[8*th July*, 1847.]

The Right Honourable ARCHIBALD WILLIAM, commonly called LORD MONTGOMERIE, eldest son and heir of the Right Honourable ARCHIBALD M. HAMILTON EARL of EGLINTON and WINTON, and the Right Honourable LADY EGIDIA MONTGOMERIE, only daughter of the said Earl, by their father as their administrator in law, and by their curator *ad litem*, *Appellants*,

AND

The Honourable SETON M. HAMILTON, second son of the said Earl, compearing, *Appellant*.

The said EARL of EGLINTON and WINTON, *Respondent*.

Tailzie.—Found that an heir of entail to whom the estate is conveyed, with all the powers given to the heirs generally, but under a condition applicable to him in common with the other heirs, that on the happening of a certain event, the lands shall devolve upon another person, has until the occurrence of the event every power to deal with the lands which a proprietor has, except in so far as expressly restrained by the terms of the deed.

IN the year 1763, Robert Hamilton, who at that time had four daughters and no sons, executed an entail by which, after successive destinations in favour of his three eldest daughters, and the heirs male of their bodies, he conveyed his lands to his fourth daughter, "Eleanora Hamilton, and the heirs male to be "procreate of her body, whom failing, to the nearest heir male "descended of the body of George Lord Lindsay," his grandson, "excluding always the person possessed of the peerage of "Crawfurd and his apparent heirs in the said peerage, and "failing all other heirs male of the said George Lord Lind-

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" say, to the peer himself, who shall be obliged to denude in " favour of his own second son upon his existence, in the " manner as is after herein provided as to other heirs who " may succeed to the peerage."

The entail, after a condition upon the heirs to bear the name of Hamilton, contained a prohibition " to sell, alienate, " or impignorate the said lands and estate, or any part thereof, " either redeemably or under reversion," or burden it with debt, and after fencing these conditions and prohibitions with irritant and resolutive clauses, it contained a clause in these terms:—

" Moreover, it is hereby declared and specially provided, " that if it shall happen that the said Robert Lindsay, or the " heirs male of his body, or any other heirs of tailzie, shall suc- " ceed to the peerage and dignity of the Earl of Crawfurd, " or to the peerage of Viscount of Garnock, or to any other " peerage whatsoever, or to any estate entailed under a con- " dition that the heir shall take the name and arms of the " family thereby represented, and none other:

(1.) " In all and every one of these cases, the heir suc- " ceeding to a peerage, or to any estate entailed, when he is " possessed of my said estate, or succeeding to my said lands or " estate, when he is possessed of a peerage, or estate entailed as " aforesaid, shall *ipso facto* forfeit all right, title, and interest " to my said lands and estate, *and that not only for themselves,* " *but for all their descendants, as long as any heirs male of the* " *bodies of my daughters shall exist*, and my said lands and " estate shall devolve and belong to the next heir of tailzie " called to the succession after the said excluded heir and des- " cendants, who shall make up his titles thereto by declarator, " adjudication, and any other manner in law competent, in " the same manner as if such excluded heir and his descendants " were not existing: And in case the person thus succeeding, " *through the exclusion of prior heirs*, or any other substitute,

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" shall thereafter succeed to a peerage, or to an estate entailed " under the condition above mentioned, he shall in like manner " *ipso facto* forfeit his right to my said lands and estate, for " himself and all his descendants, and the same shall fall and " devolve to the next heir of tailzie not descended of his body, " in the same manner as if he and his descendants were all " naturally dead.

(2.) " And it is further provided, that the person succeeding " to my said estate, *by the exclusion of such peer or possessor of* " *an entailed estate*, and the other heirs to him substituted, " shall *not* forfeit their right to the same by existence of " nearer heirs, but the said lands shall remain with him and " the after substitutes as long as there shall exist any other " heirs male descended of the bodies of any of my said " daughters: But *failing all other such heirs male*, the *succession* " of my said lands and estate shall *fall and devolve* to the " nearest heir male descended of the body of such peer or ex- " cluded heir, in the order above specified, excluding always " the person possessed of the said peerage at the time, and all " his apparent heirs therein; and *failing all other heirs male* of " the bodies of my said daughters, the lands and estate shall " then *fall and devolve* upon the person possessed of the " peerage or estate entailed as aforesaid, and shall remain with " him until he or his heir-apparent shall have a younger son, " who is not apparent heir in such peerage or estate, and such " younger son or sons successively shall, on their birth, have " right to my said lands and estate, exclusive of the prior " heirs, so that the estate shall at no time remain with a peer " or possessor of lands entailed under the above condition " while there are any other heirs male descended of my daugh- " ters' bodies who can take up my estate, and keep up a " separate representation of my family."

