[*Heard 28th April*, 1846.—*Judgment*, 21*st July*, 1847.]

ALEXANDER GRANT and ROBERT GRANT, Trustees of the Deceased ROBERT LEITH, Esq., of Druminnor, *Appellants*.

JAMES SHEPHERD, W.S., *Respondent*.

Writ.—Where an erasure occurs in a substantial part of a deed, the presumption of law is that it was made after execution; and this presumption is not rebutted by showing that the words erased are consistent with other parts of the deed, for the erasure amounts to a revocation, unless it can be also shown that it was made before execution. Neither can the words written on the erasure be adopted unless upon similar evidence.

Ibid.—Where a vitiation occurs in the first of a series of dependent substitutions, the effect of the nullity of the first is to vitiate the whole.

Homologation.—There cannot be homologation of a deed altogether void by reason of erasures.

Prescription.—Act 1617, cap. 12. The right to sue reduction of a deed, as null in respect of erasures *in substantialibus* apparent *ex facie*, is not cut off by the lapse of forty years.

ON the 13th November, 1761, John Leith executed a deed of entail, whereby, after saying "I have taken into my serious "consideration that I have no heirs male of my own body "to represent me, and that I have grandchildren, and am "desirous that my memory and sirname of Leith should be "preserved in the persons of my grandchildren and their heirs," he disponed his lands to and in favour "of myself in liferent, "and to the heirs male lawfully to be procreated of my own "body in fee; whom failing, *to the eldest son living at the time* "*of my decease*, procreated betwixt John Grant Younger, of "Rothemaise, and Anna Leith, my eldest daughter, and to the "heirs male of his body in fee; whom failing, to the eldest son

" of Thomas Shepherd, minister at Bourty, procreated betwixt " him and Janet Leith, my second daughter, and the heirs male " of his body in fee; whom failing, to the eldest son lawfully to " be procreate of Margaret Leith, my third daughter, and the " heirs male of his body in fee; whom failing, to the second son " procreate betwixt the said John Grant and the said Anne " Leith, my eldest daughter, and the heirs male of his body in " fee; whom failing, to the second son of the said Thomas " Shepherd, procreate betwixt him and Janet Leith, my second " daughter, and the heirs male of his body; whom failing, to the " second son lawfully to be procreated of the body of Margaret " Leith, my third daughter, and the heirs male of his body in " fee; whom failing, to the heirs male of my said first, second, " and third daughter in the same order of succession; all whom " failing, to me, my nearest heirs and assignees whatsomever." And in a subsequent clause the granter declared that " it should " not be in the power of the said John Grant, my grandson, " or any of the heirs of taillie, to sell, alienate, impignorate, " or dispone the lands." The words in the passages quoted, which are in italics, were evidently written upon erasures; at what time made did not appear,

In the year 1763 the granter of the deed executed another deed, whereby he gave the liferent of the lands to his eldest daughter, Mrs. Grant, upon the narrative that the fee had " been " made over to John Grant, her eldest lawful son, by disposition " granted by me in his favour." The entailer died without having had any heirs male of his body. Upon his death Mrs. Grant entered into possession of the entailed lands, and continued in the enjoyment of them until her death in 1807. After her death her son, John Grant, entered to possession, but died without having had any issue, or having made up any title to the lands. Upon John Grant's death in 1790, John Shepherd, the eldest son of the second daughter, entered to possession of the lands, and made up his titles to them as heir of taillie and

provision to the entailer, and obtained infeftment upon the precept in the deed of entail.

John Shepherd continued in possession until his death in 1832, without issue. But in 1811, during John's possession, his brother Alexander brought an action setting forth that erasures had been made upon the entail, with a view to defeat his rights under it, and concluding to have them ascertained. This action was never prosecuted to a conclusion.

At the period of John Shepherd's death, the third daughter of the entailer had died without leaving issue, and the second and third sons of the eldest daughter were likewise dead; but Janet, the third daughter, was still alive, and it did not appear at what time she died. The lands continued in non-entry until the year 1834, when Alexander Shepherd, the second son of the second daughter served himself heir of taillie and provision, and completed his title by infeftment under the entail.

In 1836 Alexander Shepherd died without issue, and thereupon Robert Grant, who was the fourth, and, at the period of John Shepherd's death, the only surviving son of the eldest daughter, served himself heir of taillie, and was infeft in the lands. At the same time the Respondent, who was the son of the third son of the second daughter of the entailer, sued out a brieve for serving himself nearest heir of taillie and provision. This brieve was the foundation of a competition between the Respondent and Robert Grant, upon the assumption that the deed of entail was valid and effectual, which was ultimately terminated by a decision in favour of Robert Grant, finding him to be the nearest heir under the entail.

