predecessors knew a great deal more about this matter than we can possibly know. But were I to hazard a guess at the matter, I venture to think that what he must have meant is that when a man had a charter in that way and went to the superior and said, "I want to alter the destination from heirs whatsoever to a set of heirs I am going to pick out; give me another charter," I can quite understand that that charter would be given without another payment of composition. It is quite within one's knowledge that superiors do not always insist on their extreme rights. The Crown, for instance, gives entries for less than could be demanded. The Crown in the case mentioned by Lord Johnston of *Drummond Murray* gave entry for less, and I know that subject-superiors have acted in the same way.

Now I think here that if Sir James Riddell, after he had got his charter in 1849, had made up his mind about his entail at once, and had gone back to the superior, say the next week, and said, "Now I have got a charter from you to my heirs whomsoever, but in the meantime I want to settle my affairs by entail; I propose to do that by a procuratory of resignation, and I propose to get a charter of resignation from you and take infeftment myself and start my own entail," I do not think the superior, unless he or his agent had been a Shylock, would have had the face to ask a composition. Now that class of thing, I cannot help guessing, is what Lord Corehouse is referring to. But it is a different thing to say that the superior could have been forced to do it. And if the whole thing was left over, and the vassal afterwards disposed of his estate by *mortis causa* deed, and no title was taken upon it till the year 1872, the situation would be entirely altered, and I do not think the superior would be a Shylock in 1872 in demanding his composition. I do not mean demanding it from Sir Thomas, for he was entirely shut out from that by the decision in the case of *Mackenzie* and the *Marquis of Hastings*.

Your Lordships will have observed that hitherto I have treated the case entirely upon the view of what the superior could have been forced to give. I now come to the one remaining question, viz.—whether the actual granting of the charter of confirmation of 1872 and the reservation there makes any difference. Here I confess I have had the very greatest difficulty, and it is this part of the case which to my mind is much thinner than the general view so well argued by Lord Kinnear. There is no question that, as expressed, this reservation reserves to the superior a right to claim composition on occasions when he has not the slightest right to get it, because, of course, it is a reservation of a right to composition whenever the heir that happens to succeed is not the heir of line of the last entered vassal. That is exactly what was held to be bad in the case of *Stirling* v. *Ewart*. Therefore I have had very great difficulty, but on the whole I have come to the conclusion that the reservation will do, and for this reason—I think we are all agreed that the superior's right does not turn on the reservation; he must have his right first, and all that the reservation does is to prevent the retort that would be made to the superior, "Oh no, you have granted another charter of confirmation under which I am the actual heir" (the man of the moment, as I call it). Well, now—I of course assume that I am right on the first point here—if the superior as matter of right could demand composition upon a charter which would have brought in then and there the person now claiming, I think it would be rather hard that he should be cut out of having that right because he framed his reservation in such terms that, while it included the particular case, it also included other cases in which he would not have had a right to demand his composition. I think this is a very narrow point, but to the best of my judgment I have come to the conclusion that it would be too hard to tie the superior down to a judaical interpretation of that clause; and therefore upon the whole matter I come to the same conclusion as is come to by the Lord Ordinary.

LORD SALVESEN—At the end of the first hearing I formed the opinion that the Lord Ordinary was right, and I must say that that opinion was much strengthened by the able argument that we had from Mr Macphail at the second hearing in defence of the Lord Ordinary's interlocutor. I therefore concur with the majority of your Lordships that his interlocutor should be affirmed.

LORD MACKENZIE—I have had an opportunity of reading the opinion delivered by Lord Johnston, and concur in its result.

The Court adhered.

Counsel for the Pursuer and Respondent—Macphail, K.C.—Chree. Agents—Lindsay, Howe, & Co., W.S.

Counsel for the Defender and Reclaimer—Constable, K.C.—Moncrieff. Agents—Hamilton, Kinnear, & Beatson, W.S.

Saturday, February 3, 1912.

FIRST DIVISION.

[Sheriff Court at Duns.

KERR *v.* SIMPSON.

Executor—Executor-nominate—Confirmation—Danger to Estate—Judicial Fdctor.

A master left a universal settlement in favour of his servant. The servant having presented an initial writ craving confirmation, it was opposed by the next-of-kin of the deceased, who averred that there was danger of the estate being lost if confirmation were granted to the petitioner. The objectors had already raised an action of reduction of the settlement.

The Court, on appeal, *dismissed* the initial writ and *appointed* a judicial factor.