In the year 1817, by the death of the last of the three eldest daughters of the entailer without issue, the succession

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under the entail opened to the heir male of the body of the fourth daughter Eleanora, who had pre-deceased the last of her sisters. This heir male was the Respondent, the grandson of Eleanora by her last surviving son, who had pre-deceased herself. The Respondent, who was then a commoner, made up titles to the entailed lands by special service and infeftment, in the autumn of 1819.

In December, 1819, the Respondent succeeded to his present title of Earl of Eglinton, by the death of his grandfather, the husband of Eleanora.

In 1833, the Respondent, by the death of Lady Mary Lindsay Crawfurd, became the heir-at-law of the entailer. On the 17th February, 1841, he married for the first time. In 1843, he sold part of the entailed lands to the Appellant by missive of sale, which contained the following proviso:—"Whereas the said "James Morton or his foresaids may on the ground of alleged "want of title in the said Earl to sell the said lands and others, "and to discharge the said price, raise an action of suspension of "any charge or threatened charge for payment of the said price, "or institute other legal proceedings in relation to the said Earl's "powers of sale; and whereas, in case it shall be found in the "said action of suspension, or in any action of declarator, or "other judicial procedure to be raised in relation to the pre-"mises or in relation to any other lands contained in the said "deeds of entail, that the said Earl is not entitled to sell the "said lands and others, or any of the other lands contained in "the said deed of entail absolutely and irredeemably, not only "would any infeftment or other real right in the said lands, and "others obtained from him, be liable to be reduced and set "aside, but the Earl himself might be exposed to an action "of declarator of irritancy of his own right to the said lands and "others: therefore, it is hereby provided that until it shall be "judicially determined, in the manner that shall be adjudged "satisfactory and sufficient by counsel, to be mutually named

" by the said parties, in any action of declarator, process of " suspension, or other judicial procedure, at the instance of " either of the contracting parties, or in any proceedings at the " instance of any other party in relation to the sale of any other " lands contained in the said deeds of entail, that the said Earl " has power to sell and alienate the foresaid lands and others, " or any of the other lands contained in the said deeds of entail, " he, the said Earl, shall not be bound to infeft and seise the " said James Morton and his foresaids in the said lands and " others, nor to grant any disposition of the same: and until a " decision to the effect foresaid shall take place, these presents " shall not form or be capable of being used as the ground or " warrant of any adjudication in implement or other process at " law whatsoever under which a real right in the foresaid lands " and others may be obtained or constituted in the person of " the said James Morton and his foresaids; and in case any " suspension or action of declarator, or other judicial pro- " ceedings to be raised as aforesaid by either party, or by any " other party in relation to any other lands in the said deeds of " entail, it shall be decided that the said Earl is not entitled to " sell the foresaid lands and others, or any of the other lands " contained in the said deeds of entail, then and in any such " event, these presents, with all that may have followed " thereupon, shall become extinct, void, and null, and of no " force, strength, or effect whatever, in like manner as if the " same had never been entered into: and the said James " Morton and his foresaids shall not be entitled to any damages " from the said Earl or his representatives, on the ground of " non-implement of the bargain, or on any other account " whatever: as also the said James Morton and his foresaids " shall be bound and obliged, if required by the said Earl, to " renounce and discharge all right, title, and interest which he " has or may claim or pretend to the said lands and others, or " to any part thereof: and in case the said James Morton

