the nomination of trustees, was not intended as a self-subsisting independent act, but had distinct relation to the making of the codicil. Immediately after scoring out the words in his deed of 1868, the testator, on the afternoon of the same day (12th October 1872), recorded in the writing which he intended to be operative as a codicil the reason for the change which he had made on his will, and at the same time added provisions shewing that it was not his intention to deprive his grandchildren of all benefit under his settlements, and in language importing a present act of gift he made another bequest in their favour. The terms of the codicil are, I think, sufficient to shew that he regarded it as an operative deed or writing, and that he meant it to control and modify the effect of his deed of settlement, and if other proof were necessary the evidence given by Mrs Matheson strongly supports this view. It is to be observed that the proof allowed by the interlocutor of 3d November 1874, before the discussion took place in the case, was of a more limited nature than it probably should have been, for the parties were not allowed any proof as to the intention of the testator in the obliteration of part of his deed. There is, however, enough, I think, under his own hand, and separately in the evidence which has been adduced, to warrant the conclusion at which I have arrived.

"Cases in which obliterations have occured in deeds have usually been presented in the form of actions of proving of the tenor, and I observe that in the case of *Dow* v. *Dow*, 30th June 1848, 10 D. 1465 (Lord Cockburn dissenting), the Court required an action in that form to be raised. In the present case, however, I think such an action is unnecessary, because, in the first place, all the parties interested are in Court, and desire to have the questions between them tried in this process, and there does not appear to be any difficulty to prevent this being done, and in the next, because, notwithstanding the deletions, the words originally written may still be ascertained with certainty on the face of the deed itself."

This judgment was acquiesced in.

Counsel for the various Parties—Burnet—Strachan—M'Laren—and J. C. Smith. Agents—J. W. & J. Mackenzie, W.S.—G. & H. Cairns, W.S.—Thomas M'Laren, S.S.C.—Walls & Sutherland, S.S.C.

Friday, January 14.

FIRST DIVISION.

[Lord Young.

VISCOUNT FINCASTLE *v.* LORD DUNMORE AND OTHERS.

Entail—Disentail—Entail Amendment Act (11 *and* 12 *Vict. cap.* 36)—16 *and* 17 *Vict. cap.* 94, *sec.* 24.

D, who was heir of entail in possession of an estate held under an entail dated in 1841, presented a petition in 1864 for authority to disentail. After the usual procedure, and the three next heirs having lodged deeds of consent, the Lord Ordinary granted the petition. No pecuniary consideration was given for the consents, on the understanding that the disentailed lands were to be sold and the proceeds applied in the purchase of other lands to be entailed on the same institute and series of heirs and under the same conditions as in the previous entail. For that purpose D executed a trust-disposition in favour of trustees, who were duly infeft. In 1869 D presented a petition for authority to acquire the said estate in fee-simple, and called as respondents (1) the then three next heirs of entail, and (2) the trustees under the trust-disposition. No answers were lodged, but deeds of consent were granted by the three heirs, and in 1870 the Lord Ordinary interponed authority to the transaction, and authorised D to acquire the estate in fee-simple. In 1871 an heir-apparent was born to D, who meanwhile had borrowed on the security of the disentailed lands as fee-simple proprietor.—*Held* (1) that under sec. 1 of the Entail Amendment Act (11 and 12 Vict. cap. 36) the petitioner could not disentail without the consent of an heir-apparent, and that there being no such heir, he was not entitled to do so; but (2)—*diss.* Lord President—that under 16 and 17 Vict. cap. 94, sec. 24, the heritable securities remained good to the creditor, who had *bona fide* acted upon a "judgment and decree" which was as regards them "no longer reducible on any ground of irregularity or non-compliance" with the provisions of the statute.

The Earl of Dunmore was heir of entail in possession of the lands and estate of Harris, under a deed of entail in favour of heirs-male dated in 1841, when in 1864 he presented a petition under the Acts 11 and 12 Vict. cap. 36, and 16 and 17 Vict. cap. 94, for disentail of a portion of the lands. After the requisite consents, those viz. of the three nearest heirs, had been obtained, and the other steps of procedure had been complied with, the instrument of disentail was executed. No pecuniary consideration was given for the consents, on the understanding that the disentailed lands were to be sold, and the proceeds were to be applied in the purchase of other lands, to be entailed on the same institute and series of heirs, and under the same conditions as in the previous deed.

In conformity with that object and understanding, Lord Dunmore, on 21st June 1864, executed a trust-disposition in favour of the Countess Dowager of Dunmore and John Tait, as trustees for the above amongst other purposes, and they were duly infeft, and exercised the powers and directions given to them under the deed.

In 1869 Lord Dunmore presented to the Court a petition for authority to acquire in fee-simple the property he had previously conveyed in the trust-disposition of 1864, and called as respondents (1) the then three next heirs of entail, his uncle and two cousins, and (2) the two trustees under the trust-disposition. At that time Lord Dunmore had no heir-apparent. No answers

were lodged to this petition, and the consents of the three heirs having been obtained on the footing of certain payments, and the deeds of consent granted, the junior Lord Ordinary, after the usual procedure and a remit, pronounced an interlocutor, dated 5th February 1870, interponing authority to the transaction, and authorising Lord Dunmore to acquire in fee-simple the southern portion of the estate of Harris, and granting warrant to and ordaining the trustees under the trust-disposition to execute a conveyance thereof to him in fee-simple.

That decree was extracted, and following upon it a deed of disposition and conveyance, and discharge and ratification, dated March 1870, was executed, whereby, on the one hand, the trustees above-named conveyed to Lord Dunmore the southern half of the estate of Harris, being the lands conveyed to them under the trust-disposition in 1864, and, on the other hand, Lord Dunmore ratified and confirmed the whole intromissions and actings of the trustees, and discharged them accordingly.

Thereafter Lord Dunmore borrowed from James Campbell Tait, W.S., Edinburgh, the sum of £35,000 upon the security of these lands, of which he was now fee-simple proprietor.

Viscount Fincastle, Lord Dunmore's only son and his heir-apparent, was born on 22d April 1871.

