"Certain objections, chiefly of a technical kind, have been stated to the validity of the will; but the Lord Ordinary does not find it necessary to pronounce any judgment upon these technical objections, because he thinks that the implied revocation of the will by the subsequent birth of the testator's two children is sufficient for the disposal of the whole cause.

"The Lord Ordinary may say, however, that his impression is that the technical objections would not *per se* be fatal to the will. He thinks that although all the formal clauses of the deed are lithographed it is in substance and in law the holograph deed of the late Mr A. The essentials of the deed are in his handwriting, and in accordance with various decisions the fact that the holograph of the maker is filled into a printed form does not destroy the holograph character of the deed. The name of the granter, the names of the trustees, and the effective words disposing of the whole estate, are all in the handwriting of the testator himself.

"If this view be correct, the objections to the testing of the deed are obviated, and as a holograph deed does not require instrumentary witnesses, the objection that Mrs B herself is one of the instrumentary witnesses seems to be sufficiently met.

"The vitiation in the date is also immaterial, for a date is not essential to a will, and the date of actual signing is admitted by the parties.

"In the Lord Ordinary's view the true question in the case is whether the will was revoked by the subsequent birth of the testator's two children, C and D. The Lord Ordinary thinks it was.

"When the will was made the testator had no children. There had been two children of the marriage, but they had died in infancy, and it seems impossible to read the deed without feeling that it is the will of a person who did not expect to leave children, or rather that it is a will made for the case of the testator dying without leaving children. But this is just the condition *si sine liberis* which is sometimes expressed, but which the law holds to be always implied in testamentary writings like the present, and the Lord Ordinary reads the will just as if it had contained the words, 'in the event of my dying without leaving lawful issue.'

"C, the testator's eldest daughter, was born on 24th January 1871, being two years after the date of the will, and his second daughter, D, was born on 8th November 1872, and the Lord Ordinary does not doubt that the birth of these children, if the testator had not died immediately or soon thereafter, would operate, in the absence of contrary evidence, as an implied revocation of the will. The cases will be found cited in Mr M'Laren's book on Wills, vol. I., p. 257 and subsequent pages. The leading case is that of *Colquhoun* v. *Campbell*, 5 June 1829, 7 S. 709, but the principle has been recognised in many other cases.

"The real difficulty in the present case arises from the fact that the testator survived the birth of his children a considerable time, and did not take any steps to alter his testament, for it seems to be the law that the presumption of revocation may be overcome by facts and circumstances showing that the testator, notwithstanding the existence of children, still intended the testament to take effect.

"The Lord Ordinary thinks, however, that nothing but the very clearest evidence will overcome the presumption of revocation. To use the words of Lord Glenlee, it must be made "as plain as a pikestaff that the testator did not intend the succession to go to the child." This has not been shown and cannot be shown in the present case. The testator was a comparatively young man, only 44 years of age when he died. He was in vigorous health, and although complaining for a week or two before his death, he was able to attend to business, and was actually out at two public meetings the very day upon which he died. Persons like the testator, and indeed other persons also, are very apt to delay adjusting their *mortis causa* settlements thinking that there is no hurry. The mere lapse of time *per se* goes for very little unless it is coupled with circumstances indicating an intention that the old settlement should stand. But the interval of survivance in the present case is comparatively short. Mr A only survived the birth of his daughter D about four months, and, so far from there being any indication of his intending the settlement of 1869 to stand, it is admitted that three months before his death he expressed his intention of making another settlement. His sudden death, apparently with only a few hours' warning, prevented this intention from being carried out, but the Lord Ordinary thinks it clear that there is no evidence whatever, but the reverse, that he intended to disinherit both his children.

"The raisers are of course entitled to expenses, but in the circumstances the Lord Ordinary thinks that the claimants should each bear their own expenses. The present judgment was necessary for the exoneration of all concerned."

This interlocutor has since become final.

Counsel for Pursuers and for the Widow—Trayner. Agent—P. S. Beveridge, S.S.C.

Counsel for Children—J. C. Lorimer. Agents—Gibson & Ferguson, W.S.

Friday, January 23.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

PADWICK *v* STEWART.

Entail—Res judicata—*Record of Entails.*

An heir of entail in possession of an entailed estate entered into a personal contract of sale of the estate with a purchaser, subject to the following conditions—that the price should not be payable or entry given until the seller's death, and then only "at the first term of Whitsunday or Martinmas six months after the validity of the will hereby made shall be finally and irreversibly ascertained and determined." The price was not to be held payable until the purchaser had obtained a valid title by adjudication or otherwise, and power was reserved to the seller to put an end to the whole transaction in certain circumstances. In an action of adjudication in implement by the purchaser against the succeeding heir of entail, *Held* (1) that a judgment in the Outer House (which had not been reclaimed against) affirming the validity of the entail,

was *res judicata* against the purchaser, he being in the circumsiances *eadem persona* with the seller: (2) That the seller was really and effectually under fetters: (3) That an entail constituted by two deeds, a bond of tailzie and a deed of nomination, was validly recorded though the latter deed was not recorded till forty years after the former: (4) That when an heir of entail holds different parts of his estate under separate charters, whether from the Crown or from subject-superiors, he cannot be called on to have the fetters applying to the whole lands engrossed in each of the charters.

Opinion, per Lord Deas, that the plea of *res judicata* would have been good even against a *bona fide* onerous purchaser.

The late Sir William Drummond Steuart was heir of entail in possession of the lands of Murthly, Grandtully, and others, in the county of Perth, and these lands he sold to the pursuer Mr Henry Padwick under certain conditions. The object of the present action was to compel Sir Archibald Douglas Stewart, Sir William's heir and successor, to implement the obligations undertaken by Sir William in the agreement of sale.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh*, 19*th July* 1873.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record in the conjoined actions, proof, and process—Assoilzies the defender, Sir Archibald Douglas Stewart, from the conclusions of the summons, and decerns: Finds the said defender entitled to expenses, of which allows an account to be given in, and remits the same, when lodged, to the Auditor to tax and to report.

"*Note.*—The pursuer concludes in his summons for decree of declarator that a minute or agreement of sale of the Grandtully, Murthly, and Strathbraan estates, entered into between him and the late Sir William Drummond Steuart, constitutes a valid and effectual contract of sale, and is binding on the defenders, and that he is entitled to enforce implement thereof notwithstanding the prohibitory, irritant and resolutive clauses contained in the bond of tailzie and relative deed of nomination affecting the said estates, and also for decree of adjudication of these estates in implement to him of the obligation contained in the said minute or agreement of sale.

"I. Besides maintaining that the bond of tailzie and deed of nomination constitute a strict entail of the said estates, the defender, Sir Achibald Douglas Stewart, who succeeded as heir of entail on the death of Sir William Drummond Steuart, pleads that it is *res judicata* by two judgments, dated respectively 19th March 1853 and 16th May 1871, that the deeds condescended on constitute a valid and effectual entail. The first of these judgments was pronounced by Lord Cowan, as Lord Ordinary, in an action of declarator raised by Sir William Drummond Steuart against his son and Sir Archibald Douglas Stewart and others, to try the validity of the entail, and the second of these judgments was pronounced in an action of declarator and adjudication raised for the same purpose by Mr Alexander Moncreiff, Writer to the Signet, Perth, under an arrangement with Sir William Drummond Steuart, against the said Sir William Drummond Steuart, Sir Archibald Douglas Stewart, and others. In the first of these actions the validity of the entail was challenged on the same grounds as are now urged against the validity of the prohibitory, irritant, and resolutive clauses of the bond of tailzie. Lord Cowan by his judgment found that the entail was not defective in any of the clauses requisite by statutory law and practice for the constitution of a valid and complete entail, and assoilzied the defenders. In the second action the validity of the entail was challenged on all the grounds which are stated in the present action, and decree of absolvitor was pronounced therein by the Lord Ordinary in respect of the failure of the pursuer to deliver the printer's proofs of the pleadings in terms of the Court of Session Act, 1868. This last judgment was pronounced eighteen days after the death of Sir William Drummond Steuart.

"It appears to the Lord Ordinary that these two judgments do not stand in the same position, and that while the first judgment is operative as *res judicata* against the pursuer, having regard to the peculiar nature of the agreement of sale entered into between him and Sir William Drummond Steuart, the second judgment has not that effect.

"1. The Lord Ordinary considers that, although the plea of *res judicata* in respect of Lord Cowan's judgment would not have been effectual against the pursuer if he had purchased and obtained a title to the estates, for a full price paid, from Sir William Drummond Steuart during his life, yet that it is effectual against him in respect of the very peculiar nature of the terms and conditions of the agreement with and under which Sir William Drummond Steuart sold the estates to him. By the agreement Sir William sold the estates to the pursuer, and bound himself and his heirs and successors to deliver to the pursuer a good, valid, and clear title to the estates, and it was thereby agreed that the term of the pursuer's entry should 'be at the date of the death of the said Sir William Drummond Steuart, and that the statutory rule as to rents and assessments shall apply to and regulate the rights of parties.' It was also agreed as to the period between the date of the agreement and Sir William's death, that he should have right to grant leases and alter some subsisting arrangements with tenants, subject to the condition that he should not be entitled to grant any lease of Murthly Castle, offices, gardens, and policies, or any lease at a diminution of rental, or subject to payment of meliorations by the pursuer, or before the expiry of the then existing leases, or to alter without the pursuer's consent the existing leases of the game and salmon fishings, or to grant any new lease thereof for a period longer than his life, or to grant any lease of the lands for longer than nineteen years. The price was £350,000, which appears from the proof to have been fixed at somewhat less than thirty years' purchase of the rental; and this price, it is agreed, shall be paid to Sir William or his executors. 'at, but only at the first term of Whitsunday or Martinmas, six months after the validity of the sale hereby made shall be finally and irreversibly ascertained and determined, with interest at the rate of 5 per cent. per annum from that date, and that the free realised amount of the rental arising prior to that time, but after the death of Sir William Drummond Steuart, so far as actually received by the said Henry Padwick or his foresaids, shall be also paid over to the executors of the said Sir William Drummond Steuart.' It was also thereby agreed that the price should only be paid on the pursuer obtaining a valid title by ad-

judication or otherwise to the estates and implement of the obligations therein undertaken. It was also stipulated by the agreement, 'that in the event of any judicial proceeding being instituted in the lifetime of the said Sir William Drummond Steuart affecting his position or his right to the said lands, baronies, and others, or any part of them, it shall be in the power of the said Sir William Drummond Steuart to annul this agreement, and that, in the event of his doing so, these presents shall be held to have been from the beginning null and void, and of no effect whatever.' And Sir William bound himself, his heirs and successors, to pay the whole expenses as between agent and client which the pursuer should incur in proceedings in the Court or in the House of Lords, which might be raised to ascertain the validity of the sale thereby agreed to.

"A purchaser who has obtained a title to an estate held on a defective entail on payment of a full price, cannot, the Lord Ordinary thinks, be affected by any judgment previously obtained against the seller in an action *inter hæredes* to which he was not a party, because he would be entitled to plead that he bought on the faith of the records, and that these did not disclose to him the judgment which had been pronounced, but only that the fetters under which the estate was held were defective. But the pursuer does not, the Lord Ordinary conceives, stand in the position of such a purchaser. He has paid no price, and he has acquired no title to the estate. He could not have enforced the agreement during Sir William's life. Sir William remained proprietor until his death, and it was only upon and after his death that the pursuer was to obtain entry. All that the pursuer got by the agreement was the obligation of Sir William to give him a title to the estate with entry as at his death, and this obligation was conditional, because Sir William reserved right to annul it should any judicial proceedings be instituted against him affecting his position or right as heir of entail in possession. Such being the position of the pursuer and the nature of the agreement on which he founds, the Lord Ordinary is of opinion that he cannot be held to be a purchaser who has acquired an estate on the faith of the records, against whom the plea of *res judicata* will be ineffectual, but that he is liable to all the exceptions pleadable against Sir William, whose obligation he is seeking to enforce after his death, and among others to the *exceptio rei judicatæ*, which, according to Lord Stair (4, 40, 16), is not only relevant, 'being a decreet between the pursuer and the defender, but it is sufficient if it was between their predecessors or authors.' (See also Erskine, 4, 3, 3).

