the Duke of Roxburghe, leaving the trust-deed wholly unchallenged, recognizing it, on the contrary, as a valid title in the person of the trustees, and demanding, by the declaratory conclusions of the summons, that not only the deed of instructions should be reduced, but that the trustees should be prohibited from selling the lands, and that they should be ordained to divest themselves in favour of the pursuers, Ladies Essex and Mary Ker.

My Lords,—After a long litigation the Ladies Ker were unsuccessful in reducing on the head of incapacity, but they succeeded in reducing the deed of instructions on the head of deathbed. Upon this occasion the Court of Session pronounced the following interlocutor. (Here his Lordship read the interlocutor.)

Upon a reclaiming petition by the trustee and legatees, this judgment, so far as regarded the reductive conclusions of the libel, was adhered to, but the Court remitted to the Lord Ordinary to hear parties further upon the declaratory conclusions of the libel, and other prayers of the petition, and to proceed and determine therein as to his Lordship should seem proper. My Lords, there was an appeal to your

Lordships' House from that decision, and your Lordships affirmed the interlocutor in the month of February 1812. June 17. 1825.

My Lords,—Shortly after that judgment of affirmance, namely, on the 3d July 1812, Ladies Essex and Mary Ker took from my Lord Winchelsea, the then trustee, who, as your Lordships will recollect, before that time raised an action and got a decree of adjudication on the trust-bond for L.100,000, and obtained from him a conveyance of the adjudication and of all the lands contained in that adjudication, being in ordinary form, to them, their heirs and assignees.

My Lords,—In consequence of the affirmance of the judgment in the House of Lords, the case went back to the Lord Ordinary to inquire into the precise lands of which the acting trustee, Mr Wauchope, was bound, under the declaratory conclusions, to denude; and the Lord Ordinary pronounced an interlocutor, in which he appointed Mr Wauchope to state in a condescendence, first, The lands which were held under destinations exclusive of the rights of the pursuers as heirs of line; secondly, The lands in the parish of Kelso, which, according to the view of Mr Wauchope, were so affected by a power of purchase in favour of the heirs of entail, as to bar the rights of the Ladies Ker as heirs of the investiture; and, thirdly, according to the terms of it, 'The lands that were admitted to belong to the pursuers under the final interlocutors of that Court and of the House of Lords, and which the defender contends he is entitled to keep possession and management of, as trustee for the said John Duke of Roxburghe, until certain annuities are expired: what the rental of these lands are, and the extent of annuities or burdens thereon, and what objections he has to dispoise and convey these to the pursuers, the legal heirs, under the burden of what may affect these lands, or whether any of them attach upon, or have been paid out of the arrears of rent, or other property left by the said John Duke of Roxburghe.' My Lords, this explanation having been given in a condescendence, the Court, on the 20th November and the 13th December 1813, decerned and declared, that 'the defenders were bound to execute, *quam primum*, in favour of the pursuers, the said Ladies Essex and Mary Ker, proper conveyances of the whole lands in article third of said condescendence; and decerned and ordained the said defenders to execute the aforesaid conveyances in favour of the pursuers, the said Ladies Essex and Mary Ker, accordingly.' In compliance with that interlocutor, Mr Wauchope, the trustee, on the 11th January 1815, executed a disposition in favour of the Ladies Essex and Mary Ker, of the particular articles contained in the third article of the condescendence. The deed, after stating the proceedings, went on as follows:—'In pursuance of and in obedience to the decree before recited, it is incumbent on me, as trustee foresaid, to convey the foresaid lands and other heritages, in so far as the same are specially contained in the foresaid trust-disposition, all as more particularly after expressed, under the conditions above specified, to and in favour of the said Ladies Essex

June 17. 1825. ' and Mary Ker, in manner under-written ; therefore, wit ye me, the  
 ' said John Wauchope, as sole accepting trustee of the said John Duke  
 ' of Roxburghe, in pursuance and in implement of the foresaid de-  
 ' creet, to have given, granted, and disponed, to and in favour of  
 ' the said Ladies Essex and Mary Ker, and their heirs whomsoever,  
 ' and assignees, heritably and irredeemably, all and whole these two  
 ' quarters of the lands and barony,' &c. This disposition con-  
 tained procuratory and precept ; and in virtue of the precept the  
 Ladies Essex and Mary Ker were infest, and their infestment duly  
 recorded.

