

The Court pronounced the following interlocutor:—

“Find, in point of fact, that recently, before the petition and complaint by which the present proceedings originated, had been presented in the Sheriff Court, the North British Railway Company had used the ground in dispute as a dunghill for depositing the police manure or fuilzie, which was intended to be carried away *ex intervallo* by means of the railway; and, in point of law, 1st, that this was a breach or infringement of the clause in the contract of feu and ground-annual, of date 29th April and 14th May 1803, and recorded in the Books of Council and Session on 19th November thereafter, which contract contains the whole ground of which part now belongs to the North British Railway Company and part to the original complainer (respondent in the appeal) Robert Robertson, and which clause is binding and obligatory on the said railway company; 2d, that, having reference to the title-deeds of the parties, including the terms of the clause in dispute, and the nature of the breach or infringement complained of, the said Robert Robertson had and has sufficient title and interest to object to that breach or infringement; and no questions having been raised by either party under this appeal, except as regards the use of the ground in dispute in the first place as a loading stance for the railway, and, in the second place, as a dunghill or place of deposit for fuilzie as aforesaid, Refuse the appeal, and decern; find the respondent Robert Robertson entitled to expenses; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report.”

Counsel for Robertson and M'Casland—Dean of Faculty (Clark) Q.C., Marshall and Laidlay. Agents—Morton, Neilson & Smart, W.S.

Counsel for North British Railway—Scott and M'Kechnie. Agents—Hill & Fergusson, W.S.  
M., Clerk.

Friday, July 17.

FIRST DIVISION.

W. PITT DUNDAS AND THOMAS BRODIE,  
PETITIONERS.

*Interim Appointment—Intimation to the Lord Advocate.*

This was a petition for the appointment of an interim keeper of the Privy Seal, the office being vacant by the death of the late Earl of Dalhousie. The Court held that intimation to the Lord Advocate was not necessary, and pronounced the following interlocutor:—

“The Lords having considered this petition, nominate and appoint the petitioners to officiate jointly and severally as interim Keepers of the Privy Seal in place of the deceased Earl of Dalhousie, in terms of the prayer of the said petition; and appoint the petition and this deliverance to be recorded in the Books of Sederunt.”

Petitioners' Counsel—G. S. Dundas. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Saturday, July 18.

FIRST DIVISION.

[Lord Gifford, Ordinary.]

TODD v. MACKENZIE.

*Succession—Destination—Heir-at-Law—Marriage-Contract.*

In the marriage-contract of his daughter, A disposed his heritable estate to himself in liferent for his liferent use alienarily, and to his daughter “and the heirs of her body, or her assignees and disponees, whom all failing, to the nearest heirs whomsoever of the said” A. The daughter predeceased A without issue. Held that the destination thus failed, and that A took as heir-at-law to his daughter.

John Todd of Glenduffhill had a daughter Janet, who, on 29th June 1865, was married to James Mackenzie, the defender in this action. In the antenuptial contract of marriage John Todd “disposed and conveyed to himself, the said John Todd, in liferent for his liferent use alienarily, and to the said Janet Todd and the heirs of her body, or her assignees and disponees, whom all failing, to the nearest heirs whomsoever of the said John Todd, heritably and irredeemably, but expressly excluding the *jus mariti* and right of administration of her said intended husband, All and Whole his, the said John Todd's, lands of Glenduffhill.” Mrs Janet Mackenzie died on 17th September 1872, survived by her husband and father, and without issue. On 3d October 1872, John Todd, on the assumption that by his daughter's death without issue the estate of Glenduffhill had reverted to him, subject to an eventual liferent in the defender James Mackenzie, granted an absolute disposition thereof in favour of himself in liferent, for his liferent use alienarily, and to his son-in-law, the said James Mackenzie, and his heirs and assignees whomsoever in fee. On 7th November 1872 John Todd expedite a service to his daughter Mrs Janet Todd or Mackenzie, as his nearest and lawful heir in special in the said lands. The defender James Mackenzie completed his title by registering the disposition in his favour in the Register of Sasines on 4th October 1872, and by writ of confirmation by the Earl and Countess of Home, dated 26th November 1872.

John Todd died on 7th June 1873, and this action was brought by his nephew and heir-at-law, James Todd, who was also served nearest and lawful heir of provision to Mrs Janet Todd or Mackenzie. The object of the action was, in the first place, to have it declared that the service expedite by James Todd on 7th November 1872 was inept; and, in the second place, for reduction of the disposition in favour of the defender James Mackenzie.

The pursuer averred that the estate of Glenduffhill was worth £90,000. A small portion of the estate was held upon a disposition from the North British Railway Company, who had acquired from John Todd, Mrs Mackenzie, and the defender, for their respective rights and interests, a portion of the lands of Glenduffhill, in consideration of which the Railway Company made a money payment, and also conveyed to them certain other pieces of land upon a destination precisely similar to that in the marriage-contract.

The pursuer averred that the defender had obtained the disposition in his favour from John Todd by fraud and circumvention.

