for me to enter into any minute detail of the circumstances in which the present controversy has arisen. It is enough to say that two questions have been presented to the Court, the solution of which depends upon what may be held to be the true construction of the resolutive clause of the deed of entail in dispute:—1st, Does the word "other" in that clause render it so ambiguous as to destroy its efficacy? And, 2d, Is the clause otherwise so framed and expressed as to be, according to its true construction as it stands, so uncertain and unintelligible as to be insufficient to fence the cardinal conditions regarding the contraction of debt, the sale or disposal of the estate, and the alteration of the order of succession?

1. I am of opinion, and without any difficulty, that the first of these questions must be answered in the negative. The resolutive clause is itself described by the entailer as a condition and provision; for he says, "with and under this irritancy, as it is hereby conditioned and provided;" and then he goes on to state that forfeiture will be incurred by any of the heirs of entail contravening the before written conditions, provisions, limitations, and restrictions of the entail, or any of them,—that is, failing or neglecting to obey or perform "the said other conditions and provisions, and each of them." It appears to me from this to be sufficiently plain that by the use of the word "other," the entailer meant merely to distinguish the resolutive clause, which he had characterised as being itself a condition and provision, from the conditions and provisions which had been previously set out in the deed. Such appears to have been the view taken of a similar point by all the Judges in the case of *Stirling* v. *Moray*, referred to in the Lord Ordinary's note; and this being so, I should hold myself bound by that case as a precedent, even if I had otherwise entertained any doubt on the subject, which I do not.

2. The second question, viz., Whether the resolutive clause in the deed in question is otherwise insufficient to fence the cardinal conditions of the entail? although not unattended with difficulty, must also, I think, be answered in the negative. It is too obvious however to be disputed, and indeed was not disputed at the debate, that the clause as it stands is imperfect; that, in short, some words of the style intended to have been followed have been omitted. But the question comes to be, Whether, notwithstanding this, the clause is not quite sufficient for all the purposes required? It appears to me that it is so. If the entailer, after referring, as he does at the beginning of the clause in the most comprehensive terms, to a contravention of the "before written conditions, provisions, restrictions, and limitations herein contained, or any of them," had stopped at that point, there could have been no doubt or difficulty as to his meaning; but he goes on to add, "that is, shall fail or neglect to obey or perform the said other conditions and provisions, and each of them, or shall act contrary to the said other restrictions." This, however, in place of destroying only illustrates and confirms, as it was evidently intended to do, the entailer's meaning, as previously conveyed in a somewhat different way. But it was argued that the whole, and not merely a portion of the resolutive clause, must be looked at to ascertain its true meaning and effect, and that if this were done it would be found to be unintelligible, inasmuch as after the "said other restrictions" in that part of the clause which has just been quoted there follow the words, "to be hereinafter added and appointed by me." That some words, such as "and others," have been omitted immediately after "restrictions," is manifest; but the only and utmost consequence of this, as it appears to me, is that the resolutive clause is rendered ineffectual in regard only to restrictions, if any, inserted in the deed *after* the resolutive clause, but that in regard to the restrictions, including all the cardinal ones, previously inserted in the deed, the resolutive clause is quite intelligible and free from any well founded objection.

For these reasons, and without entering on the question how far the resolutive clause might be perfected by supplying what may be supposed to be omitted words,—a mode of meeting all difficulty which is not without authority to support it in *Gollan* v. *Gollan* and other cases—I am of opinion that the Lord Ordinary has arrived at a sound conclusion, and that his interlocutor now under review ought to be adhered to. I agree however with your Lordship in the chair in thinking that the case of *Adam* v. *Farquharson* is not directly in point, although the reasoning on which the judgment proceeded in that case, especially in the House of Lords, is not unimportant as bearing on the present, and supports the result which has been come to.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for Colonel Alastair M'Iain M'Donald, against Lord Mackenzie's interlocutor of 5th December 1873, Refuse said note, and adhere to the interlocutor complained of, with additional expenses, and remit to the Auditor to tax the same, and to report."

Counsel for Pursuer (Reclaimer)—Fraser and Moncreiff. Agents—H. G. & S. Dickson, W.S.

Counsel for Defender (J. A. M'Donald)—D. F. Clark, Q.C., and Trayner. Agents—Dewar & Deas, W.S.

Counsel for Misses M'Donald—Balfour. Agents—Webster & Will, S.S.C.

I., Clerk.

Friday, March 6.

FIRST DIVISION.

[Lord Shand, Ordinary.

THE HONOURABLE ROBERT PRESTON BRUCE, PETITIONER.

(Before the First Division, with Lords Benholme, Neaves, and Gifford.)

Entail Amendment Act, 11 *and* 12 *Vict. c.* 36, § 2—*Heir of Entail in Possession—Disentail.*

An heir of entail born subsequent to August 1848, and holding the estates under an entail dated prior to August 1848, by which it was provided that whenever the heirs called thereby to the succession of the said estates should come to inherit a certain title and earldom they should be bound to demit the possession of the said estates in favour of the heir next in succession,—*held* (*diss.* Lords Deas, Neaves, and Jerviswoode) to be an heir of entail in

possession of an entailed estate by virtue of a tailzie within the meaning of sec. 2 of the Entail Amendment Act.

This petition was presented by the Honourable Robert Preston Bruce, second son of the late Earl of Elgin, for authority to record an instrument of disentail of the lands of Spencerfield and others, which he held under the settlement of the late Sir Robert Preston of Valleyfield, and to acquire them and a considerable amount of trust-funds in fee-simple. The deed of entail was in the following terms (after settling the lands on himself and certain substitutes):—"whom failing, to Charles Dashwood Bruce, merchant in London, son of the Honourable Bruce, brother of Thomas Earl of Elgin and Kincardine, and the heirs-male of his body; whom failing, to the Honourable James Bruce, second son of the said Thomas Earl of Elgin and Kincardine, so long as he shall not succeed to and be in right of the title of Earl of Elgin, and the heirs-male of his body not succeeding to or being in the right of the said title; whom failing, to the third and other younger sons of the said Thomas Earl of Elgin and Kincardine, in the order of their seniority, and the heirs-male of their bodies respectively, not succeeding to or being in the right of the said title, it being his will and intention that his family name and estates should never merge in the said title or estates belonging to it, but that whenever the heirs thereby called to the succession of his said estates should come to inherit the title and represent the family and earldom of Elgin, they should be bound to demit the possession of his said estates in favour of the heir next in succession according to the order and course above expressed." On the death of Mr Charles Dashwood Bruce, then named Charles Dashwood Preston Bruce, without issue male, on 25th August 1864, the succession to the entailed estates opened to the petitioner, who was the second son of the late Honourable James Bruce, afterwards Earl of Elgin; his elder brother, Victor Alexander Bruce, the present Earl of Elgin, being excluded in consequence of his succession before the above date to the earldom.

In addition to the above-mentioned lands, Sir Robert Preston directed that the whole residue of his estate, amounting to a large sum, should be invested in heritable property and entailed in the same terms as the Spencerfield property. This money, however, still remained in the hands of the trustees. The petition was opposed by Sir Robert Preston's sole surviving trustee, Mr Hope Johnstone of Annandale.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 10th June* 1873.—The Lord Ordinary having considered the petition and proceedings, with the report by Mr Colin Mackenzie, W.S., No. 20 of process—Sustains the title of the petitioner, as the heir of entail in possession of the entailed lands mentioned in statement first of the petition, to insist in the present application: Finds that as such heir of entail in possession of the said entailed lands and estates by virtue of the decrees of special service, duly registered in the Register of Sasines, and other writs mentioned in statement third of the petition, the petitioner is entitled, by virtue of the provisions of the Statute 11 and 12 Victoria, cap. 36, with the authority of the Court, to disentail the estates and funds which form the subject of the petition, and for that purpose to have the warrant and authority of the Court to record the instrument of disentail, No. 14 of process, and warrant and authority for payment to him of the residue of the trust-estate mentioned in the petition: Finds that the procedure has been regular and proper, and in conformity with the provisions of the Acts of Parliament and relative Acts of Sederunt: Approves of and interpones authority to the instrument of disentail, No. 14 of process: Grants warrant to and ordains the keeper of the Register of Tailzies to record the said instrument of disentail in the said register; and further, grants warrant and authority to and in favour of the petitioner for payment to him of the whole residue of the trust-estate of the deceased Sir Robert Preston of Valleyfield, Baronet, conveyed by his trust-disposition and settlement and will, dated 17th October 1832, signed in duplicate on 17th April 1833, and registered in the Books of Council and Session 20th May 1834, and falling to be administered in terms of that deed, and of letters o instructions by Sir Robert Preston, dated 2d January 1833, signed in duplicate 17th April 1833, and of three codicils executed by him of dates 15th April, 19th October, and 25th December 1833, as now belonging to the petitioner in fee simple: Grants warrants to, authorises, and appoints the respondent John James Hope Johnstone, as sole surviving trustee, acting under the said trust-disposition and deed of settlement of the said Sir Robert Preston, and any other person or persons in whom the same or any part thereof may be vested, to dispone and convey or pay and make over to the petitioner in fee-simple the whole estate, funds, and effects, heritable and moveable, vested in him or them, or to which he or they have right as belonging to or forming part of the trust-estate of the said Sir Robert Preston, but under the burden of all debts, claims and liabilities affecting the said trust-estate, and to execute the necessary dispositions and conveyances or assignations or other deeds or instruments which may be requisite for these purposes, and decerns *ad interim:* Remits to Mr Mackenzie to adjust the drafts of such deeds or instruments, and to see the same duly extended, and so far as necessary feudalized; and to report.

"*Note.*—This application raises two questions of importance under the Entail Amendment Act of 1848, commonly known as the Rutherfurd Act, and also involves a pecuniary interest of considerable amount.

"The object of the application is, *first*, the disentail of the estates of Spencerfield and others, included under a disposition and deed of entail dated 3d November 1832, and recorded in the Register of Entails 14th February 1835, granted by the deceased Sir Robert Preston of Valleyfield, Bart., in favour of himself and the heirs of his body, and a series of other heirs of entail; and *second*, the acquisition in fee-simple of certain heritable subjects mentioned in statement 12th of the petition held by the respondent, Mr Hope Johnstone of Annandale, as the sole surviving trustee under the trust-disposition and deed of settlement and will, dated 17th October 1832, signed in duplicate on 17th April 1833, and registered in the Books of Council and Session 20th May 1834, by Sir Robert Preston, for the purpose of being entailed with the same destination and under the same conditions as are contained in the Spencerfield entail; and *farther*, the payment to the petitioner of the funds, amounting in all to

upwards of £110,000, specially mentioned in statement 12th of the petition, and which funds were conveyed by Sir Robert Preston by his trust-deed above mentioned to his trustees, of whom Mr Hope Johnstone is now the sole survivor, for the purchase of lands lying in the neighbourhood of the Spencerfield estates to be entailed in terms of the deed of entail above mentioned, under which these estates are now held. The lands and sums of money now mentioned, particularly specified in statement 12th of the petition, form the residue of the trust-estate conveyed by Sir Robert Preston's trust-disposition and deed of settlement. The legacies and annuities left by him have been paid, and the only trust purpose remaining to be fulfilled is the execution of a deed of entail or deeds of entail of the lands held under the trust, and of other lands to be purchased by the trustees in terms of Sir Robert Preston's directions to that effect.

"The deed of entail of the estates of Spencerfield and others was, as already stated, recorded in the Register of Entails in 1835. The petitioner was born on 4th December 1851, and was therefore at the date of presenting the application upwards of twenty-one years of age. His title to the estates was completed by service and infeftment in 1864, and since that time he has been in possession.

"The application is not opposed by any of the succeeding heirs of entail, nor by the present Earl of Elgin, who has held the petition as duly intimated to him, conform to certificate under his hand, No. of process. But Mr Hope Johnstone, the only surviving trustee under Sir Robert Preston's settlement, appeared by counsel and opposed the granting of the application, and the grounds of this opposition are stated in a minute lodged by him, and forming No. 23 of process.

"From this minute, and from the report of Mr Colin M'Kenzie, W.S., to whom the Lord Ordinary remitted the proceedings, it appears that the objections against the granting of the prayer of the application are three. The first of these is, that the petitioner is not heir of entail in possession within the meaning of the statutes founded on; the second, that the entail of the lands other than the estate of Spencerfield and others comprehended within the deed of 1832, at present forming part of the trust-estate and of the lands to be purchased with the residue of the trust-funds, did not fall to be granted until the year 1862, and that under the Entail Amendment Act the petitioner is therefore not entitled to disentail without the consent of the next heir born after the date of the entail, and of the age of twenty-five years complete; and the third objection, which has reference to the greater part of the funds belonging to the trust is, that owing to the position of these funds, as being now under the control of the Court of Chancery, the application cannot be granted.

"The Lord Ordinary has come to the conclusion that none of these objections are well founded, and he has accordingly granted the prayer of the petition. He will now deal with each of the objections urged, separately:—

"1. The first ground on which it is urged for the respondent that the application ought not to be granted is thus stated by him—'(1) Because the petitioner is not heir of entail in possession within the meaning of the sections of the Rutherfurd Act, upon which the petition is founded. If the petitioner's elder brother, the Earl of Elgin, married and had a son, that son would be entitled to the estates, and the petitioner would be bound to denude of them in his favour, and if the said Earl of Elgin died without male issue, and the petitioner succeeded to the earldom, he would be obliged to devolve the estates upon the person possessing the character of next heir under the destination. Any right which the petitioner has is thus fiduciary, provisional, and defeasible.'

"In so far as regards the lands held under the existing entail of 1832, recorded in 1835, the respondent has no title to urge the objections stated by him, but it is the duty of the Court, in reference to such applications as the present, even where there is no opposition, to see that the applicant has the right which he seeks to exercise; and the Lord Ordinary has therefore no difficulty, from the absence of anyone having a title to urge the objection, in now taking it up and dealing with it, not only in regard to the residue of the trust-estate, but in regard to the entailed lands of Spencerfield and others. The objection applies to the whole of these subjects equally, and, if sound, is fatal to the application as a whole.