After the termination of this competition, the Respondent, in 1838, brought an action of reduction and declarator against Robert Grant and the other heirs of entail, which was afterwards insisted in against the Appellants, who were the disponees of Robert Grant under a fee-simple conveyance in their favour made in derogation of the entail, setting forth that the words

" the eldest son living at the time of my decease" were written upon an erasure in the dispositive clause, and in the various other parts of the deed in which they occurred, and that there were a great many other erasures in the deed, and therefore concluding for reduction of the deed of entail and the various titles which had been made up under it, and to have it declared that the Respondent, as one of the nearest lawful heirs portioners of the entailer, had a good title to one-half of the lands, and that he ought to be served as heir portioner of the entailer, freed from the fetters of the entail, with other consequential conclusions.

The Respondent, in support of his action pleaded in law—1. That the deed of 1761 ought to be reduced in respect of the vitiations in it. 2. That the erasures must be held to have been made after the date of execution, as they were not mentioned in the testing clause. 3. That he was not barred from insisting in his action in consequence of any of the legal proceedings in which he had been engaged with the Defenders.

Robert Grant pleaded in answer—1. That the Respondent's right to challenge the entail was cut off by the negative prescription. 2. That as the Respondent had homologated and approbated the entail while in the knowledge of the erasures in it, he was barred from challenging the deed *personali exceptione.* 3. That the erasures did not occur in essential parts of the entail, and therefore it was valid and effectual. 4. That it was competent to show by parole testimony that the erasures had been made and words superinduced upon them before the deed was executed. 5. That as the Respondent's ancestors had made up titles under the entail to the exclusion of the other heirs-portioners, and had thereby incurred an implied obligation to abide by the entail and waive their right of challenge, the Respondent could not pass by the heirs between himself and the entailer, who had made up titles under the entail, and serve to the entailer, without becoming liable to the obligation so

incurred by the intermediate heirs, and was, therefore, barred from challenging the entail. 6. That as the intermediate heirs had adopted the entail by serving under it, and had thereby renounced their right of challenging it as heirs-portioners, and as these intermediate investitures contained a destination in favour of the Defender, all right of challenge by the Respondent was cut off.

The Lord Ordinary, (*Cunningham*,) before taking the case to report to the Inner House, issued the following note :—

" I. It is set forth by the pursuer that the instrument under " challenge, in so far as it refers to the first disponee in the tailzie " after heirs of the granter's own body, is uniformly and in every " instance *erased*, and the first question which arises is, If this " be an erasure *in essentialibus?* As to that point the Lord " Ordinary has no doubt. It is self-evident that the name or " legal designation of the party called in a leading place of the " destination, is one of the most essential parts of a conveyance, " and, therefore, if the deed under reduction had been a convey- " ance to that party alone, whose right is constituted only by " words written uniformly on erasures, it must have been in- " stantly reduced as void and improbative. The analogous case " of Keddar, decided in this Court in 1835, (*vide* Reports of 6th " March, 1835,) and affirmed with costs in the House of Lords " within these few weeks, would be decisive of the question. In " one respect the erasures in the case of Keddar could hardly " be viewed as so essentially affecting the deed as those which " occur here; for in Keddar's case the testing clause was so " framed as to entitle the defender very plausibly to argue that " the word erased had been altered by consent of the granter; " but there is no such speciality in the present case.

" The defender refers to another deed executed by John " Leith on 31st August, 1763, to show that the disposition and " deed of tailzie, exactly as it stands, though erased, was " thereby acknowledged to have been previously executed by

" him. But that deed, in the Lord Ordinary's mind, leads to " an opposite conclusion. It is therein set forth that the dis- " position and settlement of Blair, sometime before executed " by Mr. Leith, was in favour of his grandson, '*John Grant*,' in " fee. It is probable indeed that the conveyance under reduc- " tion was so framed in the first instance, and that the words " 'John Grant, eldest lawful son procreate,' &c., stood at first " upon the space erased, and which now bears these words, " 'the eldest son living at the time of my decease, procreate " 'betwixt John Grant,' &c. &c. The difference between these " modes of designating the first member of the tailzie might " unquestionably have been of great importance, as in the one " case a favoured *individual* was called, who might have pre- " deceased the granter, while on the other, such party as might " be his eldest daughter's eldest son, *at the time of his death*, " was called. As John Leith, however, in the deed of 1763 " referred to the conveyance as one then subsisting in favour of " his grandson, John Grant, by *name*, it rather goes to shew " that the deed was altered and erased after that date. That " state of the fact could obviously confirm very strongly the " pursuer's plea.