George Kerr presented an initial writ in the Sheriff Court at Duns, in which he asked the Court for warrant to the Sheriff-Clerk "for issue of confirmation in favour of pursuer as sole executor-nominate of the said deceased William Simpson, who died at Laverock Braes on the 31st day of August 1911, under the disposition and settlement of the said William Simpson, therein designed as son of the late Sir James Young Simpson of Strathavon, Baronet, and then residing at Fleurs, near Coldingham, in the county of Berwick, dated 18th June 1904, and registered in the Books of Council and Session on 7th September 1911, and an inventory of whose personal estate, along with an extract of the said disposition and settlement sworn with reference thereto, has already been lodged with the Sheriff-Clerk by the pursuer, and confirmation applied for by him in the ordinary manner, but intimation has been received from the Sheriff-Clerk that confirmation cannot be issued without the special authority of the Court, in respect that caveats have been lodged on behalf of" certain persons.

The Sheriff-Substitute (MACAULAY SMITH) appointed the caveators to lodge objections, if so advised, within six days, and objections were lodged for (1) David Simpson and others, the trustees and executors appointed under a trust-disposition and settlement of the said deceased William Simpson, dated 18th July 1892, and (2) Miss Evelyn Blantyre Simpson, sole next-of-kin of William Simpson.

The objectors averred that the deceased William Simpson was a person of weak mind and character, and that he was addicted to drink. They further averred, *inter alia*—"(Obj. 3) The petitioner entered the deceased's service a number of years before the date of the pretended settlement and soon acquired considerable influence over his master. All through the period of his service he pandered to his master's tendency to take too much drink, thus gradually increasing his influence until he obtained complete ascendancy over him. The petitioner used the influence thus gained for the purpose of alienating the deceased from his relatives and isolating him from them and his other friends. Prior to the petitioner entering his service the deceased was intimate with and fond of all his relatives. He was also always glad to welcome and receive other friends. After the advent of the petitioner a gradual change took place in this respect. For some time he continued to receive his relatives and friends, but when the petitioner was present was rude and surly to them. If the petitioner was absent he was pleasant to them and appeared to enjoy their society. The petitioner gradually assumed the position of master of the house, excluded the deceased's friends, and finally erected barricades across the door of the house to prevent persons entering without his consent. When matters were in this state the petitioner took advantage of the deceased's weakness and facility and obtained the pretended settlement of 18th June 1904 by fraud and circumvention. The said pretended settlement, which is referred to for its terms, purports to convey the whole of the deceased's property to the petitioner, with the exception of a legacy of £50 to his housekeeper. When the petitioner entered the deceased's service he received wages of £24 a-year, and while it is presumed that he received larger wages during the latter part of his service, he is a person of no credit and substance and is of dissipated habits. There is therefore serious risk of the deceased's estate being lost if confirmation is granted in the petitioner's favour."

The objectors pleaded—"(1) The objectors having raised an action for the reduction of the disposition and settlement founded on by the petitioner, and there being serious risk of the estate being lost, or at least administered to the disadvantage of the objectors, in the event of confirmation being granted to the petitioner, the present proceedings should be sisted pending a decision in the said action of reduction. (2) The disposition and settlement in virtue of which confirmation is sought having been obtained from the deceased when he was weak and facile by the fraud and circumvention of the petitioner, the crave of the initial writ should be refused."

On 8th December 1911 the Sheriff-Substitute pronounced this interlocutor—"The Sheriff-Substitute having heard counsel for the objectors and the agent for the pursuer, and considered the closed record and productions, grants warrant to issue confirmation as craved: Finds the objectors liable to the pursuer in expenses."

The objectors appealed to the Sheriff (CHISHOLM), who on 2nd January 1912 pronounced this interlocutor—"Sustains the appeal: Recals the interlocutor of the Sheriff-Substitute of 8th December 1911: Sists proceedings in this case pending a decision in the action of reduction of the disposition and settlement founded on by the petitioner, which has been raised by the objectors in the Court of Session: Reserves to the petitioner right to apply to the Sheriff for recal of said sist in the event of undue delay on the part of the objectors in prosecuting said action of reduction, or in an application to the Court of Session which they have undertaken to make for the appointment of a judicial factor to hold and administer the estate until the rights of parties are determined: And reserves the decision of the question of expenses in the proceedings before the Sheriff-Substitute and in this appeal."

