Nathaniel as a party who could in no event occupy the position of an institute or disponee, particularly as the only objection taken to his service as heir of provision to the granter of the deed was that he ought to have served to John Gordon as the first party called *nominatim* in the destination—an objection unfounded in the circumstance of the case, but indicating that the objector considered himself precluded by the terms of the deed from representing Nathaniel as in any sense or in any event a conditional institute or disponee.

This seems the most reasonable and consistent explanation of the judgment in the case of *Carlton*, and it derives much support from the information and suggestions contained in an opinion of Lord Craigie in *Colquhoun* v. *Colquhoun*—an opinion in many respects of great weight in this branch of the law. His Lordship says—"It had been provided by the entail of Carlton that the persons there called *nominatim* might be served heirs of tailzie to the entailer; and Lord Kilkerran's interlocutor, to which the Court adhered, appears to be chiefly rested on that specialty. The judgment is not recited in the report, probably because the collection was not originally intended for publication, but it is in these words—'Having advised the minute of debate, and considered the disposition of tailzie, finds the title properly made up by Nathaniel Gordon to James Gordon, the maker of the entail.'"

For the reasons now stated and explained, the decision in *Gordon of Carlton* cannot be held to establish that a party called *nominatim* under a destination after the heirs of the granter's body, and without any disposition or other conveyance in favour of the granter himself, does not, on the death of the granter without heirs of his body, become institute and disponee. In certain exceptional circumstances, and according to the terms of such a deed as the Carlton entail, this result may be produced, but nothing short of such exceptional circumstances and expressions of the deed can interfere with the general rule that the first substitute becomes institute upon the institute predeceasing the granter without heirs, or with the application of that rule to such a destination as occurs in the present case.

The other case relied on by the heir of line, *Peacock* v. *Glen*, has been also the subject of a good deal of criticism, and also of a good deal of misunderstanding.

In the first place, it must be observed that in *Peacock* v. *Glen* the whole controversy regarded the completion and validity of a feudal title, while in *Gordon of Carlton* the question turned on the vesting of a personal right of fee in Nathaniel Gordon, to enable him to dispone to his eldest son. The finding of the Court was by a majority that – "there was no proper feudal title in the person of William Beatie junior at the date of the bond in security in question," and therefore they reduced the bond and infeftment thereon.

In the second place, the defect of the feudal title of William Beatie junior consisted in the imperfection of the sasine in his favour, in respect of failure to comply with the requisites of the Act 1693, c. 35. This is the only ground of judgment stated by Lord Glenlee and Lord Robertson, who concurred with him. Lord Alloway dissented from the judgment, holding the feudal title of Wm. Beatie junior to be unobjectionable. The Lord Justice-Clerk and Lord Pitmilly no doubt proceed to a certain extent on the supposed authority of the case of *Carlton*. The destination in *Peacock* v. *Glen* was to the heirs of the granter's body, whom failing to William Beatie his nephew, and on the death of the granter without issue, William Beatie took infeftment on the precept of sasine contained in the disposition, without service or any other preliminary to connect himself therewith. The two judges last named held that his title was bad for want of such service, proceeding on what may now be assumed to be a misunderstanding of the case of *Gordon of Carlton*. But this was certainly not the opinion of the majority of the Court. The case of *Peacock* v. *Glen* cannot therefore be relied on as either following the case of *Carlton*, or as a case in which the doctrine of that case was accurately ascertained and understood.

If the cases of *Gordon of Carlton* and *Peacock* v. *Glen* are not authorities for the heir of line, and authorities of undoubted weight and application as understood and expounded by Professor Bell and Professor Menzies, the whole contention of the heir of line fails. It is based on a rule of construction supposed to be established by these cases, which is in the highest degree artificial, and which, by ascribing a non-natural sense to words of plain meaning, would convert a *de præsenti* conveyance of lands into a mere nomination of heirs, with executry clauses for completing the titles of those heirs who may connect themselves therewith by service. This is a perversion of all the ordinary rules of construction of such deeds, and is calculated, as it has been found in practice, to introduce great confusion and uncertainty in the operations of conveyances.

The Court are of opinion that when one by *mortis causa* conveyance in the ordinary form disponers to the heirs of his body, or the heirs male of his body, whom failing to a person named, the person so named (there being no heirs of his body then existing) is conditional institute; and if no heirs of the body of the granter come into existence, or existing predecease him, the condition is purified, and the person named is, on the death of the granter, without qualification or condition disponee, and as such is entitled to use the executing clauses of the disposition for the purpose of feudalising his right as disponee without service or declarator.