" Reference, however, is farther made by the defender to " the parole testimony of Alexander Scott, the writer of the " tailzie under reduction, and one of the testamentary witnesses " who it is said emitted a disposition taken to lie *in retentis* in " another process in 1814, in which he swore that the erasures " founded on were made before the execution of the deed, and " at the *express desire of the granter*. But as a similar proof " was offered in Keddar's case, and refused, and as the judg- " ment of the Court on that point, as well as on the merits of " the case, has been lately affirmed in the Court of last resort, " the testimony of Scott must be thrown entirely out of view in " the present question.

" Had the deed under challenge then been a conveyance

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" to that party alone, whose name and legal designation is " written uniformly on erasures, the deed must have shared the " fate of that of Keddar's case, and been reduced.

" II. It is next maintained on the part of the defender, " however, that there is a material and decisive distinction " between the present case and that of Keddar, in so far as it " is alleged that the party entitled to claim under the erased " clause of the taillie, according to any reading which the clause " (as completed by words written from the first in characters " clear and unvitiated) admits of, and his whole issue are long " since extinct, and that the defender's claim arises under " *other* clauses inserted and constantly repeated in the tailzie " without any erasure, and therefore it is argued that the con- " veyance to the defender, at all events, must stand good and " receive effect, on the maxim that *utile per inutile non vitiatur*. " The argument and authorities on that view of the case are " pretty fully detailed in the revised case for the defender (pages " 14, 22), although the pursuer has not thought it necessary to " advert to them. The pursuer appears to have taken it too " easily for granted that this part of the defender's case required " no notice.

" No doubt there is a distinction between the present case " and many of those in which a deed has been held in part " ineffectual and sustained *quoad ultra* as improbative. Thus, " when a settlement, conveying heritage and moveables, is " found ineffectual as to the former, there is no difficulty or " inconsistency in giving effect to it as to moveables, because it " must be presumed to be the will of the deceased to give the " party favoured the benefit of the conveyance, as far as it can " be enforced, according to law; and, on the same principle, " though one clause of a settlement conferring a legacy on an " individual (as in Kemp's case) is vitiated or rendered impro- " bative, the instrument may be sustained as to another bequest, " when there is no vitiation in the clause relative thereto. But

" it is doubted if these cases are sufficient to rule decisively " such a question as the present, in which there are erasures " throughout the whole of the conveyance in the description of " one of the primary members of the dispositive or destination " clause. It may be argued that the ulterior members of the " destination are only introduced on his failure, and that the " substitutes can never take if there be any uncertainty or " nullity in the nomination of the party, on the contingency of " whose failure only any right is given to them.

" This is a point which seems to have been much considered " by the Court in the case of Abernethie *v.* Forbes in 1835, " (*vide* Reports, 16th January, 1835;) and then it was found to " be an irrelevant objection to a tailzie, as an obligatory deed, " to allege that the nomination of a *posterior* substitute in such " a deed was null and ineffectual, from the mode in which his " name was filled in. Still it was noticed, as a specialty of " importance in that instance, that the nomination objected to " was that of a *posterior* and not of a prior substitute. Whether " the erasure, or as it might be, the omission to fill up an " earlier disponee's name in proper form, should vacate that " of other disponees, clearly and correctly named and designed " in the deed, seems at least an open question, not decided *in* " *terminis* in any prior case; and if the present question shall " be thought to bear on that point, it may deserve more dis- " cussion than it has yet received in the argument hitherto " urged in this cause.

" III. There are other views of this case, however, which " deserve to be considered before the parties are involved in " much expense in the preceding question.

