as in point of law a condition precedent of his right. I am therefore of opinion that the interlocutor of the Lord Ordinary should be altered, that the claim of Mrs Paterson as her husband's disponee should be repelled, and the claim of the factor *loco tutoris* for their only child sustained.

Agent for Factor—James S. Mack, S.S.C.
Agent for Mrs Paterson—David Forsyth, S.S.C.

Friday, January 21.

RATTRAY *v.* LANGLANDS.

Affiliation. Circumstances in which alleged paternity held not proved.

This was an appeal from the Sheriff-court of Forfarshire, in which the pursuer sued the defender for inlying expenses and aliment, as being the father of her child. The Sheriff-substitute (ROBERTSON) pronounced the following interlocutor:—"*Forfar*, 27*th May* 1869.—The Sheriff-substitute having heard parties' procurators, and having made avizandum with the proof and whole process, Finds, in point of fact, that the pursuer has failed to prove that the defender is the father of her illegitimate child, born on or about 14th December 1868: Finds, in point of law, that the defender is not due the sums sued for; therefore assoilzies him from the conclusions of the action; Finds the pursuer liable in expenses, of which allows an account to be lodged and taxed by the auditor; to whom remits and decerns.

"*Note.*—The Sheriff-substitute thinks the pursuer has not made out her case. Her previous character cannot bear comparison with that of the defender. She has had two illegitimate children already; whereas the defender is an elderly married man, with a grown-up family, and of undoubted respectability. The antecedents of the parties being in this position, the proof has to be very narrowly inspected.

"It is remarkable, and significant also, that the only two persons who corroborate in any particular the pursuer's story, are man and wife. It certainly is very odd that this couple should happen to see corroborative evidence at different times and on separate occasions. There is no reason why these two people, more than any other two people, should happen to have seen corroborative evidence of the pursuer's story; but they both say that they did—and upon independent and separate occasions. No other person on the farm or in the neighbourhood sees anything between the pursuer and defender, and it is a suspicious fact that this couple agree in having seen independent and totally disconnected pieces of evidence. The pursuer's case would have been much stronger if the two corroborative witnesses had been parties in no way related to each other, and between whom no collusion could exist.

"The Sheriff-substitute is not satisfied that Mr and Mrs Stewart, the corroborating couple, are unbiassed parties. It is proved that Stewart and the pursuer were on terms of intimacy, and that the pursuer lodged with Mr Stewart after she left her service at the defender's. That the couple should stretch a point in the pursuer's favour is not unlikely.

"A kiss is what the witness Stewart sees: and a meeting at Arbroath is what the witness Mrs Stewart sees. And certainly if these witnesses had been unconnected with each other—had their evidence been supported by third parties referred to by them—and had the defender been detected in any prevarications, the case against him might have assumed a serious aspect. But an examination of the evidence minutely strengthens his case.

"Stewart says he saw his master kiss the pursuer in the girnal-house. He had left that apartment and returned unexpectedly, as he said, for further orders. He got these, but was sadly at a loss to tell the Court what they were. His manner was that of a man who was decidedly at a loss for an answer. He says he mentioned what he had seen to his fellow-servant Nicol, and did so that very day, as was natural. Nicol does not bear this out. He says it was not until the rumour broke out that Stewart said a word about his master having been familiar with pursuer; and the kissing was not alluded to, it was 'gripping,' a familiarity which he never saw.

"Mrs Stewart says that she saw her master meet the pursuer in Arbroath, and go into the inn together. If this is true it is very suspicious, for by this time the pursuer had accused him of being the father of the child. They were shewn up to a room in this inn by Ann Callum, and if Ann Callum had corroborated this, the Sheriff-Substitute would have been much impressed by that fact. But Ann Callum has no recollection of this transaction, and says, if it ever had happened she must have remembered it. This shakes Mrs Stewart's evidence very much. The fact that the pursuer shewed Mrs Stewart money after this interview does not prove much.