Judgment must therefore in this case be pronounced in favour of the heir of conquest, and against the heir of line of Robert Hutchison.

Counsel for Allan Hutchison—Marshall. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for David Hutchison—Kinnear. Agents—Macallan & Chancellor, W.S.

Friday, December 20.

FIRST DIVISION.

[Lord Mure, Ordinary.

BOYD *v.* EARL OF ZETLAND AND OTHERS.

Process—Title to Sue—Mines and Minerals, Reservation of—Service.

A was infeft upon a feu-contract, by which certain lands were conveyed to him without reservation of the mines and minerals. Upon A's death, his son B was infeft in the said subjects upon precept of *clare constat* from the superior, which contained a reservation of

mines and minerals. The said subjects were subsequently sold by A's greatgrandson, and A's great-greatgrandson C, having served to A, brought an action of declarator of his right to the minerals in the said subjects, against the purchasers, on the ground that the minerals were *in hereditate jacente* of A. *Held* that there was nothing *in hereditate jacente* of A, the reservation in the precept of *clare constat* being inept, and that therefore C had no title to sue.

This was an action brought by Mr John Boyd, Liverpool, against the Earl of Zetland and George Caddell Bruce, C.E., William Broom and Thomas Brownlie, to have it declared that the pursuer was in right of the mines and minerals in a certain portion of the lands of the barony of Seabeggs, of which the defender the Earl of Zetland was superior and the other defenders proprietors. The circumstances under which this action was brought were as follows:—By feu-contract, dated the 20th and 22d September 1729, entered into between John Don of Seabeggs and William Don, his eldest son, on the one part, and the pursuer's great-great-grandfather John Boyd (I.) on the other part, the said John and William Don sold, alienated, and in feu-farm disponed to John Boyd, heritably and irredeemably, the said lands of Seabeggs, and the said John Boyd (I.) was duly infeft in the said subjects. The said John Boyd (I.) died about the year 1765, and was succeeded by John Boyd (II.), portioner of Seabeggs, his eldest son and nearest and lawful heir, who in that character made up a title to said subjects by precept of *clare constat*, dated 25th December 1765, granted by Major Chalmers of Camelon, liferent superior, and Sir John Pringle, W.S., the commissioner for Sir Laurence Dundas, to whom the said William Don had sold the superiority of the said lands of Seabeggs in the year 1762. Upon this precept the said John Boyd (II.) was infeft in 1766. The said John Boyd (II.) died in or before the year 1814, and was succeeded by John Boyd (III.), portioner in Seabeggs, his eldest son and nearest and lawful heir, who made up titles to said subjects by precept of *clare constat*, dated October 10, 1814, granted by the Right Honourable Thomas Lord Dundas (now Earl of Zetland), superior of the lands and barony of Seabeggs, upon which the said John Boyd (III.) was infeft in 1814. In each of these precepts of *clare constat* there was a clause professing to reserve the mines and minerals to the superior. The clause, which was substantially the same in both writs, was expressed in the precept of 1765 in the following terms:—"Excepting and reserving always to us, according to our respective rights and interests of liferent and fee above mentioned, the haill mines and minerals within the ground of the foresaid lands, with power to set down sinks, drive levels, and work and win the same as we think fit, the said John Boyd, his heirs and successors, being always payd of what damages shall be sustained by them in working the same, as shall be determined by two neutral persons." John Boyd (III.) sold the subjects, which, after passing through several hands, came into the possession of the defenders George Caddell Bruce, William Broom, and Thomas Brownlie. Before raising this action, the pursuer obtained from the Sheriff of Chancery service as nearest and lawful heir in general to John Boyd (I.).

The defence was that John Boyd (I.) did not die last vest and seised in the said mines and minerals, in respect (1) that the superior was entirely divested of the *dominium utile* of the lands of Seabeggs, including the mines and minerals therein, by the unqualified infeftment in favour of the said John Boyd (I.), the original feuar; (2) that the attempted reservation of mines and minerals in favour of the superior in subsequent renewals of the investiture was wholly unauthorised and inept, and had not the effect of making the mines and minerals an estate separate and distinct from the *dominium utile* of the surface; (3) that the whole *dominium utile* of the said subjects, including the mines and minerals, was effectually transmitted to and feudally vested in John Boyd (III.), the grandson of the original feuar, in virtue of the renewals of the investiture by the successive precepts of *clare constat* and sasines in favour of him and of his father John Boyd (II.); and (4) that the whole *dominium utile* of the subjects, including mines and minerals, had been conveyed to the defenders in virtue of the transmissions above set forth.