" In particular, the defender pleads, that all challenge by " the pursuer of the tailzie is excluded by the *negative pre-* " *scription*, which it is said cuts off the pursuer's right to " challenge the deed, even although the defender and his " predecessors have not had possession exclusively under it for

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" the full period of forty years. The Lord Ordinary must own " that he should doubt the soundness of that plea, as applied " in the abstract, or in ordinary cases to dispositions, which the " Act 1617 expressly requires to be fortified by *possession*, " bruiked under the rights protected by that law. Neither " does the case of Paul in 1814 (*Fac. Coll.* 8th February, 1814) " support the argument of the defender, as that proceeded on " decrees of adjudication and expiry of the legal, followed " by seventy or eighty years' possession, (though not by a " regular feudal title,) which plainly distinguished that case " from the present in one essential particular, it being main- " tained here that, in one view, actual possession under the " entail did not commence till 1807. If the Court, however, " shall think that the possession of the heirs of tailzie com- " menced in 1790, by the infeftment taken by the defender's " uncle, John Shepherd, in that year, to be immediately " adverted to, then this challenge will be excluded, and the title " of the heirs of entail will be for ever validated by the *positive* " prescription.

" As this does not seem to be the view of the case on which " the defender relies, the Lord Ordinary thinks himself bound " to state that, on a careful examination of the circumstances of " the present case, and of the titles and other writs produced, " various pleas arise against the challenge now brought forward, " which, though not pleaded on record, will probably occur " before the case is finally disposed of, and therefore deserve " very serious consideration. It will be observed then that " the pursuer sues this action as now one of the two *heirs-* " *portioners* of John Leith, the maker of the tailzie. John " Leith died in the end of 1763; and, although the property " libelled on was disponed by a separate deed to a liferenter " who survived till 1807, yet the fee of the estate was " claimable by the heirs at law, from the period of John " Leith's death downwards, if they chose to challenge the

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" tailzie as erased or improbative, or on any other ground. " Leith, as appears from the tailzie, had no sons, but he left " three daughters, one of whom died unmarried, so that the " two heirs-portioners were (1.) the heir of Mrs. Grant, and (2.) " the heir of Mrs. Shepherd. But the parties who possessed " these characters for a long series of years after Mr. Leith's " death, did not choose to claim as heirs-portioners, but found " it more for their interest, or chose on views of their own, to " homologate and give effect to the tailzie. In particular, when " Mrs. Grant's eldest son died prior to 1790, the defender's " elder uncle, *John* Shepherd, made up a title under the tailzie. " by getting himself retoured as heir of entail, and taking " infeftment on the precept of sasine thus taken up in 1790. " Upon that title John Shepherd drew the rents of the whole " estate of Blair from the death of the liferenter in 1807 till " his death in 1832, a period of 25 years. Again, on John's " death, his next brother, Alexander Shepherd, also served heir " *under the tailzie*, and made up titles and continued in pos- " session of the estate for four years, till his death in 1836.

" Now it is supposed that both of these parties did, from " the date of the titles expede by them, or at least long prior to " their deaths, *unite* in their persons the characters both of " heirs-portioners and of heirs of tailzie of John Leith. The " retour of Alexander Shepherd in 1834 (No. 54 of process) " expressly bears, that his mother was *then* deceased, and it is " possible she may have predeceased John also. If so, both " the Messrs. Shepherds, while heirs-portioners, made their " election and expede titles under the tailzie which the other " heir-portioner of old Mr. Leith admitted. One question, " then, which arises here is, If any subsequent heir claiming " this estate, or a portion of it, as an unlimited fee, can challenge " the title which his predecessors chose to adopt and confirm. " It appears very difficult to maintain such a plea. Not only " were the Messrs. Shepherds entitled to take up the estate " under the tailzie if they chose, in preference to claiming on

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" their fee-simple title, but their doing so was a most natural " and beneficial proceeding for them, though it was equivalent " to a discharge of all action competent to them and their succes- " sors, as to the validity of the deed of tailzie as a probative " and authentic writ. Suppose that either of the Messrs. Shep- " herds deceased had been the sole heir of line of old Leith, and " that the entail had been executed by him on deathbed, if they " chose to decline instituting a challenge on that head, and to " make up a title under the tailzie, and to possess thereon for a " series of years, could their son or any collateral heir *pass by* " their immediate predecessor, and serve to the tailzier in the " character of an unlimited fiar, and prosecute the challenge " which the primary heir had waived and virtually discharged? " The contrary has been repeatedly found, as exemplified in the " case of Hood 1734, reported by *Elchies*, *voce* deathbed, and " in that of Hedderwick in 1740,—*Dictionary*, page 3180.