"But the defender's plea of *res judicata*, founded on the judgment of Lord Cowan, is only effectual against the pursuer upon the questions raised and determined in the action in which it was pronounced, that is, upon the objections now urged against the prohibitory, irritant, and resolutive clauses.

"2. In regard to the plea of *res judicata* founded upon the judgment pronounced in the action at the instance of Mr Moncreiff, the Lord Ordinary is of opinion that it is not effectual against the pursuer. Although it was pronounced in an action which had been raised by arrangement with Sir William for the purpose of trying the validity of the entail, no decreet was pronounced during Sir William's life. The decree was only pronounced eighteen days after his death, and then it was not a judgment on the merits of the action, but only on a decree by default, which Mr Moncreiff allowed to be pronounced because it had been resolved not to proceed further with the action. Such a decree cannot be said to have been pronounced against Sir William Drummond Steuart, and it cannot, it is thought, be held sufficient against the pursuer.

"The pursuer has stated on record numerous objections to the bond of tailzie and deed of nomination and other deeds condescended on, but the only objections which were ultimately insisted in at the debate were those now to be noticed.

"II. The pursuer maintains that in the bond of tailzie there are no fetters imposed upon the heirs to be named in the deed of nomination,—that the maker intended these heirs to be subject to other fetters which were to be inserted in the deed of nomination, and that these were not and could not validly be inserted therein, and that the two deeds do not together constitute a valid entail.

"The Lord Ordinary is of opinion that this objection is not well founded.

"By the bond of tailzie the granter resigned the lands for new infeftment in favour of himself and the heirs-male of his body, and the heirs whatsoever of their bodies, whom failing, to the heirs whatsoever of his own body, and the heirs whatsoever of their bodies, the eldest heir-female being always preferable and succeeding without division, 'which failzing to any person or persons that I have now or shall at any time hereafter during my lifetime *vel in ipso articulo mortis* nominat, design, and appoint to succeed to the lands, baronys, and others above rehearsed, by a writ or nomination subscrived or to be subscrived with my hand, and under such reservations, provisions, qualifications, conditions, restrictions, limitations, and irritancies as are or shall be contained in the said nomination which the persons therein nominat or to be nominat shall be holden to perform and fulfil, and which nomination shall be as valid and sufficient as if it were insert herein and in the infeftments to follow hereon, and failzeing of any such nomination, or the same being made and afterwards revoked or cancelled, or if the persons therein named or to be named shall faill, then to the' several persons therein specified and their heirs-male, 'which failzieng to return to me and my nearest and lawfull heirs-male whatsoever, which failzieing to my other heirs and assigneys whatsomever, under the reservations, provisions, qualifications, conditions, restrictions, prohibitions, limitations, and irritancies after mentioned, viz.'; and then follow the prohibitory, irritant, and resolutive clauses.

"The Lord Ordinary considers that, according to the true construction of the bond of tailzie, the lands were resigned, not only in favour of the heirs designed and specified, but also in favour of those who should be named or designed in the deed of nomination, with and 'under the reservations, provisions, qualifications, conditions, restrictions, prohibitions, limitations, and irritancies after mentioned' in the tailzie, that is, the prohibitory, irritant and resolutive clauses. These fettering clauses were made applicable to the whole heirs named or to be named. No doubt the words occur after the destination to heirs to be nominated—'And under such reservations, provisions, qualifications, conditions, restrictions, limitations, and irritancies as are or shall be contained in the said

nomination.' But these words, which are in accordance with the style given by Dallas of Saint Martin's (p. 582), do not prevent the application of the fettering clauses, which is clearly made by the tailzie to the heirs to be nominated, and are additional thereto. The words employed are different from the general words used to designate the fettering clauses, and they were, it is thought, used with reference to provisions which the granter considered it necessary to insert in the nomination in consequence of the peculiar position of the persons whom the granter then intended to call and called by the deed of nomination. The deed of nomination is a proper deed of nomination. It was executed on the same day as the bond of tailzie. In that deed of nomination the heads of various families were named who had been omitted in the destination in the tailzie. These persons were either under attainder, or were liable to be attainted for treason, and by the deed of nomination, in case of their being pardoned or freed from attainder, and not otherwise, the granter made, in exercise of his undoubted power, a new nomination of heirs under the prohibitory, irritant, and resolutive clauses of the bond of tailzie, by which he introduced these heads of families into their proper place in the former destination. Having done this, the granter provided that if any of the heirs according to the destination of the bond of tailzie should have got possession of the estates before the above written events shonld happen as to any of the said persons, who were posterior in order by the nomination, then the said heirs should be bound to denude in favour of the prior heir, but should not be obliged to account for the rents during their possession, the said heirs nevertheless being bound to pay all taxes and burdens during that time, to keep up houses, dykes, planting and policy, and to account to the prior heir for the price of wood sold. It was also provided that the nomination should be effectual in favour of any of the persons named, and his issue, upon his being rehabilitate, although others should not be so rehabilitate, or free from suspicion, or safe from conviction, so as they may be capable to succeed.

"It was just such reservations and provisions as these that the granter reserved right to apply to the heirs to be named in the deed of nomination in addition to the prohibitory, irritant, and resolutive clauses of the tailzie. These latter clauses were, the Lord Ordinary considers, distinctly made applicable to the heirs to be named, as well as to the other heirs of tailzie specified in the bond of tailzie. Their application was not affected by the conditions in the deed of nomination above noticed, and these conditions, which were within the granter's power, do not affect the validity of the bond of tailzie and deed of nomination.

"The Lord Ordinary is therefore of opinion that the bond of tailzie is valid and effectual as regards the heirs to be named,—that the deed of nomination was a valid exercise of the faculty to name heirs,—and that the objections of the pursuer to the bond of tailzie and deed of nomination above referred to are untenable.

"III. The pursuer also maintains that the deed of entail is defective in regard to the prohibition against alteration of the order of succession, and also in respect that the irritant and resolutive clauses are not applicable to a prohibition against alteration of the order of succession, and are otherwise invalid.

"1. It is by the prohibitory clause 'expressly provided and declared that it shall noewise be lawful to any of the heirs above written, failing heirs of my oun body, and their male descendants, to sell alienat, and dispon the lands, baronies, and others above rehearsed, or any part thereof, either irredeemably or under reversion, or to grant woodsetts or infeftments of annualrent furth thereof, or to burden the said lands with any servitudes, or other burdens, or to set tacks or rentalls for any longer space than the setter's lifetime, or if the same be granted for longer space, not under the rentall, neither shall it be lawfull to them, nor in their power, to contract debt, nor committ any crime, or do any other deed whereby the lands, baronys, and others above wryten, or any part thereof, may be apprysed, adjudged, or any other manner of way evicted or forfaulted, or the order of succession hereby sett down anieways altered or innovat in prejudice of this present tailzie, or of those who, by virtue thereof, shall be then to succeed.'

"The objection of the pursuer to the prohibitory clauses is founded upon the cumulative manner in which the prohibitions, other than sales and alienations, are described, commencing with the words 'neither shall it be lawful to them nor in their power to contract debt, nor commit any crime, or do any other deed whereby,' &c. He maintains on the authority of the *Overton* case (Maclean and Robertson, 871), that there is no substantive or self-subsisting prohibition against the alteration of the order of succession, but only a prohibition against contracting debt and committing crime, whereby the lands may be adjudged, evicted or forfeited, and, as a consequence of such adjudication, eviction, or forfeiture, the rights of succession of the succeeding substitutes evaded or prejudiced. The Lord Ordinary is of opinion that the prohibitory clause in the present entail does not afford room for the application of the principles on which the *Overton* case was decided. Giving full effect to these principles, he considers that there is here a substantive prohibition against alteration of the order of succession, which is independent of the prohibition against the contraction of debt and commission of crime, and of the adjudication, eviction, and forfeiture, which are described as the consequences of these acts. In the *Overton* entail the prohibition was not to sell or dispose upon the lands, nor to 'contract debt' or do any other deed whereby the said lands and subjects may be adjudged or evicted from the succeeding members of entail, or their hopes of succession thereto in any measure evaded.' These words were held not to contain a substantive prohibition against alteration of the order of succession, but only a prohibition against the contraction of debt whereby the succession may be evaded, which it would be by adjudication for debt. But in the present case the clause is altogether different. The heirs are thereby prohibited 'to contract debt, nor commit crime, or do any *other* deed;' that is, any deed other than contracting debt, or committing crime, whereby the lands may be adjudged, or evicted, or forfeited, '*or the order of succession hereby sett down anieways altered or innovat in prejudice of this present tailzie*;' that is, *applicando singula singulis*, not to contract debt whereby the lands may be adjudged or evicted, not to commit crime whereby the lands may be forfeited, and not to do any other deed whereby the order of succession may be altered. Further,

the words used in regard to the alteration of the order of succession, which are very different from those in the *Overton* entail, exclude the construction contended for by the pursuer, because there is no debt or crime whereby the order of succession can be altered. The words employed are those used by conveyancers, and, as remarked by Lord Cowan in the rule to his judgment, they are those technically appropriate to describe deeds of alteration of the order of succession. The Lord Ordinary thinks it unnecessary to allude further to this objection after the very full note of Lord Cowan thereon, in the reasoning contained in which he concurs.

"2. The irritant and resolutive clauses are in the following terms:—And if the said heirs of tailzie 'shall do anything in the contrair of the said provisions, either by disponing, or committing any crime or delict, or by contracting debt, or doing any other deed, the said debts, deeds, and all and every one of them, shall not only *ipso facto* become void and null in so farr as concerns the lands, baronys, and others above specified, so that they shall not be affected therewith in prejudice of the succeeding heirs of tailzie and provision who are to succeed, seing thir presents are granted *sub modo*, and with the provisions above specified, and no otherways, but also the contraveeners' shall forfeit and amit their right and interest in the said lands, and the same shall devolve upon the person who shall 'have right to succeed by virtue hereof, free from all debts, deeds, and crimes done, contracted, or committed by the contraveners,' &c.

"The first objection to these clauses is, that, while the heirs are prohibited from selling, alienating, and disponing, the irritant clause only refers to disponing. Even if the irritant clause were to be construed on the principle of enumeration, as contended for by the pursuer, it is, the Lord Ordinary thinks, hopeless for the pursuer to maintain that the word dispone is not sufficient to cover both sales and alienations, after the numerous decisions to the contrary—*Elliot*, 19th May 1803, Dict. 15,542; *Stirling* v. *Walker*, 20th February 1821, F.C.; *Elliot* v. *Pott*, 14th March 1821, 1 Shaw's App. 16 and 89; *Stirling* v. *Dun*, 22d June 1829, 3 W. & S. 462; *Murray*, 4 D. 803, and 3 Bell's App. 100.

"3. The pursuer also maintains that the irritant and resolutive clauses are not applicable to a prohibition against alteration of the order of succession. The Lord Ordinary is of opinion that this objection is not well-founded. The resolutive clause is a continuation of the irritant clause, and the two form one unbroken sentence. The leading and governing words of these two clauses are—and if the heirs '*shall do anything in the contrair of the said provisions*,' that is, of the prohibitions which immediately precede; and then the deed proceeds, 'either by disponing or committing any crime or delict, or by contracting debt or doing any *other* deed,' that is, any other deed 'in the contrair of the said provisions.' If these words do not include, as the Lord Ordinary thinks they do, all deeds done in contravention of the prohibitions, they can only apply to deeds altering the order of succession. The tailzie then provides that 'the said debts, deeds, and all and every one of them, shall' be void and null. These latter words are not confined in their application to the immediately preceding words, 'or doing any other deed.' They are general words of reference, which extend to and comprehend, the Lord Ordinary thinks, everything done in the contrary of the prohibitions. Further, the clause goes on to provide that the contraveners shall forfeit their right to the estate, and that the same shall devolve upon the next heir 'free from all debts, deeds, and crimes done, contracted, or committed by the contraveners;' that is, deeds done, debts contracted, or crimes committed. These words are also quite general. The whole of them follow upon the hypothesis with which the irritant and resolutive clauses commence, namely, the doing anything in the contrary of the provisions; and they refer to and include all acts of contravention done in the contrary of all the prohibitions. Depending as they do upon the irritancy declared in the commencement of the clause, they strengthen, if that were necessary, the view that the 'debts, deeds, and all and every one of them,' done in the contrary of the prohibitions, refer to and include the whole of these prohibitions—*Murray* v. *Murray*, 4 D. 803, and 3 Bell's Appeal Cases, 100; *Kintore*, 23 D. 1105, 4 Macqueen, 520.