"The only other corroboration which the pursuer's story meets with is from the witness Marr, who sees the bonnet of the pursuer crushed on one occasion. But this is not enough to justify a belief in her story throughout. Is it too much to believe that the man Cuthill, to whom the pursuer had yielded up her virtue once before—and also resided close by, who is seen visiting the house late at night—is it too much to believe that he is the father? The Sheriff-Substitute prefers to believe this rather than that the defender should have so far forgotten his position and his marriage vows as to commit fornication with his own maid-servant."

The Sheriff (HERIOT) adhered.
The pursuer appealed.
BALFOUR for her.
SOLICITOR-GENERAL and CRICHTON in answer.
The Court adhered.
Agent for Appellant—Charles S. Taylor, S.S.C.
Agents for Respondent—G. & J. Binny, W.S.

Saturday, January 22.

MACKENZIE *v.* CATTON.

Title to oppose—Service—General Disposition—Heir of Entail—Notarial Instrument—Titles to Land Consolidation Act, 1868. A party who possessed various heritable properties, and who also held certain lands as institute under an entail, executed a general disposition of his whole estate and effects, heritable and moveable, in favour of certain trustees, who assigned it to his daughter, the sole beneficiary under the trust. On the narrative of the truster's infeftment, general disposition, and

its assignation to her, she made up a title by notarial instrument; and, alleging that the entail was bad, and that the truster was entitled and intended to reduce it, and that a declarator of its nullity at her instance was pending, she opposed the service of the *nominatim* next heir of tailzie to the entailed lands. *Held* she had no title to oppose his service.

Under an entail executed by the late Murdo Mackenzie, Esquire of Ardross, the petitioner is *nominatim* heir-substitute; and he now applied for service as nearest and lawful heir of tailzie and provision in special to his brother, the deceased Hugh Mackenzie, Esquire of Dundonnell. His petition was presented on 24th November 1869, and was opposed by Mrs Catton, on the ground that the lands in regard to which he applied for service were held under a defective and invalid entail, and that she had brought an action of declarator to that effect. She also maintained that her father, Mr Hugh Mackenzie, being institute under the entail, was entitled to disregard its fetters and hold the lands under it in fee-simple, and to dispose of them, and that he had availed himself of this power in a general disposition of his estate and effects, heritable and moveable. This deed was executed by him on the 4th of July 1854, and, along with a codicil thereto, dated 22d February 1864, recorded in the books of Council and Session on 9th August 1869. By it Mr Mackenzie conveyed to certain trustees the whole estate and effects, heritable and moveable, real and personal, of what kind or nature whatsoever or wheresoever situated, then belonging, or which should pertain and belong, to him at the time of his decease; and the trustees by assignation, dated 18th and 20th December 1869, assigned the deed of trust, to the extent of the general trust-disposition, to Mrs Catton, the sole beneficiary under it. On the narrative of Mr Mackenzie's infeftment, the general disposition by him to the trustees, and its assignation by them to her, she made up a title under sections 19 and 23 of the Titles to Land Consolidation Act 1868, by notarial instrument, which was recorded on 21st November 1869.

On 22d December 1869 the Sheriff of Chancery (M'LAREN) pronounced the following interlocutor and annexed note:—"The Sheriff having heard counsel on the objections offered on behalf of Mrs Mary Mackenzie or Catton, with consent of her husband, as also on the petitioner's motion for a diligence to recover the title-deeds of the estate to which the petition relates, and the said objections with the deeds therein referred to having been received and seen, Finds (1) that the respondent Mrs Catton does not claim the character of heir of provision of the deceased Hugh Mackenzie of Dundonnell; (2) That the respondent claims the estate to which the petition relates in the character of beneficiary and residuary legatee under a deed of trust granted by the said Hugh Mackenzie, containing a general disposition of heritable estate; which deed, to the extent of such general disposition, has been assigned by the trustees to the respondent; (3) That the respondent is not infeft, and has not the means of presently obtaining herself infeft, in the estate in question. In these circumstances, Finds, in point of law, that the respondent has not a legal title to oppose the petitioner's claim of service, and therefore repels the said objections as defences to this petition, and decerns: Farther grants diligence at the instance of the petitioner as craved, and appoints the haver or havers to appear at this diet of Court and exhibit the title-deeds called for.

