The facts in this case, to which the provisions of the deed and the rules of law are to be applied, have been clearly stated by your Lordship, and are not disputed. I need not repeat them. It is enough to say that General John Campbell took Boquhan by devolution from his brother Henry, who succeeded to Salton. General John, on the death of Henry, succeeded to Salton in 1803, and died in 1806. He had two sons, the present Mr Fletcher of Salton, born in 1796, and the defender, Henry, born in 1800. On the death of General John, his eldest son took Salton, and Henry, his second son, took Boquhan, assuming the name of Campbell in terms of the entail. The defender has from that time possessed the estate of Boquhan. After a lapse of sixty years, the pursuer, who is the eldest son and heir of Fletcher of Salton, brings this action, claiming the estate of Boquhan under this entail. The pursuer was born in 1827—twenty years after the defender succeeded; and brought the action in 1867—sixty years after the defender succeeded. His right to prevail depends on the construction of the deed.

Two questions arise,—1st, If the pursuer had been alive when, in 1803, General John succeeded to Salton, how would the succession have passed? I am of opinion that Boquhan would then have devolved on the defender as the next branch of the heirs of entail. I am also of opinion that, on the death of General John in 1806, the estate of Boquhan would not have passed to the pursuer if he had been then alive, but rightly belonged to and was vested in the defender, Henry Fletcher Campbell, second son of General John Campbell, and heir of tailzie under this destination of succession.

If this view is correct the second question does not arise; but as the parties probably desire the opinion of the Court on that point also, I add that, even on the assumption that this pursuer, if born before 1803 or 1806, would have succeeded to Boquhan, still I am of opinion that the defender, having justly and lawfully succeeded to Boquhan and held it for sixty years, cannot be now extruded from his rights and possession at the instance of a gentleman born in 1827 and raising the action in 1867. I do not think that this claim of the pursuer is cut off by prescription or by long delay of action. And I am of opinion that the law would not have sustained this claim by an emerging heir—son of the proprietor of Salton—even if it had been made on the birth or on the majority of such emerging heir. But the fact of the possession by the defender for sixty years without challenge does create an equitable presumption in his favour.

The defender was, when his father succeeded to Salton in 1803, and also when his father died in 1806, the "next immediate heir of tailzie." Now, in so far as can be gathered from the terms of this entail, there is no condition of devolution, and no obligation to denude, except only in the event of his succession to Salton. Does the birth of a nearer heir, after the lapse of many years, operate as a divestiture of Henry? Does it receive effect under a resolutive condition of Henry's tenure of Boquhan? I answer both these questions in the negative. Henry having succeeded as undoubted heir of entail, we must find every qualification and limitation of his right either in the principles of the common law as applicable to all landed succession, or in the provision of this deed of entail.

It is settled in accordance with all our authorities by the decision in the case of *Grant*, in 1859, that the birth of an emerging heir does *not* divest a proprietor of an estate who has succeeded and possessed in fee-simple and *ab intestato*. The opinions of the Court, especially of Lord President Colonsay and of Lord Ivory, are conclusive. There is no rule or principle of common law which can sustain the pursuer's pleas. Then, is there any rule, different from the common law, applicable to this entailed estate? I say to this entailed estate; because I am clearly of opinion that, if there be no common law rule, then the qualification of this defender's right must be found within this deed of entail. I concur in the views expressed by your Lordship in regard to cases where there is the failure of heirs previously called to succession, and in regard to the case of *M'Kinnon* and to the case of *Carnock*. There is here no condition suspensive of the defender's right. All who had been called before him had failed. No doubt of that. No condition of devolution to an emerging heir is expressed, as it was expressed in the *Carnock* case, and on that express specialty the *decision* in the *Carnock* case depends, though some remarks *obiter* may have gone further. The law will not create by implication a condition resolutive of the right to a landed estate. I decline to seek for conditions or qualifications of the defender's right elsewhere than in the principles of the common law, or the provisions of this entail, and I do not find, either in the common law or in this entail, any resolutive condition, or any obligation to denude in favour of the pursuer as an emerging heir.

Lord Curriehill absent.

Agents for Pursuer—Tods, Murray, & Jamieson, W.S.