"4. It is further maintained that the bond of tailzie and deed of nomination were not duly recorded in the register of tailzies in accordance with the Act 1685, c. 22, in respect that, while the bond of tailzie was recorded on 8th June 1720, the deed of nomination was not recorded until 4th March 1760.

"By the Act 1685, c. 22, it is enacted, with reference to recording, as follows:—'And the original tailzie, once produced before the Lords of Session judicially, who are hereby ordained to interpone their authority thereto, and that a record be made in a particular register-book, to be kept for that effect, wherein shall be recorded the names of the maker of the tailzie, and of the aires of tailzie, and the general designations of the lordships and barronies, and the provisions and conditions contained in the tailzie, with the foresaid irritant and resolutive clauses subjoined therto, to remain in the said register *ad perpetuam rei memoriam*.'

"The pursuer maintains that the bond of tailzie and the deed of nomination together constitute the deed of entail, and that the Act requires one production and one entry; that is, that the two deeds should be produced to the Court, and recorded at one and the same time. The Lord Ordinary cannot adopt this view, and he considers that it is not required by the Act. The object of the Act in requiring recording was publication to the lieges and preservation *ad perpetuam rei memoriam*. The words, 'once produced before the Lords of Session judicially,' does not mean that where there is a deed of entail and a deed of nomination following upon a destination *hæredibus nominandis* in an entail, the two must be produced to the Court at one and the same time. It means, the Lord Ordinary thinks, that when produced, or upon being produced, the authority of the Court shall be interponed thereto, and it shall be recorded. There does not seem any principle on which this simultaneous recording is necessary, and very strong grounds must be shown for requiring that as a solemnity under the sanction of nullity. No such grounds were stated to the Lord Ordinary. Suppose that the heirs of the granter's body had succeeded and held the estate under the recorded bond of tailzie, and the succession had never opened to the heirs named in the deed of nomination, and that the latter deed had never been re-

corded, could it have been maintained that the entail was bad in consequence of that deed not being recorded? Or suppose that the heirs named in the recorded tailzie held the estate, and that the heirs called by the unrecorded deed of nomination were all dead, would the failure to record the latter vitiate the tailzie? Or take the case of a nomination of postponed substitutes made long after execution of the tailzie, may the granter not record his tailzie until he executed his nomination, which he might do even *in articulo mortis?* And if the granter died leaving his tailzie recorded, could the first called heirs of tailzie who succeeded maintain that they held the estate in fee simple until the nomination was recorded? The Lord Ordinary thinks that the answer to all these cases would be in the negative; and if he is right in this, it follows that simultaneous recording is not necessary to the validity of the entail. No doubt the Act 1685, c. 22, requires that the names of the heirs of tailzie shall be recorded. This, therefore, appears necessary as a security against purchasers and creditors when the succession has opened *hæredibus nominandis;* but it is, the Lord Ordinary conceives, sufficient, if after that succession has taken place the deed of nomination be recorded at any time before the estate has been acquired by a purchaser, or exposed to the diligence of creditors. In the case of *Stewart* v. *Porterfield* (8 Shaw, 16, 2 W. & S. 369, and 5 W. & S. 515), where an estate had been possessed for more than forty years on the entail alone, an heir claiming upon an unrecorded nomination when the succession opened to him was held preferable to an heir called by a posterior substitution in the entail. Surely in that case the recording of the nomination in the register of tailzies would be full implement of the provisions of the Act, and would effectually secure the estate against purchasers and creditors, and the deeds of the heir so succeeding. In the present case the nomination has been recorded and acted on without challenge since the year 1760, and Sir William Drummond Steuart and the whole heirs of entail have since that date made up their titles to, and have held the estates as heirs of tailzie and provision under the bond of tailzie and deed of nomination.

"V. The last objection which was stated to the validity of the entail was that the estates were possessed in two portions, under two dispositions and relative Crown charters dated in 1784 and 1789, and titles following thereon, which were adverse to the bond of tailzie and deed of nomination, and that these dispositions and charters, having never been recorded in the register of tailzies, the fetters of the original entail were thereby worked off.

"In 1784 the heir in possession propelled by disposition the lands of Airntully, a portion of the estates to his eldest son, who completed his title to Airntully by Crown charter of resignation and instrument of sasine thereon. By disposition granted five years afterwards—in 1789—the same heir in possession propelled the whole estates, including Airntully, to his said eldest son, who completed his title under this deed to the whole estates other than Airntully, by Crown charter and instrument of sasine thereon.

"It is objected by the pursuer that the grantee in these deeds and his successors held and possessed the estates in two portions, and by virtue of these deeds only, and not under or by virtue of the bond of tailzie and deed of nomination, for upwards of forty years before Sir William Drummond Steuart made up his titles to the estates in 1839. Sir William then made up his title to the estates as heir of tailzie and provision under the bond of tailzie and deed of nomination.

"In regard to the disposition and Crown charter of 1784, the pursuer maintains that a deed of propulsion of part of the estate is opposed to and unwarranted by the entail, it not being competent to the heir in possession to propel part and retain part. He further maintains that there is no cross forfeiture inserted either in the disposition or Crown charter of 1784 and Crown charter of 1789,—that is, no provision that if the heir shall contravene he shall forfeit the whole lands,—but only a provision in each deed that if he shall contravene he shall forfeit the lands mentioned in that deed.

"The Lord Ordinary considers that these objections are not well founded. He is of opinion that the Act 1685, c. 22, which requires that the 'provisions and irritant clauses shall be repeated in all the subsequent conveyances of the said tailzied estate to any of the aires of tailzie,' has been fully complied with in these deeds, and that these provisions and clauses, which are set forth in their entirety, and as being those contained in the bond of tailzie, are therein inserted as applicable to the whole entailed estates. The disposition of Airntully in 1784 is granted with and under the whole fettering clauses of the bond of tailzie in favour of the eldest son. The Crown charter following thereon is in accordance therewith. It seems to the Lord Ordinary impossible to hold that these deeds constitute a contravention of the entail, and form a different investiture. Further, the eldest son only held part of the estate for five years. After that he held the whole, the deed of 1789 having propelled to him not only Airntully but also the whole other tailzied lands. An heir in possession may propel the estates to an heir *alioquin successurus* (*Craigie*, 4th Dec. 1817, F. C.). No doubt the Crown only granted a charter in 1789 with reference to the lands other than Airntully, because it is supposed the heir had already obtained from the Crown a charter as regards Airntully. Being infeft in Airntully on the Crown charter of 1784, it was unnecessary to make up a second title thereto. From 1789 downwards he was by the propulsion proprietor of the whole estates as heir of entail under the whole fetters of the tailzie. The grantee in these deeds only held part of the estates for five years. If that was a contravention it only lasted for that time, and was then purged. It is thought not to have been a contravention, because none of the cardinal prohibitions were violated. The estate was not alienated to a stranger, but conveyed to the heir *alioquin successurus*, and that under the whole fetters of the entail. This cannot be held adverse to the entail. But even although it were held a contravention, the result of it might be, if not purged, to create a forfeiture of the granter and grantee's right, and to devolve the estate on the next heir, but not to invalidate the entail."

The pursuer reclaimed, and pleaded—"(1) There not being an entail of the said lands and others made and duly recorded in accordance with the Act 1685, cap 22, the sale to the pursuer is binding and effectual. (2) The bond of tailzie and deed of nomination, both dated 31st May 1717, are in-

valid and ineffectual, in respect (1) That they do not contain the clauses required by the Act 1685, cap. 22, in order to constitute a valid and complete entail; and (2) In respect the same have not been properly or duly recorded in the register of entails. (3) The said bond of tailzie and deed of nomination do not together constitute a valid entail. (4) The said bond of tailzie and deed of nomination and other dispositions and deeds of entail before condescended on are, *inter alia*, defective in regard to the prohibition against alteration of the order of succession; and also in respect the irritant and resolutive clauses are not applicable to a prohibition against alteration of the order of succession. (5) The bond of tailzie does not contain prohibitory, irritant, or resolutive clauses affecting the heirs to whom the estates were destined, failing the entailer and heirs of his body. (6) The said deed of nomination is not executed in terms of the power to that effect reserved in the bond of tailzie; and no fetters are imposed upon any of the heirs named in the said deed. (7) Upon the execution of the said deed of nomination the whole fettering clauses of the bond of tailzie were superseded in so far as concerned the heirs of entail nominated in said deed, and these heirs were only subject to such conditions, restrictions, obligations, and irritancies, as were contained in the said deed of nomination. (8) The titles under which the successive heirs of entail have held and possessed the lands since 1720, having been adverse to the said bond of tailzie and deed of nomination, the entail is now invalid. (9) At all events, the titles under which the estate has been held by the successive heirs of entail since 1789 having been adverse to the said bond of tailzie and deed of nomination, the entail is now invalid. (10) The lands libelled having been possessed for more than forty years on titles other than the bond of tailzie and deed of nomination, or one or other of them, and under a different destination, the entail has been extinguished. (11) The whole lands which formed, or were intended to form, the entailed estate under the original bond of tailzie and deed of nomination having been possessed in two portions, under the crown charter of 1784 and 1789, and investitures following thereon, from and after the dates of said charters, the fetters imposed by the said bond of tailzie and deed of nomination were thereby worked off; and the deceased Sir William Drummond Steuart was entitled to sell said lands to the pursuer, in respect that neither the said charters nor the dispositions which formed their warrants have been recorded in the register of tailzies. (12) The deed of nomination and contracts of excambion contain no prohibitions or clauses irritant and resolutive, and are therefore invalid and ineffectual to constitute entails. (13) The said bond of tailzie and the other deeds of entail being invalid and ineffectual as regards the prohibitions against alteration of the order of succession, are invalid and ineffectual as regards all the prohibitions therein contained; and the said lands and others were subject to the deeds and debts of the said Sir William Drummond Steuart. (14) The said Sir William Drummond Steuart having sold the said lands and others to the pursuer conform to the agreement libelled, the pursuer is entitled to decree of adjudication in implement as concluded for."

Argued for him—(1) The bond of tailzie does not fetter the heirs who took under the deed of nomination; there is no effectual prohibition against altering the order of succession, and the irritant and resolutive clauses are not effectually applied to the prohibitions. The deed of nomination is not a nomination of heirs in the usual terms; it is not a nomination introducing the heirs into the other deed. The testator contemplated a separate deed with the other irritancies, and these fettering clauses being imposed by reference merely, are not binding on the heirs taking under that destination and nomination. Under the bond of tailzie the fetters of the entail are only imposed and only intended to be imposed upon the heirs other than those referred to in the second branch of the substitution, namely, the destination of *hæredes nominandi*. The deed of nomination is an entail by reference. (2) The entail is not validly recorded. The thing that must be recorded is the deed of entail, no matter how many deeds it may consist of. It was intended by the Legislature that under one entry in the register of entails a creditor resorting to that register should find the whole conditions of the deed of entail. Assuming that the deed of entail is a good one, you have one part of the tailzie recorded in 1720, the other part, namely, the deed of nomination, not till forty years later. (3) Lord Cowan's judgment of 19th March 1853, though *res judicata* in any question *inter hæredes*, is not so in a question with a creditor or onerous purchaser who is not within the destination of the entail—any person being a purchaser who pays a full price and is not a trustee or representative. The pursuer is in no sense *eadem persona* with Sir William Steuart.