The present action was at the instance of Lord Fincastle, with consent of his father Lord Dunmore as his administrator-in-law, and concluded for reduction of (1) the above mentioned interlocutor or decree, dated 5th February 1870; (2) the above-mentioned disposition and conveyance, and discharge and ratification, dated March 1870; (3) the above-mentioned bond and disposition in security for £35,000, granted by Lord Dunmore in favour of James Campbell Tait; and (4) certain assignations of the said bond and disposition in security, varying in amount, to eight different parties. It further concluded for declarator that the trust constituted in 1864 by Lord Dunmore still subsisted. Lord Dunmore, the trustees above-mentioned, the three consenting heirs in the petition for disentail granted in 1870, the bondholder James Campbell Tait, and the various assignees, were all called as defenders.

The pursuer, *inter alia*, averred—"The defender, the Earl of Dunmore, had no heir-apparent under the said destination until the birth of the pursuer, who is his only son, which occurred on the 22d day of April 1871, being subsequent to the date of the foresaid interlocutor or decree pronounced by the Court in the said petition. The said application to acquire the said lands in fee-simple, with all that has followed thereon, was thus incompetent and inept."

He pleaded—"(1) The prayer of the said petition to acquire in fee-simple having been granted without the requisite consents, the interlocutor or decree dated 5th February 1870 was and is unwarranted, incompetent, and inept, and ought to be reduced as concluded for. (2) The defenders the Countess Dowager of Dunmore and John Tait, trustees foresaid, not having been *in titulo* to grant the disposition and conveyance, nor the defender the Earl of Dunmore to grant the ratification and discharge contained in the deed dated 25th, 26th, and 29th March 1870, the same are inoperative and null and void, and as such should be reduced and set aside. (3) The trust-deed dated 21st June 1864 being still in force, and the said defenders, the trustees foresaid, being still bound to execute the trust purposes therein contained, so far as not yet implemented, the pursuer should have decree of declarator and implement as concluded for. (4) As the defender, the Earl of Dunmore, is not and was not at the date of the bond and disposition in security, 12th April 1870, fee-simple proprietor of the lands and others therein mentioned, he was not *in titulo* to grant the disposition thereof to the defender James Campbell Tait, contained in that deed, and the same, and the various assignations thereof, should be reduced as and to the extent concluded for. (5) The interlocutor or decree and deeds libelled on and in the summons being unwarrantable and incompetent, and being pronounced and granted in prejudice of the pursuer's rights in the premises, he is entitled to decree of reduction, declarator, and implement as above set forth."

The defender Lord Dunmore pleaded—"(1) The requisite consents having been given to the petition to acquire the estate in fee-simple, the decree of 5th February 1870 was valid and unchallengeable. (2) The disentail effected in 1864 being for the purpose of selling the lands of South Harris with a view to the purchase of other lands to be entailed on the same series of heirs, and the trust-deed having been granted solely with the view of carrying this purpose more completely into effect, the consent necessary to the disentail of the trust property was merely such consent as was requisite to the disentail of the lands in 1864. (3) The defender did not, under the decree dated 9th June 1864 and instrument of disentail thereafter recorded, acquire the lands and estate of South Harris in fee-simple within the meaning of the Act 11 and 12 Vict. cap. 36. (6) The disposition and conveyance by the Countess of Dunmore and Mr John Tait as trustees was a valid and effectual deed, in respect that the decree of disentail of the trust property was valid, and these trustees only obeyed the decree of the Court in granting the said conveyance."

The defenders, Lord Dunmore's trustees pleaded—"(1) The disposition and conveyance executed by the defenders in favour of the Earl of Dunmore having been granted under authority of the decree of the Court, the trust in favour of the defenders was extinguished. (2) The trust having been validly put an end to, the defenders are not bound again to take it up and to execute the unfulfilled purposes thereof."

The defenders James Campbell Tait and others adopted the defences and pleas stated by Lord Dunmore, and in addition, *inter alia*, founded upon the Act 16 and 17 Vict, cap. 94, sec. 24, which enacted—"Every judgment and decree pronounced, and that shall be pronounced, upon any application under the said recited Act or under this Act, where such judgment or decree has not been, or shall not be, brought under review of the House of Lords by appeal, or brought under reduction upon any relevant ground during the period within which such judgment or decree might have been appealed from, shall, as regards third parties acting *bona fide* on the faith thereof,

be no longer reducible on any ground of irregularity or non-compliance with the provisions of the said recited Act or of this Act, but in respect of any such ground of challenge be final and conclusive; and the period during which challenge or appeal is competent under the said recited Act or under this Act of any such judgment or decree, or of any instrument of disentail or other deed executed in virtue of such judgment or decree, shall not be extended in respect of the minority or want of capacity to act of any person or persons whatever."

They pleaded—"The bond and disposition in security and assignations thereof having been made and taken *bona fide* on the faith of the decree of disentail, and the said decree not having been appealed from or brought under reduction within the time appointed by law, the said bond and disposition in security, and assignations thereof, are unchallengeable, and ought not to be reduced."