Agents for Defender—J. & H. G. Gibson, W.S.

Saturday, July 11.

M'ANDREW *v.* REID AND OTHERS.

Title to Sue—General Service—Heir—Apparency—Timeous Production—Action. In an action which concluded for (1) declarator that a certain *ex facie* absolute disposition granted by the pursuer's ancestor was truly only a security; (2) count, reckoning, and payment; and (3) reconveyance to pursuer of the subjects contained in the disposition — *Held* that a decree of general service of the pursuer as heir of his ancestor, the granter of the disposition—produced in process after the calling of the case, but before defences had been lodged—had been timeously produced.

This action was raised by William M'Andrew, weaver, Kirkintilloch, as "eldest surviving grandson and nearest and lawful heir, served and decerned, or to be served and decerned, to the deceased William M'Andrew." The summons concluded to have it found and declared that a certain disposition granted by the pursuer's grandfather to the grandfather of the defender, though apparently absolute, was truly granted only in security, and that the subjects were redeemable by the pursuer as heir foresaid. There were also conclusions for count and reckoning for the rents and profits of the subjects contained in the disposition, and for ordaining the defenders to remove from the said subjects. The summons was dated 5th May last, and called in Court on the 21st May. The decree of service serving the pursuer as nearest and lawful heir of his grandfather was dated the 22d May, the

day after the summons was called. In these circumstances, the defenders made the preliminary defence that the pursuer, not having been served heir of his grandfather at the time the action was raised, executed, or brought into Court, had no title to sue.

The Lord Ordinary (ORMIDALE) repelled this plea on the following grounds, which are stated in the note to the interlocutor:—

"In the present case the pursuer had not at the date of the summons, or of its execution, or of its being called in Court, expede the general service of which he has since produced an extract. That service was, however, expede on the 22d, recorded on the 26th, and produced in process on the 28th of May last, all of which dates are prior to the lodging of the defences, which was not till the 8th of June current.

"It is in this position of matters that the defenders have stated and insisted in their first plea in law. The Lord Ordinary has repelled this plea in respect that, regard being had to the nature and object of the action, viz., the vindication of a right of redemption, the pursuer, as heir-apparent to his grandfather, is entitled to sue, and that, his service having been *in initio litis* produced, any objection to which his title to sue might otherwise have been exposed has been obviated.

"That the pursuer *de facto* possesses the character of heir in which he sues is admitted by the defenders (answer to condescendence 4). The objection is that he had not served as heir before instituting, or at any rate before calling in Court, the action, and has only produced *cum processu* an extract of his service.

"The defenders cited in support of their plea the passage in Stair (iv. 38, 18), where it is stated that the active title of a pursuer must be obtained 'anterior to the day of compearance, at least before calling of the process in the presence of the judge.' Now if, according to this doctrine, it is not essential that the pursuer's service should have been expede, and the extract of it obtained before the date and service of his summons, but that it would have been sufficient had the extract been produced 'anterior to the day of compearance, at least before calling of the process in the presence of the judge,' the whole matter comes to be reduced to form of process merely; and in that view the Lord Ordinary does not think that any principle would be violated in holding that the production of the pursuer's service at the time it was produced was sufficient to obviate the defender's preliminary plea. But the Lord Ordinary rather thinks that he would be warranted by the same high authority in holding that, for the vindication of a right of reversion or redemption, such as that in question, the pursuer could sue without a service at all, in virtue merely of his right of apparency, for Lord Stair (iii. 5, 6) seems to class rights of reversion with pensions and tacks, to the benefit of which he says heirs are admitted 'without the necessity of being entered.' And Professor Bell in his Principles (sec. 1683), while he states that an apparent heir is entitled to challenge deeds done on deathbed, goes on to remark that 'it has been doubted whether he is not entitled to reduce any infeftment affecting the estate to which, as heir, he has a right to succeed;' and he then gives his own opinion, that where 'the challenge arises from the alleged inefficacy or illegality of the deed excluding the heir who would otherwise take, he may vindicate that right without service.' So, in the old case of *Cunningham* v. *Cardross*, July 1860, shortly noticed in Morison 16,095, a process appears to have been sustained at the instance of an apparent heir not served, for declaring the lands that he was to succeed to free of the predecessor's debts.