"The petitioner, on the death of Charles Dashwood Bruce without male issue on 25th August 1864, succeeded to the entailed estates under the following branch of the destination:—'Whom failing, to the Honourable James Bruce, second son of the said Thomas Earl of Elgin and Kincardine, so long as he shall not succeed to and be in right of the title of Earl of Elgin, *and the heirs-male of his body* not succeeding to or being in the right of the said title.' The Honourable James Bruce here mentioned succeeded to the earldom of Elgin, and on his death in 1863 his eldest son, Victor Alexander Bruce, the petitioner's immediate elder brother, became Earl of Elgin. When Mr Charles Dashwood Bruce died in August 1864, the petitioner, as the nearest heir-male of his father 'not succeeding to or being in the right to the said title' of Earl of Elgin and Kincardine, took up the entailed estates. The destination clause in the entail, which is narrated on page second of the petition, further contains these words—'It being my will and intention that my family name and estates shall never merge in the said title or estates belonging to it' (that is, belonging to the earldom of Elgin and Kincardine), 'but that, whenever the heirs hereby called to the succession of my said estates shall come to inherit the title and represent the family and earldom of Elgin, they shall be bound to demit the possession of my said estates in favour of the heir next in succession, according to the order and course above expressed.'

"Under the destination it is clear that if the petitioner, by the death of his brother without issue, should succeed to the earldom of Elgin, he would be under obligation to denude of the estates of Spencerfield and others in favour of the heir next in succession. The respondent further maintains that if the present Earl of Elgin should marry and have a son, that son would be entitled to the estates, and the petitioner would be obliged to denude of them in his favour. There may be room for questioning the soundness of this proposition. There is no clause in the entail which provides that in the case of a nearer heir under the destination coming into existence after a second son of an Earl of Elgin has succeeded and made up his title to the estates, such second son shall thereupon denude of the estates in favour of the issue of an

elder brother who are necessarily in the direct line of heirs to the Earldom of Elgin, and there is some room for the argument which was maintained successfully in the case of *Boquhan Campbell* v. *Campbell*, 10th July 1868, 6 M. 1035, as distinguishing it from the case of *Carnock Stewart* v. *Nicholson*, &c., December 1859, 22 D. 72; and for thus maintaining that the estate having once gone to a second son of an Earl of Elgin, does not under the destination, and in the absence of a direct provision to that effect, revert to the family of a first son coming afterwards into existence. The Lord Ordinary does not, however, consider it necessary to deal with this question. For the purposes of the present question he assumes that the respondent is right in holding that the present petitioner would be bound to denude of the estates in the event of an nearer heir under the destination,—a lawful son of his elder brother—coming into existence, and even in that view he is of opinion that the petitioner is entitled to succeed in the application.

"The person entitled to disentail an entailed estate or trust-funds appointed to be invested in land to be entailed is, under the Rutherfurd Act, the heir of entail 'in possession of such entailed estate by virtue of such tailzie.' These are the words used in the 1st and 2d sections of the Act. The words of the 3d section, which also provides for disentail, are 'any heir of entail . . . in possession of an entailed estate in Scotland holden by virtue of any tailzie,' &c. In most cases deeds of consent by succeeding heirs are required, but in the case of an estate held by virtue of an entail dated prior to the Rutherfurd Act (1st August 1848), it is made 'lawful for any heir of entail born on or after the said 1st day of August, being of full age and in possession of such entailed estate by virtue of such tailzie, to acquire such estate in whole or in part in fee-simple,' by executing, under the authority of the Court, an instrument of disentail as therein provided. The expression in the various sections giving power to disentail is the same, and the question which arises in each case is whether the petitioner is the heir of entail in possession of the entailed estates by virtue of the tailzie thereof. If he be, he is entitled to exercise the powers given by the statute.

"The Act itself contains no clause of interpretation or declaratory clause defining or declaring the meaning of the words 'heir of entail in possession under such tailzie.' There is no limitation of the effect of these words, so as to make them apply only to persons in possession of an estate as heirs of entail under the deed of entail, whose right to the estate must continue to exist until their death. Accordingly, it appears to the Lord Ordinary to be clear that although an heir of entail in possession of an estate should hold it under a condition that in the event of his succeeding to a certain title, or to another and more important estate, or in some other event which may or may not happen in the course of his lifetime, he shall denude in favour of another party, such heir in possession is within the meaning of the statute in the different clauses above referred to, and is entitled, with or without consents, according to his particular position and age, to disentail the estates under the statutes. The Lord Ordinary is not aware of any case in which this question has been raised, but he cannot doubt that disentails have been carried through under entails containing such clauses, and he thinks the right of an heir in possession under such an entail to carry through a disentail is not doubtful. Before the Entail Amendment Act, it was held in the case of *Eglinton* v. *Hamilton and Others*, June 3, 1847, 9 D. 1167, affd. 6 Bell's App. 136, that an heir of entail in possession of an estate under an entail containing such a clause of devolution was not an interim holder or fiduciary fiar merely, but as an ordinary heir of entail was entitled to take advantage of a defect in the tailzie, and to sell the estates. If, in such a question, an heir holding the estate under such a tailzie be regarded as an ordinary heir entitled, taking advantage of a defective entail, to sell the estate, there appears to be no good reason to doubt that he is heir of entail in possession of the estate in terms of the statute founded on in the present application.

"But it is said the case is quite otherwise if the right be of such a conditional or contingent nature that it comes to an end by the birth of an heir called earlier in the destination. In that case, it is said, the person holding such a qualified right cannot be regarded as the heir in possession to all intents, but merely as a fiduciary heir holding for another, and the *Carnock* case and the case of *M'Kinnon*, there referred to, are cited in support of this contention. The Lord Ordinary is unable to adopt this view. The petitioner, or any one like him, holding an entailed estate subject to the contingency of a nearer heir coming into existence and superseding him in possession of the estate, is nevertheless heir of entail in possession. He acquires right to the estate because of his being the heir entitled to possess in virtue of the tailzie, and his service is the evidence of his right. During his possession he is entitled to exercise all ordinary acts of administration of the estate, like any other heir. His right, no doubt, may be resolved by the occurrence of a contingency which may or may not happen; but till that event occurs he is to all intents the heir entitled to possession, and to exercise the rights which flow from that possession—drawing the rents, letting the lands, and the like. It may be a question whether he could effectually charge the estate under the Aberdeen Act with children's provisions, which should take priority of such provisions made by a nearer heir coming afterwards into existence; for that statute fixes the provisions according to a standard which can only be appealed to on the death of the granter of the deed. Even in the case of such provisions, it appears to the Lord Ordinary that they would be effectual. Whether the amount could be charged in competition with provisions by a nearer heir would depend on the estate being liable to a charge at the death of the granter, which it might not be if the nearer heir having possessed should be the first predeceaser leaving a bond of provision creating a charge.

"But however this may be, the statute now under consideration (the Rutherfurd Act) having given the power to disentail—or, in the words of the statute, 'to acquire such estate in fee-simple,' to heirs of entail in possession under the entail of the estates, without any limitation arising from the defeasible nature of the heir's title, even from the occurrence of a contingency which might resolve his right, the Lord Ordinary is of opinion that the Court is not entitled to introduce such a limitation, or to presume that any such limitation was intended. If it could be shown that the person in possession is not an heir because his right may be resolved, the case would be different

But he draws the rents and enjoys the possession, not as a fiduciary for another, but for himself and in his own right, as an heir who has expede a service and was entitled to do so as nearest heir in existence under the entail; and though the right of such an heir has been spoken of as fiduciary, this expression has reference merely to the fact, which it is used to express, that his right is subject to an obligation to give up his enjoyment of the estate from the date when a nearer heir comes into existence. It has no doubt been held, in the case of *M'Kinnon* and in the *Carnock* case, that such an heir could not give an indefeasible and effectual title to the purchaser of an estate where the fetters of the entail were bad. The ground of judgment was that the party's right was qualified and conditional, and therefore defeasible under the destination; and that the purchaser having notice of this, could not take a higher right. But in the present question, conditional though the right be, the person in possession has acquired this possession by his right as an heir and by virtue of the tailzie, and this is all that the statute contemplates as necessary to give the right to disentail. That right is one conferred by the Legislature, and the question to be solved is simply, How large was the class of persons to whom it was given? This is altogether different from the question in the *Carnock* case, as to whether at common law an heir in possession having a qualified right could in a question *inter heredes* give a higher right than he himself possessed. The very purpose of the Legislature under the Entail Amendment Act is to give heirs in possession of entailed estates rights which are entirely contrary to the provisions of the deeds of entail under which they acquire and hold the estates; and if the petitioner is able to show, as the Lord Ordinary thinks he is, that he comes within the description of persons entitled to exercise the power to disentail conferred by the statute, then the question under consideration must be answered in his favour.

"The Lord Ordinary, in coming to this conclusion, is aware that there are strong expressions in the opinions of some of the Judges in the *Carnock* case which may fairly be said to indicate a contrary opinion.

"Indeed, Lord Curriehill, while explaining that even an heir holding an entailed estate under a destination similar in its effects to the present is for the time, and until superseded by the birth of a nearer heir, the proprietor in whom the *jus dominii* has vested, has yet indicated that such an heir could not in his opinion disentail the estate with or without consent of the next heirs. The Lord Ordinary has given the best consideration to these views, but is unable to concur in them. It is worthy of observation that he has had to consider particularly the terms of the statute, which were not before the Court in any way in the *Carnock* case.

"The case of a nearer heir *in utero* would of course raise a different question, and in the opinion of the Lord Ordinary would probably deprive the possessor of the character of heir in possession entitled to exercise the power of disentail, but there is no case of that kind here; and, on the whole, the Lord Ordinary is of the opinion that the first objection above referred to is not well founded.

"2. The second ground on which it is urged for the respondent that the application ought to be refused is thus stated:—'2 Because the entail of the lands forming part of the residue of the trust-estate, and of the lands to be purchased with the remainder of the same, did not fall to be made until the year 1862, and the petitioner is therefore not entitled to disentail without the consent of the next born heir after the date of the entail and of the age of twenty-five years complete.'

"The question thus raised has been decided by the Lord Ordinary in the case of the petition of *Captain James Scott Black* (26th May 1873), and for the grounds of this decision he refers to that case. In accordance with the opinion which he there expressed, the Lord Ordinary holds that under section 28th of the statute the date of the entail of the lands held by the respondent, and of any lands to be purchased by him in terms of the directions in Sir Robert Preston's trust-deed for the purposes of the statute, including disentail in virtue of its provisions, must be held to be the date when that deed first came into operation by the death of Sir Robert Preston, viz., 7th May 1834, and that the entail in the present case must therefore be taken as prior to the statute.

"3. The respondent objects to the application being granted:—'3. Because the funds to which the petition relates are for the most part at present now under the control of the Court of Chancery.'

"The Lord Ordinary is, however, of opinion that wherever the funds may be locally situated, provided they fall within the operation of the trust-deed, and are conveyed to the trustees for the purpose of purchasing lands to be entailed, the petitioner is entitled to a decree from this Court disentailing these funds and giving him right to payment of the amount for his own benefit. He may have to take proceedings in the Court of Chancery before he can obtain the money, but that does not seem to create any ground depriving him of his right to a decree in this Court, or which requires this Court to refuse to give effect to the application."

The respondent reclaimed, and submitted that the prayer of the petition ought not to be granted, for the following reasons:—"(1) Because the petitioner is not heir of entail in possession within the meaning of the sections of the "Rutherfurd Act" upon which the petition is founded. If the petitioner's elder brother, the Earl of Elgin, married and had a son, that son would be entitled to the estates, and the petitioner would be bound to denude of them in his favour, and if the said Earl of Elgin died without male issue, and the petitioner succeeded to the earldom, he would be obliged to devolve the estates upon the person possessing the character of next heir under the destination. Any right which the petitioner has is thus fiduciary, provisional, and defeasible. (2) Because the entail of the lands forming part of the residue of the trust-estate, and of the lands to be purchased with the remainder of the same, did not fall to be made until the year 1862, and the petitioner is therefore not entitled to disentail without the consent of the next heir born after the date of the entail, and of the age of 25 years complete. (3) Because the funds to which the petition relates are for the most part at present now under the control of the Court of Chancery."

Argued for him—The petition applies to three classes of subjects (1) lands already entailed; (2) lands belonging to Sir Robert Preston, to be entailed; (3) a sum of money to be invested in land

to be entailed. On the authority of *Black's Trs.*, Nov. 4, 1873, the last two may be held to stand in the same position as the first. James Earl of Elgin died in 1863, so that on the death of Charles Preston Bruce in 1864 it was to Lord Elgin's heirs that the Spencerfield succession opened, and the eldest son of these was disqualified as having succeeded to the Earldom. There is a wide distinction between tailzied and intestate succession. The old rule was that as long as a nearer heir was possible a remoter heir was not allowed to enter at all; this rule, from motives of convenience, was subsequently so far relaxed that the remoter heir was allowed to hold the estate as a *fidei commissum*, and when a nearer heir appeared he took, not as succeeding to the remoter heir, but on the footing that the latter had no right to succeed at all (Lords Ivory and Curriehill in *Carnock* case; Lord Advocate Rutherfurd in *Eglinton* case; Lord President Inglis in *Boquhan* case). The remoter heir holds under a condition or trust; the trust emerges on the birth of a nearer heir, and it is to denude in the latter's favour. [LORD ARDMILLAN —The question is whether an heir of entail in possession *sub conditione* is enabled by the Rutherfurd Act to clear himself of that condition.] Under the Rutherfurd Act, if there be nothing between an heir in possession and the fee-simple of the estate except the fetters of the entail, he is entitled to have these struck off; but there is a great deal more than that between the petitioner and the fee-simple, and he is not in a position to apply for the advantages granted by the Act. He must satisfy three requisites; (1) He must be an heir of entail; (2) he must be in possession of the estate; (3) he must be so in virtue of the tailzie. Being a mere fiduciary holder, he does not satisfy the last two conditions.

