Lord Benholme—The real question is, at what price could this man produce steam-power? There is not here merely the evidence of scientific witnesses required; we must also take into consideration what the peculiar circumstances of the case enabled the pursuer to do. To these peculiar circumstances I think scarcely sufficient weight has been given. To both parties in this cause the results have been most disastrous, and I deplore a litigation which should have ceased after the report by the man of skill.

Lord Neaves—Your Lordships did not regard a mere inspection by a man of skill as sufficient, and therefore a proof before further answer was allowed. This proof has not in any way been a fortunate business for either party. If anything, the indulgence to the defender we have shown may have been too great, but, on the whole, I concur with your Lordship's views, as in the circumstances best calculated to dispose of the question at issue.

The following interlocutor was then pronounced:—

"Find it is established that the defender entered into the agreement libelled, and that he failed to implement the same: Find that the pursuer has failed to establish any sum as the minimum cost of producing the steam power which he undertook to furnish, Therefore recall the judgment in so far as the merits are concerned: Find that the appellant is liable to the respondent in the sum of £5, in respect of his having violated the agreement libelled: Find no expenses due in this Court: Adhere to the judgment complained of in so far as it decides the question of expenses in the Court below, and decern."

Counsel for Pursuer and Respondent—J. P. B. Robertson. Agents—Gillespie & Paterson, W.S.

Counsel for Defender and Appellant—Millar, Q.C., and Smith. Agents—J. B. Douglas & Smith, W.S.

Wednesday, December 18.

FIRST DIVISION.

LANG *v.* ERSKINE

Process—Appeal—50 *Geo. III. c.* 112, § 36—16 *and* 17 *Vict. c.* 80, § 24.

The 36 section of the Act 50 Geo. III, c. 112, provides, *inter alia*, that Bills of Advocation from the Sheriffs and other inferior judges shall be allowed in respect to an *interim* decree for a partial payment, provided leave is given by the inferior judge.

The 24th section of the Act 16 & 17 Vict. c. 80, provides, *inter alia*, that it shall be competent to take to review of the Court of Session any interlocutor of a Sheriff giving *interim* decree for payment of money; and the enactments of 50 Geo. III. c. 112, are, so far as inconsistent with this enactment, repealed.

Held (after consultation with the Second Division) that it is competent to appeal against an interlocutor of the Sheriff giving *interim* decree for payment of money, without leave from the Sheriff.

Act. Balfour. Agents—Muir & Fleming S.S.C. *Alt.* Gloag. Agents—Ronald, Ritchie & Ellis, W.S.

Friday, December 20.

FIRST DIVISION.

SPECIAL CASE—ALLAN AND DAVID HUTCHISON.

(Heard before Seven Judges.)

Vesting—Service—Heir of Line—Heir of Conquest—Substitute—Conditional Institute—Disponee.

A party disponed the fee of his heritable estate to the heirs of his own body equally, share and share alike, whom failing, to his brothers A, B, C, D equally, and died without heirs of his body. A service was expede in their favour, but B died before it was carried through, without issue and intestate. *Held* that his share of the property went to the heir of conquest.

The question in this case was whether a certain property went to the heir of line or the heir of conquest. The facts will be found stated in the opinion of the Lord President, who delivered the judgment of the Court.

Argued for David Hutchison, that a right vested in Robert Hutchison before his death. There was no conveyance of a fee, constructive or otherwise, to the granter of the deed himself, and it operated as a divestiture of him because he did not convey to himself as institute, and he continued to hold in spite of, not in consequence of, it. The deed, as soon as it came into operation by the death of the granter, acted as a direct disposition to the disponees, and no service was necessary: the beneficiaries under it took as disponees, not as heirs. If there be a *nominatim* disponee, who dies before the granter, the next substitute takes as direct disponee; a conveyance to non-existing persons, and a conveyance to predeceasing persons, have equally little influence in controlling the destination. It has been suggested that a conveyance to heirs of the body must be held by implication to be a conveyance to the father himself, in order to get rid of the difficulty of the fee being *in pendente* during the non-existence of those heirs, but there is no necessity for such a construction here.

Argued for Allan Hutchison, that no right had vested in Robert Hutchison at the time of his death; the granter of the deed was himself the institute as fiar, the others being merely substitutes.