The defenders therefore pleaded, *inter alia*, that the pursuers could not insist in the action while the defenders' title remained unreduced.

The Lord Ordinary pronounced the following interlocutor and note:—

"*9th July* 1872.—The Lord Ordinary having heard parties' procurators, and considered the Closed Record and productions—Finds that the pursuer has not instructed any sufficient title to insist in the present action: Therefore dismisses the action, and decerns; Finds the defenders entitled to expenses, of which appoints an account to be given in, and remits the same, when lodged, to the Auditor to tax and report.

"*Note.*—The Lord Ordinary has felt the question of title to sue here raised to be attended with considerable nicety, and if the object of the present action had been to reduce infeftments which stood in the way of the pursuer establishing a claim to the minerals in question, he would have had difficulty in holding that a general service was not a sufficient title to sue because although the decisions in such questions are in some respect contradictory—*Horns*, 6th Nov. 1741, D. p. 16,117, as contrasted with *M'Callum*, 21st February, 1793, D. p. 16,135—it appears to have been held in the later case of *Carmichael*, 15th Nov. 1820, that a general service is a sufficient title to challenge an investiture flowing from the party to whom the general service was expede, although there does not appear to have been in that case, any more than here, any objection to the party founding upon the general service entering as heir in special to the ancestor. The present, however, is not an action of that description. It is one of declarator, in which the pursuer seeks to have it declared that the minerals in the property belonging to the defenders, in which it is alleged that the deceased John Boyd, younger in Lochgreen, was last vest and seised, belong to the pursuer as heir of John Boyd; and the title in respect of which the pursuer seeks to have this declared is a service as heir in general of that John Boyd. Now the Lord Ordinary understands it to be an undoubted rule of law that a general service is inept to carry to the party served right to any lands in which the ancestor died infeft—Ersk. iii. 8, sec. 63. In such circumstances a special service seems to be essential to transmit the right, and as the object of this action is to have it declared that the pursuer is

now the actual proprietor of the minerals in which John Boyd the younger died last vest and seised, and which are said to have ever since remained *in hereditate jacente* of John Boyd, the Lord Ordinary does not think that a general service can be held to be a proper title on which to found such an action.

"But there is another ground on which it appears to the Lord Ordinary that the pursuer's title is objectionable. This action proceeds upon the assumption that the minerals are still *in hereditate jacente* of John Boyd younger of Lochgreen, who died in or about 1765. For it assumes that the precepts of *clare constat* under which the investiture was renewed in 1765 and 1814 were insufficient, notwithstanding the reservation in the superior's favour of the minerals therein contained, to confer upon the superior any right to the minerals which under the original feu-contract, had admittedly been conveyed away to John Boyd of Lochgreen. And in this latter assumption it is thought that the pursuer is correct; because it appears to have been deliberately settled in the case of *Graham*, January 27, 1842, that such a reservation in a charter of progress, but which was not in the original titles, was altogether ineffectual to deprive the owner of the *dominium utile* of his right to the minerals, or of any other part of the subject originally feued, unless it distinctly appeared from the deeds by which the investiture was renewed that there had been a new transaction then entered into, under which the parties intended so to alter the investiture. But it is not alleged that there was any such transaction entered into at any of the renewals of the investitures in this case, and the deeds themselves, which are produced, do not bear that there was. Now these precepts are founded on by the pursuer in the Record as showing that the minerals in question are still *in hereditate jacente* of John Boyd the first, who died in 1765. On a sound construction, however, of the precepts, they appear to the Lord Ordinary to disprove that fact. For if the reservation is ineffectual to entitle the superior to re-assert a right to the minerals as in a question with his vassal—and it was so ruled in the case of *Graham*—then the minerals must, it is thought, be held to have been here transmitted, in respect of the infeftment which followed upon the precepts of *clare constat* referred to in the condescendence, first, to John Boyd the second in 1765, and afterwards to John Boyd the third in 1814, by whom the property was sold in 1825. Whether the conveyance then granted in favour of Mrs Munro, and the subsequent transmissions, are apt to carry the minerals to the parties from whom the property was subsequently acquired by the defenders, or whether the minerals are still *in hereditate jacente* of John Boyd the third, appear to the Lord Ordinary to be the main questions raised upon the merits in the present action. But the defenders cannot, it is thought, be called on to discuss these questions, or to defend the titles on which they rely, in an action at the instance of a party whose only title is a general service to John Boyd the first of Lochgreen, who was not, in the opinion of the Lord Ordinary, the heir last vest and seised in the minerals."