" But the present is a far stronger case. Here the heirs-por- " tioners, who were called as heirs of entail, and ultimately took " up the possession as such, were *lucrati* to a great amount by " confirming the entail; they got the whole rents instead of one- " half only, to which they must have been limited as heirs-por- " tioners. Hence the question arises, If they did not come under " an onerous obligation, binding on themselves and their succes- " sors, not to impugn, but to give effect to the tailzie, at least as " the authentic deed of their common author? It is important " under this head to observe, that the documents produced, and " in particular the proceedings in the former process at the " instance of Alexander Shepherd in 1814, already referred to, " (*vide* Nos. 25—53 of process,) prove that that party was *quite* " *aware* of the whole erasures now founded on. Nevertheless, " he abandoned all claim as heir of line or heir-portioner of his " grandfather, and made up a title under the tailzie. It is to be " considered if any heir of line after him can challenge a title " which he ratified.

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" The pursuer's plea, of course, must be, that he does not re-
" present either of his uncles, John or Alexander Shepherd, and
" that the title he has expede is as one of the heirs-portioners of
" his great-grandfather, Mr. Leith, *passing by* the parties who
" first succeeded and acknowledged the tailzie. But the ques-
" tion is, If he be entitled to pass by preceding heirs, who were
" entitled, (on the pursuer's view,) to take up the share now
" claimed in fee simple? As the Messrs. Shepherd could have
" sold or burdened the one-half of the estate if they chose, it
" seems to follow that they could forego and discharge the right
" to challenge any settlement of it, competent to them as ordi-
" nary heirs, and more especially when they got a large benefit
" by so doing, and had possession of the estate for many years.
" It is rather thought that every heir attempting to pass them
" by, is bound, both according to the intent and terms of the
" Act 1695, to fulfil their acts and deeds. The estate of old
" Leith, if the entail was challengeable, may be viewed as con-
" sisting of *two* portions, viz. the portion claimable by the
" Grants, and that claimable by the Shepherds. But when
" John and Alexander Shepherd, being successive heirs-por-
" tioners, took up the whole entailed estate, they came under
" an obligation to execute an entail of their own portion, if the
" title were in any respect objectionable. This was one of the
" chief points decided in the case of Carmichael in 1810, (*Coll.*
" *Fac.* 15th November, 1810,) which has an important bearing
" on the present case.

" At the same time, the Lord Ordinary is bound to feel
" some distrust as to the views thrown out in the latter branch
" of these notes, as they have not hitherto been urged by the
" parties, and have probably been rejected on grounds which
" will be apparent on a more mature consideration of the case.
" It may also be doubted if the record, as prepared, would
" admit of the whole pleas latterly suggested. Hence it is re-
" commended, that the parties should confer with each other on

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" the shape of the record, and of the cases as prepared, and " consider if they should not be amended. The case may be " enrolled in the first motion roll of November, and if the parties " think the cause then prepared for report, an order to that " effect will be pronounced." In consequence of the suggestion in the concluding part of this note, the two last pleas which have been stated for the Appellants were put upon the Record.

On the cause being reported, the Inner House directed the papers to be laid before the whole Judges of the Court for their opinion, and thereafter, (on the 19th January, 1844,) in conformity with the opinion of the majority of the consulted Judges, sustained the reasons of reduction, and decerned in terms of the declaratory conclusions.

This interlocutor was the subject of appeal.

The *Lord Advocate* and *Mr. Bethell* for the Appellants.—The destination in the deed is quite in consistence with the intention of the granter, as expressed in the inductive clause. His wish is to have his name and memory preserved in his grandchildren, and his first disponee is a son of his eldest daughter—that is beyond dispute from the words which are unerased; and that this son was the eldest is shown from the subsequent part of the destination, where, after giving the lands to the eldest son of the second and third daughters, it reverts to the second son of the eldest daughter.

[*Lord Chancellor.*—The words originally might have been to the third son.]

But John Grant is mentioned in a subsequent part of the deed, where he is prohibited by name from selling or alienating, and the general structure of the deed raises probabilities against any other person amounting almost to a certainty.

If when the competition arises no person is in existence to claim under the first substitution, its being upon an erasure won't destroy the deed. The erasure amounts to no more than this,

that it leaves it uncertain which of the sons of John were to take first; but all of the sons being gone, the deed remains good as to the other substitutions. If there be a gift to the eldest son of the marriage of A and then in remainder, though the words of the first gift be upon an erasure, yet if *all* of the class who could possibly claim under it are extinct, there is neither reason nor authority for saying that the erasure in the first gift will render that in remainder void; the two are separate and distinct parts of the deed.