Authorities—*Colquhoun* v. *Colquhoun*, July 8, 1831, 9 S. 911, Lord Craigie's opinion; *Fogo* v. *Fogo*, Aug. 18, 1843, 4 D. 1063, 2 Bell, 195; Ross' Leading Cases, ii, 36; *Gordon of Carlton* v. *His Creditors*, M. 14,366-14,368; *Mackenzie* v. *Mackenzie*, Session Papers, F.C., 1818-19, No. 190; *Peacock* v. *Glen*, June 22, 1826, 4 S. 742; Bell's Principles, 1834-39; Menzies, p. 795; Montgomery Bell's Lect. p. 1022; *Anderson* v. *Anderson*, June 22, 1832, 10 S. 696, note p. 701; Bell's Illustr., ii, 425-8.

At advising—

Lord President—The facts of this case admit of being very shortly stated. John Gilmour by *mortis causa* deed disponed the fee of his heritable estate to "the heirs of my own body, equally among them, share and share alike; whom failing, to and in favour of David Hutchison, Robert Hutchison, Allan Hutchison, and James Hutchison, my brothers uterine, equally among them, share and share alike, and their respective heirs"

(under a certain burden), "in fee and property." The deed remained in the granter's repositories, undelivered, till his death. He died without ever having had heirs of his body, and was survived by his four brothers uterine. A service was expede in their favour as heirs of provision in general to the deceased, but before the service was carried through Robert Hutchison died, without issue and intestate, and the service, so far as his right was concerned, was therefore inept.

Robert Hutchison being thus vested in the personal fee of one-fourth part *pro indiviso* of the testator's estate, and having died without making up any title, a competition has arisen between his heir of line and his heir of conquest, and the question to be determined is, whether the said Robert Hutchison took the fee of the said one-fourth part as heir or as disponee.

The heir of conquest maintains that the only persons called before the four brothers Hutchison, viz., the heirs of the testator's body, never having come into existence, the disposition took effect on the testator's death directly in favour of the Hutchisons, as conditional institutes and disponees. But the heir of line maintains, on the contrary, that the effect of the conveyance to the heirs of the granter's body, as the first branch of the destination, was to make the granter himself the institute in the destination, and all the other parties called heirs substitute to heirs in any event.

Apart from authority, and dealing with the question as depending on legal principle only, the considerations in favour of the heir of conquest seem greatly to predominate. A *mortis causa* deed remaining undelivered in the hands of the granter produces no change on the title of the property conveyed. The granter being infeft remains the undivested proprietor in fee; and the usual clause in such deeds reserving the granter's liferent is intended only to provide for the contingency of the deed being delivered during his life. The other usual clause, dispensing with delivery of the deed, though found undelivered in the granter's repositories after his death, makes it a delivered deed, or gives it the effect of a delivered deed immediately upon his death. Though, therefore, the disposition is in form a conveyance *de præsenti*, as every conveyance of heritage (but for a recent statute) must be, still, if it remains undelivered, it is ambulatory, revocable, and absolutely inoperative as much as a testament nominating an executor, till the granter's death gives it the effect of a delivered deed. During his own life the granter of such an undelivered deed plainly takes nothing as his own disponee, his original title being entirely undisturbed and unaffected. Just as little can he take anything in that character after his own death. No doubt, if the granter conveys to himself *nominatim* as the first member of a destination, the well settled rules of conveyancing have fixed that any one who takes after him takes as his heir of provision, and this is not an unreasonable construction of such a disposition, which is read as equivalent to a resignation in favour of himself and a series of heirs. But it seems a violent and unnatural extension of that rule to say that the only disponee must still be the granter himself, where the conveyance is simply from him to another party, whether that party be a person named or the heirs of his own body, or any other class of heirs *nascituri*. It may also be possible in particular dispositions, where the granter does not expressly name himself as disponee or first member of the destination, nevertheless to construe the words used as importing the same thing, and expressing the intention of the granter that no person or class named in the destination shall take otherwise than as heirs substitute of provision to him. But it seems impossible, according to sound principle, to put such a construction on a destination directly to the heirs of the granter's body, non-existent, but possible, whom failing, to A, B, and C, where there is nothing else in the deed to lead to such a construction.