"Be that matter, however, as it may, the Lord Ordinary cannot doubt that the production of the pursuer's service was sufficiently timeous in this case to obviate the defenders' preliminary plea. Besides the passage in Stair already noticed, on which the defenders themselves found, the Lord Ordinary may refer to the case of *Cunningham* v. *Semple*, 5th March 1624, Mor. 13,269, where, in a process of reduction improbation at the instance of a pursuer as heir to his predecessor, 'the Lords sustained the pursuit upon the production of a retour when the pursuer was served heir, albeit it was deduced, served, and retoured after the instituting of the summons, which they found sufficient to instruct the pursuit, albeit he was neither served nor retoured at that time, seeing that he was nearest of blood, and that person who only could be heir, and the same drew back the retour to the time of the pursuit; and so much the more, because it was a general retour, and not in any particular lands.' And in the case of *Robertson* v. *Houston*, 13th March 1703, Mor. 13,291, a personal bond granted by an apparent heir was sustained as an active title in a reduction of deeds that might affect the defunct's estate, the pursuer making up and producing a title *cum processu*, and, as the report shows, the process, 'after the disputation had commenced,' being sisted to enable him to do so. Again, in *Spottiswoode* v. *Brown*, 3d July 1712, Mor. 13,294, and in *Crock* v. *Gibson*, 8th December 1736, 1 Elchies' Decisions, App. to Redemption, No. 4, the same principle was, although the circumstances were different, given effect to. Nor is the analogy unimportant, derivable from that class of cases where the *cum processu* of the title of a pursuer in actions of removing has been held to be sufficient. —*Brown* v. *Lang*, 10th February 1802, Hume, 565; and *M'Intosh* v. *Munro*, 23d November 1854, 17 D. 99."

The defenders reclaimed.

CLARK and SHAND for them.

COOK and BLACK in reply.

At advising—

LORD PRESIDENT—It is indispensable for us to consider the precise nature of this action. The summons concludes (1) for declarator that a certain disposition granted by the pursuer's grandfather to the defender's grandfather, though *ex facie* absolute, is truly only a security; (2) for accounting and payment of a balance one way or other; and (3) on payment by the pursuer to the defender of such balance (if any) as may be found due by him, that the defenders should be decerned and ordained to re-convey to the pursuer the subjects contained in the above mentioned disposition. It seemed to be argued for the defender that in these circumstances the heir (the pursuer) was not entitled to sue without first expeding a *special* service. But in the present state of his title the pursuer is not entitled to a special service, because his ancestor did not die last vest and seised in the subjects in dispute since he had conveyed them by disposition to the defender's ancestor. The question then comes to this. The pursuer's propinquity to his ancestor being admitted (ans. to cond. 4), was it necessary for him to expede a general service before raising the present action? Now, I think all the authorities are one way—that apparency is suffi-

cient to entitle him to sue. Before serving, an heir must clear off other competing titles. Here the competing title could be cleared off in no other way than by this action. A mere discharge of the security would not have been enough. The disposition being apparently absolute, a reconveyance of the subjects was necessary. I am for adhering.

Lord Deas—I concur. It is necessary to keep in view the particular nature of the action. The pursuer says he is entitled to a re-conveyance of certain subjects. He produces his retour before the case comes into the roll in the Outer-House, and the whole objection is, that it should have been produced before the formal calling of the cause. I do not wish to say he could have gone on with the action without service. It would be difficult to say that—because a person in the pursuer's circumstances wishing a re-conveyance must connect himself with the party in right of whom he is entitled to re-conveyance. But in fact he *has* produced a service, and the whole question is, Has he been too late? This is not a question of legal principle. It is merely a technical point which must depend on authority. But the defender has been unable to cite any decision to the effect that production of service in a case like this is necessary before the calling.

There is a good deal of analogy between this case and cases of removing where the landlord's title is allowed to be produced *cum processu*. The last case of this in the books was *Mackintosh* v. *Munro*, 23d Nov. 1854, 17 D. 99, where, in delivering his opinion Lord Robertson says:—"If production of his (the landlord's) infeftment before the calling be sufficient, why not production before decree? All that the tenant has to look to is, that he is not removed by a party who has not a sufficient title. That right is equally satisfied by production of the title before decree."