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh*, 2*d July* 1875.—The Lord Ordinary having heard parties' procurators, and considered the closed record and whole process—Finds that the prayer of the petition for authority to disentail, in which the interlocutor of 5th February 1870 in the first place mentioned in the conclusions of the summons was pronounced, was granted without the consent required by law, and that the said interlocutor, and the deed or writing dated 25th, 26th, and 29th March, and recorded in the Register of Sasines 1st April 1870, in the second place mentioned in the conclusions of the summons, are in consequence invalid; but finds, nevertheless, that the bond and disposition in security for the sum of £35,000, with interest and penalties corresponding thereto, and containing in security of said sum, interest, and penalties, a conveyance of the lands and estate of South Harris, described in the conclusions of the summons, granted by the defender the Earl of Dunmore in favour of James Campbell Tait, W.S., dated the 12th, and recorded in the division of the General Register of Sasines applicable to the county of Inverness the 26th day of April 1870, and the several assignations thereof in the 4th, 5th, 6th, 7th, 8th, 9th, 10th, and 11th places mentioned in the conclusions of the summons, are, by virtue of the 24th section of the Act 16 and 17 Victoria, cap. 94, valid and effectual securities, and that the several sums of money contained in the said bond and disposition in security, and assignations thereof, form valid and effectual charges on the said lands of South Harris and others: Therefore reduces the said interlocutor and deed or writing, and decerns and declares as regards said writs in terms of the reductive conclusions of the summons, but always under the declaration that this decree of reduction shall not prejudice or affect the said bond and disposition in security and the several assignations thereof; and that the dispositions therein contained shall be held to subsist, in so far as necessary, to protect the said bond and disposition in security, and the assignations thereof, and the rights of the creditors therein: Further, assoilzies the said James Campbell Tait, &c., &c. . . . . from the whole conclusions of the summons: Grants warrant to the keeper of the Register of Sasines to mark upon the said register that decree of reduction has been pronounced of the said deed or writing, subject to the exception above mentioned: Finds and declares, but without prejudice to the validity of the said bond and disposition in security, and assignations thereof, that the conveyance made, and the trust constituted by the defender the Earl of Dunmore under his trust-disposition, dated 21st June 1864, in favour of the defenders Catherine Dowager Countess of Dunsmore and John Tait, as his trustees, is operative and subsisting, and decerns and ordains the said two last-mentioned defenders to give effect to and forthwith to execute the purposes contained in the said trust-disposition in so far as the same have not been already implemented by them, subject always to the effect of the said bond and disposition in security and assignations thereof as valid securities on the said estate of South Harris and others: Finds no expenses due, and decerns."

The defenders reclaimed, and argued—The date of the trust-deed of 1864 was not the date of a new entail which required the consent of an heir-apparent to break it. Lord Dunmore was still heir under the entail of 1841. The old fetters were relaxed for a special purpose. The execution of the trust-deed was practically one transaction with the application for disentail, and Lord Dunmore was not in truth fee-simple proprietor, but was subject to conditions and limitations. The reductive conclusions of the summons were intended to open the way for the declaratory conclusion that the trust was still subsisting and ought to be carried out. But the only parties who had a right to demand the fulfilment of the personal obligation under the trust-deed had released him from that by consenting to his acquiring the estate in fee-simple, and the pursuer therefore had no title.

The doctrine of *jus quæsitum tertio* was not applicable, for in 1864 Lord Dunmore and the consenting heirs were absolute masters of the property, and could have done with it what they chose.

The Act 16 and 17 Vict. cap. 94, sec. 24, was a complete protection to *bona fide* creditors, who here acted on the faith of a decree of Court. The cases decided under the Montgomery Act had no application.

Authorities—*Black* v. *Auld*, 5th Nov. 1873, 1 R. 133; *Preston Bruce* v. *Johnstone*, 6th March 1874, 1 R. 740; *Riddell* (*Petitioner*) 6th Feb. 1874, 1 R. 462; *Lindores* v. *Stewart*, 1714, M. 7735; *Scott* v. *Scott*, 1713, M. 15,569.

The pursuer (respondent) argued—In terms of sec. 27 of the Rutherfurd Act the date of the trust-deed was the date of the entail. The entail of 1841 was put an end to by the interlocutor in the first application by Lord Dunmore for authority to disentail. At the date of the trust-deed he was fee-simple proprietor, and in it spoke of himself as such. The entail, therefore, coming into operation after 1848, required the consent of the heir-apparent under sec. 1 of the Entail Amendment Act.

The creditors here were not protected under the Act 16 and 17 Vict. cap. 94, sec. 24. There was here a patent nullity in the decree—the persons requisite to its validity not being in exist-

ence—which was much more than "non-compliance."

Authorities—*Buchanan* (*Petitioner*) 11th June 1864, 2 Macph. 1197; *Stirling's Trs.*, 1st June 1865, 3 Macph. 851.

At advising—

Lord Deas—There are two questions here—in the first place, whether the deed now sought to be reduced is a valid disentail, and in the second place, whether, if it is not so, the heritable securities nevertheless remain good to the creditors. The Lord Ordinary has found in favour of the pursuers of the reduction on the first of these questions, and in favour of the heritable creditors upon the second.

It appears that there was an entail of the estate executed by the father of the present Earl in 1841, and there seems to be no question raised as to the validity of that entail. But that entail is said to have been done away with by a valid deed of disentail executed in 1864, followed by a trust-disposition under which the proceedings now challenged took place. I cannot say that I think it admits of any doubt that the entail of 1841 was effectually done away with and extinguished. If so, the consequence was that the trustees of the Earl were acting entirely upon the trust-disposition which he had executed, and this, I think, placed him in the position of not being entitled, under the clauses of the statute quoted in the record, to execute the deed of disentail which he did execute in 1870 without the consent of his heir-apparent for the time being. It is true he had at the time no heir-apparent, but the consequence of that I take to be that he was not in the position in which alone the clauses of the statute quoted entitle an heir of entail to execute such a deed. I need not go into any detail of the enactments. I think it only necessary to say that on that part of the case I entirely agree with the Lord Ordinary.

The difficult and delicate question is the second—whether, notwithstanding that what was thus done was unauthorised by the statute, and consequently reducible, those heritable securities which were granted upon the faith that the proceedings were not reducible are nevertheless to take effect? The Lord Ordinary has found that they are, and the soundness of that judgment depends entirely upon the construction to be put upon section 24 of the Statute 16 and 17 Vict. c. 94. That section bears—[*reads section.*]

Now, it cannot be disputed that no appeal or reduction of the judgment or decree now complained of was instituted within the time mentioned in the enactment which I have just read—that is to say, within the time during which it was competent to have appealed to the House of Lords against that judgment or decree, and that being so, the question is, whether the heritable creditors are not entitled to say that they are in the position of third parties who acted *bona fide* upon the faith of that judgment or decree, and so are entitled to the protection given by the statute. There can be no doubt, I presume, that if third parties choose to take heritable securities within the time allowed for appealing against the judgment or decree, they take the risk of that judgment or decree being altered upon appeal, and it may very plausibly be said that that goes a considerable way to shew that the heritable creditors in such a case must be held to have taken that risk. But although that may be so, still, if the time for appealing is allowed to lapse without either reduction or appeal being instituted, it does not follow—whatever risk they may have been taking in the interval—that these creditors are not then entitled to the protection given by the statute. I think it would be very difficult to say that creditors who had accepted securities within that time, but with reference to whom no appeal or reduction had been instituted till after the time had expired, were in any worse position than creditors who had taken their securities after the time had expired. Those of the defenders, at all events, who became onerous assignees after the time for appealing had expired, but before the reduction had been instituted, would surely be in the ordinary position of *bona fide* singular successors in what, although relating to securities merely, is really a question of heritable rights.