[*Lord Chancellor*.—If John Grant could not take under the deed, the subsequent estates could never arise. Till the first estate is known, the remainders cannot come into existence.]

But the erasure does not necessarily prevent his taking, if from the other parts of the deed it be apparent that in the erased part he was the person intended; and this is shown by the mention of his name in several subsequent parts of the deed where it is not written upon an erasure. The erasure to be fatal must be in an essential part of the deed, and what is essential is not determined by looking at the particular part, but by looking at it in connexion with the rest, *Stair*, IV., 42, 19, Wright *v.* M'Leod, *Mor*. 11540; Lyon *v.* Aboyne, *Mor*. 11544.

II. The Respondent's right is barred by the acts of those under whom he claims. When John Shepherd, on the death of Mrs. Grant, made up titles to the lands, he could only have done so on an agreement to hold the deed of 1761 as valid; for on the hypothesis of its being invalid his mother, as heir-portioner of the granter, was entitled to one-half of the lands, and all to which he would have been entitled would have been to that half from her death, but, passing by her, he made up his title to the whole under the deed of 1761, and so did his brother Alexander upon his death, and both of them until their respective deaths possessed the entire lands under these titles, to the exclusion of the children of the first daughter, who, on the hypothesis of the deed being invalid, were entitled to have en-

joyed one-half of them. This in fact amounts to a transaction between the parties—to an agreement to hold the deed valid upon the footing of being allowed to enjoy the rights which it gives according to its terms. To allow the Respondent to challenge the deed after those through whom he claims have reaped the benefit of this agreement, would be to sanction a fraud upon the other parties to it, and to deprive them of the consideration for which they yielded the possession of the whole lands, and forbore to assert their legal right to two-thirds, viz., the prospect of at one time enjoying the whole themselves. But the Respondent is excluded from this course, not only upon equitable but upon legal grounds. If the deed of 1761 was a nullity, John and Alexander Shepherd had a right only to a third, and that upon apparency; their possession of the other two-thirds was upon an agreement to hold the deed valid as to the whole, and that is such an agreement as falls under the Act 1695, and as the Respondent is bound to fulfil, seeing both of the Shepherds were more than three years in possession, Carmichael *v.* Carmichael, 16 *F. C.* 17.

III. The acts of John and Alexander Shepherd amount to a ratification of the deed of 1761; to making valid that which otherwise might have been invalid, and such a ratification is binding, not only upon the party who makes it, but upon every remoter heir, whether such remoter heir takes under the party homologating or not. *Ersk.* III., 8, 99. Moreover, the Respondent is barred by his own acts from challenging the entail, for in the competition of brieves he joined issue with the Appellants upon their rights under it, as a valid and subsisting deed, while aware of the defects upon which he now challenges it.

IV. The Respondent's right of action is cut off by the negative prescription, and this is a plea which the Appellants are entitled to maintain, although they might not have established in themselves a title by the positive prescription. It is no

doubt true, that when there is a competition of rights, no party can plead the negative prescription who has not established in himself a title by the positive; but it is not so where the negative prescription is pleaded in defence to an action challenging a deed upon nullities in it. When the question is not as to the right of ownership of lands, but a challenge of a deed dependent upon various extrinsic enquiries, the right to prosecute such enquiries prescribes by the statute 1617, cap. 12, like any other action, Paul *v.* Reid, 17 *F. C.* 556.

The Solicitor-General and *Mr. H. Robertson* for the Respondents.—It is unnecessary to produce any argument or authority to shew that the erasure in the first branch of the destination is a vitiation *in substantialibus;* and any attempt to shew from other parts of the deed that the words on the erasure correspond with them, does not get over the objection of there being no evidence that the erasure was made by the maker of the deed. If the nullity could have been maintained successfully against the sons of the eldest daughter immediately after the entailer's death, it is impossible that any posterior change of circumstances could alter the rights of the parties. If an action of the nature of the present had been then brought by the younger daughters of the entailer, as his heirs-portioners, together with the elder daughter, it must certainly have prevailed, and had the pursuer obtained decree, reducing the entail, and declaring their rights as heirs-at-law, by what possibility could any party entitled to take under the subsequent branches of the destination have disturbed that decree at any future time? How could he have established the failure of the first branch of the destination, which must have been a condition precedent to his own right to take, while that branch was a nullity, and so declared? how could he have established his right to take under a destination commencing with "Whom failing," when he could not shew who was the first dis-

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ponee whose failure was to give him his right. If this be so, it cannot make any difference that the action was not brought until a later period, so long as it is not barred upon other grounds. Any offer to set up by parole the erased clause, so as to shew the failure of the parties entitled to take under it, would at every period have been ineffectual, Kedder *v.* Reid, 1 *Rob.* 210.