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" and his foresaids shall have entered to possession of the said " lands or any part or portion thereof as proprietor thereof in " virtue of these presents, he shall be bound and obliged to cede " and give up such possession to the said Earl or his heirs of " taillie under the foresaid dispositions and deeds of entail, " who shall be entitled to enter to possession of the said lands " and others in the same manner as if these presents had never " been entered into: and on the other hand, in case the said " Earl shall have received the price of the foresaid lands and " others after stipulated, or any part thereof, he shall be " bound and obliged to repeat and pay back the said price, or " such part thereof as he may have received, with interest on " the same at the rate of four per cent., from the time when he " received the same until the same shall be repaid, and with the " whole law expenses of every description incurred by the said " James Morton or his foresaids in consequence of his having " purchased the foresaid lands and others, whether such ex- " penses shall have been incurred in regard to the arrangement " of the purchase or to the conveyance of the said lands and " others, or to any legal proceedings which may be instituted " by the contracting parties, or either of them, or in renouncing " his title to the said lands, such expenses being charged as " between agent and client, and not as between party and " party."

In the year 1844 a question as to the validity of this sale was raised in a suspension as of a threatened charge at the instance of the purchaser, and by an action of declarator at the instance of the Respondent, which was conjoined with the suspension. On the 14th February, 1845, the Court of Session pronounced an interlocutor that the deed of entail " contained " no valid or effectual prohibition against selling or alienating " the lands therein contained absolutely and irredeemably, and " that the contracts of sale entered into between the Earl of " Eglinton and the several parties referred to in the summons

" were and are valid and unchallengeable," and repelling the reasons of suspension, and in the action of declarator finding that " the pursuer, the Earl of Eglinton, has full power to sell " the whole lands in the deeds of entail absolutely and irre- " deemably, and to grant valid dispositions to the several " purchasers."

In the month of May, 1846, while the interlocutor was *sub judice* in an appeal, the Appellant, S. M. Hamilton, the *second* son of the Respondent, was born.

The House of Lords then remitted the case without giving any judgment; and under that remit the Appellant, S. M. Hamilton, was allowed to put in defences to the action of declarator. These defences were afterwards repelled by the Court, and the appeal was taken against this interlocutor and the one previous to the remit.

The Hon. Mr. Wortley, Mr. Hope, and *Mr. Gordon* for the Appellants.—By the first part of the clause of devolution, the Respondent's right to the lands was absolutely forfeited by his " succeeding to a peerage " so soon as that succession opened to him, not by the operation of the clause as a declaration of forfeiture in the technical acceptation of that term, but as a modification impressed upon the destination that it should be enjoyed only by a commoner. Any right, therefore, which the Respondent has is derived from the subsequent part of the clause. By the subsequent branch of the clause the lands are to devolve to the heir having succeeded to a peerage, if there shall have been a failure of all other heirs male of the entailer's daughters, but not so as to do away the forfeiture declared by the previous branch, but only to provide a means by which the lands might be held until another heir not having the ground of forfeiture in him should come into existence.

The right of the Respondent during the temporary title thus given to him was not like that of the heirs under the entail, who

take *pleno jure* except in so far as limited by the entail itself, for the lands are only to "*remain*" with him "*until*" these other heirs come into existence.

It was not necessary for the entail to void any act which might be done by the Respondent during this temporary right, for the nature of the right was not such as gave him any power to do an act which could bind the lands beyond the period of his possession.

The nature of the limited right thus given to the Respondent, and to those who might be in the same predicament with him, may be anomalous and innominate. It may be difficult to find any class of known rights under which it should be placed, but this difficulty will not alter its essential character as being of a limited nature, and amounting in truth to a trust for the persons entitled to take under the deed upon their coming into existence. In Mackenzie *v.* Mountstewart, *Mor.* 14903 and 14912, although the nearest heir in existence was allowed to serve while a nearer was only *in spe*, yet the right which he acquired by such service was declared to be merely a *fidei commissum* until the nearer heir should appear. And in McKinnon *v.* McKinnon, *Mor.* 6566, it was found that a nearer heir upon his coming into existence had a right from his birth, and that a remoter heir who had taken in the meanwhile until his birth, was bound to denude and convey to him. It is no doubt true that in a subsequent branch of the same case, *Mor.* 5279–5, *Bro. Supp.* 873, 904, it was found that a sale of part of the lands by the heir who enjoyed this temporary possession was good, but the ground upon which that proceeded was that the sale was necessary in order to preserve the estate from being torn to pieces by the creditors of the original disponer, and that in that light it was a prudent act of administration within the powers even of a fiduciary fiar, the necessity and propriety of the sale was the ground mainly put forward and relied upon by the purchaser in his pleading. The expressions used by *Lord*