Authorities—*Bruce* v. *Melville*, Feb. 22, 1677. M. 14,880; *Mackinnon* v. *Macdonald*, M. 5290, 6566; *Mackenzie* v. *Mounstewart*, M. 14,903; *Stewart* v. *Nicolson*, Dec. 1859, 22 D. 72; *Eglinton* v. *Hamilton*, June 3, 1847, 9 D. 1167, 6 Bell's App. 149; *Fletcher* v. *Fletcher Campbell*, July 10, 1868, 6 Macph. 1035.

Argued for petitioner—There are two questions raised by this petition—(1) Whether, even assuming his title to be defeasible, the petitioner is entitled under the Rutherfurd Act to disentail, which turns on the construction of the statute? (2) Whether, in the event of a nearer heir being born to his brother Lord Elgin, he would be bound to denude, which turns on the construction of Sir Robert Preston's destination? The respondent's argument was directed mainly to the third requirement of the statute—that he must be an heir of entail in possession by virtue of the tailzie. Would not Mr Preston Bruce be subject to the penalties of contravention of the entail? Is he not bound to assume, as he has done, the name and arms of the entailer? The case of *Bruce* v. *Melville* was overruled by the case of *Mackenzie* v. *Mountstewart*, which has been followed ever since. *Mackinnon* v. *Macdonald* only decided that when a nearer heir came into existence the holder was bound to denude, but it was decided in a subsequent branch of the case (2 Pat. 252) affirmed on appeal by the House of Lords, that a sale by him during his holding was not reducible. In another branch of the same case it was held that such an heir might make provision for his widow. This entail contains no clause of devolution in the event of a nearer heir being born. The heir of entail who takes under it becomes the head of a *stirps* by a right only defeasible in the event of his succeeding to the Earldom—that being the only contingency to which the clause of devolution is directed.

At advising—

LORD-PRESIDENT—The petitioner alleges that he is the heir of entail in possession of the entailed lands and estate of Spencerfield and others, under a deed of entail dated 3d November 1832, and recorded in the Register of Tailzies on 14th February 1835. He alleges, further, that he is the party presently beneficially interested under a trust-disposition dated 17th October 1832, by which certain lands thereby conveyed are directed to be entailed, and a certain large sum of money is directed to be invested in the purchase of lands to be also entailed upon the same series of heirs as are called in the deed of entail of Spencerfield. The granter of these two deeds was Sir Robert Preston of Valleyfield, and he died in the year 1834. The destination in the deed of entail was to a certain series of heirs in the first place, whom it is unnecessary to specify because they all failed, and then, failing them, the destination was "to Charles Dashwood Bruce, merchant in London, son of the Honourable Bruce, brother of Thomas Earl of Elgin and Kincardine, and the heirs male of his body; whom failing, to the Honourable James Bruce, second son of the said Thomas Earl of Elgin and Kincardine, so long as he shall not succeed to or be in right of the title of Earl of Elgin, and the heirs male of his body not succeeding to or being in the right of the said title." Mr Dashwood Bruce died without issue on 25th August 1864. By that time the party next called in the destination, the Honourable James Bruce, had also died, but leaving two sons, one of whom succeeded to the title of the Earl of Elgin and Kincardine, and the second son is the petitioner. As his elder brother was disqualified by succeeding to the title, there can be no doubt that the petitioner, as the second son of the Honourable James Bruce, is the party next in succession; but his position is subject to this peculiarity, that if his elder brother, the present Earl of Elgin and Kincardine, has a son, then he will be a nearer heir than his uncle, the petitioner. The petitioner, therefore, is in the position, quite well known to the law, of being an heir served, because he is the nearest heir in existence, but whose right is liable to be afterwards defeated by the existence of a nearer heir. The petitioner was born on 4th December 1851, and he says that, being born subsequent to the 1st of August 1848, and the deed of entail in both the case of Spencerfield and in the case of the other lands, and the money directed to be entailed, being prior to 1st August 1848, he is within the provisions of the 2d section of the Entail Amendment Act, and so entitled to execute and record an instrument of disentail of the lands of Spencerfield and others, and to claim a conveyance of the lands directed to be entailed, and payment of the money which has been directed to be invested in lands to be entailed. The 2d section, taken in connection with the 27th section of the Entail Amendment Act, he says enables him to obtain all these things.

Now the question comes to be, whether he is in the position contemplated by these sections. The 2d section of the statute provides, "That where

any estate in Scotland is held by virtue of any tailzie dated prior to the said 1st day of August 1848, it shall be lawful for any heir of entail born on or after the said 1st day of August, being of full age and in possession of such entailed estate by virtue of such tailzie, to acquire such estate in whole or in part in fee-simple." Now, if the petitioner was born, which he certainly was, after the 1st of August 1848, and if the entail is dated prior to 1st August 1848, and if he be of full age, which is undoubtedly the case, then all that is required beyond that to give him a title to disentail under this section is, that he shall be in possession of such entailed estate by virtue of such tailzie. Again, in the 27th section it is provided, "That where any money or other property, real or personal, has been or shall be invested in trust for the purpose of purchasing land to be entailed, or where any land is or shall be directed to be entailed, but the direction has not been carried into effect, it shall be lawful for the party who, if the land had been entailed in terms of the trust, would be the heir in possession of the entailed land, and who in that case might, by virtue of this Act, have acquired to himself such land in fee-simple by executing and recording an instrument of disentail as aforesaid, to make summary application to the Court as hereinafter provided, for warrant and authority for the payment to him of such money, or for the conveyance to him of such land in fee-simple." It is obvious that if the petitioner is in the position contemplated by the 2d section of the statute with regard to the land which is embraced in the existing entail, he is also plainly in the position contemplated in the 27th section as regards the unentailed land and the money held in trust. One difficulty with regard to this latter part of the succession was stated by the respondent, to the effect that the date of the entail as regards the unentailed land and the money must be held to be a date long subsequent to the death of the truster, and subsequent to the 1st of August 1848; and if that contention had been well founded, of course that would have been a sufficient answer to the claim of the petitioner, considered as an heir of entail under an entail dated prior to 1st August 1848. That question depended upon the construction of the 28th section of the statute, which provides, that for the purposes of this Act the date at which the deed placing such money or other property under trust first came into operation shall be held to be the date at which the land should have been entailed in terms of the trust. If that question had been open it would have been an important one; but it was decided in the recent case of *Black* that the date of the deed of entail in all such cases must be held to be the date of the death of the truster, at which time the trust-deed came into operation. That difficulty, therefore, is removed from the case, and the only case really remaining for our consideration is, whether the petitioner is an heir of entail in possession of an entailed estate by virtue of a tailzie within the meaning of the 2d section.

Now the title of the petitioner was made up, in so far as the entailed lands are concerned, by three decrees of special service dated in the year 1864, with warrants of registration, upon which these decrees were duly registered in the Register of Sasines; and so the right of the petitioner as heir was to be derived, and that was followed by writs of confirmation from the crown. Now the title of the heir or the petitioner, as appearing upon the face of these decrees and writs of confirmation, is an unqualified title. It is neither a title in trust, nor is it a title under a condition, in so far as appears upon the face of the title. But no doubt there is a condition attached to the title and the right of the petitioner. It is attached by the law, but not by the form of the title itself; and the important question which we have to consider, in the first place, is what is the nature of that condition, and what is the character of the title and of the possession of the petitioner? Now I think one proposition may be laid down with perfect certainty, and that is, that whatever may be the qualification of this petitioner's title, he is the fiar of the estate. I am speaking now of the entailed estate, for the sake of clearness, apart from the unentailed lands and money, which, however, really must follow. I confine my observations, in the first place, to the entailed lands; and I think it cannot admit of dispute that he is the fiar of the estate. No doubt he is a limited fiar; but so is every heir of entail, and the only difference between him and any other heir of entail is, that the limitation of his title is somewhat different, and perhaps somewhat greater, than in the case of an ordinary heir of entail. But he is in the eye of the law, just as much as any heir of entail is, a limited fiar of the estate in which he stands infeft. The respondent in his argument made reference to a passage in the judgment of Lord Curriehill in the case of *Grant's Trustees*, which I think defines and explains the position of an heir situated as the petitioner is, very clearly and very satisfactorily. After going through the cases of *Bruce* v. *Melville* and *Mountstewart* v. *M'Kinnon*, his Lordship says, "The law thus ultimately reconciled the difficulties which had at first been suggested with reference to this class of questions. On the one hand, the eventual right of the posthumous heir is saved entire for him if he come into existence; on the other hand, not only is the inheritance not left *in pendente*, but the party who is in the position of being the nearest heir for the time is the conditional fiar of the estate—the condition of his right of fee being that he is bound to denude of it in favour of the nearer heir who is *in spe*, if eventually he should emerge. That obligation, moreover, besides being no obstacle to the conditional fee vesting in the meanwhile in such remoter heir, expires *ipso facto* if the existence of such nearer heir becomes impossible—which it always does on the death without issue of the party by whom alone such a nearer heir could be procreated." In the reports of the cases of *Mountstewart* and of *M'Kinnon*, this right of fee is denominated a *fidei commissum*: this, however, plainly means not that the fee, or *jus dominii*, does not truly belong in the meantime to the party himself in whom it is vested, but merely that that fee is *ipso jure* qualified by such a contingent condition. I really could add nothing to that expression of the opinion of Lord Curriehill which would have the effect of making clearer what I conceive to be the true position of the petitioner here. He is fiar of the estate; but in a certain contingent—or rather I should say in a contingent and uncertain—event, he may be deprived of that fee. But, on the other hand, he may never be disturbed in his possession of the estate and in his title to that estate and its possession. He may transmit the estate to the heirs of his own body

and his descendants for centuries, and their services and infeftments may all be based upon that service and infeftment which he now possesses, and in virtue of which he is in possession of the estate. It is a mere chance whether he shall ever be disturbed or no. The thing may happen; but just as much it may not happen. The inference which I draw from that, in point of law, is that the condition which, as Lord Curriehill says, attaches to the fee *ipso jure*, is not a suspensive, but a resolutive condition. It was argued by the Lord Advocate for the respondent, that although he could not maintain that the condition suspended the possession, still, he said, it suspended the title or the proprietary right. Now that, I think, is unsound in point of law. I think it does not suspend either all the title or the proprietary right, for the reason that I have already stated—that I think it is incontrovertible in point of law that the petitioner is fiar of the estate. If, then, this be a merely resolutive condition, I think it would seem to follow of necessity that so long as the condition does not exist, and so long as the right of the heir is not resolved by the existence of the condition, he is, as much as any other heir of entail within the meaning of the second clause of this statute, an heir of entail in possession of the entailed estate by virtue of the tailzie.

But the next question comes to be—and I think it is quite necessary to determine this also—what will be the effect of allowing the petitioner to execute an instrument of disentail, and also to obtain possession of the unentailed land and payment of the money directed to be invested in land and entailed. As far as the disentail of the entailed lands is concerned, this is made very clear by the 32d section of the statute, which provides, "That an instrument of disentail when duly executed and recorded shall have the effect of absolutely freeing, relieving, and disencumbering the entailed estate to which such instrument applies, and the heir of entail in possession of the same, and his successors, of all the prohibitions, conditions, restrictions, limitations, and clauses irritant and resolutive, of the tailzie under which such estate is held; and of entitling such heir in possession to alter the course of succession prescribed by such tailzie, and to alienate and dispone such estate onerously or gratuitously, and to burden the same with debt, and to do any other act or thing in relation thereto competent by the law to any absolute proprietor in fee-simple." These latter words appear to me to be extremely important to the question. And it is further provided, "That such instrument of disentail shall not defeat or affect injuriously any charges, burdens," and so forth, "of third persons lawfully affecting the fee or rents of the estate, or such heir in possession other than the rights and interests of the heirs-substitute of tailzie, in or through the tailzie under which such estate is held." In connection with this clause, it is also not unimportant to observe the terms of the instrument of disentail itself, as given in the schedule appended to the statute, in which the heir takes instruments in the hands of a notary public that the lands and others are now held by him free from the conditions, provisions, and clauses prohibitory, irritant, and resolutive of the entail by virtue of this Act. Now, what is meant by saying that an heir of entail who executes and records an instrument of disentail is put in the same position as an absolute proprietor in fee-simple? These were not technical words in the law of Scotland before this statute. They are rather borrowed, I think, from English law, but I do not apprehend that their meaning can be disputed. They mean that the heir of entail shall come to be in the same position, not as a person who takes as an heir of provision under a destination,—that is certainly not the meaning of them,—but he is to be in the same position as a direct disponee or an heir-at-law, making up his title by special service and infeftment. That is what his position is to be, and therefore I do not doubt in the least degree,—and it is quite necessary that we should see what is the effect of the proceeding that we are asked to authorise here—I do not doubt in the least that this petitioner will be placed in the position of an absolute proprietor in fee-simple in that sense, just as if he had taken up the estate as heir-at-law *ab intestato*, or had it conveyed to him by absolute disposition. In that case, of course, it is needless to say that neither a disponee to whom no such condition as we are dealing with here could possibly attach, nor an heir-at-law making up his title *ab intestato*, could possibly be affected with the resolutive condition which attaches *ipso jure* to the petitioner's fee as he stands at present; and therefore the effect of the disentail will undoubtedly be to liberate his title from that resolutive condition, and to make him absolutely free from it. It is pretty plain, therefore, that if the petitioner is entitled to become fee-simple proprietor, the proceeding under this statute is admirably adapted to afford him the remedy which he desires. If it had been devised for the purpose of meeting the case of this petitioner it could not have been better devised. But then the question occurs, Is it intended to apply to the case of a remoter heir served while another and nearer heir is *in spe?* To that I am inclined to answer by another question, Why should it not apply? If it is not intended to apply to such a case, the case could have been easily excepted from the operation of the statute by express words, and it cannot be said that the case of an heir in the position of this petitioner is so uncommon or so little known to the law that the framers of this Act of Parliament could not have had it in contemplation. On the contrary, I think that the fair presumption is that they had it in contemplation, and as they have not expressly excepted it from the enactment of the statute, the natural inference is that it was not intended to be excepted. For, in the second place, I think there cannot be much doubt that the words of the 2d section of the statute clearly cover the case of the petitioner. Is he not an heir of entail? Surely it is impossible to dispute that. He never could have taken this entailed estate—he never could have become fiar of this entailed estate—if he had not been the heir of entail called to it by the destination. And if he be an heir of entail, then the next question comes to be, Is he not in possession? Why, even the argument of the Lord Advocate conceded that his possession was unconditional as long as it lasted,—that there was nothing to suspend his possession, or prevent his possession being a full and beneficial possession. If, then, he is an heir of entail in possession, he must also be in possession plainly by virtue of the tailzie, for by no other means could he possibly have obtained it; and therefore I think the words of the clause cover the case. But, in the third place, I think it is equally clear that the case of the petitioner falls