The more general question, however, comprehends the original creditors as well as assignees, and just comes to be, what did the Legislature mean by this protecting clause? what was the *bona fides* with which the Legislature was here dealing? It appears to me that the words "third parties acting *bona fide* on the faith thereof," mean third parties acting *bona fide* upon the faith of the judgment or decree. The word "thereof" plainly refers back to the words "judgment or decree," and this reference is, I think, carried throughout the rest of the sentence. Well, then, what is *bona fides* in a judgment or decree? The thing required is not *bona fides* in the proceedings which preceded the judgment or decree, but *bona fides* in the judgment or decree itself. It appears to me that if the parties *bona fide* believed the judgment or decree to be a good judgment or decree, that was the kind of *bona fides* which the statute required. It must be kept in mind that such a judgment or decree is never pronounced without careful investigation and consideration. It is not pronounced lightly, far less as a matter of course, but *causa cognita*, after the mind of the Court applied to the whole matter, including the question whether the party applying is or is not in the position required by the statutes to entitle him so to apply. No one can dispute that in this case the Lord Ordinary applied his mind to this question. It was his undoubted duty to do so. There is no more anxious duty, according to my experience as a Lord Ordinary, which a Judge has to perform, than to deal with petitions under this class of statutes, to see that they are all right and regular, that they come within the terms of the statutes, and that the thing which is proposed to be done is a thing which the law allows. Most unquestionably, therefore, we are to hold that the Lord Ordinary took all these things into consideration, that he made a remit for inquiry in the usual way, and that he had the facts as well as the statutes before him.

The question then comes to be, was it necessary to entitle a creditor to plead the statutory *bona fides* that he should himself, by his own counsel and agents, make all the investigation and solve all the legal questions which the statutes have committed to the Lord Ordinary, and through him, if he sees cause, to the Court. I cannot think that is the meaning of the clause. The matter was committed to a competent Judge,

who, it was to be presumed, knew his duty, and had performed his duty. There was nothing upon the surface to create suspicion of error or mistake, and this being so, I think it would be an unreasonable construction of the enactment to hold that the creditor was bound to perform over again all that the Judge had already performed, with a chance of arriving at a different conclusion than the Judge had arrived at, before being entitled to the benefit of the protecting clause in the statute.

It appears to me that the *bona fides* required was the *bona fide* belief that the Lord Ordinary had done his duty—that he had looked into the whole matter, and was to be presumed to have come to a right conclusion. It may appear a little startling at first sight to say that a creditor lending upon heritable security was not bound to look farther, but we must recollect that these statutes as to the law of entail had interfered to an extraordinary extent, and by very complicated enactments, with what had always previously been considered the rights of property; and it is not to my mind at all wonderful that in making these changes the Legislature should have extended to creditors lending their money on the faith of all being right the privilege and protection of *bona fides*, in the sense in which I am disposed to construe these words in the enactment. Be this as it may, however, I think such is the fair and sound construction of the clause in dispute; and although the point is undoubtedly a nice and delicate as well as a novel one, I am on the whole inclined to agree on that point also with the judgment of the Lord Ordinary.

Lord Ardmillan—I concur in the decision of the Lord Ordinary. I concur also in the opinion now expressed by Lord Deas.

There can be no doubt that the petition for disentail presented in August 1869 was supported by deeds of consent which were not sufficient in law, as the petitioner had no heir-apparent, and therefore could not have the consent of an heir-apparent. The only consent was not according to the provisions of the statute, and accordingly the interlocutor or decree of the Court was invalid.

It has been so declared, and rightly so, by the Lord Ordinary.

But a more difficult question arises in regard to the validity of the bond for £35,000 granted by Lord Dunmore to creditors on the faith of the decree, and accepted in *bona fide* by the creditors.

I think these bonds were granted and were accepted *in bona fide* on the faith of the judgment of the Court. I think that, being held by *bona fide* third paries, they are within the protection of the Statute 16 and 17 Vict. c. 94, sec. 24, and that the Lord Ordinary has rightly found the bond and assignations to be valid and effectual securities.

After the explanations given by Lord Deas I have really little to add. The petitioner for disentail was the Earl of Dunmore, the heir in possession. The obtaining the proper consents was necessary to the success of the petition; and these consents, believed to be appropriate and sufficient, were obtained after the petition had been presented. These consents are not conditions of the petition, but muniments of the right to demand decree in terms of the prayer. They were required by the Act. The obtaining and producing the consents after the petition was presented, and in course of the procedure, was compliance with the provisions of the Act. The production of insufficient consent was just failure to produce sufficient consent, and was non-compliance with the provisions of the Act, leaving the petition unsupported by the consents which the statute required, and decree on the petition was therefore reducible—reducible within a certain time to all effects, but after a certain time the rights of third parties acting *in bona fide* are protected. Now, on this petition, regularly presented but insufficiently supported by consents, there was judicial procedure, and a regular decree of Court was pronounced authorising the acquisition of the estate in fee-simple. On the faith of this decree the bond was executed and accepted, and the assignations granted. All this was done in good faith, in the natural and honest belief that the decree of Court was conclusive.

Now, observe the provisions of the 24th section of the 16th and 17th Vict. c. 94—[*reads.*] The non-compliance is something different from mere irregularity.

It is also very important to observe what it is that is protected. It is not the procedure, or any step of a party in the procedure. It is the "judgment and decree." Around the judicial deliverance of the Court this protection against reduction is thrown by the statute in every case where third parties have acted *in bona fide* on the faith of the judgment. It seems to me natural, equitable, and becoming, that a party acting on the faith of a judgment of Court, obtained by an heir of entail in possession and presented to him as a valid judgment, shall be protected.