"*Note.*—The petitioner is *nominatim* heir-substitute under a deed of entail of the estates of Dundonnell and others in the counties of Ross and Cromarty, executed by his deceased father Murdo Mackenzie. In consequence of the death of his elder brother, Hugh Mackenzie, without issue, the succession has opened to the petitioner under the destination in the deed of entail, and unless he stand excluded by a preferable title, he is clearly entitled to be served heir of provision in terms of his petition.

"The respondent Mrs Catton is the residuary legatee under the trust-settlement of the institute of entail, Hugh Mackenzie, through whose death the succession has opened. She claims the estate on the assumption that the entail is defective in certain particulars, which render it invalid under the provisions of the Entail Amendment Act; that Hugh Mackenzie was entitled to dispose of the estate as a fee-simple proprietor, and that he has effectually done so by the general conveyance contained in his settlement. Since this petition was presented, an action of declarator to the effect here stated has been commenced in the Court of Session. Mr Mackenzie's trustees have executed an assignation of the deed of trust in favour of the respondent, to the effect of making over to her their personal right under the general disposition, and on this title she claims right to oppose the petitioner's service. It would seem that she is not in a position to take infeftment on the assignation in her favour, because under the Titles to Land Consolidation Acts 1868–1869, secs. 22 and 23, and relative schedules, registration to the effect of giving infeftment is only competent in the case of assignations of deeds disposing of specific heritable estate. Indeed it is obvious there can be no infeftment upon a general conveyance of unascertained subjects.

"The question thus arises, whether a personal right to lands is a good title to the disponee to oppose a claim of service. This is a question arising at common law, for the statutes regulating the present procedure in services make no alteration of the law in this respect. On the authority of the cases of *Suttie* v. *Duke of Gordon*, Mor. 14,457, and *Douglas* v. *Duke of Hamilton*, Mor. 14,457, the Sheriff holds that a disponee not infeft has not a legal title to state objections to the proceedings in a service. He is of opinion that a party who is not in the position of a claimant under a competing petition can only object on the ground that he is himself feudally vest in the subject to which the special service relates. It must be remembered that a service is a proceeding of a purely formal character. It is not adapted for the determination of such questions as are involved in the respondent's claim to the estate of Dundonnell. Moreover, a decree of service in favour of the petitioner is in no respect prejudicial to the assertion of the respondent's claim by action of declarator; and if it should be found in that action that she is entitled to the estate in the character of disponee, the judgment in her favour will enable her to reduce the service as a matter of course. On the other hand, supposing the objections to be held relevant in this process, it is difficult to see how this Court could have disposed of them

on the merits. It is obviously beyond the province of the Sheriff to give a judicial opinion on the validity of the deed of provision as an entail. The deed in question is the subsisting investiture; the fee is vacant, and the petitioner is the heir. These considerations, in the opinion of the Sheriff, are sufficient for the decision of the claim of service.

"With regard to the formal objections taken to the proceedings, the Sheriff is of opinion—(1) That the statutory requirement of a special mandate is sufficiently complied with by the production of the power of attorney, containing authority to make up titles; (2) That this Court has all the authority to grant diligence for the recovery of writings, or to compel the attendance of witnesses, that is possessed by any of the inferior courts in Scotland. The power of granting diligence has been exercised ever since the establishment of the Court of Chancery in 1847, and without such a power the business of the Court, even in *ex parte* applications, could not be carried on."

Against this interlocutor Mrs Catton appealed.

LORD-ADVOCATE, DEAN OF FACULTY, and DUNCAN for her.

SOLICITOR-GENERAL and SHAND in answer.