Pursuer's Authorities — *Gemmell* v. *Cathcart*, Nov. 13, 1849, 12 D. 19, H.L. 13 Dec., 1852, 1 Macq. 362; *Broomfield* v. *Paterson*, June 29, 1784, M. 15,618; *Lindsay* v. *Earl of Aboyne*, March 2, 1842, 4 D. 843; *Paterson* v. *Leslie*, July 1, 1845, 7 D. 950; *Porterfield* v. *Stewart*, May 15, 1821; 1 S. 6, (new ed.), 2 W. and S. 369, 8 S. 16, 5 W. and S. 515, 1 Ross' Leading Cases, 569; *Pet. J. C. Moore*, Nov. 28, 1821, 1 S. 173; *Earl of Leven* v. *Cartwright*, June 12, 1861, 23 D. 1038; *Leith Dock Commissioners* v. *Inspector of Poor*, June 17, 1864, 2 Macph. 1234, June 12, 1866, 1 Law Rep., Scotch App. 17 (Lord Chelmsford's opinion, 22); *Gibson Carmichael* v. *Carmichael Anstruther*, June 19, 1866, 4 Macph. 842; *Dempster* v. *Dempster*, June 12, 1857, 19 D. 14, 3 Macq. 62; *Duke of Hamilton* v. *Lord C. Hamilton*, Nov. 20, 1868, 7 D. 139; *Lang* v. *Lang* (Overton entail), Nov. 23, 1838, 1 D. 98; Aug. 16, 1839, M'L. and Rob. 871; *Ker and Innes* v. *Ker* (Roxburghe entail), June 23, 1807, M. App. Tailzie, No. 13, H.L. June 8, 1811; *Buchan* v. *Erskine* (Strathbrock entail), June 23, 1842, 4 D. 1430, H.L. Feb. 21, 1845, 4 Bell, 22; *Murray* v. *Murray* (Cockspow entail), Feb. 26, 1842, 4 D. 803; *Horne* v. *Rennie*, March 13, 1838, 3 S. and M. 142; *Earl of Kintore* v. *Lord Inverurie*, June 18, 1861, 23 D. 1105; April 16, 1863, 1 Macph. (H.L.) 32, 4 Macq. 520; *Viscount Dupplin* v. *Hay*, Nov. 15, 1871, 10 Macph. 89; *Montgomerie* v. *Eglinton*, Jan. 22, 1842, 4 D. 425, Aug. 18, 1843, 2 Bell's App. 149.

The defender pleaded—(1) It is *res judicata* by the judgment of 19th March 1853 that the deeds condescended on constitute a valid and effectual entail of the lands in question, and the said judgment is binding upon the pursuer, as deriving right from Sir William Drummond Steuart. (2) At all events the said judgment forms *res judi-*

cata against the pursuer, in respect he entered into the said transaction for the purpose of aiding Sir William Drummond Steuart in his intention and purpose of transferring the said estates, or the price thereof, to the said Franc Nichols Steuart, a gratuitous disponee under his settlement, and that he was aware of the judgment of 19th March 1853; or in respect of one or other of these grounds. (3) It is *res judicata* by the judgment of 16th May 1871, in the action at the instance of Mr Moncrieff, who truly represented Sir William Drummond Steuart in said action, that the deeds condescended on constitute a valid and effectual entail of the lands in question, and that the said entail is a subsisting entail, and the judgment of 16th May 1871 is binding upon the pursuer. (4) The defender ought to be assoilzied, in respect that the deeds condescended on constitute a strict entail of the lands in question, and that Sir William Drummond Steuart had no power to sell or otherwise alienate the said lands. (5) The action cannot be maintained, in respect that the agreement libelled does not constitute an absolute or enforcible contract for the purchase and sale of the lands in question. (6) The pursuer is not entitled to prevail, in respect that the said agreement was entered into by the said Sir William Drummond Steuart on deathbed, and was to the prejudice of the defender, his heir. (7) The pleas founded upon the manner in which their titles were made up by heirs of entail are unfounded in fact and untenable in law; and are, *separatim*, excluded by prescription. (8) The pursuer's statements are not relevant nor sufficient in law to support the conclusions of the summons. (9) The original entail having been validly constituted and recorded, and the lands mentioned in the excambions having been effectually brought under the operation of the said entail, the defender ought to be assoilzied with expenses.

Argued for him—(1) The heirs who took up the estate, with one exception, made up their titles under the tailzie and not under the deed of nomination. A deed of nomination is not the origin or basis of the right of an heir of entail, it is simply the evidence of his right which he gets created under the original bond of tailzie. (2) The fetters were directed by the deed of tailzie against the *hæredes nominandi* according to any just construction of the bond of tailzie as a whole. (3) An entail by reference is only bad where the second deed is a substantive and separate deed; where it is intended to be, and is, the origin of a right, as being a new disposition or a fresh procuratory of resignation, but there is no law or decision which establishes that where the two deeds are intended to be one, a mere reference between these deeds is not to be made. (4) With the exception above mentioned, every one was entitled to take under the bond of tailzie as well as under the deed of nomination, and therefore it is proper to ascribe their possession to the bond and not to the deed. (5) If that be true, it is unnecessary to consider the objection as to the invalidity of the recording, but in any view the objection is not supported by either statute or authority. (6) Even supposing the pursuer was to be taken as a proper onerous purchaser, he would be subject to the plea of *res judicata.* That plea will *a fortiori* be a good one when he is in fact *eadem persona* with Sir William Steuart. The principle of *res judicata* is, that wherever a title has been acquired from a person against whom the plea would have applied, any one taking from him just uses his right, and cannot free himself from any judgment which has been got against the person from whom his title flows; in short, you cannot, by transferring your title to another, make it different from what it was when you held it yourself.

Defender's Authorities—Juridical Styles, (1826) p. 226; *Norton* v. *Stirling,* July 6, 1852, 14 D. 944; Stair, iv. 40, 16; Ersk., iv. 3, 3; Dig., 44, 2, 9, 2, and 11, 3; Voet. Pand., 44, 2, 5; *Gordon* v. *Ogilvy,* Feb. 17, 1761, M. 14,070, 2 Pat. 61; *Rutherford* v. *Nisbet,* Nov. 27, 1832, 11 S. 123; *Marquis of Huntly* v. *Nicol,* Jan. 9, 1858, 20 D. 374; *Elliot* v. *Heirs of Stobs,* May 19, 1803, F. C.

At advising—

Lord President—My Lords, a number of objections have been taken by the pursuer of this action against the validity of the entail of Murthly, which require to be separately considered; and those which seem naturally to occur first for discussion are the objections which have been taken against the prohibitory, irritant, and resolutive clauses. It is contended that there is no effectual prohibition against altering the order of succession, and also that the irritant and resolutive clauses are not effectually applied to the prohibitions in various particulars. But it is admitted that these objections were considered and made the subject of a judgment by Lord Cowan in the year 1853. His judgment, pronounced upon the 19th of March in that year, disposed of all the objections which are now stated against the prohibitory, irritant, and resolutive clauses, and held them to be all bad objections; and it is maintained on the part of the defender that this is *res judicata,* and that the question cannot now be again raised. In so far as regards the identity of the questions raised in the case before Lord Cowan and in the present case, there is of course no room for dispute; but it is contended that this judgment of Lord Cowan is not pleadable as *res judicata* against the present pursuer, because he stands in the position of an onerous purchaser of the estate. The pursuer of the former action was the late Sir William Drummond Steuart, and the defenders were the substitutes of tailzie. In the present case the pursuer of the action is Mr Padwick, the so-called onerous purchaser, and the defender is the heir now in possession under the tailzie, Sir Archibald Drummond Steuart, the brother and immediate successor of Sir William. If Mr Padwick were an onerous and *bona fide* purchaser in the full sense of the term—that is to say, if during Sir William Drummond Steuart's life he had paid the price of the subject, and received a disposition, and made up his title to the estate, a question of very considerable difficulty and importance would certainly have arisen—a question which, so far as I know, has never been disposed of, although it has occurred for consideration incidentally more than once. I had occasion to consider that question in the case of *Lord Leven* against *Cartwright,* but had no occasion to pronounce any judgment upon it; and I am just as little disposed to pronounce any judgment upon it here, because I don't think that Mr Padwick stands in the position of a party who has purchased the estate, paid the price, and received a title. The question, therefore, whether an onerous creditor attaching the estate during Sir William Drummond Steuart's lifetime, for his debt, or a *bona fide* purchaser from him, with a completed title, and the

price paid during his lifetime, could be met by this plea of *res judicata*, may be laid aside; because it appears to me to be evident that the position of Mr Padwick is very peculiar, and that he is in truth here merely the representative of Sir William Drummond Steuart—in this sense, that he has just received from Sir William Drummond Steuart a sort of testamentary assignation of his (Sir William's) right to try this question, if he had such a right. This is made very clear by the terms of the agreement which constitutes Mr Padwick's only title. It is dated the 3d of April 1871, and it is simply a personal contract of sale. There is no disposition or conveyance of any kind. It bears that in consideration of the price after stipulated, and with and under the terms and conditions after written, Sir William "hereby sells to the said Henry Padwick, and his heirs and assignees, heritably and irredeemably, all and whole the lands and baronies of Grandtully, Murthly, and Strathbraan." The term of entry is stipulated to be at the death of the said Sir William Drummond Steuart, and the price to be payable at that time is £350,000 sterling, "payable by the said Henry Padwick or his foresaids to the said Sir William Drummond Steuart or his executors, at—but only at—the first term of Whitsunday or Martinmas six months after the validity of the will hereby made shall be finally and irreversibly ascertained and determined." The price is to be under deduction, among other things, "of the whole expenses incurred by the said Henry Padwick as between agent and client, and of all expenses in which he shall be found liable in connection with these presents and the ascertaining of the validity of the sale, including in these the costs in the House of Lords. And it is also agreed that the price shall be payable only on the said Henry Padwick obtaining a valid title by adjudication, or otherwise, to the lands, baronies, and others hereby sold, and on implement of the obligations hereinbefore undertaken by Sir William Drummond Steuart." It is also agreed "that in the event of any judicial proceedings being instituted in the lifetime of the said Sir William affecting his position or his right to the said lands, baronies, and others, it shall be in the power of Sir William to annul this agreement; and that in the event of his doing so, these presents shall be, and shall be held to have been from the beginning, null and void and of no effect whatever." And it is also agreed "that in the event of such judicial proceedings being instituted, and of the said Sir William in consequence exercising the power conferred on him" of putting an end to the agreement, "he shall free and relieve the said Henry Padwick and his foresaids of all expenses previously incurred by him or them, but shall not to any further extent be liable in damages for breach or non-implement of this contract." Now, this agreement was made in the beginning of the year 1871. It is actually executed by Mr Padwick on the 30th of March, and by Sir William Drummond Steuart on the 3d of April; and in the month of January preceding Sir William Drummond Steuart had made a general settlement of his affairs in favour of Mr Franc Nichols Steuart, by which he made him his universal disponee and legatee. So that, of course, if the agreement I have referred to about the entailed estate should receive effect, and the price of £350,000 become payable, it would fall to be paid over to Mr Franc Nichols Steuart. The object of this agreement, in so far as Sir William Steuart was concerned, is therefore not far to seek. He desired, if he had the power, to convert the entailed estate into money, and to give that money to Mr Nichols Steuart. The object of course was quite apparent also to Mr Padwick. He must have known—he could not help knowing from the very terms of this agreement—that that was the object which Sir William had in view, and he agreed to aid him in carrying out that object—I don't say gratuitously, but he certainly lent himself to aid Sir William in carrying through that object by agreeing to purchase the estate at the price and under the very singular terms and conditions contained in this agreement. The result of all this appears to me to be that Sir William was not prepared to make any sale during his lifetime, because he was afraid of incurring an irritancy, and he even exhibits some apprehension on the face of this agreement, that what he has done, although it is not to come into operation until his death, if it should be heard of and made known to the substitutes of talzie, might be made the foundation of some proceedings against him with a view to declare an irritancy, and accordingly he stipulates that if anything of the kind should take place it should be in his power to annul the agreement entirely, The position of Mr Padwick therefore is this, he is to have the chance of being able to set aside this entail,—to have it declared invalid, and so to affirm the validity of this personal contract of sale after Sir William's death, but not in his lifetime. What he purchased therefore from Sir William for £350,000, to be paid only in the event of success, was the chance of being able to make this agreement effectual. Now, that places him, as I said before I think, simply in the position of having assigned to him by Sir William the right, if Sir William had such a right, of trying the validity of the entail after Sir William's death. In that point of view it appears to me that the pursuer Mr Padwick is the successor and representative of Sir William Steuart in the fullest sense of the term as used by the institutional writers in dealing with the plea of *res judicata*, and therefore that the judgment of Lord Cowan is conclusive against Mr Padwick, just as much as if he had been himself a party to that suit. This not only relieves us from the necessity of considering the objections which have been urged against the prohibitory, irritant and resolutive clauses, but I think renders it improper that we should consider them, because the matter being *res judicata*, this Court is not entitled to review a judgment which is *res judicata*, and therefore I offer no opinion upon the merits of these objections.