It must now be held as settled for all practical purposes that, when by a *mortis causa* undelivered disposition the conveyance is directly to A *nominatim*, whom failing to B, and A predeceases the granter, B takes as conditional institute, and not as heir either of A or of the granter. If this be so, it is difficult to understand how the circumstance that instead of a person named, the heirs of the granter's body are first called, should vary the character of the person called in the second place in the destination, when upon the granter's death it is found that no heirs of the body ever existed, and there is no one to stand between the person second named and the estate conveyed.

This case derives its chief importance from the prevalence of an opinion among conveyancers and writers on the practice of conveyancing, that the law applicable to such a destination as here occurs is so unsettled and uncertain that it is necessary in prudence so to complete the title of parties standing in the position of the brothers Hutchison as to be ruled on either supposition, that they are heirs of the granter on conditional institutes. Some writers have stated the law to be as contended by the heir of line in this case. Among others, Professor Bell in his Principles says—(§ 1839—"When the disposition is to the granter's heirs male or heirs of the body, whom failing to A, whom failing to B, and the granter survives such heirs, and A predeceases, it has been held that the fee is still in the granter, and that B's title is to be made up by service as heir of provision to the granter." This doctrine (which is repeated by the late Professor Menzies in his Lectures on Conveyancing, p. 795, 3d ed.) is founded entirely on the authority of two cases—*Gordon of Carlton Crs.* v. *Gordon*, M. 14,368, and *Peacock* v. *Glen*, 4 S. 754, both of which have been a good deal misunderstood.

Kilkerran's report of *Gordon of Carlton* (though it is more accurate in the statement of the facts than Falconer's) is unfortunately rather meagre. All that can be safely gathered from it is that the deed having disponed the lands to the heirs male of the granter's body, whom failing to John, whom failing to Nathaniel, and the granter having died without heirs male of his body, and John having predeceased him, and Nathaniel having served heir of provision in general to the granter, it was objected, in a competition, that he should have served not to the granter, but to John, whom the objector called the institute. The decision was that the title was good, because "plainly there was no right ever in John, the first substitute, that could be carried by a service." So far only Kilkerran's report carries our knowledge of the case, and leaves it in doubt upon what ground the Court held the title to be good, as made up by general service to the granter, though it leaves no doubt that the ground of objection urged against the title was bad, viz., that Nathaniel ought to have served heir to John.

As might have been expected, this judgment has been variously interpreted. In the case of *Colquhoun* v. *Colquhoun*, 8th July 1831, Fac. Coll. the consulted Judges (Lords J. C. Boyle, Glenlee, Cringeltie, Meadowbank, Corehouse, Mackenzie, Medwyn, Moncreiff, Newton, and Fullerton) state that in the case of *Gordon of Carlton*, "Nathaniel served to the entailer, and that was held sufficient; not certainly because the service transmitted any right from the entailer to Nathaniel, but because it afforded evidence that both the entailer and John Gordon had died without male heirs, and consequently that the conditional institution in favour of Nathaniel had taken effect." Had this exposition of the ground of judgment in the *Carlton* case been confirmed, or had it passed unquestioned, it would probably have been held to settle the law adversely to the doctrine laid down by Professor Bell and Professor Menzies. But within less than a year—in the course of the arguments in *Anderson* v. *Anderson*, June 22, 1832, 10 S. 701—there was brought to light for the first time, by the research of Dean of Faculty Hope, a note by Lord Drummore, on his session papers in the case of *Carlton*, in the following terms:—"In this case the Lords thought the case the same as if the disposition had been to himself, and failing him by his decease, to his heirs male. The fee in both cases was absolutely in the disponee, and the decision was unanimous." As to the value of this note, it must be observed, in the first place, that Lord Drummore was on the bench at the date of the judgment, and probably took part in it; and, in the second place, that he was *omnium consensu*, an acute and able judge, worthy to be the son of the President Sir Hugh Dalrymple, and the grandson of Lord Stair. Generally speaking, no great importance is to be ascribed to loose notes on session papers, even if proved to be in the handwriting of eminent Judges, because there is seldom any reliable evidence that they express the ultimate opinion of the writer, and they may well be either a statement of the result of a first judgment, afterwards altered on reclaiming petition, or notes preparatory to an advising, which may never have taken the form of an opinion, and may, after further consideration, have been discarded as unsound. But this note of Lord Drummore bears internal evidence of being something much more valuable. It is unmistakably a statement of the import of a unanimous judgment of the Court, and it appears from the session papers of Lord Drummore himself, as well as from those in the Arniston Collection, that there were, presumably at least, no farther written arguments on this branch of the *Carlton* case, and therefore (as we may safely infer from the practice of that time) no attempt to reclaim against or disturb the unanimous judgment. This contemporary authority is preferable to the conjectural explanation of the case given in *Colquhoun* v. *Colquhoun*, notwithstanding the great weight of the names subscribed to the opinion of the consulted Judges. Accordingly, in the later case of *Fogo* v. *Fogo*, 2 D. 651, the whole Judges, who referred to the case of *Carlton*, preferred the explanation of Lord Drummore to that of the consulted Judges in *Colquhoun* v. *Colquhoun*.