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Kaimes, Mor. 5284, shew that this was the ground relied upon by the Court in making its judgment, and *Bro. Supp.* 905 shows that while only two out of eight Judges were of opinion that the right of the temporary holder was absolute and the sale unchallengeable, four held it to be justified only upon the ground of necessity, and the remaining two were for reducing it as *ultra vires.* In this case, then, upon the authority of *Lord Kaimes*, it was held that the heir taking in the meanwhile "can "be considered in no other light than as a fiduciary heir holding "the estate for behoof of the nearest 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 way "so as to have the power of alienation or 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," and *Lord Monboddo*, 5 *Bro. Supp.* 849, supports this, where he says that "the "Court was not called on to determine whether the debts of "the fiduciary heir affected the estate, but the President gave it "as his opinion, and with him a great majority of the Lords "seemed to agree, that they would not, because the fee being "of its nature temporary and resolvable, could not be affected "with any."

If, then, the Respondent was in truth but a trustee, it is impossible that he can by a sale defeat the rights of those for whom he is trustee; that he with whom the lands are only directed to "remain" until the birth of his second son should have power while they so remain to defeat by an absolute sale the right of that son before he comes into existence. Whatever might be his character, expectant heir, fiduciary fiar, or trustee, the express terms of the title under which he took were that the lands should remain with him until the birth of the Appellant, his second son.

The Respondent did not take as in the common case of an heir under the entail, subject to a clause of devolution in a

certain event. In such cases the fee is given to the heirs under certain limitations common to them, and subject to a devolution equally extensive. Until the devolution takes effect, they enjoy all the powers of heirs of entail. In the present case the fee was taken from the Respondent on the day that he became a peer, and all right that he could thenceforth pretend was under that part of the clause which provides a mere temporary possession, and which so far from making his right devolve is that which thus gives him any right at all, not as a proper heir in the line called by the investiture, but as a mere hand to hold the estate until the heirs of the investiture come into existence. But,

II. Whatever might be the position of the parties if an actual sale had been accomplished by the Respondent, no such sale has in fact been made; all that has been done is to create a tentative title under which to raise the question of the power to sell; no price has been paid nor conveyance executed; all that the purchaser has is a conditional and personal obligation to convey, if it shall be found that the Respondent has the power. This is at best a conditional obligation to make a sale, but the Respondent was under a prior conditional obligation to convey in favour of the Appellant his second son, on his coming into existence. This was a condition which qualified the Respondent's title, and which, by the Appellant coming into existence, has been purified. The obligation to convey to him has therefore been rendered absolute and defeats the conditional obligation to the proposed purchaser, who entered into his suspensary contract with the full knowledge and in apprehension of the Appellant's right.

III. Assuming that the sale may now be made valid and effectual it was *ex concessis* not completed prior to the birth of the Appellant; it is not yet completed. As the Appellant at his birth was entitled to the land, the price payable for it must belong to him as a *surrogatum*. It may be that the title of the

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Respondent was such as will support a sale by him, but inasmuch as the beneficial interest was in the Respondent the price payable must belong to him; Hyslop *v.* Small, 1 *Sh.* 133.

At the conclusion of the address by the Counsel for the Appellants, the Counsel for the Respondents were directed to confine themselves to the question whether the case of their client came within the principle of the decision in M'Kinnon *v.* M'Kinnon, the House not entertaining any difficulty upon the other questions which had been raised.

The Lord Advocate and *Mr. Bethell* for the Respondent.—The clause in the entail upon which this question arises declares in the first branch of it an absolute forfeiture of the lands, in case the heir in possession should succeed to a peerage, not only for himself but for all his descendants, "as long as heirs male "of the bodies of the entailer's daughters should exist." The second branch of the clause assuming the succession to have passed from the heir first entitled by the operation of the first branch directs that the succession shall continue downwards without reverting to the branch thus thrown out, so long as there shall be any heirs male of the bodies of the entailer's daughters; but upon failure of all heirs of the bodies of the entailer's daughters, it provides that the lands should fall and devolve upon the nearest heir male of the body of the excluded heir, and failing all other heirs male of the bodies of the heir, until he or his apparent heir should have a younger son not an apparent heir in the peerage.