The next question for consideration is—Whether Sir William was himself really and effectually under fetters? It is said that he took the estate as one of the heirs called to the succession by the deed of nomination, and that the heirs called to the succession by the deed of nomination are not by the deed of tailzie subjected to the fetters. There are thus, in regard to the objection that I am now to deal with, two points which require to be made out by the pursuer in order to his success. He must make out, in the first place, that the heirs nominated by the separate deed of nomination are not put under fetters, and, in the second place, he must make out that Sir William Drummond Steuart held the estate as one of that class of

heirs. Now, if it were necessary to determine the first of these questions—whether the heirs called by the deed of nomination are effectually subjected to the fetters of the entail—I confess I should have some difficulty in dealing with that objection. But it appears to me unnecessary to consider and determine that, because I am very clearly of opinion that Sir William Drummond Steuart held this estate, not as one of the heirs named in the deed of nomination, but as one of the heirs specially called in the bond of tailzie itself—that he and all his predecessors, with one exception, made up their titles as heirs called by the bond of tailzie, and did so properly, and would not have made up their titles properly if they had made them up in any other way; and if that be so, it follows of necessity that whatever may come of the objection as to the application of the fetters to the heirs called by the deed of nomination, that objection cannot apply to the case of Sir William Steuart. The destination in the bond is in the first place "to myself and the heirs-male lawfully to be procreated of my own body, and the heirs whatsoever lawfully to be procreated of their bodies, which failing, to the heirs whatsoever lawfully to be procreated of my own body and the heirs whatsoever lawfully to be procreated of their bodies, the eldest heir-female being always preferable, and succeeding without division." This may be called the first branch of the destination, and it is unnecessary to make any observation upon it, because it never came into operation, the entailer having died without issue. Then comes what I shall call the second branch of the destination, which is in favour of *hæredes nominandi* "which failing, to any person or persons that I have now, or shall at any time hereafter, during my lifetime *vel in ipso articulo mortis*, nominate, design, and appoint to succeed to the lands, baronys and others above rehearsed, by, a writ or nomination subscribed, or to be subscribed, with my hand, and under such reservations, provisions, qualifications, conditions, restrictions, limitations, and irritancies as are or shall be contained in the said nomination, which the persons therein nominate, or to be nominate, shall be holden to perform and fulfil, and which nomination shall be as valid and sufficient as if it were insert herein, and in the infeftments to follow hereon;" and then follows what I may call the third branch of the destination, "failing of any such nomination, or the same being made and afterwards revoked or cancelled, or if the persons therein named or to be named shall fail, then to the eldest son procreate or to be procreate of John Steuart, late of Innernytie, his body, and the heirs-male of the eldest son, his body," and then there follows a corresponding nomination in favour of the younger brothers of this eldest son of John Steuart of Innernytie, "which failing to Sir George Steuart, eldest lawful son to the deceased Sir Thomas Steuart of Balcaskie, late one of the Senators of the College of Justice, and the heirs-male of his body, which failing to the eldest son lawfully procreate or to be procreate of John Steuart, second brother to the said Sir George, his body, and the heirs-male of the said eldest son, his body." And then there follow a number of other substitutions which it is quite unnecessary to consider, because the estate has descended in terms of this last part of the destination which I have just read, viz., to the heirs-male of the second brother of the said Sir George Steuart—the late Sir William and the present Sir Archibald having taken the estate in the character of heirs-male of the body of the second brother of Sir George Steuart. Now, it will be observed that in the second branch of the destination, which calls in heirs to be named by another deed, it is not said in what order or under what conditions these heirs are to take. That, of course, is left on the deed of nomination itself. But in the opening of the third branch of the destination some words occur which I think are of importance to be kept in view in reading the deed of nomination. The hypothetical introduction of the third branch is, "failing the nomination, or if the persons therein named or to be named shall fail." We shall consider by and bye what is the precise meaning of these words in reading the deed of nomination. The deed of nomination itself proceeds upon the recital of the bond of tailzie, "and further, seeing that by the foresaid destination I have for certain causes and considerations passed by and left out in the order of succession John Steuart, late of Innernytie, John Steuart, brother-german to Sir George Steuart, eldest lawful son to the deceased Sir Thomas Steuart of Balcaskie," and several other persons who are there particularly named, "and also seeing that I, not only as absolute fiar, but also by virtue of the faculty to nominate and to alter the succession at my pleasure, may dispose of my estate and the succession thereof as I shall think fit, and being accordingly resolved in the cases and events underwritten that the above named persons should succeed in their proper rank, according to the nomination and destination underwritten, therefore,"—and he proceeds in certain events to nominate heirs. Now, it will be observed that in so far as we are concerned with the destination in the third head of the bond of tailzie, the only two persons who are omitted are, in the first place, John Steuart, late of Innernytie, and John Steuart, brother-german to Sir George. That is the first person called in the third branch of the destination. John Steuart's, of Innernytie, eldest son is to be preceded in certain events by his father, John Steuart of Innernytie, himself; and in like manner the succession after Sir George Steuart and the heirs-male of his body is to go—not to the eldest son of John Steuart—but to John Steuart himself. That is the object of the deed of nomination in so far as concerns the part of the destination that we are dealing with. Now, what he goes on to provide in the deed of nomination is, "Therefore, in case His Royal Majesty King George or his royal successors shall be pleased to receive the said John Steuart, late of Innernytie," and various other persons therein named, "and in case the said John Steuart, brother-german to the said Sir George Steuart," and certain other persons there named, "shall give evidences of their being free from any suspicion of treasonable practices against the Government, or shall be free and safe from any conviction or attainder against them for the same, in these cases, and not otherwise, wit ye me to have nominated, designed, appointed, declared, and ordained, likeas I by the tenor hereof, under the reservations, provisions, qualifications, conditions, restrictions, prohibitions, limitations, and irritancies particularly expressed in the foresaid bond of tailzie, nominate, design, appoint, declare, and ordain the persons underwritten, failing the heirs of my own body, male or female, and failing any

other nomination to be made according to the faculty in the said tailzie, to succeed to me in my lands and estate contained in the said bond of tailzie, and in my personal and moveable estate, disponed by the foresaid disposition and assignation of the same date, viz., the said John Steuart, late of Innernytie, and the heirs-male of his body, which failing, the said Sir George Steuart and the heirs-male of his body, which failing, the said John Steuart, his second brother, and the heirs-male of his body, which failing, the said Kenneth Steuart, his third brother, and the heirs-male of his body." And there we may stop again, because we really have no concern with the latter part of the destination. It is only necessary to keep in view that this nomination of heirs is just the same as the destination contained in what I have called the third part of the destination in the bond of tailzie; with this exception—that it puts in, in their proper order, the names of the persons who were left out in the bond of tailzie. And then he proceeds to declare "that this present nomination in the cases and events above written shall be as valid and effectual for the right of succession as above destinat and appointed as if this nomination had been the only destination of succession, and specially insert in the tailzie itself, and in the infeftments to follow thereupon; and, further, for making my intention in this nomination the more effectual, it is hereby specially provided and declared that in case any of the heirs of tailzie, according to the order of succession expressed in the principal tailzie itself, shall have attained and got into the possession of the said lands and estate by virtue thereof,"—that is, by virtue of the bond of tailzie—"before the above written events shall happen as to either of the persons above named, but are posterior in order by this present nomination; that then and in that case the said heir of tailzie who has so attained to the possession of the said lands by virtue of the said bond of tailzie, shall be bound and obliged to denude *omni habili modo* in favour of the prior heir of tailzie, according to the order of succession as above expressed in this nomination, sicklike and in the same manner as if this present nomination had been the only destination of succession and contained in the principal tailzie, and that how soon and whensoever the events above written shall happen and fall out as to either of the persons above named being prior in the order of succession by this nomination." Then he declares "that if the events above mentioned shall happen and fall out as to either of the persons above named who are postponed in the tailzie, that then and in that case this present nomination shall have its full effect as to him, and he and the heirs-male of his body shall succeed as in the order of succession contained in this nomination, though others of them should not be so rehabilitate, or free from suspicion, or safe against conviction, as aforesaid, so that they may be capable to succeed; and so, whenever the events respective above written shall happen as to either of the persons above named, this present nomination, unless altered or revoked, shall stand as the rule of my succession as to the persons respective above named, or either of them." Now it must be kept in mind that this deed of nomination was executed on the same day with the bond of tailzie; and the object of putting this nomination into a separate deed is quite apparent. There were certain of the heirs whom he wished to call to the succession who had been attainted, and were therefore not in a condition to take the succession. There were others of them, again, who were under suspicion of treason, and who might be attainted, although that had not yet happened, and he desired to prevent the succession falling upon them unless they should receive a pardon in the case of those who were attainted, or unless those who were under suspicion should be freed from that suspicion. And accordingly he leaves out their names in the bond of tailzie; but if any one of these persons shall be restored against his attainder, or in the other case be freed from suspicion, then he desires that individual to take his place in the destination and to succeed in the order of succession which is contained in this separate deed of nomination. But it is quite obvious that it was not his purpose that the nomination contained in the separate deed should come in all at once in place of the destination contained in the bond of tailzie. That would not have answered the purpose. Supposing that John Stewart of Innernytie had received a pardon, and had been in a position to take the estate, being the person first called to the succession after the issue of the entailer's own body, it would never have done upon that event merely to bring in the deed of nomination as the deed regulating the succession, and to supersede the destination contained in the bond of tailzie; for the result of that might have been that if John Steuart of Innernytie had failed without issue, then the next person, John Steuart, Sir George's younger brother, not being free for suspicion, but on the contrary being declared a traitor, in the meantime would have taken the succession contrary to the intention of the entailer. That would not have answered his purpose. And therefore it appears to me perfectly clear that what he intended was, that the two deeds should stand together, that the one, the bond of tailzie, should be the standing destination of the estate, with this exception only, that if any of the attainted persons when the succession would have devolved upon him should be no longer an attainted traitor but a liege subject of His Majesty, then he was to come in and take the estate: but the deed of nomination was to come into operation not as a whole, but only as regarded that individual. And so the operation of the deed of nomination standing alongside of the bond of tailzie was to be occasional and intermittent, and never to become the proper destination of the estate. That being so, it seems to me that so long as none of the persons excepted from the destination in the bond of tailzie was in a condition to take up the succession, and the succession had come to him in the order prescribed in the deed of nomination—so long as that did not happen, the standing destination of the estate was that which is contained in the bond of tailzie, and that the heirs who are there called, in the order there prescribed were bound to make up their titles under the bond of tailzie alone. They had nothing to do with the deed of nomination. The deed of nomination was not intended to bring them in. They were brought in already. The only operation and effect of the deed of nomination, as declared by the entailer himself, is in favour of those who had been omitted in the other deed. And therefore, when this succession, upon the death of the entailer, opened to Sir George Steuart, the son of Sir Thomas Steuart of Balcaskie, he was bound to make up his title under the bond of