The pursuer reclaimed; and before the reclaiming note was heard he obtained from the Sheriff of Chancery an interlocutor finding it proved that he was nearest and lawful heir in special of the said John Boyd younger of Lochgreen, in the mines and minerals in the said subjects.

It was argued for the pursuer that the minerals were *in hereditate jacente* of John Boyd (I.), for while he was fully vest and seized in the mines and minerals, the right never went beyond him, being reserved in the precept of *clare constat* under which John Boyd (II.) was infeft.—Bell's Prin., § 1823. And so, the pursuer having served to John Boyd (I.), was in right of the minerals.

It was argued for the defenders that the minerals were not *in hereditate jacente* of John Boyd (I.), but were transmitted through John Boyd (II.) and John Boyd (III.) to them. The mines and minerals not being reserved in the original charter could not be so by the precept of *clare constat.*—*Graham* v. *Duke of Hamilton*, Jan. 27, 1842, 1 D. 482. So nothing remained in John Boyd (I.), and there was nothing which service could take up, and so service to him gave the pursuer no title to insist in the action.

At advising—

Lord President—The Lord Ordinary in this action has found that the pursuer has not instructed any sufficient title to insist in the action. This finding is based upon two grounds—(1) that the pursuer has, as his title to sue, only a general service; and (2) that even if he had had a special service he could not thereby have connected himself with the subject claimed.

The first of these grounds has been set aside by the pursuer obtaining a special service, so we must now consider whether that gives him any title to sue,—whether by special service to his great-great-grandfather, John Boyd younger in Lochgreen, he has so connected himself with the mines and minerals in dispute that he can insist that they belong to him and not to the defenders.

The lands of Seabeggs came into the possession of John Boyd (I.) by feu-contract of 20th and 22d September 1779, and in that feu-contract there is no reservation of minerals. The estate was to be held of the superior in feu-farm and for a certain feu-duty; and a feudal estate being thus created, the superior could not make any alteration on the subjects, or on the manner of holding, or on the reddendo, by merely introducing a reservation into a charter by progress, or a precept of *clare constat.* Such things may be done by transactions between the superior and vassal, but we have no such transaction in this case. Here, when John Boyd (I.) died, his son John Boyd (II.) made up a title to the estate by precept of *clare constat*, upon which he took infeftment. In that precept of *clare constat* there was inserted these words—"Excepting and reserving always to us, according to our respective rights and interests of liferent and fee above mentioned, the haill mines and minerals within the ground of the foresaid lands, with power to set down sinks, drive levels, and work and win the same, as we think fit, the said John Boyd, his heirs and successors, being always payd of what damages shall be sustained by them in working the same, as shall be determined by two neutral persons."

Now, this exception in the precept of *clare constat* is absolutely inept in a question with parties taking infeftment. The superior had no power to work the minerals, and the vassal had such power, and so it follows in law that the exception of minerals was beyond the power of the superior,

and had positively no effect. It follows, therefore, that John Boyd (II) was infeft in the feu as fully as his father before him in all the subjects conveyed by the original feu-contract. Now, the mines and minerals may be made a separate estate from the lands, but, until this is done, there is only one subject, and the conveyance of the lands is a conveyance of the minerals. And in the original charter there is, as we have seen, no reservation of minerals, so John Boyd (I) was in right of them as well as of the lands, and therefore John Boyd (II), having been infeft in the feu as fully as John Boyd (I), was also in right of the mines and minerals. Now, the case of the pursuer rests entirely on the assumption that the mines and minerals are in the *hereditate jacente* of John Boyd (I), and as it is apparent that they are not so, but that they passed to John Boyd (II), the pursuer has no case—no title to sue. I am therefore of opinion that we should adhere to the interlocutor of the Lord Ordinary.

LORD DEAS concurred.