The pursuer pleaded—“(1) The pursuer, as nearest and lawful heir of provision in special and general to the said Mrs Janet Todd or Mackenzie, has the only good and undoubted right and title to the fee of the subjects conveyed by the said antenuptial contract of marriage and the disposition by the said North British Railway Company. (2) The conveyance of the said subjects by the said John Todd to the defender James Mackenzie ought to be reduced, in respect that the said John Todd had not, either at the date thereof or subsequent thereto, any right or title to the fee of said estates, or any power to grant the said conveyance. (3) In respect that the special service expedite by the said John Todd to his daughter Mrs Janet Todd or Mackenzie was inept and did not transmit any right to him in or to the lands and others therein mentioned, the pursuer is entitled, in virtue of his services as heir of provision to her, the said Mrs Janet Todd or Mackenzie, to decree of declarator as concluded for. (4) The said conveyance by the said John Todd in favour of the defender James Mackenzie not being the deed of the said John Todd, it ought to be reduced. (5) The said conveyance having been impetrated and obtained from the said John Todd when he was weak and facile in mind, by the said defender James Mackenzie, by fraud or circumvention, the same should be reduced and set aside. (6) In the event of any of the defenders appearing to oppose the conclusions of the present summons, they ought and should be found conjunctly and severally liable in the expenses of this process.”

The defender pleaded—“(2) The pursuer's general service as heir of John Todd is inept, in respect that it was not expedite before the Sheriff of the county within which the said John Todd had at the time of his death his ordinary or principal domicile, but before a Sheriff who had no jurisdiction to pronounce the decree of service. (3) In respect of the ulterior destination or clause of return in the said antenuptial marriage-contract and disposition by the Railway Company, the said John Todd had right to the lands in question upon the death of his daughter, and his title thereto was effectually completed by the service which he expedite and the infetment which followed thereon. (4) The said ulterior destination, so far as regarded the heirs of the said John Todd, being gratuitous and revocable, was effectually revoked by him. (5) The said John Todd's service is valid and effectual as a service of heir of provision to his daughter, in respect that the antenuptial contract of marriage and disposition by the Railway Company are duly mentioned therein; and that it also appears *ex facie* of the decree that the said John Todd, and he alone, possessed the character of such heir of provision. (6) *Separatim*, the said service would be effectual even if construed as a service as heir of line. (7) The pursuer's special service as heir of provision to Mrs Mackenzie is inept, in respect that she was not last vest and seized in the fee of the said lands, and that the said service was excluded by the existing titles. (8) In no view can the pursuer's claim to the said lands be sustained, or his said service be available, while the said John Todd's service and the existing titles stand unre-

duced. (9) The defender James Todd Mackenzie having, by virtue of the existing titles, the full and true right to the lands in question, the present action is unfounded.”

The Lord Ordinary pronounced this interlocutor—

“*Edinburgh, June 9, 1874*—The Lord Ordinary having heard parties' procurators, and having considered the closed record, writs, and title-deeds produced, and whole process: Finds that, assuming the validity of the disposition granted by the late John Todd, Esq. of Glenduffhill, in favour of himself in liferent, and the defender James Mackenzie in fee, dated 3d October 1872, that is, assuming that the said disposition was the proper deed of the said John Todd, and that the same is not subject to reduction as improperly obtained from him by fraud or circumvention, then and in that case the said disposition effectually conveys the fee of the lands and others thereby disposed to and in favour of the defender the said James Mackenzie: Therefore, and to this extent, assolizies the defenders from the first or declaratory conclusion of the summons, and decerns; and with reference to the reductive conclusions, Appoints issues to be adjusted on a day to be afterwards fixed: Grants leave to reclaim against this interlocutor, reserving in the meantime all questions of expenses.

“*Note*—This is a very important action, involving the right to the lands and estate of Glenduffhill and others, said to be of the value of £90,000. This estate belonged at one time to the late John Todd of Glenduffhill, and was settled by him on his only daughter and the heirs of her body, on the occasion of her marriage with the defender James Mackenzie of Glentore.

“Mrs Mackenzie, John Todd's only child, died without issue on 17th September 1872, survived by her father, the said John Todd, and by her husband, the said James Mackenzie. Shortly after his daughter's death, and on 3d October 1872, the said John Todd, on the assumption that by his daughter's death without issue the said estate had reverted to him, subject to an eventual liferent in the defender, granted an absolute disposition in favour of himself in liferent, for his liferent use alienarily, and to his son-in-law, the said James Mackenzie, and his heirs and assignees whomsoever in fee. Thereafter, and with a view to validate the said deed, in case a service should be necessary, the said James Todd expedite a service to his daughter Mrs Janet Todd or Mackenzie as her nearest and lawful heir in special in the said lands. This service is dated 7th November 1872. The defender James Mackenzie completed his title by registering the disposition in the Register of Sasines on 4th October 1872, and by writ of confirmation by the Earl and Countess of Home, dated 26th November 1872.

“The said John Todd died on 7th June 1873, and the present pursuer is his nephew and heir-at-law.

“In the present action the pursuer challenges Mr John Todd's disposition to the defender of 3d October 1872, as not the deed of the grantor, the said John Todd, and as having been impetrated from him by the defender by fraud and circumvention, and while the said John Todd was weak and facile; and the present action contains appropriate reductive conclusions on these grounds.

“But the pursuer maintains, alternatively, or