tailzie. What had happened was this, that there was no issue of the entailer's body, and there was no issue of the body of John Steuart of Innernytie, and the next member of the tailzie specially called was this Sir George Steuart, son of Sir Thomas. Accordingly we find that Sir George Steuart did make up his title in this way; he served heir of provision in general to the entailer, and by that means he acquired right to the procuratory of resignation in the bond of tailzie, and upon that procuratory he resigned in the hands of the Crown, and obtained a crown charter. In these titles there is no mention of or allusion to the deed of nomination. The title is made up upon the bond of tailzie and nothing else: and, for the reason I have already stated, I think this not only was the proper way of making up the title, but that it was the only legitimate way of making up the title. But Sir George died without issue, and he was succeeded by his brother Sir John. Now this Sir John was one of the persons omitted in the bond of tailzie, and he was only brought in under the deed of nomination. At the time that the entail was made he was under suspicion of treason, but it must be presumed that when he took up the estate he had been freed from that suspicion, or had somehow or other survived it, and accordingly he took up the succession. But he did it in a very strange manner. He expede a general service to Sir George as nearest and lawful heir of tailzie and provision under and in terms of the deed of nomination; and then he proceeded to expede an instrument of resignation upon the procuratory contained in the bond of tailzie. But that procuratory had been already exhausted by the resignation made by his elder brother Sir George. He says, indeed, in the resignation which he expede, that this procuratory had not been hitherto duly executed and exhausted agreeable to the nomination therein specified. But in that I think he was entirely wrong; because I think Sir George Steuart's title was properly made up, for the reasons I have already given, and that being so, it was quite impossible to act upon this procuratory of resignation a second time; and so Sir John Steuart's title, although very properly made up under the deed of nomination, by which alone he was called to the succession, was as a feudal title entirely null and ineffectual. But Sir John did not live very long, and upon his death his son, the second Sir George, made up his title to the estate, and he made up his title under the bond of tailzie, just as the first Sir George, his uncle, had done. He served himself by special service as heir-male of tailzie and provision to his uncle Sir George, passing over Sir John, whose title was bad, and was seen to be bad apparently by the conveyancer who made up the title of the second Sir George. And that service makes mention of the bond of tailzie, and proceeds upon the bond of tailzie alone and serves the second Sir George as heir to the first Sir George, as the person last vest and seized under the destination contained in the bond of tailzie. They took no notice whatever of the titles of Sir John, but passed them by altogether. Now, this again, I think, was quite accurate and proper conveyancing. And here again you have the heir making up his title just as he ought to do, under the bond of tailzie by which he was called to the succession. According to the construction of the tailzie and deed of nomination taken together, such an heir as this was not called to the succession by the deed of nomination. That was not the mind or intention of the entailer at all. He was called to the succession by the destination contained in the bond of tailzie. Then this Sir George is the heir who executed the propelling deeds, of which we have heard a good deal in the course of these discussions. It is not necessary, with reference to the present branch of the case, to notice these particularly; but the history of the succession after this is very simple. This Sir George the second was succeeded by his eldest son John, and the next heir who succeeded was the late Sir William, who was the second son of the second Sir George; and the present heir in possession, Sir Archibald, is the third son of the same father. Now, the titles of all these persons have been made up in precise conformity with the example set them by the first and second Sir George. Their titles are made up as heirs of tailzie under the destination contained in the bond of tailzie itself, without any reference to the deed of nomination. It appears to me therefore to be perfectly clear that not only in respect of the title of the late Sir William Steuart was he an heir called to the succession, and taking the succession under the destination contained in the bond of tailzie,—what I have called the third branch of the destination,—but that in point of feudal conveyancing he could not properly have made up his title in any other way; and therefore it is impossible to hold him to be one of the heirs named in the deed of nomination. The deed of nomination was never intended to have, and never had, the effect of calling any of these heirs to the succession, they having been already effectually called by the bond of tailzie. An attempt was no doubt made to show that when the deed of nomination came into operation, it fell necessarily to regulate the succession, because it was only failing the heirs called by the deed of nomination that the heirs named in the third branch of the bond of tailzie are called to take. But that, I think, is a mere misreading of the two deeds. No doubt, if that had been so, then as soon as the deed of nomination came into operation, the third branch of the destination in the bond of tailzie could have been for ever extinguished and put an end to, because all the heirs called in it are also called in the deed of nomination. But then I have shown, I think conclusively, that the deed of nomination is by the very express words of the entailer himself never to come into operation till that event,—is never to come into operation so as to supersede the third branch of the destination in the bond of tailzie,—but only to come into operation for special purposes with regard to particular heirs upon the occurrence of certain events, so as to put them into the succession in the order there appointed, in the event of their being in a condition to take the succession. Therefore it appears to me that whether the fetters of the entail are properly or sufficiently applied to the heirs called by the deed of nomination, that is a matter of no moment in the present question,—Sir William not being such an heir, and Sir William Steuart therefore being, notwithstanding of any such objection, properly subjected, and effectually subjected, to the fetters of the entail.

The next objection which falls to be considered may be dealt with very shortly. It is said that the entail constituted by these two deeds has not been effectually recorded, and the reason of that is that while the bond of tailzie itself was recorded immediately after the death of the entailer, the deed

of nomination was not recorded until the succession of Sir John Steuart in 1760. That was the person who took in virtue of the deed of nomination. When he made up his title his son caused the deed of nomination to be recorded in the register of tailzies, and from that time both the bond of tailzie and the deed of nomination stand upon the register. But it is said that it is not competent to have these two parts of the tailzie in different parts of the register,—that they must be recorded together,—that if they are not recorded together, that is to say, the one immediately following the other, the provision of the statute requiring the registration has not been properly complied with. I think this is a fanciful objection, and one that certainly never was heard of before; nor is it possible to sustain it consistently with what is obviously the fair meaning and intention of the statute 1685. It is quite competent for an entailer to reserve power to himself to nominate heirs to come in and take up the succession of the estate at any point in the original destination that he may think fit; and if he reserves to himself a faculty of making such a nomination in the deed of entail, he may execute that deed of nomination at any time during his life. But it is also quite competent to an entailer to deliver his deed of entail in his lifetime, and to infeft himself in liferent, it may be, and the institute in fee, and record the deed of entail; and although he does all that, his reserved faculty to nominate other heirs will stand perfectly good. Now, when he comes to execute that deed of nomination he must record the deed; at least it is very doubtful indeed whether it can be successfully maintained that a deed of nomination, even if it be a mere nomination of heirs, does not require to be recorded; because the statute expressly requires that there shall appear upon the register the whole series of heirs. But if he is to record that deed of nomination he cannot possibly record it immediately after the deed of entail, because the deed of entail has been already recorded years before. Now, there is nothing in the Act of Parliament of 1685, as far as I can see, to lend the slightest countenance to the notion that it is incompetent, in circumstances such as I have just supposed, to record the deed of nomination when it comes to be executed, and effectually to record it as a part of the entail, so as to make the whole destination of heirs appear upon the face of the register. Therefore I think that this objection is quite untenable.

There remains only one other question, arising from the manner in which certain of the titles to the entailed estate were made up under the propelling deeds which I mentioned before. Sir George Steuart had obtained two deeds during his father's lifetime propelling the succession to him, Sir George Steuart the second; and upon these two separate deeds he expede separate crown charters, and there is no doubt that the lands which together make up the entailed estate came thus to be held separately under two separate crown charters. And it is said that the effect of this is to make a new entail requiring to be recorded, and that as those Crown charters have not been recorded, the consequence is that from that time downwards the estate has been possessed upon unrecorded entails. The sole ground, so far as I can understand, upon which this is maintained is,—not that the fetters are not properly and correctly engrossed in both of these Crown charters,—but that, although they are properly and correctly engrossed in terms of the statute, yet the effect of applying them only to the one set of lands contained in each Crown charter is not to show that these fetters apply to the entire entailed estate, but only to show upon the face of the Crown charters that they apply to the particular lands contained in that charter. In short, a person reading the Crown charter, it is said, would naturally suppose and be led to the belief that the entire entailed estate was that which is contained in the particular Crown charter which he is reading, and that it is to that estate only, or that parcel of lands only, that these fetters are applicable by virtue of the tailzie. Now, that seems to me rather an unwarrantable conclusion. I do not think anybody is entitled to come to the conclusion that because in a Crown charter the conveyancer, following the instructions of the Act 1685, repeats the fetters of the entail, and repeats them with reference to the lands contained in that Crown charter, without making mention of any other lands, that therefore of necessity there are no other lands contained in the tailzie. I see no reason for that conclusion. On the contrary, a very little consideration would lead anybody to see that nothing could be more rash or unwarrantable. There are entailed estates which are held not of one, but of different superiors. One parcel of lands may be held of the Crown, another parcel of one subject-superior, and a third parcel of some other subject-superior. You cannot by possibility embrace all these in one charter; on the contrary, you must have three charters. You must have one charter from the Crown, and you must have a charter from each of the two subject-superiors. And you must, in order to comply with the statute, insert the fetters in each one of them. But it is said—It should appear upon the face of the charter that the fetters are applicable not only to the lands therein contained but also to the other lands. Now, looking to the fact that the charter is the writ of the superior and not of the vassal, and that the superior cannot be compelled by any process that I am aware of to mention in his charter any lands except those that he is giving out, I do not see how this argument can well be maintained. It might be done with the consent of the superior. It is quite possible to do it; it is quite possible, in inserting the fetters of the entail in a charter, to say that these fetters apply not only to the lands herein contained, but also to the lands of A, B, and C, all of which are embraced in the bond of tailzie. It is quite possible to say that, but can a superior be compelled to say that? I apprehend not, and therefore to require that an heir of entail making up his title in this way shall do this thing on pain of incurring an irritancy—for it would amount to that—would be to insist upon his doing a thing which it is not in his power to do except with the assent and concurrence of somebody else. And therefore I think this objection cannot be listened to. It seems to me to be an exceedingly thin and valueless objection taken in any view of it, but the plain and conclusive answer, in my mind, is, that you cannot require this to be done by an heir of entail making up his title with the superior simply for the reason that it is a thing that he has it not in his own power to do except with the consent of somebody else.

I think that exhausts the whole questions which are raised by this summons, and I have only, in conclusion, to express my concurrence generally

with the views of the Lord Ordinary, and to adhere to his interlocutor.