The case which in the event has happened, viz., of an heir succeeding to a peerage while there were no other heirs male in existence, was not therefore provided for by the clause. Its provision throughout is for the case of an heir succeeding while there are other heirs male in existence. The first branch excludes him while there are any such other heirs in being, and the second

winds up by providing for his re-admission on the subsequent failure of such heirs.

But assuming that the clause is broad enough to embrace the case as it occurred, all that it does is to impose upon the heir succeeding to a peerage an obligation to denude in favour of his second son, when he comes into existence. But until that event no limitation is imposed upon this heir other than is contained in the fettering clauses applicable to the heirs generally.

At the time at which the Respondent succeeded under the entail he was a commoner, and there was no other heir male of the bodies of the entailer's daughters then in existence. Unquestionably at this time the Respondent took the lands like any other heir called by the entail, and was entitled to enjoy them as amply.

When the Respondent succeeded to his peerage there was still no other heirs male of the bodies of the entailer's daughters in existence, and as the foreiture upon such event declared by the first branch of the clause in question was to take effect only "as long as any heirs male of the bodies of "my," the entailer's, "daughters shall exist," the forfeiture was still-born, and the clause of devolution never came into operation.

At all events, the soonest period at which, in the most unfavourable view, it could come into operation, was the birth of the Respondent's second son. Up to that time the Respondent's rights under the entail were the same as those of any other heir called by it. The Respondent was liable to have his right brought to an end, not simply by his succeeding to a peerage, but by his having a second son in conjunction with that circumstance. This was a provision not peculiar to him, but common to all the heirs, and one that, until the two events happened so as to bring the devolution into operation, in no degree altered the rights or powers as an heir in possession, which he was entitled to enjoy like the other heirs called by the entail. The

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Respondent might never have married, or never have had a son, or he might have had only one son—who in his turn might have succeeded to the lands and the peerage, and have had only one son. The peerage and the lands might have continued thus united for two or three generations, and yet, according to the Appellant's argument, none of the possessors during that time would have possessed as heirs of entail, or under a title to which a *nomen juris* could be assigned; and yet nothing has been shown in the terms of the entail which could prevent them, as in fact the Respondent has done, from exercising the powers given to all heirs of entail by the Aberdeen and Montgomery Acts, to burden the lands for improvements and provisions to wives and younger children, or to do any other act which an heir of entail might do.

The Respondent took the lands in his own right, as the heir called by the deed, and in the order in which he was called—no doubt his title was defeasible upon his having a second son, but till that event happened, and it might never have happened, there was no one who had a prior right, or any title which could interfere with his. His position in this respect was essentially different from that of an expectant heir, to which the Appellant assimilates it. Where lands are given to A. B. on failure of a prior class of heirs or disponees, so long as there is any possibility of any individual of the class being in existence, or coming into existence, nothing is given to A. B. So much is this the case, that until the case of Mountstewart, *Mor.* 14903, an heir in such a situation was not allowed to serve or take possession at all. The lands were put under the care of a curator *ad litem* until the possibility of a nearer heir coming into existence should be beyond a doubt. The case of *Mountstewart*, however, so far relaxed the rule that the expectant heir was allowed to serve and take possession, but under an obligation to denude in favour of the nearer heir upon his coming into existence; and all that the case of M'Kinnon *v.* M'Kinnon

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Mor. 6566, did was to affirm the rule that the heir serving was under this obligation.

These cases have no analogy to the present. So soon as the nearer heir comes into existence there is ground for arguing that the possession of the expectant heir has been without a title, as nothing was given to him until the failure of the nearer heir, whose title it may be said 'draws back to the death of the next heir before him, so as to squeeze out the expectant heir. But the coming into existence of his second son did not make the Respondent's previous possession without a title. As has been already shown, he had as good a title under the entail and in his own right up to that time as any heir called by it, and all that the birth of his son did was to determine that title thenceforth and thenceforth only.

Every act, therefore, done by the Respondent prior to the birth of his second son was good and effectual, unless in so far as it was restrained by the entail; and as the entail has been found not to be effectual to restrain sales, the sale by the Respondent is beyond a challenge.