The judgment stands till reduced, and this Statute of 16 and 17 Vict. declares that when acted on by third parties relying on the faith of it *in bona fide* it shall not be reducible on any ground of irregularity or non-compliance with the provisions of the Act. During the debate at the bar I asked the pursuer's counsel—"Why did you get consents?" The answer, and the right answer, was, "Because it is so provided by the statute." Then the failure to obtain the proper consents is "non-compliance with the provisions of the Act;" and on the ground of such non-compliance the judgment is assailed. Having been accepted and acted on by third parties in good faith, I think that to their prejudice it cannot be reduced. I am at present assuming the good faith of these third parties, and if so, I am humbly of opinion that the bond and assignations cannot be reduced on the grounds here alleged.

But it is said or suggested that these creditors were not *in bona fide*, because they might have discovered, and ought to have discovered, the defective character of the consents, and could have done so by careful and skilful perusal of the judgment and the titles. I shall only say that, while admitting this question to be attended with some difficulty, I cannot arrive at that conclusion. There are preliminary examinations and reports on these petitions. There was in this case such examination and report before judgment, and the judgment is given, not hastily or without inquiry, but *causa cognita* on consideration of "the report, petition, and whole proceedings." There is every

presumption in favour of a judgment thus pronounced. There is everything to give and to sustain confidence, and nothing to excite suspicion. Nothing has been proved or alleged to throw the least doubt on the good faith of these creditors, and I cannot hold that want of *bona fides* is to be presumed or lightly implied against creditors accepting a bond granted under such judicial authority, and as the result of such a judgment. There was no appeal from the decree of disentail, and no reduction instituted within the period allowed by law. It was acted on as valid, was unchallenged and uncomplained of, and on the faith of it, and *in bona fide*, money was lent and this bond accepted. The reduction of the bond, the refusal to *bona fide* creditors of the protection of the Act of 16 and 17 Vict., notwithstanding that these creditors acted on the faith of a decree of Court, would in my view be most inequitable; and to let in the principles of equity on the laws of entail is, I think, one of the leading purposes of all recent legislation on the subject.

I am of opinion that the Lord Ordinary is right.

Lord Mure—I have arrived at the same conclusion, and I have not had any difficulty upon the first point, viz., the reduction of the interlocutor of the 5th of February 1870, by which the property in question was authorised to be acquired in fee-simple.

The facts under which this question is raised are few and simple. The original entail, under which the estates were held, was dated in 1841. There was then a disentail in 1864 at the instance of the present Earl of Dunmore; and that disentail having been regularly carried through with the requisite consents, the estate was held in fee-simple. In the same year, and as the condition apparently of the consent being given to the disentail, there was a trust-deed executed in favour of certain of the disentailer's relations, by which the estate so disentailed was appointed to be held in trust, with a view to sell portions of it and acquire other lands, and with directions to re-entail the estates.

In 1870 Lord Dunmore, who was born before 1848, presented another application to the Court in order to obtain leave to hold the estates so placed under trust in fee-simple. That was done by him as the heir of entail in possession of the estate at the time. In the course of the application he obtained the consent of the three nearest heirs, under certain clauses of the statutes authorising disentails; and after due inquiry the interlocutor or judgment now in question was pronounced, authorising him to acquire the lands in fee-simple.

That judgment was pronounced after the procedure which is usually taken in such cases, and after a man of business had been appointed by Court to inquire into the whole proceedings, and to report whether they were in compliance with the statutes. It further appears from the appendix which has been laid before us that as two of the heirs who were called as respondents in the petition were minors, experienced men of business were appointed to act as their curators, and attend to their interests in the matter. And it also appears that, after due inquiry, a report was made to the Lord Ordinary in the usual way, and that upon this report judgment was pronounced, giving right to Lord Dunmore to acquire the lands in fee-simple.

This proceeding is now challenged, upon the ground that the requisite consent was not obtained, inasmuch as Lord Dunmore was in the position of a party holding under an entail dated subsequent to 1848, and it was necessary that he should have the consent of an heir-apparent of twenty-five years of age, without which it was incompetent for him to acquire the property in fee-simple. This objection to the procedure, and to the conveyance of the estate in fee-simple following upon the disentail, is, in my opinion, well-founded, and I concur with your Lordships in thinking that the pursuer is to that extent entitled to reduction.

But a more difficult question is raised under this action relative to the position of the creditors who have advanced money on the estate upon the supposition that it was held in fee-simple; because if the estate was not disentailed, and there was no right given to Lord Dunmore to acquire it in fee-simple, then unquestionably the security of the creditors is imperilled unless they can find protection within the provisions of the statutes. The defence of the creditors is rested on the 34th section of the 16th and 17th Vict. c. 94, which provides that "every judgment or decree pronounced" under such an application which is not taken to appeal or brought under reduction within a certain time "shall, as regards third parties acting *bona fide* on the faith thereof, be no longer reducible on any ground of irregularity or non-compliance with the provisions of the recited Acts, or of this Act."

The question, therefore, comes to be, whether seeing that the proceedings relative to the acquisition of the estates in fee-simple in 1870 have been irregular, and not in compliance with the provisions of the statute as regards the matter of consent, and were therefore invalid, these creditors are entitled to the protection conferred by the statute upon third parties acting *bona fide* on the faith of a judgment so pronounced? I have come to the conclusion that the creditors in the present case are entitled to that protection.