Lord Deas—The first matter which comes naturally to be considered is that class of objections which apply to the prohibitory, irritant, and resolutive clauses in this entail; and the first question which naturally occurs with reference to these clauses is whether the judgment of Lord Cowan upon them is to be held *res judicata*. It was distinctly conceded in argument that the objections which are now urged to these clauses are identical with the objections which Lord Cowan disposed of. There is no room, therefore, for doubt that the subject-matter of the action, so far as these clauses are concerned, is the same. But it is said that the parties are not the same. It is said that Mr Padwick, the purchaser here, was not represented in that action. With reference to that point, we must look to what the position of Mr Padwick is,—whether he is to be regarded as an onerous *bona fide* purchaser for a full price, or whether he is to be regarded in substance as the assignee of Sir William Steuart,—to try a question after his death which could not have been tried free of the objection of *res judicata* in Sir William's lifetime. Your Lordship, I understand, holds that in the peculiar circumstances of this case Mr Padwick is not to be regarded as an onerous *bona fide* purchaser in the same position as if the estate had been handed over to him and he had entered into possession or been entitled to enter into possession of it in Sir William's lifetime. In that view I am disposed to concur. There can be no doubt at all that this was a most peculiar transaction. There had been a previous sale or pretended sale of a very large portion of these estates to Mr Padwick at the price of £250,000. The object of that sale avowedly was to get the question of the validity of the entail and the effect of the former judgment tried in Sir William's lifetime. After that transaction had been completed upon the face of the documents, we see from the evidence and the correspondence that Sir William was advised that if that was attempted in his lifetime the purpose would fail. Counsel were of opinion that the plea of *res judicata* would be held good, and consequently that his purpose would be defeated; and when that opinion was obtained, another mode of endeavouring to accomplish the purpose, viz., that mode with which we have now to deal, was resorted to. It is certainly very remarkable that the whole of that second transaction, as well as the whole of that first transaction, was managed and directed by Sir William's agents. Mr Padwick was a mere passive instrument, doing whatever he was asked to do, having no agent of his own, but allowing himself to be guided and directed throughout by the agents of Sir William. It is certainly a very unusual thing, particularly in a transaction of this magnitude, for the agent of the seller to fix the price that is to be exacted and to arrange and fix the whole conditions of the sale without ever thinking it necessary to ask the opinion of the purchaser, and without it ever being thought necessary that the purchaser should have an agent to attend to his interests in the matter. The price of £350,000 was fixed, and the terms of the whole transaction were arranged by the seller's agent—I need not say before the purchaser had any agent, but without the purchaser ever having an agent from the beginning to the end. Although latterly he had a nominal agent—than whom he could not have had a better, if he had been appointed in the usual way, and under the usual circumstances, viz., Mr Webster—although, I say, he had a nominal agent in the end, he really and truly had no agent, for he never knew that he was appointed, and he never inquired about it. All that we see distinctly upon the face of the correspondence which is printed here, as well as upon the face of the proof. Mr Jamieson is apparently quite candid about that throughout, and no man can read Mr Jamieson's deposition without thinking that he was acting for Sir William, and taking on himself to act for Mr Padwick, for the simple and sole object of carrying out Sir William's purpose in this large transaction with Mr Padwick. We must also take that coupled with the terms of the transaction itself, viz., that no step whatever was to be taken in Sir William's lifetime to make the transaction effectual against him, and, on the contrary, that if any action whatever was raised or any judicial step taken to enforce this or to have it declared effectual while Sir William was alive, the transaction was to be void and null. I do not enter farther into particulars, as they are all to be found in the papers. But that is the nature of the transaction, and I cannot resist coming to the conclusion with your Lordship that this was just placing Mr Padwick in the position of Sir William's assignee, for the purpose of trying the question for Sir William's benefit, and to enable Sir William to carry through his purpose of disposing of the whole of these estates past his brother, who would otherwise have succeeded to them. I cannot help coming to the conclusion that that is palpably the object of the whole matter, and that although in a certain sense Mr Padwick may be said to be an onerous purchaser—that is to say, the day might come when he would have to pay the price—still this is not a transaction which will enable him to maintain any plea with reference to the question of *res judicata* which Sir William himself could not have maintained. If it shall ever be found elsewhere that Mr Padwick is bound and entitled to take these estates as the onerous purchaser, I hope he will not suffer from that extraordinary simplicity which pervades his whole conduct in this matter—taking the estate at any price proposed to him, taking it upon any conditions proposed to him, taking it either now or ever so many years hence, or never getting at all. I hope it will be found that he has not been induced to pay a much larger sum for the estate than it was worth, but that he may come out of all that simplicity without pecuniary loss. But while I am disposed to concur in that view of the objection, I am humbly of opinion that although Mr Padwick were to be regarded as a *bona fide* purchaser, with all the rights which a *bona fide* onerous purchaser generally has, including the right to entry in the lifetime of Sir William, or although he were held to be in the same position as if he had got entry or been entitled to get entry in the lifetime of Sir William, still the plea of *res judicata* would be good against him. The action which was raised by him in his own lifetime to try the question of the validity of the entail is not said to have been a collusive action. There can be no doubt whatever that his object was to try the question fully and fairly, expecting most probably to succeed in place of failing in it. But there is not a trace nor a suspicion of collusion between him and

the substitute heirs of entail, all of whom were called in that action. I suppose it will hardly be doubted that if he had succeeded in that action, in place of having failed in it, that would have been *res judicata* in his favour, and in favour of any purchaser to whom he sold the estate, or any creditor with whom he transacted; and it is, to say the least of it, a very anomalous thing to hold that while the judgment would be *res judicata* in favour of all the world if it went in a certain way, it is not to be *res judicata* against all the world if it goes the other way. There is no case in the books that I know of that goes to that; and although it may not have been determined in precise terms that such a judgment is good against an onerous purchaser, there certainly is no judgment the other way, and I fail to see any principle, any more than authority, the other way. No doubt, before the Entail Amendment Act was passed, when a party was desirous to purchase an entailed estate, the entail being regarded as effectual, the mode generally resorted to was to make an actual sale of the estate, subject to the condition that it was only to take effect if it was found that there was power to sell. That was the ordinary mode of proceding, and rightly so; because the purchaser otherwise could have no security that the point was fully and fairly pleaded. He could have no security that there was no collusion between the heir in possession, who was selling, and the living heirs, who were called as defenders. It was very natural for him, therefore, to insist that the question should be tried as with himself, when he could make sure that it was fully and fairly pleaded. Another reason probably was, that before the Entail Amendment Act was passed the entail might be void in a question *inter hæredes*, and not void with onerous purchasers nor creditors; and that naturally might create a doubt and a difficulty as to whether any question tried merely *inter hæredes* was *res judicata* with third parties. But whatever doubt or difficulty might arise on that exists no longer; because it is now fixed by Act of Parliament that if there be any defect whatever in the entail, whether it is as regards the prohibitions *inter hæredes* or with reference to third parties, that defect renders the entail altogether void and null to any effect whatever, That being so, it seems to me that it would be a very extraordinary thing if an heir of entail in possession of an estate, being advised that there was a defect in the entail, although it might only be with reference to selling or contracting debt, is to have no way of having it found and declared whether this is so or is not so unless he chooses to sell his estate or to contract debt upon it, when he is not bound to be in debt and he is not bound to be desirous to sell his estate. And if he is neither in debt nor desirous to be in debt, and is not desirous to sell his estate, is he not to have a power to bring an action of declarator against the only parties in the world, or who ever can be in the world, interested to object, viz., the substitute heirs of entail, to have it found and declared that he is in the position conferred upon him by the statute, of being what really comes in substance to be, though perhaps not in form, a fee-simple proprietor, having all the powers of a fee-simple proprietor? Is he not to have the means of having that found in terms, unless he chooses to sell or contract debt for the purpose of raising that question? I think it very difficult to come to that conclusion. I see nothing in the authorities, nor in the principles of entail law, to lead to that conclusion. On the contrary, my humble opinion is, that although Mr Padwick were to be held in the same position with an onerous *bona fide* purchaser entitled to try the question in the lifetime of Sir William, that judgment would still be *res judicata* against him. It is said that the onerous purchaser is not bound by the judgment, because he is entitled to purchase upon the faith of the records. He looks to the record of entails, and he sees or thinks he sees that there is an objection to that entail, and he does not see in the record of entails that it has been decided that that objection is not a good one. That weighs very little in my mind. The record of entails is not a record of judgments applicable to entails, whether they are pronounced in questions *inter hæredes* or in questions with purchasers or creditors. If that is a reason for not being bound by the judgment when it is *inter hæredes*, it would be equally a reason for not being bound with another purchaser, or with a creditor. I know of no record which the law has provided for publishing the judgments of this Court. The judgments of this Court about entails have been innumerable, both *inter hæredes* and with creditors, and not one of them ever entered the register of entails, or any other record for publication that ever I heard of. There is no greater hardship, therefore, on the one hand, and no greater right, on the other, than there is in all cases where the judgment as publicly and solemnly pronounced by a court of justice is held binding upon parties, and parties are held bound to inquire into it. I have only farther to say, with reference to this class of judgments, that while I am of opinion with your Lordship that the judgment of Lord Cowan being *res judicata* it is not open to inquire whether it was well pronounced or not upon its merits, yet as this case may naturally not be supposed to rest upon the judgment of this Court, I think I am bound and entitled to express my humble opinion, after having heard full argument on these questions, and having fully considered them, that the judgment of Lord Cowan in its result was perfectly right, and such as I should have been prepared to repeat if these questions had been open.

The 2d point in the order in which your Lordship took them is, whether the heirs named in the deed of nomination are put under the fetters of the entail? One answer made to that objection, which I agree with your Lordship in thinking is of itself well-founded, is that Sir William was not bound to take, and did not take, as one of the heirs under that deed of nomination. He was entitled to take, and did take, under the deed of entail. The deed of nomination was really only intended to meet the case of those other heirs who were in the peculiar position of being guilty of treason, or under suspicion of treason, and Sir William took under the deed of entail. But apart from that, I am of opinion that the objection is not well-founded. The objection is that it is an attempt to make a deed of entail by reference, which cannot be done. I don't think that that is the nature of the objection here. The deed of entail dispones the subjects in favour of a certain series of heirs, "which failing, to any person or persons that I have now, or shall at any time hereafter during my lifetime, *vel in ipso articulò mortis*, nominate, design, and appoint to succeed to the lands, baronies, and others above rehearsed, by a writ or nomination subscribed or to be sub-

scribed with my hand, and under such reservations, provisions, qualifications, conditions, restrictions, limitations, and irritancies as are or shall be contained in the said nomination." Then follows a clause in which he resigns the subjects "in favour of myself and the heirs-male to be procreated of my body, &c., which failing, in favour of my other heirs of tailzie and provision after mentioned, under the reservations, provisions, qualifications, conditions, restrictions, and limitations after specified." And at p. 18 power is given to the heirs "to obtain themselves infeft and seised under the provisions, qualifications, conditions, restrictions, limitations, prohibitions, and irritancies above expressed, in the lands and others therein contained, and hereby resigned in manner above expressed." And then comes the clause of registration—"and shall brook and possess the lands and others above expressed by no other title than this present tailzie." Now these clauses appear to me *in terminis* to be equally applicable to those heirs who are to be named in the deed of nomination as to the heirs who are named and described in the tailzie itself; and if it had not been that in the clause that I first read the words occur "under such reservations, &c., as are or shall be contained in the said nomination, which they are to be held bound to perform,"—if it had not been for these words, there would not have been room for the slightest dispute. It is the introduction of these words alone that gives rise to the argument that we are to hold that the intention of the entailer was to place the heirs of tailzie who are pointed out or named in the deed of tailzie under the restrictions contained in it, and to place the heirs who were to be named in the deed of nomination under the restrictions and irritancies, &c., which were contained in the deed of nomination, and no other. That is the argument; and for that argument, as I have said, there could have been no room if it had not been for the words that I have just read. These words are just as nearly as may be in conformity with the form given by Dallas for a deed of this kind. There are two or three more words in this clause than what Dallas suggests to be put in, but the substance of them is precisely the same. I think it quite impossible to read these two deeds, which bear reference to each other, and were executed upon the same day, without seeing upon the face of them that there is no reasonable reading which does not lead to the result that the object and the intention was, that the heirs under both deeds should be under the same irritancies and restrictions, &c., with this qualification, that there were some additional clauses necessary with reference to that class of heirs who might be attainted for treason, or who might be under suspicion of treason. It was in order to provide for that object alone that this was expressed in the way in which it is. Now, although in a question of fetters it is said that if there are two modes of reading a deed, you must adopt the reading which is favourable to freedom and against fetters, I understand that to mean only this, that if there are two modes in which you can reasonably read it, then you will take the reasonable mode in favour of freedom and against fetters. I do not know of any rule that leads to this, that if the one reading is totally unreasonable, and the other is fair and reasonable on the face of it, you are to adopt the totally unreasonable meaning contrary to what was plainly the meaning of the entailer. I think it would be doing that here to adopt a reading that would favour that objection. Apart from that altogether, I am not prepared to hold that the deed of nomination could have been said to be making an entail by reference. You cannot make an entail by one deed by reference to another deed, but you may make two deeds at the same time, and if in the first deed you refer to the second, and in the second to the first, that is a totally different case from the case of a reference altogether in the first to the second deed. That is an entail by reference. The entail being made, and containing nothing about the other deed, then when in the second deed you attempt to make an entail by reference to the former deed, that would not do. But it does not follow that if you make the two deeds at once, and the one refers to the other, that there is room for the same objection. Here the two deeds were executed on the same day, and they did refer to each other.