My Lords,—Upon the title so made up, the Ladies Ker continued to possess during their respective lives. Lady Mary Ker, who then held a right to the pro indiviso half of these lands contained in Mr Wauchope's conveyance, completed by infestment, died without executing any settlement, leaving her sister, Lady Essex, her surviving. Upon the death of Lady Mary, Lady Essex, on the 25th of March 1818, was served heir in general to her ; and it appears that, in the following month of April, she expeded a charter of resignation on the procuratory contained in the disposition by Mr Wauchope, and her own general service as heir to her sister Lady Mary, in virtue of which last she had right to Lady Mary's interest in the procuratory. This charter also included a confirmation of the trust-deed in favour of Mr Wauchope, and of his infestment under it, and upon this charter Lady Essex was infest. My Lords, under these circumstances, Lady Essex, in the month of March 1819, executed a trust conveyance to the Right Honourable George Earl of Winchelsea and Sir Robert William Vaughan, the appellants in this case, by which she made over to them all her effects, heritable and moveable, and among others, all and sundry lands and heritages whatever belonging to her, or to which she had or might have right, situated or being in that part of Great Britain called Scotland. The purposes of the trust were to sell the truster's lands and estates to pay the debts, the residue being disposed of in the following terms: ' And then,' according to the terms of it, ' to pay over the residue and remainder of the proceeds, to and for the use of any person  
 ' or persons I shall name by any writing under my hand, or for such  
 ' purposes as I may direct by such writing ; and in default of my mak-  
 ' ing such writing, or giving directions in writing, then to pay over the  
 ' said residue to and among my next of kindred, according to the law  
 ' of England or statute of distribution.'

My Lords,—Her Ladyship afterwards, on the 20th of August in the same year, executed a will, desiring that her whole lands and property might be sold, and the proceeds applied in the manner there described in the payment of various legacies, and appointing Lord Winchelsea and Sir Robert Vaughan her executors. My Lords, Lady Essex died a very short time after the execution of this will. The trustees, probably under the impression that the whole lands, property and superiority, had been vested in Lady Essex, proceeded to charge the respondents,

the heirs-portioners, to enter heirs in special to Lady Essex ; and upon these charges they brought an action of constitution against the respondents, concluding, that they should be ordained to make up titles to the estates without exception, and convey the same to the trustees. That action does not appear to have been proceeded in. The respondents, however, proceeded to make up their own titles. In the first place, they were served heirs-portioners of line in special of Lady Essex Ker, and were on the 13th April 1821 infeft; and being thus vested in the superiority of the pro indiviso half belonging to Lady Mary, on the 10th of May in the same year they granted precept of clare constat for infefting themselves as heirs-portioners of line of Lady Mary Ker in her pro indiviso half, and upon the 19th June they were infeft. June 17. 1825.

. My Lords,—After thus assuming that Lady Mary's right under the adjudication, to which I have referred, was vested in Lady Essex by her general service as heir to her sister, and carried by her trust-disposition to them, the appellants obtained a charter of adjudication in favour of themselves, and were infeft.