Upon the matter of *bona fides* I have no doubt whatever. There is no allegation that the creditors were not *in bona fide*, or that they were not in the firm belief that they were advancing money on a fee-simple estate. In that view the question is reduced to this—must they be held to have been *in mala fide* because the irregularity was of a nature which might have been discovered upon looking into the proceedings with a view to the advance of money? Now, if it is to be held as a sufficient reason for creditors not being *in bona fide* that they could have found out upon examination and by the advice of skilled lawyers that the proceedings were irregular and not in compliance with the requirements of the statute, I do not very well see how there could be *bona fides* under the statute in almost any case of this description, where an erroneous judgment has been pronounced, because the examination of legal experts will in all probability in most cases detect any mistakes a Court may be liable to make in granting the decree. But I do not think that under this provision of the statute it could have been intended that if the judgment itself bore, as here, to be a judgment of the Supreme Court—of the tribunal authorised by

statute to deal with these matters—and to be a judgment pronounced after due inquiry, it was still to be the duty of creditors before they advanced money upon the estates to set on foot an examination into the details of the proceedings which led to the judgment, and into the grounds of the judgment, in order to see whether the Court had not gone wrong in granting leave to disentail. I do not think the Legislature ever intended that, or that the words of the statute force one to adopt that construction. It, on the contrary, humbly appears to me that a creditor is entitled to to act, and to rely upon a judgment of the Court pronounced on an application bearing to have been presented and carried through under the statute, although it may turn out that the application was defective in respect of non-compliance with the provisions of the statute relative to consents, and I think that this is a matter as to which creditors are entitled to the protection afforded by the 24th section.

It was strongly contended on the part of the pursuer that the whole proceeding was *funditus* and *ex facie* null and void beyond the jurisdiction of the Court to deal with at all, because Lord Dunmore had then no son, and there could not therefore be an heir-apparent of twenty-five years of age. But this is a difficulty which does not appear to have occurred to the Court when the judgment was pronounced after due inquiry, as the decree itself bears; and the statute says that every judgment or decree so pronounced and not taken to appeal "shall, as regards third parties acting *bona fide* on the faith thereof," &c., "be final and conclusive." After setting forth that curators had been appointed to the minor children, and a remit made to a man of business to report, it further bears that "the Lords having considered the report, the petition, and whole proceedings," interponed their authority thereto. Now, I think that creditors when advancing money were entitled to believe this to be a sound judgment, and to make advances on the faith of it, and cannot be held to have been *in mala fide* because they did not enter into an examination of the proceedings in order to see whether the Court were right or wrong in the judgment they pronounced. The argument which was pressed upon this point appeared to me to come to this, that because *ex facie* of the proceedings there was not any consent of an heir-apparent, the Court had no jurisdiction to deal with the matter; that this was not therefore mere irregularity or non-compliance" with the statute in the sense of sec. 24, but that, in this view, there was truly no judgment which should have been plain to any man of business advancing money. But this, as I apprehend, does not solve the difficulty. Because in every case where a Court is exercising a purely statutory jurisdiction, and where there have been irregularities and non-compliance with statutory requisites, the ground upon which such proceedings are generally challenged and set aside is, that the Court had not jurisdiction to act except in the way the statute authorised. To hold, therefore, that the protection given to *bona fide* creditors by the 24th section of this Act cannot be extended to this case because the objection strikes at the jurisdiction of the Court which pronounced the decree, would, in the view I take of it, be in effect to hold that there cannot be any case to which the provisions of the statute relative to the protection of creditors can be applied; and this is, in my opinion, a sufficient answer to the objection in so far as it is rested on alleged want of jurisdiction in the Court to deal with the matter.

I agree therefore with Lord Deas and Lord Ardmillan in holding that the objection taken to the securities granted to the creditors is not well founded, and that the interlocutor of the Lord Ordinary should be adhered to.

Lord President—The Lord Ordinary has found that the interlocutor of the 5th February 1870, and the conveyance by the trustees to Lord Dunmore by disposition dated 25th and other days of March 1870 are invalid; and there I agree with his Lordship and with all the Court.

But the Lord Ordinary further finds, "nevertheless, that the bond and disposition in security for £35,000, and the various assignations thereof, are by virtue of the 24th section of the 17th and 18th Vict. cap. 94, valid and effectual securities, and that the several sums of money contained in the said bond and disposition in security and assignations thereof form valid and effectual securities, and that the several sums of money contained in the said bond and disposition in security and assignations thereof form valid and effectual charges on the said lands of South Harris and others." In regard to this second finding, I have the misfortune to differ from all your Lordships and from the Lord Ordinary; and as the question appears to me to be one of great and general importance I must take leave to state the grounds of my opinion somewhat in detail. In the first place, we must ascertain what was the position of the Earl of Dunmore when he proceeded to make the disentail in 1864. He had succeeded as heir of entail and provision to his father under a deed of entail which was executed and recorded in the year 1841, and he was infeft as heir of tailzie and provision under that deed. He was thus in the position of being heir of entail in possession of the estate of South Harris and others under an entail dated prior to the 1st of August 1848, and he was entitled to disentail that estate if he could obtain the requisite consent under section 2d or section 3d of the Entail Amendment Act. He did obtain the requisite consents, and the category under which he brought himself, among the various categories contained in these two sections, was that of an heir of entail in possession, with the consent of the three nearest heirs. That disentail was regularly and properly carried through; but although he thereby became fee-simple proprietor for the time, he had carried through this disentail under an arrangement with the three next heirs not to pay them any pecuniary consideration for their consents, but under an obligation undertaken by him that he would re-entail the lands, or rather that he would apply the lands in such a way, by selling them and employing the price in the purchase of new lands, as to secure these new lands under a deed of entail to the same destination of heirs as was contained in the entail of 1841. In implement of this obligation he conveyed the lands of South Harris, which he had disentailed in the manner explained, to two trustees, his mother, the Countess Dowager of Dunmore, and Mr John Tait, and the purposes of that trust are very clearly explained in the 5th

and 6th heads of the deed. After providing for some preliminary purposes, it provides,—"In the fifth place, I hereby authorise, empower and direct the said trustees, as soon as it is by them deemed advisable and advantageous, to bring to sale the whole lands and estates and other heritages hereby disponed, and after advertisement of sale thereof in such way and to such extent, having regard to the advertisements already made and being made, the trustees may deem best calculated to effect an advantageous sale or sales (of which they shall be the sole judges) to sell and dispose of the said lands and estate and other heritages hereby disponed in whole or in part, by public roup or by private bargain." Then the sixth purpose is,—"I hereby authorise and empower, appoint, and direct the said trustees, as opportunities may offer, after the sale or sales of the said lands and estate, and other heritages hereby disponed, of applying the free residue of the said price or prices in the purchase of other lands and heritages in Scotland, to apply the said free residue of the said price or prices in the purchase of such other lands and heritages in Scotland as may be approved of by me, or failing me by the said Honourable Charles Augustus Murray, and failing him by the said Honourable Henry Anthony Murray; and upon such lands and heritages being so purchased and acquired, and the title of the said trustees thereto being duly made up, I direct and appoint the said trustees forthwith to execute an irrevocable and valid and sufficient disposition and deed of strict entail of one or more of the said lands and heritages so purchased and acquired, to and in favour of myself, the said Charles Adolphus Earl of Dunmore, and the heirs-male of my body, whom failing, of the said Honourable Charles Augustus Murray," and so forth, repeating the destination in the original entail of 1841.