Lord Ardmillan—I am glad we are not called on to decide the broader question whether the pursuer could have gone on with this action without producing his service. That would have been a point of considerable difficulty. On the narrower question before us, I concur with your Lordships.

Agent for Pursuer—L. Mackersy, W.S.
Agent for Defenders—James Webster, S.S.C.

Tuesday, July 14.

HINSHAW AND CO *v.* FLEMING, REID, AND CO.

Agreement—Sale—Price. By written memorandum of agreement, A agreed to take back from B so much as remained in B's hands of a certain quantity of yarn A had previously sold to him, and in place thereof B ordered from A a larger quantity of yarn, of a more expensive kind; the difference to be paid at a certain specified rate. An action brought by B to recover from A the price of the yarn so agreed to be taken back, *dismissed* as irrelevant.

In 1866 the pursuers purchased from the defenders a quantity of a certain kind of yarn. On 21st June 1867 the defenders agreed to take back from the pursuers the amount of that yarn then remaining in the pursuers' hands, and in place thereof to furnish them a greater amount of another kind of yarn at a specified price. The memorandum of agreement was as follows:—"Greenock, 21st June 1867.—Messrs Fleming, Reid & Company agree to take back what we have of 30 L hank yarn, abou 6000 gross, at price invoiced; and we order, in place thereof, about 10,000 gross B quality, spool, to sample last submitted. For each gross of spool up to the quantity of hank returned we pay 17s. 3d., and for balance we pay 15s. 6d. (fifteen and six), common colours; yarns to be delivered and to take date as our last orders of July 22 and August 10, 1866.—(Signed) W. Hinshaw & Co." The acceptance by the defenders, which was of same date, was without qualification, being as follows:—"21st June 1867.—We accept your order as contained in yours of 21st instant. (Signed) Fleming, Reid & Co."

Thereafter there arose a misunderstanding between the parties respecting the dates of delivery of the 10,000 gross spool yarn, in consequence of which instructions as to the dyeing of the yarn were not timeously given to the defenders, and they were thus prevented (they allege), through the fault of the pursuers, from implementing the agreement. The pursuers, stating that they held the 6000 gross yarn (which by the agreement the defenders agreed to take back), at the order of the defenders, and thus were ready to perform their part of the contract, raised this action against the defenders, concluding for £4690, 5s. sterling, the total price of the 6000 gross yarn the defenders had agreed to take back, calculating at the price at which it had been invoiced to them by the defenders.

The following issue was proposed:—

"It being admitted that the pursuers ordered from the defenders 6000 gross L 30s. hank yarn at the price of 15s. 1½d. per gross, and 2500 gross of the same yarn at 15s. 6d. per gross; and that the said quantities of yarn were thereafter invoiced to the pursuers by the defenders at various dates at and prior to 20th January 1867, and that the said price was paid by the pursuers to the defenders,—

"Whether, in terms of the offer or memorandum No. 30 of process, and acceptance thereof, No. 10 of process, dated 21st June 1867, the defenders agreed to take from the pursuers the whole of the said 30 L hank yarn which the pursuers had—about 6000 gross—at the prices at which said yarn had been invoiced to the pursuers by the defenders; whether the pursuers, in implement of said agreement, have delivered or duly offered to deliver to the defenders 6140 or thereby gross of said yarn; and whether the defenders are due and resting owing to the pursuers the sum of £4690, 5s., or any part thereof, being the price at which said yarn was invoiced to the pursuers, with interest from the 21st June 1867?"

The Lord Ordinary reported on the issue with this note:—

"The defenders object to the issue that, as it is now framed, the pursuers do not put in issue a proper contract of sale, in consistency with the way in which the action is libelled, and with the terms of the issue originally proposed. It does not occur to the Lord Ordinary that this is a substantial objection. The contract set forth in the summons is of a special and anomalous kind, to which the terms of the issue appear to be quite appropriate.

"The defenders, however, take a more fundamental objection to the issue, which resolves into a plea against the relevancy of the action. They say that the contract averred in the summons, and in the second article of the condescendence added on revisal, is a complex transaction in regard to the defenders receiving back goods formerly sold