If the deed of tailzie stands exactly as it does here, saying that it is granted under all the conditions, irritancies, &c., in the deed of nomination, and when you come to the deed of nomination you find that these are described as being the conditions, irritancies, &c., in the deed of tailzie, the clause is satisfied. The tailzie says the irritancies, conditions, and so on, are to be those in the deed of nomination; and the deed of nomination says that will satisfy it by saying they will be the same as in the tailzie—that of itself would be a sufficient answer to any objection of that kind. Therefore, take that objection on what may be called its merits, or take it as your Lordship takes it, I think the conclusion is the same,—that it has no effect in support of this action.

The next question relates to the objection that the deed of nomination was not duly recorded, in respect it was not recorded along with the deed of tailzie. I entirely agree with your Lordship that there is no force whatever in that objection. I have no doubt there are innumerable deeds of nomination on the record of entails, recorded at different times from the deed of tailzie, and it is quite plain, as your Lordship pointed out, that if that were not effectual, the objects of the statute authorising entails would not be carried out, because a party may desire, and very often does desire, to record his entail in his own lifetime, so that he may make sure that the recording shall take place, and reserving, as he is entitled to reserve, a power to alter that deed of entail at any time,—a power to nominate heirs which he may exercise up to the last moment of his life; and it would be a very extraordinary result if that deed of nomination were to be either left unrecorded altogether,—which would be a very perilous thing,—or could not be recorded at all because it was not recorded at the same time with the deed of entail.

The only other objection, I think, is that which is founded upon the variations in the charters, and in particular the not applying in each of the titles made up, the prohibitions and irritant and resolutive clauses to the whole lands which are in the deed of entail. I am of opinion with your Lordship that that is not a good objection. It is quite plain that in many cases it must be absolutely impossible to apply in the titles to each portion of the estate the prohibitions and irritant and resolutive clauses. If one portion of the lands is held of one superior, and another of another, this could not

possibly be done. The superior who grants the one charter is not entitled to apply in that deed irritant and resolutive clauses to lands which are not held of him at all, and with which he has nothing to do. The statute does not require that; and there would be no possibility, according to any rules of conveyancing with which we are acquainted, of complying with any such rule. The very utmost that can be required to make the charter quite formal and complete would be to let it appear on the face of the charter that there were some other lands comprehended in the same deed of entail. It has not been shown that that is not done here. If it is not done, it was the duty of the party taking objection to it to point that out, but no such attempt was made. So far as I saw, in those that were brought prominently before us it was plain enough on the face of the charter that there were other lands comprehended under the entail. But suppose that were not so, that would not be an objection under the statute. It would not be a kind of objection that would go to the nullity of the deed, and in no point of view can I see anything in that objection.

On the whole matter, therefore, I come to the same conclusion as your Lordship with regard to all these objections. I think they must all fall to be repelled.

LORD ARDMILLAN — The patrimonial interests involved in this case are very large, and therefore the case must be considered an important one; but, qualified and limited as it is in the aspect in which it is presented, I do not think it a case attended with serious difficulty, either in ascertainment of the facts or in application of the law. If my difficulty had been greater than it has been, it would have been removed by the luminous exposition with which your Lordship has favoured us. The first point to be disposed of is the plea of *res judicata*, founded on the judgment of Lord Cowan, in March 1853, which disposed of the objections to the prohibitory, irritant, and resolutive clauses of the entail. I concur in the opinion now expressed by your Lordship in the chair, that this judgment, pronounced on this entail, in an action at the instance of the late Sir William Drummond Steuart, is effectual as *res judicata* against the present pursuer, Mr Padwick. After the opinion now given by Lord Deas, I do not wish to express or to suggest an opinion to the effect that the judgment of Lord Cowan sustaining the entail might not be *res judicata* against Mr Padwick even if he were an onerous purchaser acquiring by direct present disposition for a full price the lands within the entail. That would be a difficult question, however, on which we have no direct authority, — certainly none since the date of the Rutherfurd Act, and I reserve my opinion upon that point.

In the present case, however, I am satisfied on the ascertained facts that the pursuer, Mr Padwick, cannot maintain this action on any other footing than as representing Sir William Drummond Steuart. There are no materials for separating and disconnecting him from Sir William Steuart, so as to render him as secure as it may be that a direct purchaser and a singular successor would be from the judgment sustaining the entail pronounced against Sir William. I think that Sir William Steuart, and any one representing him, was beyond doubt bound by this judgment; and that Mr Padwick transacting with him, and deriving right from him in a very peculiar manner, and in terms of the very singular deed which has been already mentioned, and under the circumstances already explained so fully by your Lordship and Lord Deas, is also bound by this judgment. He just aided Sir William in carrying out his views. He had no enforceable right while Sir William lived against him. He had a right conveyed by Sir William, but that could be only according to the measure of the right of Sir William, and it was to take effect after Sir William's death. Sir William, who was thus his author, also gave him a right to try the question of the validity of the entail after Sir William's death, and that question he could not try on any other footing than as representing Sir William, who was his author; thus satisfying the terms of the definitions of both our great institutional writers. Therefore, I think he cannot escape from the conclusive judgment on the entail which had been pronounced by Lord Cowan. If it bound Sir William, it binds Mr Padwick in the position in which he stands to Sir William. I agree so entirely with the views expressed, and the very instructive explanations given by your Lordship in the chair on this matter, that I really think it unnecessary to do more than to express my concurrence in your construction of the deeds and in your exposition of the law. As Lord Cowan's judgment is final, and we hold it to be *res judicata*, we cannot consider it on its merits; but we suggest no doubt of its soundness.

On the remaining question raised, my opinion is in favour of the defender. I am disposed to think that the fetters are by the deed of entail sufficiently imposed on the heirs to be nominated, and that the fetters attach to each heir so nominated on his coming to the succession. The simultaneous and relative character of the two deeds is on this point of great importance. But I am also, and more clearly, of opinion that Sir William Steuart held the estates on a title built, and rightly built, on the bond of tailzie. This objection is not affected by the plea of *res judicata*, but is competent to the pursuer. So viewing it, however, I am of opinion that, whether it be on the ground that the *hæredes nominandi* are subject to the fetters, or on the other and separate ground explained by your Lordship, that Sir William held the estate on the bond of tailzie, Sir William was, in either view, subject to the fettering clauses of the entail. In the next place, I think that the recording of the deed of nomination was necessary, and it was recorded; but the recording at one and the same time of the tailzie and the deed of nomination is not necessary. It is not a statutory provision. In some instances it could not be done. I have no difficulty in repelling this plea. The remarks of your Lordship, as also of Lord Deas, on this subject, are most instructive, and to my mind are quite satisfactory. To sustain this objection would be, I think, perilous to the law and practice of Scotland on this subject. The remaining pleas have, in my opinion, no substance. They are mere speculative statements, and I have nothing to add as regards them.

LORD JERVISWOODE.—My opinion is so entirely in accordance with that of your Lordship and the other Judges, that if I were to add anything it might weaken, but certainly would not strengthen, what has been said. The case is one of great importance. I think the plea of *res judicata* is clearly a sound one on the judgment of Lord Cowan, and

that probably is sufficient for the determination of this case; but I also agree with your Lordship on the other grounds stated.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for Henry Padwick against Lord Mackenzie's interlocutor of 19th July 1873, Adhere to the said interlocutor, and refuse the reclaiming note: Find the defender, Sir Archibald Douglas Stewart, entitled to additional expenses, and remit to the Auditor to tax the amount of said expenses, and report."

Counsel for Pursuer—Solicitor-General (Clark), Watson, and Keir. Agents—Tods, Murray & Jamieson, W.S.

Counsel for Defender—Lord Advocate (Young), Balfour and Mackay. Agents—Dundas & Wilson, C.S.

Wednesday, February 11.

FIRST DIVISION.

[Lord Gifford, Ordinary.

CATTON *v.* MACKENZIE.

(*Ante*, vol. vii. 250, 410, 687; ix. 425.)

Entail—Erasures—Charter by progress—Crown Charter—Entail Act 1685.

Held (1) that the statutes as to the testing of deeds do not apply to Crown charters; (2) that where words in a Crown charter, written on erasures, are correctly and distinctly written in the signature and precept ordaining the charter to be made and passed under the seal, that gives important security for the authenticity of the charter; (3) that the erasures, &c., occurring in the charter of resignation and confirmation expede upon a deed of tailzie, itself unobjectionable, were not such as to free the party expeding said charter from the fetters of the entail, in respect of the provisions of the Entail Act 1685, cap. 22.

This was the second action brought by the pursuer for the purpose of having the entail of the estate of Dundonnell set aside, and of having it found that the late proprietor, Hugh Mackenzie, validly conveyed that estate by his testamentary writings to trustees, for behoof of the pursuer's late wife, Mrs Mary Mackenzie or Catton, in whose right the pursuer now stands.

In the first action the objections to the validity of the entail were confined to alleged defects in the deed of entail itself, and then, assuming the invalidity of the entail, the pursuer and his wife concluded that the estate was effectually conveyed by Hugh Mackenzie's trust-disposition and settlement.

In this first action a great deal of litigation took place, both in this Court and in the House of Lords. On 7th June 1870 the Lord Ordinary (Lord Mackenzie) repelled the whole pleas in law for the pursuers, and assoilzied the defenders from the whole conclusions of the action; but he explained in his note that he did so on the ground that the entail was a valid and subsisting entail; that the objections to the deed of entail were groundless; and that therefore Hugh Mackenzie's trust-disposition did not operate as a conveyance of the estate or interfere with the destination in the deed of entail. The Lord Ordinary did not find it necessary to consider whether, supposing the deed of entail to be invalid or defective in its fetters, Hugh Mackenzie's trust-deed was sufficient to carry the estate, which on that supposition he would have had power to convey.

Lord Mackenzie's interlocutor was taken to review to the First Division, and on 19th July 1870 the First Division recalled Lord Mackenzie's interlocutor of 7th June 1870; sustained only the second and third pleas for the defenders; and of new assoilzied the defenders. The grounds of this judgment, as appears from the pleas sustained, and from the opinions of the Judges (7 Scot. Law Rep. p. 687) were, that whether the entail was valid or not, Hugh Mackenzie's trust-disposition was not sufficient to convey the estates, that is, even assuming that Hugh Mackenzie had power to do so. The Judges of the First Division gave no opinion as to whether the objections to the entail were or were not well-founded, or whether the entail was a valid and effectual entail or not.

The case then went to the House of Lords, and on 11th March 1872 the House of Lords recalled the interlocutor of the Inner House, except as to expenses, and affirmed the original interlocutor of Lord Mackenzie (9 Scot. Law Rep. p. 425). The judgment of the House of Lords, although disposing of the whole case, proceeded exclusively upon the ground that the deed of entail was in all respects valid and effectual, and this being so, they found it unnecessary to decide the purely speculative question whether, supposing the deed of entail defective, Hugh Mackenzie's settlement was sufficient to carry the lands. The House of Lords therefore recalled the judgment of the Inner House, and simply returned to the judgment of the Lord Ordinary.

The present action had, like the former one, two branches. It first sought to declare the entail invalid, not in respect of defects in the deed of entail itself, for that is completely excluded by the judgment of the House of Lords, but in respect of alleged erasures and interpolations occurring in the Crown Charter of 1842, which followed upon the deed of entail, and then, assuming that the entail was set aside upon this new ground, it repeated or renewed the declarator contained in the former action, that the estate of Dundonnell was validly conveyed by Hugh Mackenzie's trust-deed and settlement.

The following are the averments with regard to the erasures:—First (Cond. 13), "Following the dispositive clause in the Crown charter, the disponee and series of heirs in whose favour the grant of the lands and estate of Dundonnell and others is made are set forth in the following terms, viz.: 'Dilecto Nostro Hugoni M'Kenzie filio natu maximo procreat, inter Murdo Mackenzie Armigerum de Ardross vel Dundonnell et Christy vel Christian Ross ejus spons*am et hæredibus quibuscunq. ejus corporis* Quibus deficien. Kennetho Mackenzie filio secundo *dict. Murdo Mackenzie et hæredibus quibuscunq. ejus corporis Quibus deficien. Roberto Mackenzie* filio tertio dicti Murdo Mackenzie et hæredibus quibuscunque ejus corporis Quibus deficien.'" The words and letters in italics were alleged to have been written on an erased portion of the deed,