within the policy of the statute; for, supposing for a moment that a person in the position of this petitioner is not within the statute, and cannot under any circumstances disentail, he is born after the date of the deed of entail, and all the persons for whose benefit he is fettered and restrained are born after the date when he obtained it; and it is the policy of this Act of Parliament that no heir born after the date of the deed of entail. or after the 1st of August 1848, shall be fettered for the benefit of other persons who are to be born. Therefore to refuse the petition is certainly against the policy of the statute, and the position in which the petitioner would be left would be plainly a much more unfavourable position than that of any other of those heirs of tailzie for whose benefit the statute is intended. The great object of this statute is, with certain very natural exceptions, to enable all heirs of entail in possession to free themselves from the fetters of the entail; but this gentleman is not only subjected to the fetters contained in the entail itself, but, by reason of the circumstances under which he has been served heir of entail, he is subjected by the operation of the law of tailzie to additional fetters. He is more restrained than any other heir of entail. It is said that even if this were a fee-simple estate in the sense that it was a bare destination without any fettering clauses at all, he still would be disabled from selling the estate, and I assume that to be good law as laid down in the case of *Grant* by three of the Judges. But does not that just show that he has the more need of this beneficial statute,—that his case is a stronger case than that of other petitioners under this section of the statute, because he is subjected to more serious limitations and fetters than any other heir of entail is. Therefore it appears to me, on these grounds, that it is quite impossible to refuse to give this petitioner the benefit of the statute if he be within the words of the 2d section. If he be an heir of entail in possession of this entailed estate by virtue of the subsisting tailzie, we have no right to exercise any discretion. We have no further question upon which to give judgment. If that be once established he has an absolute right to have the prayer of this petition granted.

With regard to the other part of the case, depending upon the 27th section of the statute, it follows so clearly from the other that I really won't detain your Lordships by making any further observations upon it. I have confined my observations to that view of the case which would apply to every remoter heir of entail served while another heir was *in spe*. There are a number of peculiarities in this case, which may be very fairly appealed to in illustration and confirmation of the opinion which I have formed. There is the case of the devolution of the estate in the event of the heir of entail in possession succeeding to the Earldom of Elgin; and the question will arise there, whether that provision of the tailzie could prevent the heir in possession from availing himself of the provisions of the 2d section of the statute. It would be very strange if it did, because the effect of that would be that it would be in the power of a person, by introducing such a clause of devolution into his entail, to defeat the Entail Amendment Act altogether in so far as disentailing is concerned. Now, is there any distinction in point of principle between the case which occurs here—I mean the provision of the law which we have been considering here—and that *provisio communis* contained in the entail itself regarding the devolution on the succession to the Earldom? I think in principle there is none. In the one case and in the other the right of the heir in possession is subject to a resolutive condition, the one being introduced by the entail the other introduced by the law,—that is, the law of tailzied succession; for it is not a general principle of the law of Scotland applicable to any case, except a case of succession under a destination; and therefore it appears to me, that even if this gentleman had not been a remoter heir with a nearer heir *in spe*, but had taken up this estate as the nearest possible heir, the same objection might have been stated to his disentailing, because his right is subject to be defeated in the event of his succeeding to the Earldom. But I have purposely abstained from making that part of my ground of judgment, as I originally stated, because I think it is quite right that we should deal with this case upon general principles, and not with reference to any peculiarities in this particular deed or set of deeds. I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord Deas—On 3d November 1832 the late Sir Robert Preston executed an entail of his lands and estate of Inverkeithing and others, therein described, situated in the parish of Inverkeithing and shire of Fife, in favour of his three nieces and the heirs of their bodies successively; whom failing, to Charles Dashwood Bruce and the heirs male of his body; whom failing, to the Honourable James Bruce, second son of Thomas Earl of Elgin, so long as he should not succeed to that title, and the heirs male of his body not succeeding to the said title; whom failing, to the third and other younger sons of the said Earl Thomas, in the order of their seniority, and the heirs male of their bodies respectively not succeeding to the said title; declaring his will to be that whosoever succeeded to the Earldom should be bound to demit the possession of the estates in favour of the heir next in succession, according to the order and course prescribed by the deed.

The three nieces all died without issue, and Charles Dashwood Bruce (who was the brother of Earl Thomas) succeeded. He died without male issue on 25th August 1864. Meantime, the Honourable James Bruce, and on his death his eldest son Victor Alexander, the present Earl, had succeeded to the Earldom, and consequently the estates then stood destined to the sons of the present Earl in the order of their seniority and the heirs male of their bodies respectively not succeeding to the title; and after them to the petitioner, the younger brother of the present Earl, and the heirs male of his body, subject to the same condition.

It happened, however, that at the death of Charles Dashwood Bruce the present Earl was unmarried, and the petitioner was consequently allowed to serve and enter into possession of the entailed estates, subject to the contingency of being called upon to denude in favour of any son who may be born to the Earl in the event of his marriage, which has not yet occurred.

It is in these circumstances that the petitioner proposes to acquire the said estates in fee simple, by executing and recording an instrument of disentail under section 2 of the Entail Amendment

Act, 11 and 12 Vict., c. 36, and relative enactments. He further proposes, under sections 17 and 18 of the same statute and relative enactments, to acquire in fee simple certain other lands, and to obtain payment or transference to himself absolutely of certain stocks and funds of large amount, forming together the residue of Sir Robert Preston's heritable and personal estate, under a trust-deed and settlement executed by him on 17th October 1832, and signed in duplicate on 20th May 1834, whereby he directed additional lands to be purchased with the personality, and the whole to be then entailed by his trustees on the same series of heirs and in the same terms with the entail he had himself executed.

The important question is, whether the petitioner is, in the sense of section 2 of the Entail Amendment Act, the heir of entail in possession of the entailed estate of Inverkeithing and others by virtue of the tailzie, and consequently entitled to acquire that estate in fee simple by executing and recording an instrument of disentail? If he is *in titulo* so to acquire that estate, it seems to follow that he is likewise entitled to succeed in his application as to the whole residuary estate, heritable and moveable, held by the respondent as sole surviving trustee under Sir Robert Preston's trust-deed and settlement, and for whom alone, as such surviving trustee, appearance has been made to oppose the prayer of this petition.

It is conceded that the tailzie is dated prior to 1st August 1848; that the trust-deed came into operation before that date; that the petitioner was born after that date, and that he is of full age. It is also conceded that he was allowed without opposition to expede a special service as heir of tailzie and provision to Charles Dashwood Bruce in the lands comprehended in Sir Robert's deed of entail, and to record that service in the Register of Sasines, which is equivalent to infeftment. Farther, it was not disputed at the bar that the petitioner is now in the beneficial occupancy and enjoyment of the entailed lands, although I do not find that the period when that enjoyment opened to him, or to his predecessor Charles Dashwood Bruce, by the death of the last of the three nieces and of Sir John Hay, is stated in the petition. As to the stocks and funds in Chancery, the petitioner does not explain their position, nor does he say whether he has hitherto had any beneficial enjoyment either of these or of the unentailed lands. He merely says, in article 14 of his petition, that "if the said residue had been applied in the purchase of lands settled on the same series of heirs he would now have been the heir in possession thereof."

The destination in the Inverkeithing entail, so far as we have here to deal with it, is in substance a destination to the heirs male of the body of Victor Alexander, the present Earl of Elgin, in the order of seniority, and the heirs male of their bodies respectively not succeeding to the Earldom; whom failing, to the petitioner and the heirs male of his body, &c. The precise words in which I am expressing the destination are not used in the deed; but the import of that destination is obviously what I have now stated. That is to say, the possible male issue of the Earl are called to the succession before the petitioner and his male issue. Some may think it inexpedient that such a destination should be sanctioned, and that existing individuals should always take to the absolute exclusion of those who never may exist although their future existence is possible. But that is not the law of Scotland as to tailzie succession. It is not to be doubted that the destination here in question is a perfectly lawful destination, and that if even now, *pendente lite*, a lawful son were to be born to the present Earl of Elgin, that son would at once supersede the petitioner in the enjoyment of the entailed estate. This has been recognised as the law of tailzied succession by solemn and authoritative decisions, extending over a period of nearly two centuries.

The earliest case which it is necessary to notice is that of *Bruce* v. *Melville*, 22d February and 24th July 1677, M. 14,880, and 14,890; also reported by Lord Stair, M. 9321. The destination there was to the heirs of the entailer's body in a certain order; which failing, to the second son of the Earl of Rothes; which failing, to the second son of Lord Melville; which failing, to the second son of the Earl of Wemyss, &c. The issue of the entailer's body having failed, and the Earl of Rothes (then the Chancellor) having at the time no second son, the second son of Lord Melville proposed to serve; but "the Lords having considered this dispute, with the bond of tailzie, did find that so long as there is any possibility or hope of a second son of the Lord Chancellor's own body, David Melville could not be served heir as second son of the Lord Melville"—M. 14,895. That case involved also a question whether the rents, maills, and duties did not fall in the meantime to the Crown as *bona vacantia;* but it was held that the Crown had no right beyond the retoured duties, and that the fruits remained in *hæreditate jacente* of the last heir, and fell to be managed by a *curator bonis datis*, who should be accountable to the heirs of tailzie who should thereafter enter.

In the next case, that of *Mountstewart* v. *Mackenzie*, November 13, 1707, M. 14,903, Lord Mountstewart, the nearest heir in existence, was allowed to serve although only called to the succession failing a second son of the body of Lady Langton, who was married and had already one son alive. It was strongly argued that "to suspend the nearest heir *pro tempore* from immediate entering draws a train of inconveniencies and confusion alongst with it more than the Trojan horse had of soldiers in its belly; for how shall vassals be entered, creditors' diligence proceed, and the estate be administered?" Moved by these and other considerations of inconvenience, it was decided in January 1708, as Fountainhall's Report bears, "That the service should proceed without any more stop. But sundry of the Lords explained themselves that this service would not cut off my Lady Langton's second son when he came to exist; but that he would have good action to compel him to denude in his favours, and his birth would terminate, irritate, and annul the service."—M. 14,906.

About a year after the date of the service Lady Langton bore a second son, and an action was then brought in his name, and that of his father as his administrator-in-law, for reducing Lord Mountstewart's service, and obliging him to denude of the estate. The Report bears that at the advising on 13th December 1709, "After long reasoning it came to the stating of the vote, and some were for putting in all the grounds of law whereon the pursuer and defender founded; but it was thought that would embarrass too much, therefore it was

restricted to this single point, if the tailzie and nomination imported a *fidei commiss.* upon my Lord Mountstewart in the event of my Lady Langton's having a second son, so as to make him only a fiduciary heir in that case." The Report further bears, that it was thought to be incongruous to crave both a declarator of nullity and a decerniture to denude, "therefore it was agreed, that if the Lords should find a *fidei commiss.* in favour of the pursuer, that the effect of it should be to oblige him (Mountstewart) to denude of the estate to the Lady Langton's second son, the pursuer. And the vote being so stated, the Lords, by a plurality of seven against six, found the nomination imported a *fidei commiss.* by which Mountstewart was obliged to denude in favours of the pursuer."

There were subsequent discussions and decisions upon other points, but these did not affect this judgment, which is of great importance, because it not only affirmed the obligation to denude, but expressly decided that Mountstewart's right and title imported a *fidei commissum*, which was of course inconsistent with his being in the ordinary and proper sense an heir of entail in possession of the estate by virtue of the tailzie.

Next came the case of *M'Kinnon* v. *M'Kinnon*, in June 1756 (M. 6566), in which the estate stood settled upon John M'Kinnon younger and the heirs male of his body, whom failing, upon the heirs male of the body of John M'Kinnon elder, whom failing, upon John M'Kinnon of Messinish and the heirs male of his body. John M'Kinnon younger died infeft, without leaving heirs male of his body, and there being at that time no heirs male of the body of John M'Kinnon elder, John M'Kinnon of Messinish served himself heir of provision to John M'Kinnon younger, and entered into possession. Thereafter John M'Kinnon elder had a son, Charles, whose tutors instituted an action against John of Messinish to denude of the estate. The judgment is thus reported—"The Lords found that the pursuer has right to the estate of M'Kinnon from the time of his birth, and that the defender is obliged to denude thereof in his favour."