Now, it was contended in argument that as as this disposition was granted in implement of an arrangement and agreement between Lord Dunmore on the one part, and the three next heirs of entail upon the other, it was in the power of these parties to put an end to the agreement, and also to discharge this conveyance or to require the trustees to reconvey, although they were infeft upon this disposition. I do not think any of your Lordships have given the slightest countenance to that contention, and I am not surprised at that, because nothing can be clearer than that the heirs of entail in the destination of the original deed of 1841 acquired a *jus quæsitum* under the trust-conveyance, and that no parties, not the whole parties to the agreement in implement of which this was granted, could have put an end to this trust.

What, then, was the position of Lord Dunmore under this trust-deed? He was no longer fee-simple proprietor. He had divested himself of that character, and he was beneficiary under this trust, and institute in the deed of entail to be executed by the trustees when they had sold South Harris and acquired other lands. He was in the position contemplated by the 27th section of the Entail Amendment Act; and it is very necessary to attend to the precise words of that statute. It provides 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 so purchased 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 the conveyance to him of such land in fee-simple, and the Court shall, upon such application and with such consents, if any, as would have been required to the acquisition of such land in fee-simple, have power to grant such warrant and authority." In connection with that must be taken the 28th section, which provides that "for the purposes of this Act the date at which the deed or writing placing such money or other property under trust or directing land to be entailed first came into operation shall be held to be the date at which the land should have been entailed in terms of the trust, and shall also be held to be the date of any entail to be made hereafter in execution of the trust, whatever be the actual date of such entail."

Now, the date of this deed of trust was 1864, and it came into immediate operation. About that, I suppose, there can be no doubt; but at all events it is very clear that the date of this deed of trust cannot be earlier than the year 1864, and therefore the date of the entail for the purposes of this Act, from the fetters of which Lord Dunmore proceeded to attempt to relieve himself, is not earlier than the year 1864. From that it follows very clearly that Lord Dunmore was then in the position of an heir of entail in possession by the operation of the 27th section of the statute, under a deed of entail made after the 1st of August 1848. I presume so far that it cannot be disputed. Now, can an heir of entail, possessing under a deed made after the 1st of August 1848, disentail an estate, and in what circumstances is it possible? That is the inquiry which must always be made in a question of this kind, and the answer to it is to be found in the 1st section of the statute, and let me add, nowhere else, because the other two sections, the 2d and 3d, which refer to disentailing, are concerned entirely with entails made before the 1st of August 1848. Therefore the simple key to Lord Dunmore's position as he stood after the execution of that trust of 1864 was this, that he could not disentail at all unless he was in the position contemplated by the 1st section of the statute. Now, what does the 1st section of the statute say? It provides that in two cases such a disentail may be made, but in two cases only. In the first place, if the heir was born after the date of the tailzie, and is of full age, and in possession of the entailed estate by virtue of the tailzie, he may disentail without any consents at all; and, in the second place, if he was born before the date of the tailzie, and is of lawful age, and in possession of the estate by virtue of the tailzie, he may disentail (and now I give the very words of the statute) "with the consent, and not otherwise, of the heir next in succession, being heir-apparent under the entail

of the heir in possession, and provided that such consent and such instrument of disentail shall not be valid and effectual unless granted by a person of the age of twenty-five years complete, not subject to any legal incapacity, and born after the date of the tailzie to which such instrument applies." Now, Lord Dunmore was not born after the date of the tailzie, and therefore he could not fall within the first part of this section. He was born before and not subsequent to the date of the tailzie, and therefore he is not entitled to disentail—I do not say without the consent of an heir-apparent, but he is not entitled to disentail unless there exists an heir-apparent of the full age of twenty-five years complete, born after the date of the tailzie. It is the existence of such a person in this world that gives the sole title to Lord Dunmore to disentail that estate; and without the existence of such a person there can be no title in him to disentail the estate. It is not merely that a consent is required. Now, the condition of Lord Dunmore at this time was that he had no son and no heir-apparent; and what was the necessary legal consequence of that under this statute? That until he begot a son and bred him up to the age of twenty-five years complete he could not disentail that estate. That was his position in 1864. Therefore it appears to me that Lord Dunmore had no more title to disentail the trust lands held by these trustees than if he had not been in the position of heir in possession. The one is not a bit more a condition of the right to disentail than the other. It is required that he shall be the heir in possession, but it is also required that he shall have an heir-apparent of the full age of twenty-five. The one is just as essential as the other.

It seems to me there is here not a failure to comply with any of the provisions of the statute, but the simple fact that Lord Dunmore is not within the statute at all. He is not contemplated by the statute, and he has no rights under the statute. And thus the objection to his proceeding in the year 1870 is not that what was done in Court was wrong, but that antecedently, and before he presented his petition at all, he had no title to do it. There is, in short, a radical defect of title. Now, what is done? He presents an application to disentail this estate as if the entail was dated prior to the 1st of August 1848, and gets the consent of the three next heirs, none of them being heir-apparent, and he carries through the proceeding upon that footing, and as if it were a case under the 3d section of the statute; and it is said that that is to be valid and effectual, so far at least as to set up all the bonds that have been granted by Lord Dunmore in the character of fee-simple proprietor acting on the faith of that warrant of disentail.