In consequence of all these proceedings, a competition arose between these trustees and the heirs of Lady Mary as to the rights to the rents of the pro indiviso half of the lands which belonged to Lady Mary Ker; in consequence of which an action of multiplepoinding was raised by the tenants, in order to have it ascertained by the Court which title conferred the substantial right to the property. That action came before my Lord Gillies as Ordinary, who, upon hearing the case argued, was pleased to order memorials. His Lordship being removed to another situation in the Court, Lord Meadowbank, to whom the case was remitted, pronounced the following interlocutor: 'The Lord Ordinary having considered the memorials for the parties in this case, makes avizandum to the Lords of the First Division, and appoints parties' procurators to prepare informations, to be printed and boxed forthwith.' Informations were accordingly given in, and the following interlocutor was pronounced by the First Division of the Court of Session: 'The Lords, upon the report of Lord Meadowbank, and having advised the mutual informations and whole cause, they prefer the heirs of line of the deceased Lady Mary Ker to the fund in medio, and remit to the Lord Ordinary to proceed accordingly.' The appellants then made application to the Court, praying to give in an additional petition against the interlocutor just quoted; and on that application the following interlocutor was pronounced: 'The Lords having heard this petition, allow the petitioners to state their case in an additional petition, to be printed and boxed on or before the last sederunt day of the current session, and that under an amand of forty shillings; and appoint both petitions (the additional petition being duly lodged) to be seen and answered, the answers to be printed and boxed on or before the first box-day in the ensuing spring vacation, under an amand of ten pounds sterling.' Accord-

June 17. 1825. ingly the petition was stated, and answers put in by the respondents; and finally, on the 6th June 1823, the Lords of the First Division of the Court of Session pronounced the following interlocutor: 'The Lords  
' having advised these petitions, with the answers, they adhere to the in-  
' terlocutor reclaimed against, and refuse the desire of both petitions.'

From these interlocutors an appeal has been brought to your Lordships' House; and it must appear to your Lordships, from the statement I have made, that the questions in this appeal are questions arising on the law of Scotland, and the effect of the various titles which have been made up by these parties, and that the questions in this case do not at all turn upon what might have been the intention of these ladies: the question is a dry pure question of law, whether, under all the circumstances, the heirs-portioners of Lady Mary Ker were not entitled, on the death of Lady Essex, to this moiety of the estates in question? My Lords, the case has been most ably and most elaborately discussed in the papers which are before the House, and at the Bar. No one can have heard that discussion without being impressed with the correctness of that statement. The questions that have been moved in this case are, your Lordship perceive, of this nature: The Ladies Ker—who, if they could have succeeded in setting aside the deed of instructions, were entitled to this property as the nearest heirs of the Duke of Roxburghe—previous to instituting any proceedings for that purpose, had recourse to a proceeding known in the law of Scotland—a fictitious proceeding, for the purpose of making up a title in themselves,—namely, by granting a bond provisionally for the payment of L.100,000 to the trustee for himself, namely, my Lord Winchelsea, upon which he was to institute proceedings against them, as heirs-portioners of John Duke of Roxburghe, and to obtain against them what is called a decret of adjudication of the whole unentailed lands belonging to the Duke; and it appears, that decret of adjudication being obtained by Lord Winchelsea, he reconveyed the adjudication to Ladies Essex and Mary Ker, but no charter of adjudication was taken out in favour of these Ladies Essex and Mary Ker, although it appears that, after their deaths, such a charter had been obtained in favour of the present appellants.

My Lords,—The proceeding being in that state, the decret of adjudication having been got by them, but they not having obtained any charter of adjudication, they instituted the proceeding I have mentioned against Mr Wauchope, who was the trustee appointed under the previous deed of 1803 by the Duke of Roxburghe, and who had, subsequent to the Duke's death, taken an infetment under that trust-deed. The object of that suit was, as your Lordships have perceived from my short statement, to set aside or reduce, as it is termed in the law of Scotland, the deed of instructions, on the ground that it was executed on deathbed, and affected the heritage of the Ladies Ker, and therefore ought not to be sustained; and if they succeeded in reducing that deed, they called on Mr Wauchope to convey to them the lands