Lord Kames, remarking upon this case and the case of *Mountstewart*, observes, that according to the natural construction of the tailzie, "there is no place for a substitute while there is a nearer in hope, though not existing." But, according to the feudal law, "a superior is entitled to have a vassal, and if none offer he is entitled to have back his land. Hence it is that, with a view to the superior, and not the point of right, the next heir in existence when the succession opens is entitled to serve. But then he can be considered in no other light than as a fiduciary heir holding the estate for behoof of the nearer heir. Upon the principles of the feudal law he is entitled to the rents for his service while he acts as vassal; but he is not proprietor in any view, so as to have the power of alienation or of contracting debt. For he is in effect but a trustee, and in that character he is bound to surrender the estate to the nearer heir." M. 6567-8.

Some further valuable information recorded by Lord Kames as to the opinions of the Judges in the *M'Kinnon* case, is to be found in 5 Broun's Supplement, p. 848. Lord Kames there says—"The President, and all the rest of the Lords, were of opinion that Messinish was rightly served, as there was no nearer heir at the time, because the inconveniencies would be very great, both to the superior and the vassal, if the lands were kept in non-entry till the nearer heir should exist." "But, secundo, as this was only *ex necessitate*, as soon as the nearer heir existed the fee in the person of the remoter became void and null, because it was only a fiduciary fee, which could last no longer than the existence of the person for whose behoof it was held."

The subsequent judgment in *M'Kinnon* v. *Macdonald*, of 14th February 1765, M. 5279, obviously does not weaken the judgment of 1756, and has never been supposed to do so. Messinish had sold part of the estate called Strath, in 1751,—that is to say, before the former action had been raised, for £7300 sterling, to relieve the estate of family debts,—obviously debts which affected the fee of the estate. In 1758 Charles M'Kinnon, the expectant heir, who had been successful in the former case, brought an action of reduction against Sir James Macdonald, the purchaser of Strath, to set aside the sale, not apparently with the hope of getting rid of the debts, but because, as the report bears, "land in the Isle of Skye came soon after to rise in its value." The discussion as to the nature and effect of Messinish's service was incidentally renewed, as affecting the title of the purchaser who had acquired from him; and the report by Lord Kames bears, "The plurality of the Judges came into the opinion that the infeftment of Messinish was conditional only. But there was no occasion to give an explicit interlocutor upon that point, for by a great plurality it was found that the sale to Sir James Macdonald, though an extraordinary act of administration, was yet a necessary act to save the family estate from being torn to pieces by the creditors, of which they were satisfied from evidence produced in Court. The only difficulty upon this point was, that to empower Messinish to sell he ought to have obtained a decree of the Court of Session finding the sale necessary. But, with respect to this difficulty," continues Lord Kames, the reporter, "I suggested that even a sale by a tutor, *sine decreto*, will not be reduced if it be found advantageous." His Lordship adds, "Had Messinish applied to this Court for power to sell, the circumstances of the case were such as that he must have obtained it, and equity will not suffer the neglect of this precaution to be laid hold of for voiding the sale, when the pursuer by that neglect is not *in damno evitando*, but *in lucro captando*."

Then we have the cases of *Grant* v. *Grant's Trustees*, and the Carnock case, *Stewart* v. *Nicolson*, both decided on 2d December 1859 (22 D., 53 and 72), which bring this doctrine, as *in vivida observantia*, down to our own time, drawing the distinction between the case of intestacy, where the law alone rules, and the case of tailzied succession, where the will of the testator is the governing principle, and falls to be followed as nearly as circumstances will permit.

In the case of *Grant* the Judges, with the exception of Lord Curriehill, were of opinion that it was fixed by the authorities that a father who had succeeded to his son *ab intestato* could not be called upon to denude in favour of his own later born issue. But, as Lord Ivory observed (p. 64), "It is different in various respects as to tailzied succession." "But the reason is apparent. The fee in tailzied succession is taken, or rather given, under a condition, because the fee cannot be taken in any proper or absolute sense. At common law the fee is absolute from the instant of succession. In

a tailzied succession no absolute right is acquirable, because the heir is only admitted *ex necessitate*, in order to fulfil some feudal and other considerations, and, in strictness, would not be received at all but for such purely technical reasons."

Lord Curriehill, so far from differing from Lord Ivory as to the rule in tailzied succession, was of opinion that the same rule applied to intestate succession, observing (p. 66 bot. and 67 top), that he knew of no case in which the remoter heir had been "found to be entitled to enter himself heir to such defunct otherwise than on the implied condition that the rights of the nearest heir *in spe* are saved entire, and are to be given effect to in the event of his coming into existence." And he cited the three cases of *Bruce* v. *Melville*, *Mountstewart* and *M'Kinnon*, as supporting this opinion. In common with the Lord President, I did not in *Grant's* case enter into the question what would be the rule in tailzied succession, contenting myself with holding that there was no obligation on a father to denude in favour of his child subsequently born in a case of intestate succession such as there occurred.

The circumstances of the case of *Carnock*, decided on the same day, were of a complicated description, and raised a variety of questions. But so far as we are here concerned with the case, there is no complication. The question is sufficiently brought out by stating the facts thus:—In 1836 Michael R. S. Stewart (who had assumed the name of Nicolson), having forfeited the estate of Carnock, the succession opened to the heir male of his body; but having then no such heir male, his immediate younger brother, Mr John A. Stewart, obtained possession of the estate, and assumed the name of Nicolson. The entail had not been recorded, and on the strength of that fact Mr John A. Stewart Nicolson sold the estate, in August 1851, to Sir Michael Shaw Stewart for £50,000, under the usual condition of its being found that he could give a good title to the purchaser. The seller had made up a title in May 1851; but when that title came to be reduced by one of the judgments which we ultimately pronounced on 2d December 1859, the result was that John Alexander Stewart Nicolson had at the best possessed all along upon apparency merely. The actions of reduction, declarator, and suspension brought to try the validity of the title had come into Court in September and October 1851; and while these actions were still in dependence a son was born to Sir Michael Shaw Stewart in 1854; and for this son appearance was made in the action in the character of heir male of the body of the heir of the investiture; in which capacity, with concurrence of his tutor *ad litem*, he objected to the sale made by the remoter heir in possession. The Court, on 2d December 1859 (*inter alia*), sustained the defences for the pupil and his tutor *ad litem*, assoilzied the whole defenders from the conclusions of the summons of declarator, and decerned.

It will not fail to be observed that in the *Carnock* case the sale had taken place by an onerous and concluded transaction, at a time when the seller was the nearest heir in existence. The sale was in August 1851, and the nearer heir was born in 1854. The purchaser was therefore entitled to plead that, as in a question with him, the state of matters to be looked to was their state in 1851 and not in 1854. Accordingly, it will be seen that all the Judges gave their opinions upon the footing that the question before them, so far as regarded the validity of the sale, was whether it could be effectually made by a remoter heir when a nearer heir was *in spe*. If the sale had been made after the nearer heir had been born, there would, I presume, have been no room for argument about it.

The substance of the Lord President's opinion, so far as it bears upon the matter now referred to, was that in the case of tailzied succession, supposing the question had been open, the argument would have been strong for the distinction, recognised in *Grant's* case, between intestate and tailzied succession, and for holding that in the latter case, by the will of the maker of the deed, the party taking while a nearer heir was *in spe* took only a conditional and limited interest in the estate, and could do nothing inconsistent with the course of succession, and that this had been affirmed by repeated decisions. "In this view," said his Lordship, "it is unnecessary to go into any farther question as to the interests of Mr Nicolson in the estate; for the conditions to which I have alluded, being a limiting quality of his right, he had no power to sell." He then went on to say that he saw no reason to doubt the reality of the sale, but that the purchaser and seller must both be assumed to have been cognisant of the conditions under which the estate was held; "and if under these conditions it was held as a trust for the benefit of subsequent heirs, I think it was incompetent for Mr Nicolson to have disposed of the estate, and equally incompetent for Sir Michael Stewart, in the knowledge of that, to have acquired it."

Lord Ivory went over all the authorities, and delivered a full opinion upon the subject: but it will be sufficient to quote from the concluding portion of that opinion, where he says, "It seems to me clear therefore, both on principle and authority, that a remoter heir, taking under the conditions of an entail, takes not as absolute fiar, but takes with a limited and conditional right. He takes as *quasi* fiduciary (though I think that is not a proper expression) for all other heirs, with certain rights as to rents pending his possession, as to which we have no question here. But he takes rather as representing the nearer heir in the first instance, and others, including himself, in their turn after him, than as one whose entry is either to interrupt or defeat the express substitution of the entail. That goes far to solve the question of his rights while he is in possession; whatever may be the remedies introduced in particular cases by the Court, that reduces the party in possession to an administrator in place of the true proprietor. If so, he cannot sell or exercise any of the rights of property in regard to the estate; and his disability in this respect is one which is necessarily to be read on the very face of his own investiture; and with reference to those who take from him, they are in the same position as himself," 22 D., 101.

It appeared to me that, as we were all agreed that the only title made up by John A. Stewart Nicolson, the seller, fell to be reduced, the fact that he never had been in any sense feudally vested in the estate was of itself sufficient to prevent him from being *in titulo* to sell and convey to a purchaser; and, consequently, I reserved my opinion upon the nature of his title *quoad ultra*. But it

will be observed that the other Judges did not enter upon that ground at all. They proceeded exclusively upon the views which I have quoted from their opinions; and the judgment, consequently, is a judgment of the Court giving effect to these views. No three Judges in this Court, then or now, had a more thorough knowledge of our feudal system and of our laws of tailzied succession than the three eminent lawyers who then sat with me on this bench; and, knowing, as I do, from consultations with them on the subject, how anxiously and laboriously they considered that case, I cannot but entertain a high respect for their opinions as well as for the judgment which they pronounced. Entertaining the views which they affirmed as to the relative position of a remoter heir of entail and a nearer heir *in spe*, it seems to me impossible to suppose that any of them could have concurred in granting the prayer of this petition. On the contrary, the judgment in the *Carnock* case is a direct and authoritative precedent for holding that the remoter heir cannot exercise any of the rights of property in regard to the entailed estate while there is a nearer heir *in spe*. It is not the fetters of the entail, but the terms of the destination which prevent him from doing so; for although the entail should be unrecorded, as it there was, or the fetters inapplicable, he cannot sell to a purchaser however onerous, as was held in the older cases, and expressly decided in the *Carnock* case. Still less, of course, could he gratuitously alter the order of succession; and it follows, I think, *a fortiori*, that he cannot by disentailing acquire the estate to himself in fee simple.

It is in vain to represent the question here as being whether the words of the statute are to be given effect to. That is a matter on which there can be no difference of opinion. If the petitioner be in the sense of the statute the heir of entail in possession of the estate by virtue of the tailzie, he is, unquestionably, entitled to do what he proposes to do. But the statute gives no definition of who is to be considered the heir of entail in possession of the estate in virtue of the tailzie. That is left to be ascertained by the ordinary rules and practice of the law of Scotland. We speak loosely of all who are called to the succession, although they have not yet succeeded and never may succeed, as being "the heirs of entail." But the heir of entail in possession of the estate in virtue of the tailzie is well known to the law as the heir who has come into possession in the order prescribed by the will of the entailer, and who becomes fiar of the estate in all respects except in so far as he is effectually limited by the deed, and who consequently has, *quoad ultra*, all the rights and powers of a fee simple proprietor. He is the party who can effectually sell and convey the estate to a *bona fide* purchaser if the entail is not recorded in the register of entails. He is the party who, if feudally vested, could formerly take advantage of any particular flaw in the entail to do the particular thing which the flaw left unprotected, and whose powers in that respect are now, by the statute, more extensive than they were. But if the decisions and opinions I have cited are of any authority at all, the petitioner is not in the position thus described. Although the entail were unrecorded he could not effectually sell and convey the estate. Still less could he gratuitously alter the course of succession. In like manner, although there were a flaw in the fettering clauses of the entail, his feudal title would not enable him to take advantage of that flaw either by a sale or by a deed altering the order of succession. Nor would his position in these respects be improved although the fettering clauses were struck out altogether; for it is not these clauses, but the terms of the destination, which form the paramount obstacle to his putting the £130,000 of personality, or whatever the amount may be, into his pocket, and acquiring equal power of appropriation—which is obviously what is contemplated—over the unentailed and entailed heritable estates. The petitioner is not in possession of the estate in virtue of the tailzie, which in existing circumstances *ex facie* excludes him, but *ex necessitate*, as the Judges in all the cases express it—that is, for reasons of expediency and convenience so strong as to be held to amount to a legal necessity;—and it follows, as they further observe, that the advantages thus accorded to him are not to be carried one step beyond that necessity.

The heir of entail in possession of the estate by virtue of the tailzie is entitled, if he incurs no forfeiture, to enjoy the estate till his death. The petitioner's enjoyment of the estate, on the contrary, may be terminated at any period of his life without any forfeiture. If a nearer heir should be born, the petitioner's enjoyment of the estate would terminate, not because his right and title to the estate by virtue of the tailzie had been forfeited or resolved,—for he never had such right or title,—but because the necessity which gave him that enjoyment had itself terminated. As was expressly affirmed by the judgment in the *Mountstewart* case, the infeftment of a remoter heir in the petitioner's position, imports a *fidei commissum* merely, or, as the Judges expressed it in *M'Kinnon's* case, he is "a fiduciary heir holding the estate for the nearer heir," and "in effect but a trustee, although," upon the principle of the feudal law, "he is entitled to the rents for his service while he acts as vassal." These views as to the position of the remoter heir were substantially adopted and repeated by the three Judges whose opinions I have quoted from *Grant's* case and the *Carnock* case. The Lord President's view in the *Carnock* case was that the estate "was held as a trust for the benefit of subsequent heirs." Lord Ivory in *Grant's* case expressed a similar view by saying the remoter heir "is only admitted *ex necessitate* in order to fulfil some feudal and other considerations,"—and in the *Carnock* case by saying "he takes as *quasi* fiduciary for all the other heirs, with certain rights as to rents, pending his possession," and "that reduces the party in possession to an administrator in place of the true proprietor." Lord Curriehill in the *Carnock* case, dealing with certain objections to the sale which, in common with the other Judges, he held not to be well founded, went on to say—"The other objection to that sale is, that the right to the estate which was vested in Mr Nicolson, the seller, was only a conditional fee, and that the sale was made in contravention of that condition." He then stated the facts of the case, and referred back to his opinion in *Grant's* case as explanatory of the grounds on which he held that a remoter heir, whether in fee simple or tailzied succession, could not in any way defeat the legal right of the nearer heir *in spe*; and after pointing out the terms of the destination as these appeared on the face of the title deeds, he added—"This ex-

press condition of Mr Nicolson's own feudal investiture was not a latent one, but a qualification of the real right itself, and effectual not only against himself, but also against singular successors."