LORD ARDMILLAN—As the case is presented to us the only question is, whether there was any title to the minerals left in John Boyd (I.), for if there was not, then there is an end of the case, as it is now presented to us.

It is settled that a superior cannot, at his own hand, alter the relation between him and the vassal, and cannot, in a charter by progress, introduce any reservation or limitation of the vassal's right which was not contained in the original investiture. As in a question between superior and vassal, there can be no doubt on this point. In this case there is a reservation to the superior of mines and minerals in the precepts of *clare constat*, under which John (II.) and John (III.) were infeft, although the entire estate in land and minerals was originally conveyed, and there is no such reservation in the original feu-contract. That the reservation so introduced is of no force as regards the superior—that it does not, in a question with the superior, impair the right of the vassal—is clear. The question then is, Shall that reservation be held to be valid and effectual in this question when the superior has no interest and states no plea? I think that no effect can be given to it. It was not a good reservation as regarded the superior, or as regarded the vassal as in a question with the superior, for the measure of their relative rights was within the original contract; and, if it was not a good reservation in regard to the superior, the person for whose benefit alone it was introduced, it could not be good as qualifying the right of the owner of the land, or in regard to any one else. So this reservation did not qualify the transmission of the estate to John (III.), or limit his right; and as he was infeft in the whole subjects, except in so far as legally and effectually qualified and limited, the right to the minerals as well as the lands must be held to have vested in him. That is, I think, the only question now before us, and I therefore agree with your Lordship, that we should adhere to the Lord Ordinary's interlocutor.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for the Pursuer—The Lord Advocate and Kinnear. Agents—Murray, Beith, & Murray, W.S.

Counsel for the Defenders—Solicitor-General and Marshall. Agents—Mackenzie & Kermack, W.S.

Friday, December 20.

FIRST DIVISION.

[Lord Mure, Ordinary.

TOUGH *v.* DUMBARTON WATER WORKS COMMISSIONERS.

Arbitration—Contract—Damages.

Circumstances in which the Court *repelled* the defence that the action was excluded by the clause of reference contained in one of two contracts under which the action was brought.

The pursuer of this action was Mr Charles Tough, a contractor, residing in Govan, and the defenders were the Dumbarton Water Works Commissioners, and the action concluded for payment of certain sums which the pursuer alleged to be due to him by the defenders, and also for damages on account of alleged breach of contract. In April 1870 the pursuer entered into a contract with the defenders, by which he undertook to form an embankment and other works for a reservoir on the Overtoun Burn on the lands of Auchentorlie and Strathleven, a short distance above the Black Linn, at a level of about 1000 feet above the sea, and about four miles north from the town of Dumbarton; also to form a fire-clay pipe conduit from the reservoir about 1300 yards long, and to construct an additional filter on the lands of Garshake, close to and of the same dimensions as the filter belonging to the commissioners, all according to plans and specifications referred to in said contract. In October 1870 the pursuer entered into a second contract with the defenders, by which he undertook to remove the peat from the bottom of the reservoir. The first contract—that of April 1871—also contained a general reference of all doubts, disputes, or differences that might arise in connection with the contract, to the amicable decision, final sentence, and decree-arbitral of James Morris Gale, civil-engineer, Glasgow, whom failing, by death, non-acceptance, resignation, or otherwise, of any arbiter to be named by the Sheriff of Dumbartonshire, upon the application of either party, as sole arbiter in the premises, whose decision, valuation, and awards should be final and binding on all the parties. And it was thereby declared that although the said James Morris Gale might continue and remain engineer of the commissioners, such connection should not disqualify him from acting as arbiter in the premises, and his decision should be as unchallengeable as if he were wholly unconnected with the commissioners or the said works. The pursuer proceeded with the work specified in these contracts, and his averments in reference and hereto, upon which he founded his action, were as follows. He averred that he had executed under the first contract work to the extent of £2277, 2s., on account of which he had been paid £2124, 14s. 9d., leaving a balance due to him of £152, 7s. 3d. Under the second contract the pursuer averred that he had excavated the whole peat mentioned in the contract, and, at the defender's request, 18,771 cubic yards in addition. The amount which he claimed as still due to him for these operations was £742, 1s. The pursuer next averred that, to expedite the removal of the peat, Mr Gale, the engineer of the defenders, in or about the month of June 1871, acting with the authority of the defenders, ordered the pursuer to