Note.—"In this case the petitioner is the executor-nominate under a disposition and settlement dated in 1904. The objectors have raised in the Court of Session an action for reduction of that deed. The petitioner craves confirmation as executor foresaid. The objectors ask the Court to sist the confirmation proceedings on the ground that, pending the decision in the action of reduction, there is risk of

the estate being dissipated in consequence of the alleged financial position and the alleged habits and character of the petitioner.

"I gather from the authorities that in deciding such a question as this it is to the averments of the objector that one must look. In the decided cases it is the objector's averments that are founded on where confirmation is refused, and it is on the absence or insufficiency of these that comment is made where confirmation is granted. Such averments of course are made at the risk of the objector. If they be not established ultimately by proof he must suffer the consequences.

"The question therefore is whether in the light of the reported decisions the objectors have made averments sufficient to entitle them to a sist of confirmation. Not altogether without difficulty I have come to be of opinion that they have done so. In the allegations (set forth in the objections) which form the grounds on which the action of reduction has been raised, there is a good deal which cannot fairly be left out of sight as relevant averment in this process. The objectors further aver that the petitioner 'is a person of no credit and substance and is of dissipated habits. There is therefore serious risk of the deceased's estate being lost if confirmation is granted in the petitioner's favour.' This is bald. It does not come up to the amended averment in the case of *Campbell* v. *Barber*, 23 R. 90; but it seems to me just to amount to what was desiderated in the case of *Hamilton* v. *Hardie*, 16 R. 192, *e.g.*, *per* Lord Shand at p. 198, when taken along with the consideration, there also indicated, that an action of reduction has actually been raised in the present case and not merely indicated or threatened.

"The objectors undertake to make application for the appointment of a judicial factor to safeguard the estate pending the determination of the rights of parties.

"For these reasons I think I am warranted in sisting the proceedings in the confirmation."

The pursuer appealed, and argued—The fact that a reduction of the will was being brought was not sufficient ground for refusing confirmation to an executor-nominate—*Graham* v. *Bannerman*, February 28, 1822, 1 S. 362 (2nd ed. 339); *Hamilton* v. *Hardie*, December 7, 1888, 16 R. 192, 26 S.L.R. 140. It made no difference that the action was already raised. The averments as to danger to the estate were very flimsy, and did not come up to what was desiderated by Lord Shand in *Hamilton* at p. 198, nor to the averments in *Campbell* v. *Barber*, November 7, 1895, 23 R. 90, 33 S.L.R. 59; in particular, there were no specific averments as to either the conduct or intentions of the pursuer. It was not in the interest of the estate to sist the application, for it consisted to a large extent of a farm which had to be administered.

Counsel for the objectors were not called upon.

LORD PRESIDENT—I think there should be interim management of this estate by someone who is not connected with any of the parties to the case.

I intend to say very little, because I wish it to be understood that I make no imputation upon anybody, and that nothing that is averred in the case has made an impression on my mind that is unfavourable to any of the parties.

The relations between the deceased gentleman and the appellant were admittedly those of a master with his servant—his confidential servant. When you find such a relation to exist, and when there is a universal settlement by the master in favour of his servant, when the nearest relations of the deceased come forward with an action of reduction already raised, and aver that there is danger of the estate being lost, I think it is clearly in the best interests of all concerned that the estate should be put under neutral management.

I think therefore that the learned Sheriff is right. But inasmuch as, though he could not have appointed a judicial factor in the Sheriff Court we can do so here, I do not propose that we should affirm his interlocutor and leave it to the respondents to make an application for such an appointment, but I think we should recall his interlocutor and appoint Mr George A. Robertson to be judicial factor on the estate.

LORD KINNEAR and LORD MACKENZIE concurred.

LORD JOHNSTON was absent.

The Court pronounced this interlocutor—

". . . Sustain the appeal: Recal the interlocutor of the Sheriff-Substitute dated 8th December 1911, and subsequent interlocutors: Appoint Mr George A. Robertson, C.A., Edinburgh, to be judicial factor on the executry estate of the deceased William Simpson, and in respect of the said appointment dismiss the initial writ, reserving right to the pursuer to present such other application as he may be advised in the event of the action of reduction now pending being dismissed or absolvitor pronounced therein and the factory being recalled, and decern."

Counsel for the Pursuer—M'Lennan, K.C.—W. T. Watson. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Objectors—Watt, K.C.—Cowan. Agents—R. R. Simpson & Lawson, W.S.