It is of little moment to suggest, by way of objection, that none of the terms used by the Judges to designate the peculiar position of the remoter heir in the cases referred to can be said to express that position with full and technical accuracy. The Judges who used the terms "*fidei commissum*," "trustee," "fiduciary heir," "*locum tenens*," and so on, themselves admitted this. We have not always a technical term which expresses all that is peculiar in the position of a party and nothing more. But the peculiarity is not the less real because we can only express it by analogies or in round-about language, in place of by a single word or phrase of technical import. The material thing is, that a remoter heir in the petitioner's position has not the characteristics either of right, title, or possession, which distinguish an heir of entail, properly so called, in possession of the entailed estate by virtue of the tailzie.

It was said in argument that the question at issue turned upon whether the condition as to the birth of a nearer heir was to be regarded as resolutive or suspensive merely. I have already sufficiently indicated my reasons for holding that there is nothing resolutive about it. I have no objections to its being said that there was a suspensive condition involved, except that this is only true in a partial and very limited sense, and consequently the language may be apt to be misunderstood. The tailzie really contains no condition, either suspensive or resolutive, applicable to the petitioner's position. The estate is not destined to him, either under conditions or without conditions, while there is a nearer heir *in spe*. The estate is destined, and lawfully destined, as I have already pointed out, to the heir *in spe*, and it is only failing such heir that there is any destination to the petitioner at all. It may be that if the existence of a nearer heir becomes impossible, the title the petitioner has expede may, with or without the aid of some declaratory decree, be converted from a trust title into an absolute title, so as to serve the one purpose after it has served the other. The latent nature of the trust may facilitate that result, and in that sense the trust may be said to be suspensive of the title which it is possible the petitioner may ultimately come to have. That, however, is a mere question of form and procedure, which does not touch closely the present question.

A remark of mine, in reserving my opinion in the *Carnock* case, to the effect that there might perhaps be room, even in a tailzied destination, for introducing the principle of *Grant's* case where the general law of succession had to be resorted to in order to discover who was heir under that destination, gave rise to a supplementary and very able discussion, to which I listened with much satisfaction and benefit. The result was, however, to satisfy me that, although the tailzied succession may for a time run parallel with the legal succession, it is still the will of the entailer which regulates the order of succession—that where this comes to be otherwise the tailzie is at an end—and that, consequently, there never can be room in a tailzied succession for introducing and applying the law of intestate succession which regulated *Grant's* case.

It occurred to me for consideration at an early stage of this case, whether the petitioner might not by an instrument of disentail strike off the tailzied fetters, so that the entail should be no longer what we term a strict entail, leaving the simple destination which forms the petitioner's difficulty intact. But I am satisfied that the petitioner is at present no more *in titulo* to strike off the fetters than he is to acquire the estate to himself. Nor do I see how the one result could be disjoined from the other. The petitioner claims to put the personality in his pocket—to acquire the residuary heritable estate in fee simple, and to acquire the tailzied estate also in fee simple, which seems to me to imply the evacuation, or the right to evacuate, all the substitutions, and to appropriate the whole estate to his own uses and purposes.

I have only further to observe, that if I had been disposed to take a different view of the petitioner's position, I should have felt great embarrassment from the fact that the only contradictor in the field has nothing at all to do with the tailzied estate, the proposed disentail of which is made the lever on which the whole petition turns. How even the personality is held as between the respondent Mr Hope Johnstone and the Accountant-General in Chancery has not been explained. We know from former law-suits that Lady Baird Preston, as administrator under letters of administration from the Prerogative Court of Canterbury, succeeded, by judgment of the House of Lords, in withholding the personality in England from the management of the trustees appointed by this Court, with consent of the beneficiaries, to act under Sir Robert's trust-deed and settlement, of whom Mr Hope Johnstone is the survivor—*Preston* v. *Melville*, 29th March 1841, 2 Robinson, 88. The whole estate under administration in England was then thrown direct into Chancery, and how and when, if at all, it came to be administered by Mr Hope Johnstone, so as to entitle him to represent it, is a matter upon which we have no information. In no point of view is it easy to see how any judgment of your Lordships granting the prayer of this petition can be *res judicata* against the heir *in spe*, or bar him, if he comes into existence, from challenging that judgment and trying the very question now proposed to be decided.

Upon that question itself, however, and apart from these latter difficulties, the opinion I have formed upon the argument submitted to us differs from that of the Lord Ordinary, whose interlocutor I think should be recalled, and the petition refused.

Lord Benholme—It would be impossible for me, after what has fallen from your Lordship and from Lord Deas, or indeed independent of what I have heard with such pleasure, to have said that this was a case without extreme difficulty, but my view, which I think is a very simple one, and may be expressed within a much shorter period than what has been so beneficially occupied both by your Lordship and Lord Deas, is this—this statute which we are now going to administer and act upon is undoubtedly entirely at variance with the statute law of entail as previously understood. It enables parties to commit a breach of that entail law and to take liberties with entail cases that are utterly inconsistent with the previous law of entail. Now, this statute must prevail if the words which are here quoted actually apply; and what I

have to consider is this, whether this estate is held by virtue of any tailzie dated prior to the first day of August 1848, and whether this petitioner is an heir of entail born on or after the said first of August 1848, being of full age. All that is conceded, or at least there is no great difficulty about it. It is the next words, "being of full age and in possession of such entailed estate by virtue of such tailzie," upon which our judgment is to be formed. Is he, or is he not, in possession of this entailed estate by virtue of such tailzie? Why, he has been served heir of entail in due form. He is as much in possession, in my opinion, as any heir of entail can be. It has not been suggested that he cannot draw the rents and enjoy the proceeds of this entailed estate. But it is suggested, somehow or other that he is possessing not for himself, but that he is a mere fiduciary. I think that is an assumption in which there is no amount of reality. A fiduciary is a party who does not possess for his own benefit, but possesses for the benefit of some other person or persons. Now, has it been suggested, or can it be suggested for one moment, that this petitioner from the time when he became invested with this entailed estate up till the time, if that time ever arrives, when he shall be obliged to denude, is not possessing the estate for his own benefit? That is a plain question. If he is a fiduciary fiar—if he is merely a fiduciary for some other person, some possible person, not a person *in spe*, for it is not even a *spes*, but it is the possible emergence of a nearer heir,—if he is merely fiduciary for that person, how is it that he is entitled, as he expressly and undoubtedly is, to consider the rents of this estate from the date that he entered as fiar under the entail to be exclusively his. It is said that he is not in possession of such entailed estate. But I think he is. He is in possession in every beneficial way, and will remain in possession as long as the possible emergence of a nearer heir under the entail does not happen. Then it is said that he is not in possession by virtue of such tailzie. I should wish to know by virtue of what is he in possession if not by virtue of the tailzie? Is he not served under the tailzie, has he not taken the proper steps by special service under the entail to vest himself in the estate, and if he had not taken those steps he would not be in his present position. It seems to me a very strange argument to say that he is not in possession under the entail but by necessity. That seems to be a very odd thing. How could necessity have given him this estate without the entail? It is, I admit, a necessary consequence of the entail in order to his possession that he must be served. That is quite true, but it is surely by virtue of the entail that he is served. I cannot imagine any one denying that,—that at least at present he is in possession by virtue of the entail. Whether he may always remain in possession of the estate by virtue of the entail, is quite a different thing, but the statute does not say anything about that. The words of the statute are imperative, that this right belongs to him if he is in possession of such entailed estate by virtue of such tailzie. Now it appears to me that there is a great deal more in the distinction between a suspensive and resolutive condition than my brother Lord Deas appears to concede. The difference appears to me to be just this, that the suspensive condition is operating at the moment,—it is operating at present; while the resolutive condition may never operate at all. That is the difference; and surely that makes a difference in the title of the party against whom either the one or the other is to operate. The one condition may never come to take effect at all— Can that be said to be a suspensive condition? Its character is this, that it may come to take effect, and it may be perfectly effectual when it does emerge, but is not that a resolutive condition? Now, it appears to me that after all there is in this distinction, with reference to the words of the statute and our interpretation of them, a very solid ground of judgment. It appears to me that in the words of this statute this petitioner is in possession of such entailed estate by virtue of such tailzie. If I am enabled to affirm that he is in possession of the estate by virtue of this tailzie,—and really in common sense I cannot see any answer to that,—then I am bound, under the words of the statute, without reference to the former law of entail—which it is admitted on all hands is very much impeached, and in fact put an end to in many cases by this statute. It was the intention of the statute that it should be so. And are we to say that we are not to give effect to the plain words of this statute from a reference to any imaginary view of the position of this man who is in possession for his own benefit whilst he remains, and to say that he is a mere fiduciary? I cannot say that I understand what a fiduciary is—who is possessing for his own benefit and who may never possess for any other person's benefit during his whole life. If he is not enabled under this statute to put an end to the entail, although we were not to admit him to this statutory benefit, he might, during the whole of his life be in possession of this estate and put the whole of the rents into his pocket. Is that a fiduciary? I should imagine not. I think the construction of the words of the statute, "in possession" just turns upon this,—is he in possession beneficially, or is it merely, as has been argued, a possession for the benefit of a third person? Now, after what your Lordship has said, I think it is not necessary to go into the other parts of the case. In fact, I think it is admitted that it is upon these plain words, contained in two lines, and our interpretation of them, that the determination of this case depends. I am therefore humbly of opinion that the Lord Ordinary's interlocutor is right.

Lord Neaves—The opinion which I have formed of this case coincides completely with that which has been so ably expressed by Lord Deas, and that opinion has been so fully stated, and the grounds upon which it is rested have been so well explained, and also the cases with which his Lordship is so familiar,—the latter ones especially,—that it will save me from any lengthened exposition. I shall only notice one or two points which strike me as deserving of attention. The present statute under which this disentail is proposed to be made is unquestionably a great interference with the former statute law on the subject of entail. Of that there can be no doubt; and wherever that is the case, and it is in view, we must of course apply it. But I am not aware that this statute to any great effect interferes with the law as to these tailzies that are not subject to fetters. The object of this statute is in fact to undo to a great extent what was thought politic at the time, but which is now thought impolitic to the full extent, namely, the Act of 1685. But with regard to the law,—the common law of Scotland, as I may say, upon testamentary limita-

tions of succession as to destination,—I have not heard much argument which satisfies me that that part of the law is affected. Now, it appears to me that the difficulty in this case is not from the fetters of the entail, but arises from it being a tailzied succession, though containing no fetters, because the law upon that subject is this, as opposed to intestate succession, that a tailzied succession,—that is a destination—is to be so construed as to the will of the testator that a clause which represents certain heirs who may possibly exist *in spe* before the other party claiming is in existence, is differently dealt with from that of the common intestate succession. Of that I presume there can be no doubt. Lord Benholme says he does not understand what "fiduciary" means. I think the words which have been used by our predecessors of very high authority in the law from the very earliest time, and down to the very latest time, when that question has been discussed, leave no doubt as to what is meant by that term. I do not know whether it is now meant to be held that in an ordinary destination, where the party in existence is not the nearest possible heir, that law which has been administered in these old cases is to be discontinued,—that is, the law which was laid down in *Carnock* and the preceding cases. If that is the opinion of Lord Benholme and those who are taking that view, then that is a wider view than I had imagined was pleaded; but if that law is to remain—what then? It comes to this, that the heir who, if there was no nearer person in existence, would be the next heir, is entitled to serve, but does not become thereby the absolute fiar of the estate,—not that his fee is restricted by fetters, but his fee is restricted by the circumstances under which the succession opens to him, and that is explained as arising *ex necessitate*. Lord Benholme does not see how necessity can make a man an heir, but the Court has laid it down that necessity shall entitle a man to serve, and after he has served he shall not have the full power over his estate which he otherwise would have. That is the law beyond all question. Now, that surely is a conditional right of some kind or other. I do not think it is very easy to apply the words "suspensive" and "resolutive" to this case, or cases of this kind. It is an inherent qualification of the man's right from the opening of it until the end of it, either by the accomplishment of the event or the impossibility of that event occurring. Suppose there were no fetters, he would remain heir in the absence of the nearest possible heir serving. He has a conditional interest in that estate. I should like to know what is to be said about that,—is that a suspensive or a resolutive condition? If it is only a resolutive condition, the argument must be this, that he could sell the estate as his own, and not only so, but there is even a more striking illustration of it than a case of sale, because we have seen in some of the cases that a sale may be allowed to a person who himself has a sort of fiduciary right if it is an act of necessary administration for the benefit of all concerned, including himself, and also including the non-existing heir. But can it be said that the next day after the remoter heir serves, in the expectation, and it may be, in the near prospect of a nearer heir,—for there is a marriage to take place in the family, and there is a prospect before twelve months of a nearer heir coming into existence,—that he can sit down and execute a disposition in fee-simple in favour of himself, to affect the existing destination which now stands upon the record, and which is the qualification of his infeftment, as it is a qualification by virtue of law of the service which he has *ex facie* been allowed to make? It appears to me that Lord Curriehill very well explains the nature of that service. He says it is a compromise, by which, on the one hand, the rights of the possible heir are inviolably preserved, and preserved from all invasion; while, on the other hand, the necessities of the estate in regard to due administration or fulfilment of those services, originally feudal, and now to be considered as part of the feudal law, are provided for by the provisional admission of this service of a man who, upon the face of his title, has been allowed to serve as the nearest heir when he is not the nearest heir. It is not the nearest heir in the sense of testate succession who has been allowed to serve,—the two things are inviolably preserved. He has the estate, but at the same time the rights of the possible heir, who may come in next year or years hence, are inviolably preserved. Would it be possible to lay down that as the law of the case, as Lord Curriehill has stated it, if next day after the remoter heir comes in he may convey the estate as if he had it in fee-simple? I cannot conceive that to be the case. Now, it is that which is the object here, for if this man has not a *jus disponendi*,—if he cannot sell the estate, or can only do it in some circumstances,—if he cannot test upon the estate, there being no fetters,—then he cannot be held to be in the position which is contended for. If he were the proper heir in the proper sense of the word, and if there were no fetters, he could alter the destination and convey the estate to whom he pleased. He could do with it gratuitously what he liked, and immediately annihilate the right of the possible heir, whose rights are said to be so faithfully preserved under this arrangement. What prevents him from alienating the estate? What prevents him from testing upon it? It is that he is not the full heir. He has not the *jus disponendi*, not from restrictions imposed upon him by the entail, or by the statute of 1685, or anything else, but by the mere nature of his own position. His hands are as much tied up as if the conditions were *in gremio* of the qualification that he was only to enjoy the estate for his own benefit *ad interim*, but was to be bound to denude the moment a nearer heir came in. That the law has said, not the entail; but the law has said that by virtue of the destination, and that I see no appearance in this statute of any intention to take away. It would, indeed, be rather singular if it were, for the effect would be that the man in whose case there were no fetters would be more effectually tied than the man in whose case there were fetters. If there were no fetters he could not, according to that view, get rid of the estate; he could not dispone it; he certainly could not settle it in fee-simple upon himself or others; but because there are fetters in addition to the restraints of the common law, he is to be allowed to get rid, not only of the statutory fetters imposed by statute law, and repealed or modified by this statute, but he is to get rid of the inherent law of the land itself with reference to a destination of that particular kind, and the construction of which has been fixed for centuries. The original strict rule was not to allow him to serve at all, but as a matter of convenience and necessity he is to be allowed to serve;