II. If there was any agreement express or implied, with John or Alexander Shepherd, it was in favour of the heirs under the entail, and the object of it was to support it as a valid and effectual deed; but the Respondent does not claim as an heir under the entail; he claims as heir-at-law, and against the entail as a nullity. Assuming, therefore, that there had been an agreement of the nature pretended, the Respondent is not under any obligation to perform it either legal or equitable. If John and Alexander Shepherd possessed at the expense of any one, it was at the expense of the heirs-at-law, who were thereby excluded, and if any one was to gain by the agreement, it was the heirs of entail, who were thereby to acquire a *spes successionis*. Neither, assuming such an agreement to have been made, are the Appellants in a situation to insist on its performance: for neither do they claim under the entail, but under a disposition from Robert Grant, the original Defender, made in derogation of the entail.

And with regard to the Act 1695, the Respondent does not represent either John or Alexander, but claims through his father and his grandmother, the daughter of the maker of the deed; neither did John or Alexander ever possess the lands in apparency. When John made up his title in 1790, both his mother and the eldest daughter of the entailer, his heirs-at-law, were alive, and his mother was still alive in 1807, when he actually entered to possession, on the death of Mrs. Grant, the liferentrix, and he made such entry under the title of his service as heir of entail. With regard to Alexander Shepherd he also

made up titles under the entail; and whether he possessed under this title or in apparency, his possession did not extend to the period required by the statute, for it commenced in 1834, and he died in 1836. The Act 1695, therefore, has plainly no application to this case.

III. If the deed be a nullity, as the Respondent maintains it is, there can be no room for the plea of homologation; it is impossible, by homologation, to make a deed where none exists. But no act of that nature has been done by the Respondent sufficient to bar his challenge, and he does not as to this either represent John or Alexander Shepherd so as to be bound by anything they may have done.

IV. Though the right to challenge deeds upon extrinsic nullities is cut off by the lapse of forty years, so that a deed *ex facie* good becomes so by the lapse of that period, it is not so where the objection is intrinsic, and apparent on the face of the deed. In such case no lapse of time will validate the deed, or cut off the right to challenge it, *Ersk.* iii. 7, 9. It does not make a difference that the objection cannot be made by way of exception, but requires to be made good by action of reduction, for in the case of Ainslie referred to by *Erskine*, the objection was taken by action of reduction. But if the negative prescription were applicable, there are no *termini* for its application to the present case. Till 1807, when the possession of the liferentrix ceased, it did not appear whether the entail would be founded upon as a title of possession, and no one had any interest to challenge it till then, and between 1807 and the date of this action forty years had not elapsed.

LORD LYNDHURST.—My Lords, This case arises out of a disposition made by John Leith in the year 1761, whereby he disponed and conveyed his estate of Blair to and in favour of himself in liferent, and the heirs male of his body in fee, whom failing, to the eldest son living at the time of his, (the grantor's,)

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decease procreate between John Grant the younger, of Rothmaise, and Anna Leith, the grantor's eldest daughter, and to the heirs male of his body in fee, whom failing, to the eldest son of Thomas Shepherd and Janet Leith, the grantor's second daughter, and the heirs male of his body in fee, whom failing, to the eldest son of the grantor's third daughter Margaret Leith, and the heirs male of his body in fee, with substitutions upon failure of the persons to take under the previous limitations in favour of the second sons successively of the three daughters in tail male, and afterwards to the heirs male of the daughters in the same order of succession, with ultimate remainder to the grantor's nearest heirs and assigns whatsoever.

The words "The eldest son living at the time of my "decease," are written on an erasure, and wherever they appear in the deed, which occurs several times, they are in like manner written on erasures.

Now if the part of the deed in which the vitiation occurs is a material part, or, according to the Scottish phrase, if the vitiation is *in substantialibus*, the deed becomes improbative, and no evidence can be received for the purpose of proving when or by whom, or under what circumstances the alterations were made. Here the erasure is in the dispositive clause, in the name and designation of the person who, on failure of heirs male of the body of the grantor, was to take the estate. It is impossible to contend that this is not an essential part of the deed, or that the vitiation is not *in substantialibus*. And indeed this seems scarcely to have been disputed.