At advising—

LORD-PRESIDENT desired to say at the outset, in order to guard against misconception, that the question of possession had nothing to do with the case. It could not be disputed that the petitioner possessed the character of *nominatim* heir of tailzie and provision next in the order of entail after his brother the late Hugh Mackenzie of Ardross and Dundonnell. And his service was opposed by Mrs Catton on a title made up under the recent Titles to Land Consolidation Act. Her title was made up by a notarial instrument, narrating the infeftment of Mr Hugh Mackenzie, a general disposition by him to trustees, and its assignation by them to her. Thus the first step in the progress on which her notarial instrument was founded was the registered instrument of sasine by which Mr Mackenzie was infeft in the lands mentioned in it. The warrant of this notarial instrument was thus the sasine of Mr Mackenzie, and therefore, of necessity, the sasine of Mr Mackenzie was before the Court. Now, in that sasine Mr Mackenzie was infeft, not as fee-simple proprietor, but as heir of entail. *Ex facie* therefore of Mrs Catton's warrant, the sasine of Mr Mackenzie was that of one who possessed the estate under fetters. But Mrs Catton alleged the entail was invalid and that she had an action of declarator to that effect pending in Court. She also maintained that Mr Mackenzie, being institute under the entail, was not bound by its fetters, and that he intended by his general disposition to convey the lands under the entail. But the Court had only Mrs Catton's word for these allegations, and the Court had no certainty till the entail was reduced that it was bad, or that Mr Mackenzie had the power and intention to convey the entailed lands. In the case of *Thoms* it was admitted that the entail was bad, but here there was no such admission. Till it was established in some competent form of process that it was Mr Mackenzie's intention to convey this entailed estate Mrs Catton had no title at all; and it would also have to be shewn that he had such power. On this ground, alone, Mrs Catton had no title to oppose this service; and the Sheriff's interlocutor was right and should be adhered to.

LORDS DEAS and ARDMILLAN concurred.

LORD KINLOCH—I think the Sheriff of Chancery has rightly dealt with these proceedings, and that his judgments must stand, notwithstanding the fresh grounds of objection which have been now presented to us.

The petition is for service of Kenneth Mackenzie as heir of entail under a special deed to Hugh Mackenzie of Dundonnell. His sister, Mrs Catton, has appeared, not simply to take part in the proceedings of service by cross-examining the witnesses or the like, but to demand that the service should be stopped and the petition of service dismissed.

She does not claim the character of competing heir of entail. What she founds on is an alleged general disposition of all lands and heritages by the deceased Hugh Mackenzie, followed by a notarial instrument under the Titles to Land Act, which she alleges constitutes sasine in these particular lands. By this deed, she contended, the Sheriff's difficulties were overcome, and the present special service was precluded by reason of the fee being full.

I shall not enter on the general question to what extent an *ex facie* full fee may be made the ground for stopping a special service. I shall in fitting time discuss this question, on which not a little misapprehension often occurs. For the present purpose it is sufficient to say that the notarial instrument in question cannot be received as evidence of the fee being full—(1) because *ex facie* it infers a fee-simple conveyance by one holding in entail, whose capacity to grant such a conveyance cannot be assumed; and (2) because in a question with a third party the notarial instrument, applying to these subjects the general disposition of all lands and heritages, can be taken as no better than the mere statement of the objector that these lands are contained in the conveyance.

For these reasons I think the production of this document cannot stop the service; and to hold this will not injure Mrs Catton, whose right, if valid, will still prevail in competition. To hold anything else might be most injurious to a petitioner for a service; who, even though proved in the end to have the only true claim, would be meanwhile prevented, for want of a complete title, from constituting any right over the lands, either *inter vivos* or *mortis causa*, and might die in a compulsory apparency.

Agent for Petitioner—Andrew Webster, S.S.C.

Agents for Respondent—Murray, Beith, & Murray, W.S.

Tuesday, January 25.

WOTHERSPOON, PETITIONER.

Judicial Sale—Recess. Judicial sale authorised to take place during a recess of the Court.

In an action of ranking and sale at the instance of the petitioner, the subjects had been appointed to be sold on the 9th of February before the Junior Lord Ordinary. Subsequently the Court having resolved not to sit between the 5th and 12th February, the petitioner moved the Court to delay the day of sale, as there was considerable doubt whether a sale could take place when the Court were not sitting.

PATTISON, for him, quoted Bell's Com. p. 1009,