but he is only allowed to serve under the indefeasible condition now affecting him, and in my opinion attaching to him, whether you call it suspensive or resolutive, but attaching to him at this moment—that there can be no deed that shall effectually prejudice the nearer heir if he comes into existence. Lord Benholme says he is in possession, and asks how can it be said that anybody is in possession for his own benefit without being the full fiar? Lord Benholme did not understand that, but a man may be a fiduciary fiar and a life-renter at the same time. He may have a deed making him a life-renter in expectation of his children succeeding. He may have the full benefit in every way, with rights of administration of various kinds. But the law may say, "we will make you a possessor of that description, and you shall have a right of possession and other usual rights in the estate, but, as the counterpart of your occupying the position of fiar, your *jus alienandi* shall not become effectual while there is the hope of an emergence of a nearer heir than you." On these grounds, it appears to me that we are extending this statute, which is corrective merely of the statutory law of entail, and using it to annihilate the common law of the land as to the kind of circumstances under which service is required. I think this man is not an heir in possession by virtue of the tailzie; he is not an heir in possession in this way, that he is not the heir of the destination. He is only an heir who is admitted by the law for a limited purpose,—for a purpose of necessity, and he is in possession, not in virtue of the entail, but in spite of the entail, and in virtue of that arrangement of the law for equitable purposes which gives him a certain beneficial right, but restrains him, on the other hand, from doing a single thing that would hurt the person whose rights are thus in abeyance. If he could not without fetters have a *jus disponendi*, can he have it when there are fetters in the entail? What is proposed to be done is just like a disposition, or like a new regulation of the succession. If he could not do that to the prejudice of a possible heir in the first case which I have supposed, it appears to me that there is no indication that he stands in that position with regard to the estate in the second case. He is an heir without fetters, but where there is no nearer possible heir he is surely not an heir of that destination in the same sense as one who might be cut out by a nearer heir coming in and displacing his service. There is a difference between the two. He is only a provisional person, and *prima facie* to be treated as an heir. He is a fiduciary person to that extent, and not entitled to do anything that shall affect the condition on which he gets in, and I take it to be a universal and most important rule of law that no man getting possession upon a condition can invert the condition of his possession, and turn round and destroy the very objects which are committed to him. The statute may do that, and if the statute has done it, it cannot be got over, and there is no help for it. That is the view which some of your Lordships take of the statute, but I do not see any compulsion upon me to consider that this man is in the full, true, and absolute sense an heir of entail in possession in virtue purely of that deed of entail. I think he is a person in possession with a fixed title of the description I have mentioned,—fiduciary to a certain extent, and possibly resolving into something else; but not entitled to use this Act of Parliament for correcting statutory hardships so as to defeat the common law of the land with regard to that matter of ordinary succession under the entail.

Lord Ardmillan—As I concur in the opinion of the Lord President and Lord Benholme, it is quite unnecessary for me to say more than a few words.

We are dealing with a petition presented under the Entail Acts, 11 and 12 Vict. c. 36, and 16 and 17 Vict. c. 94, and relative Acts, by the Honourable Mr Bruce; and the question is, whether he is an heir of entail in possession of the estate of Spencerfield and others in virtue of the entail quoted in the petition.

The aspect in which such a question is presented is very different from what it would have been prior to these recent statutes. According to the older law of Scotland, the creation by deed of entail of rights in favour of parties unborn, even for several generations, was not only recognised as legal, but was according to the intent and policy of the law. But since 1848 the creation by protected substitution of rights in favour of parties unborn is not recognised as according to the policy of the law. It is rather the policy of the law to prevent it. Undoubtedly the present law of entail is intended to afford, and does afford, facilities to heirs of entail in possession to escape from the fetters which protect ulterior substitutions.

This petitioner possesses all the requisites which, according to the statute, entitle him to disentail. He was born in 1851,—that is after 1848: he is of full age; he is in possession of the estates; his title of possession is the deed of entail. The only remaining question is, Can he be considered as an heir of entail within the meaning of the statute? The right to apply for authority to disentail, and the right to disentail under such authority, is given to "any heir of entail" having the requisites already mentioned.

I am of opinion that the petitioner is an heir of entail according to the meaning of the statute. The only conditions which are, or can be, urged as qualifying his right, are, in my opinion, resolutive and not suspensive conditions. There are two such conditions. The one is, that if he succeeds to the Earldom of Elgin he must cease to possess these estates, and must devolve them on the next heir under the destination. Now, it has been admitted in the argument for the respondents, and nothing to the contrary has fallen from any of your Lordships, that this condition in regard to succession to the Earldom is resolutive and not suspensive, and that it does not destroy or impair the right of the petitioner, in the meantime, to possess as heir of entail. It is as heir of entail that he has entered into possession. It is as heir of entail that he is put under obligation to surrender possession; and that he must devolve the estate on the next heir, that is, the heir of entail next to himself, for he is the present heir of entail. So much for the first condition. If there were none other the petitioner would succeed.

The second condition is said to be that if hereafter the Earl of Elgin should marry and have a son, that son would be entitled to the estates, and the petitioner would be bound to denude. I am not quite satisfied that this proposition is well-founded, for the terms of the deed must be kept in view,

and there is here no express obligation to denude in that event. At the close of the argument this point was very ably urged by Mr Clark. But, in any view of it, I am of opinion that this second condition, like the first, is resolutive only, and not suspensive. Since the death of Lord Elgin would be an event contemplated as resolving the right, but not suspending it, the birth of a son to Lord Elgin, who is not now married, would be an event also contemplated as resolving the right, but not suspending it. In both cases the petitioner is heir of entail till the event occurs. I can see no reason for holding the first condition to be resolutive and the second condition suspensive. I have heard no intelligible reason stated. The legal and logical distinction between a condition which suspends the right and a condition which resolves the right is manifest and important. In the case of a suspensive condition there is truly no right till, by the event contemplated in the condition, the suspension is removed. In the case of a resolutive condition, the right is good till the occurrence of the event which purifies the condition; and then, and not sooner, the right previously good is resolved or terminated. (See Stair, B. 1, tit. 14, sec. 4; Ersk., 3, 3, 11; 1 Bell's Com. 236.) Bearing in mind this distinction, I cannot avoid the conclusion that the petitioner is an heir of entail within the meaning of this statute so long as his right remains unresolved; and that, as heir of entail, the statutory privilege is his. He is fiar except in so far as fettered; and the statute enables him to clear himself of the fetters, and to acquire the estate in fee-simple. I think it is inaccurate to speak of the petitioner as Lord Deas and Lord Neaves have done, as being a "remoter heir." He was, when he succeeded, and he still is, not a remoter heir, but the only living person who could inherit this estate. The Earl of Elgin being excluded, this petitioner was at the date of his succession the nearest heir—the proper heir—the only person who then could be heir, and he has so succeeded, and now possesses, on titles completed as heir of entail. If he were to incur forfeiture it would be as heir of entail. If he were called on to convey, it could only be as heir of entail. If he died, the next heir who would take would be the next heir of provision under that entail, the petitioner being the heir of entail preceding the party so taking. Then suppose that he possessed for years and married, and that, under remedial and enabling statutes, he made provision for his widow, can it be maintained that his deed of provision, made while he was in possession as heir of entail, would be void? Yet void it would be if the respondent's argument is sound, and if he is not an heir of entail; for it is only as heir of entail that he can make such provision.

It was admitted by Lord Deas, if I understood him aright, that unless the petitioner is heir of entail to the effect of being entitled to disentail and obtain the estate in fee-simple, he cannot escape from the fetters; and we are called on to say that he must remain bound by these fetters. Now, I cannot say so. I am of opinion that an heir possessing an entailed estate by virtue of the entail—an heir who was born after 1848, and who is of full age—cannot, according to the present law of entail, be held to be permanently bound by the fetters, and unable to relieve himself. It is the intent and policy of the present law of entail to enable him to get free from these fetters. Now, it is to be observed, that in this case the fetters would be permanently fixed on the estate and on the heirs. It may be many long years, perhaps even a century, before any heir of entail can possess these estates who is not subject to a resolutive condition, and I do not think that such permanency of fetters is according to the terms or the meaning or the policy of the existing law. Possible contingencies of succession to heirs unborn are not protected or favoured by the present law of entail, and this petitioner is in the exercise of a privilege conferred by statute.

Without detaining your Lordships longer, I have merely to express my concurrence in the opinion of the Lord President and Lord Benholme, and in the judgment of the Lord Ordinary.

Lord Jerviswoode—The opinion I have formed is in entire accordance with that of my brother Lord Deas, and of Lord Neaves, who has also given an opinion to that effect, and I think it unnecessary to do anything further than to concur in that opinion.

Lord Gifford—While feeling the difficulties attending this case to be very great, I have come to be of opinion that the prayer of the petition should be granted, and that authority and warrant should be given for recording the instrument of disentail, and for payment to the petitioner of the whole residue of the trust-estate of the late Sir Robert Preston.

In the view which I take of the case, the whole questions turn upon the true meaning and effect of the provisions in the Entail Amendment Act of 1848, and the relative statutes following thereon. The present petition is presented and insisted in solely in virtue of these statutes; and the question is, Do these statutes confer upon the present petitioner the right which he claims, to disentail the lands of Spencerfield and others, and to obtain payment of the trust-funds which the late Sir Robert Preston directed to be laid out in the purchase of other lands to be entailed in the same terms as the lands of Spencerfield?

The right to disentail or to obtain payment of money destined for the purchase of entailed estates, is a right conferred by statute, in certain cases fixed and defined by the statute. It is in no case a question for the discretion of the Court—the Court have no discretion in the matter. They have simply to decide in each case whether the petitioner does or does not possess the statutory right—that is, whether he occupies the position and possesses the qualifications which the statute requires to combine in the person of him on whom it confers the right to disentail. If the present petitioner has the requisite qualifications, then he has an absolute right to disentail the lands and to uplift the money; and the Court, without regard to consequences, must give effect to the statute.

The right to disentail lands already entailed, and the right to receive or uplift moneys destined for the purchase of lands to be entailed, are parallel rights, and although they are conferred by different clauses of the statute, the same rules and the same arguments apply to both. The question regarding date having been settled by the case of *Black*, it will be sufficient to consider the petitioner's right to disentail the lands of Spencerfield. I do not think it is possible to dispose of the two branches of the petition in different ways.

The second section of the Entail Amendment Act of 1848 confers the right to disentail in the following words:—"Where any estate in Scotland is held by virtue of any tailzie dated prior to 1st August 1848, it shall be lawful for any (1) heir of entail (2) born on or after the said 1st August (3) being of full age and (4) in possession of such entailed estate (5) by virtue of such tailzie, to acquire such estate in whole or in part in fee simple, by applying to the Court of Session for authority,"—and so on. For the sake of clearness, I number the requisites which the statute requires to meet in him on whom it confers the right to disentail. They are five in number, as applicable to the case of an entail dated prior to 1st August 1848, and of course this applies to the entail of Spencerfield, which is dated 3d November 1832. The five requisites are, the petitioner must be—(1) heir of entail; (2) born on or after 1st August 1848; (3) of full age; (4) in possession of such entailed estate; and (5) in possession by virtue of the tailzie. If these five requisites combine, then the petitioner has the right to disentail under the statute, and that whatever the effect of such disentail may be. The effect of the disentail may in some cases be attended with doubt, and possibly there may be many questions as to what the effect of the disentail really is. None of these questions however can be decided under the present petition, though of course it is quite necessary to look to the consequences of the decision now to be given. The sole question under the present petition seems to be, Does the petitioner possess the five qualities abovementioned which the Entail Amendment Act requires? I am humbly of opinion that he does.