which he held, and of which he was possessed under that trust-deed. June 17. 1825.  
 My Lords, they succeeded in that action, the House of Lords affirmed the decision of the Court of Session ; and your Lordships perceive, that in consequence of the decision, and in consequence of the Court below directing and declaring that the trustees were bound to execute *quam primum*, in favour of Ladies Essex and Mary Ker, all proper conveyances, a disposition was accordingly executed by Mr Wauchope, and in virtue of the precept contained in that disposition, Ladies Essex and Mary Ker were infeft, and their infeftment duly recorded. My Lords, it has been contended in this case, that notwithstanding they thus made up their titles, it would be competent for them, and subsequently competent for their trustees, to complete their title on the adjudication ; and the effect of that, supposing it to be done, would be, as was contended on the part of the appellants, to abrogate the other title vested in those ladies in the present appellants. On the other hand, on the part of the respondents, it was contended, and of that opinion the Court of Session were, that by the acts of these ladies they relinquished or abandoned any intention whatever of completing their titles in that fictitious suit ; that they made up their titles under the deed of Mr Wauchope, and that that was their title to possession. Indeed it was contended, with a great deal of plausibility and strength, that considering the nature of that conveyance to Mr Wauchope, it might be very questionable whether those ladies would have a right to make up their titles in this fictitious suit instituted by their trustee, Lord Winchelsea ; but assuming that they could have done so, and that the property conveyed to the trustees by John Duke of Roxburghe was still to be considered as part of the lands for which they might make up their titles under the fictitious suit, still, they having elected to take under the disposition from Mr Wauchope, considering that as a sufficient title, the Court below have proceeded upon that as the title upon which the possession was to depend. My Lords, upon that part of the case a very elaborate argument has been presented to your Lordships, that it would have been competent for Lady Essex, who survived Lady Mary, still to have proceeded on that title, and that if it would have been competent for her, it was also competent for the trustees. My Lords, assuming again that it was not competent for Lady Essex so to have done, she claims under the title derived from Mr Wauchope's disposition ; for your Lordships have heard that, upon the death of Lady Mary, Lady Essex was served heir in general to her, and she afterwards expedite a charter of resignation on the procuratory contained in the disposition by Mr Wauchope. She therefore made up her titles under that disposition which had been made by Mr Wauchope.

I have to apologize to your Lordships, perhaps, for calling your attention to this case to-day, because I feel rather indisposed, and not able to go into it in the manner I could have wished. I should not have proceeded upon it to-day, but I feel the necessity of calling your Lordships' attention to this and other cases without further delay, consider-

June 17. 1825. ing the period of the session to which we are arrived. But for that indisposition, I should enlarge considerably more upon this extremely important case; but, my Lords, upon this branch of it, it does appear to me, that in any way of considering this case, the title which has been made up by Ladies Essex and Mary Ker under the disposition of Mr Wauchope, and under the procuratory of resignation, is the title which is to govern the subsequent transmission of this estate. They had the power of electing, and they having elected to make up their title under that disposition, I think that is the title which must decide this case.

My Lords,—Another question was then made. It was contended, that, assuming that the title was thus properly made up by the Ladies Essex and Mary Ker, and that they had no right to revert to the other title under the adjudication; still, what took place after the death of Lady Mary had the effect of consolidating the dominium directum and the dominium utile of the estate, and that therefore it was competent for Lady Essex to dispose of that property as she did, and that her trustees are, upon her death, consequently entitled to it. Now, my Lords, I apprehend there is nothing more clearly established, than that a general service takes no feudal right out of the ancestor; and that if a person so serving dies without entering by special service, the general service has no operation to carry away the estate from the heirs of the party to whom that person is served heir by general service. Indeed, I do not find that disputed in this case. My Lords, I think as little can it be disputed, that by that conveyance from Mr Wauchope, and by the infestment taken upon it by Lady Mary Ker, the feudal title in the dominium utile was completed by Lady Mary Ker to the pro indiviso half of the lands contained in the disposition; and I cannot do better on this occasion than to refer to that passage in Mr Erskine (2. 7. 16.) which has been referred to in this discussion, explaining this part of the service. He says, ‘By the more common style of dispositions, the disposer grants an obligation to infest, and a precept of sasine, both a me and de me, in the option of the disponent, and sasine is generally taken upon such dispositions indefinitely, without specially referring to either of the two precepts.’ That is the case here. ‘In that case, the law which construes the sasine in the manner most beneficial to the disponent, who has the right of option to ascribe it to either of the two kinds, considers it as a sasine de me or base right; because, if it were accounted a public right, it would be ineffectual till the superior’s confirmation; but if the superior afterwards confirmed the right, it is held from that period as if it had been from the beginning a public right: see July 15. 1680, Bishop of Aberdeen. It is universally agreed, that a right which only holds base of the granter, is not by the superior’s confirmation rendered public, so as to make the grantee, whose right is confirmed, immediate vassal to the superior confirming; for the superior’s confirmation of base rights is intended for purposes quite different.’ Then he says, ‘It is to the