But it does not by any means follow that the *Carlton* case establishes as a universal or even general rule that a destination to the heirs of the granter's body, whom failing to a person or persons named, is equivalent to a destination to the granter himself *nominatim*, and the heirs of his body, whom failing to a person or persons named. There is nothing in the report of Lord Kilkerran or in the note of Lord Drummore to warrant this sweeping conclusion; and a careful examination of the deed, upon the construction of which the judgment depended, leads to an opposite inference.

The disposition by James Gordon of Carlton, which is, or is intended to be, a strict entail, proceeds on a recital of "the love and favour I bear to the heirs male lawfully to be begotten of my own body, and the heirs male *a stirpe in stirpem successive*, whilk failing to the persons after mentioned my friends and relatives, whom I hereby *nominate and appoint to succeed as heirs* of tailzie and provision *to me* in my land and estate under-written, after my decease." The destination is "to and in favours of the heirs male lawfully to be gotten of my own body, and their heirs male *a stirpe in stirpem successive*, whilk failing to the persons after mentioned, whom I hereby nominate and appoint to succeed *to me as my heirs* of tailzie and provision therein *to me*, and their heirs male lawfully gotten, or to be gotten, of their own bodies, whilk failing to any other person or persons I please to nominate and design under my hand at any time during my lifetime *ac etiam in articulo mortis*, and the heirs male gotten or to be gotten of their own bodies, to succeed as heirs of tailzie and provisioun to me therein," &c. There then follows a procuratory of resignation, which authorises resignation to be made in favour of "the heirs male lawfully to be gotten of my own body, and their heirs male *a stirpe in stirpem successive*, whilk failzeing, to John Gordon, third lawful son to unquhile Mr William Gordon of Carlestoun, whom I specially burden with this provision, that Nathaniel Gordon of Gordonstoun be sole tutor to him during his minority, and have elected and nominated him to that effect; *and appoints the said Nathaniel Gordon the next substitute in this tailzie failzeing the said John*, whilk failzeing to John Maitland," &c..

It seems by no means an unreasonable construction of this deed to hold that there was no intention on the part of the granter to make any party a disponee, and that the effect of the deed is to create merely a succession of heirs without any such conveyance as will have the usual effect of converting a substitute into an institute in the event of the institute and the other prior members, if any, of the destination predeceasing the granter. The dispositive clause does not name any persons, but conveys the estate only to the heirs male of his body, and failing them, to persons who are most carefully and anxiously described more than once as "heirs nominated and appointed to succeed to me." There is no precept of sasine. Any feudalisation of right conferred by the deed must therefore be by resignation, and it is particularly to be noted that in the procuratory of resignation Nathaniel (whose right to the estate was sustained in respect of his general service as heir of provision to the granter) is mentioned only under this form of expression, after John Gordon, "and appoints the said Nathaniel Gordon the next substitute in this tailzie failzeing of the said John." Without mention of his name in the dispositive clause, and with this very peculiar mention of him in the procuratory of resignation, and with no precept of sasine which he could in any event use, it was not wonderful that the Court should deal with

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