The deed therefore being clearly improbative, no evidence can be admitted to prove when or by whom the alterations were made, and there is nothing on the face of the deed itself to shew that the alterations were made before the execution. The presumption of law therefore is that they were made afterwards (*Ersk.* iii. 2, 20). But it is unnecessary to carry the case so

far. It is sufficient that the erasures may have been made after the execution of the instrument, and that they may have been made by the grantor; and if so, as he had clearly the power to revoke any of the dispositions contained in the deed, and as it is obvious that the erasures were intentionally and deliberately made, this would constitute such a revocation.

Even admitting, then, that it were possible from the rest of the instrument to ascertain with absolute certainty, (which I I think it is not,) what were the words erased, they could not be restored, because that would be to determine, without anything to warrant it, that they had not been erased after the execution, and by the grantor, or by his authority, and with the deliberate intention of revoking the disposition.

But if the words erased cannot be restored, the remaining question will be whether those which are written on the erasure can be substituted in lieu of them. It is clear they cannot, for there is nothing to shew that they were inserted before the execution, and no evidence can be admitted for the purpose of establishing that essential fact. They are wholly unauthenticated. It follows, therefore, that this part of the deed is entirely inoperative.

How then does this affect the rest of the instrument? There is no doubt that a deed may be good in part, and bad in part. Where there are two independent provisions, the one may be vitiated by erasure, and the other may prevail, as in the case of a deed giving a legacy to A, and another to B. If the legacy to A be vitiated by erasure, yet the legacy to B may remain good. So also where there is a grant of an estate with a series of substitutions, and one of the later substitutions fails by reason of an erasure, that would not affect the previous estates. This was decided in the Balbeithan case, and as it would seem on the ground of those estates not being dependent on the subsequent defective limitation. But here the subsequent estates are to take effect after the failure of heirs male of

the body of an uncertain person whom the testator has not designated, there being no admissible evidence to prove who was the person intended. The vitiation, therefore, of the first limitation equally affects the substitutions which follow, and which are dependent upon it. This is the view which I submit for the consideration of your Lordships upon the first and more important part of the case under appeal.

Considerable reliance seems to have been placed in the Court below upon the ratification of the supposed disposition by John and Alexander Shepherd, with the acquiescence of all parties who had an interest in the matter, and even by James Shepherd himself, who instituted proceedings in the Court of Session founded upon the deed of 1761. But if there was in truth no disposition, no conveyance, (for this is the effect of the vitiation of the deed,) it is not easy to understand how there could be a ratification of it. To give effect to this supposed ratification would, in fact, be not to ratify but to make a disposition for the grantor, a disposition which he himself had not made.

Then as to the act of 1695, it appears to me to have no application to the present case. John and Alexander Shepherd, (the latter without right,) possessed the estate and made up titles, not as heirs-portioners but under the supposed disposition of 1761. The present claimant contests that disposition, and claims the estate under a different title, viz., as heir-portioner of his great-grandfather John Leith. The apparency therefore is in respect of a different title from that under which he claims. Other objections are stated to this defence in the opinion of Lord Wood, one of the consulted Judges, and to which I think no satisfactory answer has been given.

The only remaining point for consideration is the negative prescription relied upon by the Appellant. Now even admitting that possession under the deed of 1761 is to be calculated from 1790, the date of the investiture, and notwithstanding the

existence of the life estate which did not expire till 1807, such possession being founded upon a deed vitiated by erasure *in substantialibus* and *ex facie* void, will not, I think, upon the true construction of the statute of 1617 be sufficient to support the positive prescription, and if the positive prescription could not in this case be maintained the negative prescription must also fail.

As to the argument that this being an action to reduce the deed of 1761, the right being a mere right of action, is lost by the single effect of the negative prescription, the answer is that the deed being vitiated by erasure *in substantialibus*, and in that respect a nullity on the face of it, the rule does not apply, and that in a suit brought, as in this case, to recover the property, such an obstruction to the title may be removed notwithstanding the provision of the statute to which the Appellant refers.

I move your Lordships, therefore, that the judgment be affirmed.

LORD CAMPBELL.—My Lords, I entirely concur in the opinion expressed by my noble and learned friend, who has so very clearly and satisfactorily stated his reasons for that opinion, that I think it quite unnecessary to add a single word to what he has said.

LORD LYNDHURST.—I beg to state to your Lordships that the noble and learned Lord who has left the House, (Lord Brougham,) also agrees in the opinion which has been expressed.

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