I think it was not disputed at the bar—at all events, I think it cannot be successfully disputed or reasonably doubted—that the petitioner possesses what I have numbered as the second, third, and fourth requisites under the statute. He was born after 1st August 1848; he is of full age; and he is in actual and undisputed possession of the entailed estate. The only points upon which any doubt can be reasonably raised are in reference to the first and fifth requisites. Is the petitioner, in the sense of the Entail Amendment Act, an "heir of entail," and is he, in the sense of the statute, "in possession of such entailed estate by virtue of the tailzie?" Each of these points requires and deserves the fullest and most careful consideration.

I am of opinion that the petitioner is, in the sense of the Entail Amendment Act, an "heir of entail."

No doubt the petitioner is not, and was not at the date of his service, the nearest possible heir of entail; for if the petitioner's brother, the present Earl of Elgin, had a son, such son (so long as he shall not succeed to and be in right of the title of Earl of Elgin) would be a nearer heir than the petitioner under the existing branch of the destination. I am of opinion, however, that the circumstance that there may be a nearer possible heir than the petitioner does not prevent the petitioner from being "heir of entail," in terms of the Entail Amendment Act.

The Act does not say that the disentailer shall be the nearest possible heir. It does not even say that he shall be the nearest heir. It merely requires that he shall be an heir of entail, or, in the very words of the statute, "any heir of entail,"—adding as a farther and restricting requisite that he shall be in possession of the entailed estate by virtue of the tailzie.

Though not the nearest possible heir, the petitioner is undoubtedly an heir of entail. He has all the characters of such an heir. He is the second son of the late Honourable James Bruce, the eldest son, the present Earl of Elgin, being excluded by the title. The petitioner is served as heir male of the said James Bruce, and as present nearest and lawful heir of tailzie to the last vest heir the late Charles Dashwood Bruce, and he has completed his title as such. In virtue of this service and title the petitioner is in possession of the entailed estate, and admittedly no one else has or can have at present any title to possess. If the petitioner were to die, his elder brother still having no issue, the petitioner's own son, or the next heir of tailzie, would serve to the petitioner as to the heir last vest and seised in the lands; and if the present Earl of Elgin were to die without issue, the petitioner on becoming Earl of Elgin would be bound to demit in favour of the heir next in succession; but he would be so bound simply in terms of the entail, which provides that "whenever the heirs hereby called to the succession of my said estates shall come to inherit the title and represent the family and Earldom of Elgin, they shall be bound to demit the possession of my said estates in favour of the heir next in succession;" so that it is only because the petitioner is heir of entail called to the succession that he will be bound to demit on becoming Earl of Elgin.

There is almost no attribute of an heir of entail under the tailzie which the petitioner does not possess,—nearness of blood, service, infeftment, possession, capacity to transmit, obligation to demit in case of succeeding to the Earldom, and liability to forfeit for contravening the provisions of the entail. The petitioner is entitled as heir of tailzie to uplift and retain the rents without any liability to account.

The argument for the respondent, however, is, that the petitioner would be bound to denude in the event of a nearer heir coming into existence—that is, in the event of the present Earl of Elgin having a son; and it was urged with great force that this circumstance alone is sufficient to deprive the petitioner of the character of heir of entail in the sense of the Entail Amendment Act. The argument is, that an heir of entail who is so, or who may be so only temporarily, and who holds the estate only until a nearer heir is born, is not the heir of entail to whom the Entail Amendment Act gives the all-important power of putting an end to the entail altogether. It is impossible not to feel the weight of this view; and it is not without great hesitation that I have ultimately come to think that, notwithstanding this all-important speciality in the petitioner's position, he is still, in the sense of the Entail Acts, an heir of entail.

I am willing to assume, and I do assume in the present case, that on the birth of a nearer heir—that is on the birth of a son of the Earl of Elgin—the petitioner would be obliged to denude in his favour, and it is on this assumption that my opinion proceeds. I may say, in passing, however, that I am not quite satisfied that in the event of a nearer heir being born the petitioner would be bound to denude. I do not think it necessary to decide this question in the present case, and I do not mean to do so. It appears to me always to be a question of the intention of the maker of the

entail or framer of the destination, and there are specialties in the present case which distinguish it from any of the cases which have formerly occurred. A powerful argument was submitted for the petitioner, that under this particular deed of entail there would be no obligation to denude, and I desire to leave that question entirely open. I think it enough for the present case that, even assuming the obligation to denude, the petitioner is still entitled to disentail.

Now it humbly appears to me that the circumstance that in certain cases an heir of entail will be bound to divest or denude himself of the estate, does not deprive him of the character and privileges of heir of entail so long as the event has not occurred. No better illustration of this can be given than that which arises in the present case. Admittedly the petitioner must denude if he should become Earl of Elgin, but it has not been maintained by the respondent—I do not think it could be successfully maintained—that this circumstance alone would prevent the petitioner from disentailing. I do not think there is any distinction in principle between the contingent and uncertain event of the petitioner succeeding to the earldom, and the other event, equally contingent and uncertain, of the present Earl of Elgin having a son. If the first possible contingency would not prevent the disentail, why should the second? The events are almost equally possible, and neither of them depends in the least upon the will of the petitioner.

This leads me to the consideration of the question, whether the right of the petitioner as heir of entail served and in possession is suspensive or resolutive, that is, whether his right is suspended so long as there is a possibility of a nearer heir, or whether his right is only resolutive and liable to be terminated on the birth of a nearer heir. This is probably just another way of stating the difficulty, but it assists in arriving at a solution of the case. Now, it appears to me that the petitioner's right as heir of entail is not suspensive but merely resolutive, assuming as I do the obligation to denude when a nearer heir comes into existence. The petitioner's service is unconditional, and his title is absolute. There may never be a nearer heir, and no new title will be required when the existence of a nearer heir becomes impossible. In short, the possible emergence of a nearer heir seems to belong to the same category as the possible accession of the petitioner to the Earldom of Elgin. Either event would resolve the petitioner's right, but the mere possibility of these events does not suspend it.

To hold that the petitioner's right is suspended would really be to create a trust of indefinite and unlimited duration, and of the most anomalous description. It might very easily happen that there should be a succession of Earls of Elgin either unmarried or without male issue, and this might last a century or more. It would be very strong to hold that during all such period the separate entailed estate of Spencerfield can be only held in trust, and that only trust acts of administration were competent in regard to it. Certainly nothing could be more against the spirit of the Entail Amendment Act than to prevent the disentail of Spencerfield, for it may be one or two centuries, although all the time the beneficial enjoyment of the estates was in heirs of entail of full age and *sui juris*.

The case of *Mountstewart*, which, altering the former practice, allowed the nearest heir of entai to serve and complete his title notwithstanding the possibility of a nearer heir, seems to me, in connection with the Entail Amendment Act, to settle the present question, for it fixes that the possibility of a nearer heir does not prevent the petitioner from being "heir of entail," and the right to disentail is given to any "heir of entail" who has the other statutory requisites. None of the later decisions seem to me to decide the present question, for none of them had any reference to the pure statutory right of disentailing. These decisions had no reference to the Entail Amendment Act, and there was no occasion to consider how far a person in the position of the petitioner was entitled to disentail under these statutes.

I may add, in passing, although I think the matter does not affect the decision of the present case, that as I read the Entail Amendment Act the mere disentailing and recording an instrument of disentail does not *per se* alter the destination of the lands. The disentail seems to me merely to remove or strike off the fetters, but it leaves the destination as a simple destination untouched. The prohibitions, the irritant and resolutive clauses, are at an end, but the mere act of disentail as such goes no further. If this be so, it in one view strengthens the argument that the Entail Amendment Act intended to give the power to disentail to an heir in the position of the petitioner. It merely enables the heir of entail in possession to convert a fettered destination into a simple one, but no further or otherwise enlarges his right. After the disentail he can do all that he could have done under an unfettered destination, but nothing else. I notice this because it is right to consider all consequences, but I think we are bound simply to allow the disentail, and that we cannot decide any other question in this case.

The only other point on which doubt has been thrown is whether the petitioner is in possession of the estate "by virtue of the tailzie." This, of course, is a necessary and statutory requisite. The suggestion is that the petitioner is in possession, not by virtue of the tailzie under which he is not the nearest possible heir, but in virtue of a rule of law introduced by the decision in the *Mountstewart* case, by which rule of law the petitioner, although he has no present right to the lands, is from considerations of expediency allowed their interim enjoyment as a *quasi* fiduciary. I cannot take this view. The petitioner is in possession by virtue of his service, and the service proceeded under the tailzie. The petitioner was not put in possession by any special act of the Court, like a judicial factor or interim nominee. He took possession as heir of entail and in no other character, and he did so as a matter of absolute right. There was no rule of law called into play excepting the rule of law that the nearest heir of entail is entitled to serve and to possess, and it is just upon such heir served and in possession that the Entail Amendment Act confers the right and power to disentail.

I am therefore of opinion that the petitioner possesses, under the Entail Amendment Act, the right to disentail the lands and funds in question, and that the prayer of the petition should be granted.

The Court pronounced the following interlocutor:—

"The Lords, having resumed consideration of this cause, with the assistance of three

Judges—Lords Benholme and Neaves, of the Second Division, and Lord Gifford (Ordinary)—and heard counsel on the reclaiming note for John James Hope Johnstone, Esq. of Annandale, Sir Robert Preston's trustee, against Lord Shand's interlocutor of 10th June 1873: After consultation with the said other Judges, and in conformity with the opinion of a majority of the seven Judges present at the said hearing, adhere to the interlocutor reclaimed against, and refuse the reclaiming note, and remit to the junior Lord Ordinary to proceed further."

Counsel for Petitioner—Solicitor-General (Clark) and Mackay. Agents—Murray & Falconer, W.S.

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

I., clerk.

Friday, February 13.

FIRST DIVISION.

[Lord Mure, Ordinary.

TENNANT *v.* FYFE.

Writ—Construction (contra preferentem)—Jus quæsitum tertio—*Essential Error—Obligation to Assign—Conditional Obligation—Duty of Disclosure.*

1. Circumstances in which a party *held* not entitled to construe a writ, of doubtful import, in his own favour, against a second party—said first party having himself selected the terms of the document.

2. Where a proof was held to have established (1) that the defender in subscribing a document founded on by the pursuer had done so under essential error as to his legal rights; and (2) that the pursuer was aware of the error on the part of the defender—*held* that the pursuer could not in law avail himself of said error, but was bound to disclose the true state of matters to the defender.

3. Circumstances in which obligations alleged to have been undertaken by the defender *held* not to be inforceable by the pursuer, —he having failed to perform the counter obligation incumbent on him, and which was the condition of the undertaking on the part of the defender.

Process—Expenses.

Opinion as to expenses of reclaiming note (against an interlocutor dismissing action as irrelevant) in which reclaimer was successful, though ultimately unsuccessful upon the merits.

This was an action of declarator, implement, and damages at the instance of Robert Tennant of Scarcroft Lodge, near Leeds, sometime proprietor of the lands and barony of Tranent, in the county of Haddington, against James Fyfe, lime and coal merchant, residing at Sunnybank, Shipley, near Leeds, and one of the tenants of Tranent Colliery, part of the said estate of Tranent.

On 18th March and 2d April 1870 the pursuer entered into a lease of the colliery and other subjects on the estate of Tranent, with certain parties, and the survivors and survivor of them, and their heirs or assignees. The lease was for nineteen years from Candlemas 1870, and the yearly rent was £600, or, in the option of the landlord, certain lordships therein specified. The defender became security for payment of the first three years' rents, conform to tested obligation endorsed on said lease, of date 8th April 1870. After the lease was granted, a company was formed for the purpose of working the said colliery, under the name of the Tranent Coal Company; and under that social name or firm the colliery was worked, and the whole business thereof carried on from the commencement of the lease. The partners were the four lessees, one of whom superintended the working of the colliery, while another had the charge of the mercantile and shipping department of the business of the company. The defender alleged that he had no control of, or interest in, the business of the colliery or of the company, other than as cautioner to a limited extent. The lessees purchased the plant at the colliery, agreeing to pay the value thereof, £1226, 12s. 6d., in August 1870. They also entered on possession of the subjects. It soon appeared, however, that they were without sufficient capital, and had got into difficulties. Their cautioner, Mr Fyfe, had to make considerable advances on their behalf, and in August or September 1871 he came to Scotland and examined the condition of their affairs, which were found to be in such a state that it was quite apparent that the colliery could not be carried on by them. The said James Fyfe, with a view to some arrangement for bringing his liabilities to an end with as little loss as possible, had meetings with Mr Tennant, who at the time was endeavouring to negotiate a sale of the estate, and also with his agent, Mr Duffield, and his law agents in Edinburgh, Messrs Macrae & Flett, Writers to the Signet. The result of these meetings was that the defender, relying, as he alleged, upon the representation of Messrs Macrae & Flett, and in consequence thereof, formed the opinion that the best course for all parties was a transfer to himself of the interest of the three non-resident partners in the said lease and colliery, so as to enable him and the resident partner to carry on the colliery; and he accordingly had sundry negotiations with the Tranent Coal Company, which resulted in a minute of agreement, dated 23d September 1871, being entered into between the said three partners on the one part, and the defender on the other part (the fourth partner being a consenting party to the transaction), whereby the first parties engaged to retire from the said coal company on receiving payment of their respective interests therein, as specified in the company's ledger and in the said minute; and the defender agreed to pay the said sums to the said first parties, who further consented to their respective interests in the leases of the said colliery being assigned to the defender, with entry at 30th September 1871, he relieving them as partners foresaid, and as individuals, of all claims or demands in relation to said coal company competent against them, either under said leases or otherwise, prior and subsequent to the said term of entry. By the sixth article of the said minute of agreement, it was provided that, in the event of the landlord not consenting to relieve the said retiring partners of their obligations under the lease, the agreement should become null and void. The defender alleged that at the date of this agreement he erroneously believed that assignees without the