June 17. 1825.

‘difference here stated between base and public rights, that the frequent use of base rights in our practice has been owing ; for many purchasers avoid taking a public infeftment, not chiefly to avoid the expense of confirmation, but the better to secure their purchase ; because a purchaser, by accepting a public right from the disponent, which is not effectual till it be confirmed by the superior, was in danger of being excluded by a sasine taken before his, upon a base right in the person of another.’ And, my Lords, I apprehend, not only from what I have collected in the discussion of this cause, but also from the general information on the law of Scotland which I have been able to gain, that is considered as the established law of Scotland as applicable to dispositions of this nature, and that the laying down a contrary principle would go to unhinge the law of Scotland in this respect.

My Lords,—Upon this part of the case I think, that the admission which has been made by the appellants themselves in some of these printed papers, certainly shews that the decision of the Court of Session is a right decision. They say, in the additional petition presented to the Court of Session, ‘the petitioners are willing to admit, that if there had been occasion here for an immediately operative infeftment—had they, for example, proceeded to borrow money by heritable bond, such an act would at once have characterized the infeftment as a base one ; and, upon the principle as already explained, would have afforded a fair ground to infer, that the alternative title by adjudication was intended to be abandoned.’ Now this admission is a very important one, as it applies as well to the effect of the adjudication and title, which, as it is contended, it is competent for these ladies, or those representing them, to make up, as with respect to the effect of the proceedings by Lady Essex, after the death of Lady Mary, on the disposition of Mr Wauchope. My Lords, in a subsequent passage the same admission is repeated. ‘It is admitted, that had the precept in Mr Wauchope’s disposition been a public precept, or had there been no alternative obligation to infeft dé me and a me, this last would have been the consequence of the sasine in the persons of Ladies Mary and Essex ; it would only have been an inchoated title, which, left uncompleted by confirmation, would have been a mere nonentity in feudal law.’ Now, my Lords, although the admissions of a party, if he has made them under a mistake, are of little weight, yet I apprehend, in this case, those admissions were made consonant to the laws of Scotland ; and, as it seems to me, those admissions, independently of that which I have taken the liberty of stating to your Lordships, shew, that in this case it must be considered that the feudal title, the base fee, was completed in Lady Mary Ker ; and if so, I apprehend the consequence inevitably follows, that the general service which Lady Essex, on the death of her sister, took out, could not carry that base fee which was vested in Lady Mary ;

June 17. 1825. but the property must go to the heirs-portioners, the respondents in this case.

My Lords,—The third point raised is this: Supposing a good title to the lands had been completed by the Ladies Ker; supposing the rights of the respondents as heirs of Lady Mary were clearly established; still by their service as heirs-portioners of Lady Essex, they came under an obligation,—I will not say of contract,—but of disposition of her property. Now, my Lords, to that several answers have been made, and I think satisfactorily. The first answer is, that with respect to the disposition upon which the appellants founded, that was a more general——\*

In the next place, it is a mere general disposition; and I therefore think the case of Carmichael against Carmichael, which was cited in some part of the case, does not appear to bear upon it; and, lastly, that in this case they were forced to enter as heirs-portioners of Lady Essex, at the instance of the appellants; and that therefore now it is not competent for them to insist, that they, having called upon these parties to enter as heirs-portioners, can now turn round upon them having compelled them to enter as heirs-portioners.