LORD CHANCELLOR.—My Lords, at the conclusion of the argument for the Appellant, there was only one point which pressed on my mind, and upon which I was desirous of further information from the observations that the Lord Advocate might make, turning entirely upon the nature of the estate which Lord Eglinton took in the property in question prior to the birth of his second son. That arose partly from the apparent similarity to the case of *M'Kinnon*, and partly also from the somewhat complicated provision in the entail upon which the devolution took place. In every other respect, (and I believe that is the opinion of my noble and learned friend,) the case is free from doubt. The point was this:—whether Lord Eglinton is to be considered, after he became a peer, and until the birth of his second son, to have been in possession of the

estate as an heir of entail, and entitled to the same rights and privileges which any other heir of entail would have in such an estate under such an entail, the fetter not being properly imposed as concerns selling or alienating irredeemably. But upon consideration of the terms of the entail, and the observations made upon it, particularly with reference to the facts of the case of M'Kinnon, notwithstanding the doubt which at that time I entertained, I am now perfectly satisfied that Lord Eglinton, there being no other male descendant of a daughter, did not come within the provision of the entail which applied to the case where there were other male descendants, in which case the party having the peerage and the estate, forfeited, not only for himself, but all his male descendants, who were only to come in in the event of the other branches of the male descendants of the daughters failing, but under a provision totally distinct, which provides for the events which have occurred.

Now, that provision is, "And failing all other heirs male of "the bodies of my said daughters, the lands and estate shall then "fall and devolve upon the person possessed of the peerage or "estate entailed as aforesaid, and shall remain with him until he "or his apparent heir shall have a younger son, who is not apparent heir in such peerage or estate, and such younger son or "sons successively shall, on their birth, have right to my said "lands and estate, exclusive of the prior heirs, so that the estate "shall at no time remain with a peer or possessor of lands entailed "under the above condition, while there are any other heirs male "descended of my daughters' bodies, who can take up my estate "and keep up a separate representation of my family."

That provides for the event that has happened, namely, of there being no other male descendant of a daughter at the time of the succession to the peerage, which, although it was not in possession at the time the estate descended, makes no difference, except as to the period when the two united. The estate and the peerage uniting in Lord Eglinton, when the peerage de-

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scended upon him, he had no second son, and there was no heir male of the descendant of a daughter. The event occurred in which it is provided that the peer shall keep the estate until a second son is born, and that on the birth of such second son the estate shall devolve on that second son, the parent, of course, in that case, losing the estate.

The question is, what was the nature of the estate and interest he had until that event happened, and until that event happened nobody could supersede him, that is to say, he had the prior title. A second son being born, there was then a devolution of the estate under the provisions of the entail, but until that event happened, Lord Eglinton was entitled to the estate, and there being no effectual provision against selling, he had a right to contract and sell, and a contract for sale by a party not prohibited from selling, is good against those upon whom the estate may descend.

My Lords, that seems to me to embrace the whole question your Lordships have to decide, and I think that this interlocutor should be affirmed.

LORD BROUGHAM.—My Lords, the only doubt I have felt in this case, has been upon that branch of it which has been alluded to by my noble and learned friend, but which has been removed by further consideration. The first point was disposed of on the last hearing. The second point, whether the contract which was made by Lord Eglinton was such as to embrace the future defeasance of the estate by the birth of the second son, or was only applicable to his rights at the time he made the contract, was disposed of; at least, we felt there was no occasion to call upon the Lord Advocate, who appeared for the Respondent, to offer any argument upon it. We agreed with the majority of the learned judges on that point. Upon the other point, which was ably argued by Mr. Turner the other day, there was no division of the Judges, there was a unanimous opinion of the

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Court. We considered that the case of M'Kinnon required to be a little further elucidated, and the more so because the Judges had made no reference to it in their elaborate judgment. That has been satisfactorily explained to-day by the Lord Advocate on the part of the noble Respondent. The only part of the case remaining to be considered, is that to which the Lord Advocate confined his argument, and to which Mr. Gordon, in his reply, was desired to confine himself, and upon that point I agree with the opinion which has been expressed by my noble and learned friend, for the reasons he has given.

GRAHAME, WEEMS, and GRAHAME—RICHARDSON, CONNELL, and LOCH—SPOTTISWOODE and ROBERTSON, Agents.