I cannot agree with your Lordship in thinking that this is a case within the 24th section of the statute 16 and 17 Vict., and I think it would be very much to be deplored if that were the meaning of the 24th section of that statute, for I think it would lead to great practical injustice and great practical inconvenience. Just let us consider for a moment, before adverting to the language of that clause, what was the position of the party lending his money here. He lends the money upon an heritable security after employing a conveyancer to examine the titles, and the duty of that conveyancer is to examine the titles for forty years prior to the date at which the loan is proposed to be contracted. Now, what would the conveyancer employed by the borrower here find in that progress of titles? He would find that Lord Dunmore had been an heir of entail under an old entail executed in 1841, and that he had validly and effectually got rid of that entail, and become fee-simple proprietor. He would then find that, in fulfilment of an agreement with the next heirs of entail, he had conveyed the estate in trust to be re-entailed, or rather to be converted into other lands, and these other lands re-entailed on the same series of heirs; and he would see that then, and from that date, Lord Dunmore was no longer an heir of entail in possession under the deed of 1841, but was an heir of entail in possession under a deed with the statutory date of 1864. Having arrived at these facts, which are patent on the face of the title, was it not the duty of the conveyancer next to inquire, could Lord Dunmore get rid of that entail which was to be made by the trustees? And if he had looked at the state of the titles a little further he would have seen, not only that he could not possibly do that under the statute, but that he had attempted to do it in a way that was altogether out of the statute. He must have seen that an heir possessing under a deed dated in 1864 could not disentail under the 3d section of the Entail Amendment Act, but could only disentail under the 1st section of the Entail Amendment Act, because the 1st section of the Entail Amendment Act is the only one that is concerned with entails made after the 1st of August 1848. Now, that seems to me to be a radical defect in the progress of titles which any conveyancer ought to have detected, and which, if he did not detect, he must meet the consequences. But it is said he and his client proceeded *in bona fide*. I confess I really do not understand what is meant by *bona fides* in a case of this kind. There must be a failure to look at the progress of titles, or an incapacity to understand them when you do look at them.

But it is said he *bona fide* trusted to the decree of Court, and the decree of Court, it is said, bears such an authority upon the face of it that everybody is entitled to rely that it is a good decree. But the decree is truly a decree in absence, so far as the interests of heirs *nascituri* are concerned. At all events, the conveyancer was surely at least bound to examine the decree to see if it was what it professed to be. And what did the decree bear? Why, the decree of Court —that is to say, the extract decree which formed one of the steps of the progress of titles —disclosed upon the very face of it the illegality that had been committed. It shewed that this was an entail dated subsequent to the first of August 1848; it shewed that Lord Dunmore had not and could not have the consent of an heir-apparent, and that he was born prior to the date of the entail, and therefore it shewed incontestably that he could not by any means whatever obtain a disentail of this estate. The extract decree upon the face of it condemned itself, not for want of consent—it is a mere mistake to talk about it as a case of want of consent—it disclosed upon its face that Lord Dunmore having no son, having no apparent heir of the age of twenty-five, could not by possibility disentail

this estate. But let us look at the 24th section of the 16th and 17th Vict., and see if this is really a case within the meaning of that section. "Every judgment and decree pronounced after the time for reduction or appeal has gone by shall, as regards third parties acting *bona fide* on the faith thereof, be no longer reducible on any ground of irregularity or non-compliance with the provisions of the said recited Act or this Act, but in respect of any such ground of challenge be final and conclusive." Now, pray, observe it is not sufficient to bring the case within the protection of this statute that the party lending his money or buying the estate shall have acted *bona fide* on the faith of the judgment or decree, because it protects him only against certain grounds of challenge—not against all grounds of challenge. And therefore the inquiry must always be whether the ground of challenge in this case is within the specification of the grounds of challenge in this 24th section. Now, what are the grounds of challenge against which the party is to be protected? "On the ground of irregularity or non-compliance with the provisions of the said recited Act or this Act." I do not think it was contended, and I do not think your Lordships have expressed an opinion, that the ground of challenge here is an irregularity. It is certainly something more than that, and therefore unless it can be brought within the category of non-compliance with the provisions of the recited Act or this Act it is not within the clause. Non-compliance with the provisions of an Act of Parliament—what does that mean? It means a failure to comply, but there cannot be a failure to comply when a person cannot by possibility comply. That surely cannot be said; an heir of entail who is not in possession of the entailed estate fails to comply with the provisions of this statute in one sense of the word, for he is not the person whom the statute contemplated. But just in like manner, an heir of entail in possession of an estate under an entail dated after the 1st of August 1848, being himself born before that date, fails to comply with the provisions of this statute unless he has an heir-apparent of the full age of twenty-five years. But the one is a non-compliance just in the same sense as the other. It is not that he has omitted to do something which the statute requires. It is that he is not in a position to do it—that he cannot bring himself within the statute at all by any means. And that is exactly the position of the case here. It is not a non-compliance with the provisions of the statute in carrying through the proceedings of disentail; but it is that he comes into Court without any right whatever to have a disentail. The statute has given him no such right. It has given him no such right upon any conditions that it is possible for him to fulfil. And therefore I say this is not within the category of non-compliance with the provisions of the statute.

I think it is not in the least difficult to see what it was that *bona fide* third parties were to be protected against by means of this 24th section. It was against irregularities in carrying through the proceedings of disentail, and a most proper protection that was, because it must be observed that under the Entail Amendment Act there are a great many very stringent provisions about the way in which the thing is to be done. Under the 33d, 34th, 35th, and 36th sections of the Entail Amendment Act your Lordships will find a great many things that must be done, and to fail to do which would be a most serious non-compliance with the provisions of the statute; and that is the class of objections plainly which is intended to be covered by this 24th section of the more recent statute. I think to extend it any further would be not only against the plain sense and meaning of the words used, but would be inconsistent with the construction of statutes of this kind altogether. I confess I never heard of such words as these, "irregularity or non-compliance with the provisions of the statute," being held to cover a case where a party was not within the statute at all—had no title or *locus standi* under the statute; and yet, in my humble opinion, that is the condition of the judgment which your Lordships are now affirming.

The Court adhered.

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