My Lords,—It does not appear to me there is any ground whatever to object to the decision made by the Court of Session. Upon the whole, therefore, it appears to me, that the decision of the Court of Session is right; but I must remark one thing, that the interlocutor in this case has pronounced, that the respondents are entitled to the fund in medio. Now I should wish to know whether that fund in medio is constituted of the rents of the whole of the lands; because, if so, the interlocutor is wrong; for, I apprehend, all that the Court of Session meant to decide is, that the respondents are entitled to these funds in medio, so far as they are constituted of the half which belonged to Lady Mary Ker. If there is any difficulty upon that part of the subject, this House should guard the affirmance of this interlocutor in that way. The interlocutor is general; and therefore I would ask, Whether the funds in medio are constituted of the whole of the funds, or of the pro indiviso half?

*Keay.* We understand, my Lord, that they are composed of the rents of the pro indiviso half; but, I believe, upon that point there was little difference between the parties; and, if it is the pleasure of the House, it cannot injure our interest, that that should be expressed.

*Lord Gifford.* Then, perhaps, the proper course for the House to adopt will be to alter the interlocutor before us, so far as to declare, that it respects only the fund constituted of the rents of the pro indiviso moiety of the lands belonging to Lady Mary, and, affirming the interlocutor with that alteration, then it will go back to the Lord Ordinary to pro-

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\* A part of his Lordship's speech was here lost.

ceed accordingly. As it stands, it certainly refers to the whole fund in medio; and it is asserted in these papers, and I think was asserted at the Bar, that part of the funds in question were not constituted of this pro indiviso moiety belonging to Lady Mary. June 17. 1825.

*Adam.* There was a parcel of land not included.

*Lord Gifford.* There was a parcel of land, called Levine-side, clearly not included in the disposition of Mr Wauchope: perhaps it will be better for the House to insert after the words 'fund in medio,' 'in so far as that fund is constituted of the rents of the pro indiviso half of the lands.' I will prepare the judgment of the House, that there may be no mistake about it; and before it is moved here, the agents shall have an opportunity of seeing it, that there may be no mistake upon it. With that variation, I would move your Lordships that the judgment be affirmed.

*Appellants' Authorities.*—(1.) 1. Bell, Com. 641. 4. edith and cases there; Wight, 282. and cases there; Lockhart, Feb. 19. 1819, (F. C.); 2. Ersk. 7. 16.; Bell on Titles, 316.; 2. Ross, 173. 320.; 3. Bank. 2. 13.; Edgar, July 6. 1736, (3089.); Harvey, Dec. 12. 1811, (F. C.); Smith, June 30. 1752, (10,803.); Durham, Nov. 24. 1802, (11,220.)—(2.) 3. Ersk. 8. 54.; Carmichael, Nov. 15. 1810, (F. C.; affirmed May 15. 1816.)

*Respondents' Authorities.*—2. Ersk. 7. 16.; Robertson, Nov. 27. 1751, (3044.)

J. CHALMER—J. CAMPBELL,—Solicitors.

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HUGH CALLUM, Appellant.

No. 40.

CHARLES FERRIER, Trustee on the Estate of Scotch Patent  
Cooperage Company, Respondent.

*Lien—Retention.*—Held, (affirming the judgment of the Court of Session), That a person employed to cut wood under the superintendence of the manager of the employer, and who was not in actual possession of the wood, had no right of lien or retention for payment of his wages.

THE Scotch Patent Cooperage Company purchased the growing wood of Fairburn and elsewhere, in Ross-shire, and employed Hugh Callum and others to cut, bark, drag, and float it to Dingwall, at a certain rate per tree. The Company had a manager who superintended the work. Callum employed men, and commenced operations. After a good deal of the work had been done, and a considerable sum become due to

June 17. 1825.

1ST DIVISION.  
Lord Meadowbank.