judgment, I was anxious in this case, because it is a case of great importance in point of value, to state to your Lordships the reasons which influenced me in moving your Lordships to affirm the judgments, and to assoilzie the defenders. It is not my intention to say anything on the subject of costs, but simply to affirm the judgment of the Court of Session. May 23, 1826.

Appellant's Authorities.—3 Ersk. 2. 16.—Lord Wemyss, Feb. 2, 1800. (F. C.)—4 Ersk. 1. 14.—29. 12.—2 Stair, 7. 10.—59. Geo. III. c. 35.

Respondents' Authorities.—Williamson, Aug. 4, 1761. (10459.) Dict. vol. I. 378.—Ayton, May 19, 1801. (App. No. 6. Property.)—Kinnoul, Jan. 18, 1814. (F. C.)—Bayne, Dow's Reports, III. 233.

J. CHALMER—SPOTTISWOODE and ROBERTSON, *Solicitors*

SIR MICHAEL SHAW STEWART, Bart., Appellant.—*Fullerton*— *Keay.* No. 30.

JAMES CORBET PORTERFIELD, Esq. *Respondent.*— *D. of Fac. Cranstoun,—Murray.*

Tailzie.—Faculty.—Prescription.—A party having executed a deed of entail in favour of an institute and the heirs male and female of his body, and the heirs-male of the entailer's body; whom failing, heirs to be named by any writing under his hand; whom failing, other heirs; reserving a power to alter the succession generally, except as to the institute and the heirs male and female of his and the entailer's body: and thereafter having made a deed, whereby he altered the line of succession, and nominated heirs preferably to the heirs-female of the institute, and to the other heirs called after the substitution heredibus nominandis; and the estates having been possessed for more than forty years on the entail alone, without reference to the deed of nomination; the Court of Session held that the deed of nomination was a valid exercise of the faculty to name heirs—that an heir called by it was preferable to an heir called by a posterior substitution; and that prescription had not taken place so as to exclude the former. But the House of Lords remitted for the opinion of both Divisions.

ALEXANDER PORTERFIELD possessed the lands and barony of Duchal, in the county of Renfrew, under a contract of marriage in 1693 with Lady Catherine Boyd, and by which they were destined to the heir of the marriage. His superior in the greater part of the property was the Earl of Glencairn—one portion, the Overmains of Duchal, held of Cochrane of Kilmarnock, who again held of the Earls of Glencairn. He was also superior of the lands of Porterfield and Hapland, yielding inconsiderable feu-duties. May 24, 1826.

2D DIVISION.

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Alexander Porterfield had two sons,—William and John,—and three daughters, Jean, Eupham, and Catherine. John predeceased his father, leaving an only son, Boyd.

William, in 1719, married Miss Julian Steel, under certain articles of marriage, in fulfilment of which a formal contract of marriage, in the shape of a deed of entail, was executed in 1721, by which her father advanced 10,000 merks as tocher, and conveyed his estates to the spouses and the heirs of the marriage in fee; while, on the other hand, Alexander Porterfield bound and obliged 'himself, and his heirs and successors, with all possible 'diligence, upon his own proper charges and expenses, duly and 'validly to infeft and seise the said William Porterfield, his said 'son, and the said Julian Steel, spouses, and longest liver of 'them two, in conjunct fee and liferent, and the heirs-male pro-'created, or to be procreated of the said marriage; whilk fail-'ing, the heirs-male of the body of the said William Porterfield 'of any other marriage; whilk failing, the heirs-male of the 'body of the said Alexander Porterfield; whilk failing, the 'eldest heir-female of the body of the said William Porterfield, 'and the descendents of the body of the said eldest heir-female 'without division; whilk failing, the next heir-female succes-'sive of the body of the said William Porterfield, and the de-'scendents of her body, all without division; whilk failing, any 'other heirs of tailzie to be nominated and appointed by the 'said Alexander Porterfield, by writ under his hand, at any 'time in his lifetime, in his liege poustie; whilks failing, the 'eldest heir-female of the body of the said Alexander Porter-'field, and the descendents of the body of the said eldest heir-'female, without division; whilks failing, the next heir-female 'successive of the body of the said Alexander Porterfield, and 'the descendents of the body of the said next heir-female, with-'out division; whilks also failing, the said William Porterfield 'his nearest lawful heirs and assignees whomsoever: but al-'ways with and under the reservations, conditions, limitations, 'and clauses irritant and resolutive, which are appointed to be 'inserted and contained in the procuratories and infeftments of 'resignation, precepts and instruments of seisin, charters, ser-'vices, retours, infeftments, and others to follow hereupon, viz. 'reserving to Alexander Porterfield his liferent of the manor-'place of Duchal, and lands therein described; reserving to him 'also full power and faculty to grant liferent infeftments to any 'other spouse, and to make provisions for children of any after 'marriage, or to burden the estate with debts, all in the man-'ner, and to the extent therein provided: And further, reser-'ving full power and liberty to the said Alexander Porterfield

'at any time in his liege poustie, to alter, innovate, or change May 24, 1826.
'the order, course, and succession of the haill heirs of tailzie
'above specified, except the heirs male and female of his son's
'body, and the heirs-male descending of his own body, and that
'by a writ under his hand, notwithstanding of this present
'right of fee, and infeftment to follow hereupon, in favour of
'the said William Porterfield, and the heirs of tailzie above spe-
'cified; declaring always, that the said William Porterfield,
'and his heirs and successors, shall be obliged to take the rights
'and infeftments of the said lands and others, with the burden
'of the irritancy and provisions herein contained, to and in fa-
'vour of such heirs of tailzie as the said Alexander Porterfield
'shall so nominate and appoint, failing the heirs male and fe-
'male of the said William Porterfield's body, and the heirs-
'male of the body of the said Alexander Porterfield, as said is;
'as to which heirs male and female of the body of the said
'William Porterfield, and the heirs-male of the body of the said
'Alexander Porterfield, the foresaid succession is hereby de-
'clared unalterable by the said Alexander Porterfield, or by the
'said William Porterfield and the heirs of tailzie above men-
'tioned.'

The contract contained the usual clauses of a strict entail, ordaining the heirs to bear the name and arms, not to alter or change the order of succession, nor to sell or contract debt, under irritant and resolutive clauses, expressed in the proper and accustomed terms. It was recorded in the register of entails on the 3d of April 1722, and infeftment was taken on the precept in all the lands contained in it on the 1st of May thereafter.

Thereafter Alexander Porterfield acquired the lands of Blacksholm, and others; and his eldest son William having had no issue by his marriage, and Jean, his eldest daughter, having married James Corbett of Towcrosse; and the other daughters being also married; he executed a new deed of entail in 1737, adding the newly-acquired lands to the above entailed estate, and calling, 1st, The heirs-male of his son William's body; 2d, His grandson Boyd by name, and the heirs-male of his body; 3d, His own three daughters by name, and the heirs-male of their bodies; 4th, The heirs-male of the bodies of Porterfield of Fullwood and Hapland; 5th, The heirs-female of the body of William Porterfield; whom all failing, William's heir or assignees whomsoever.

This deed, however, was superseded by another deed of entail, which he executed on the 5th of November 1742, proceeding on

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the narrative of the marriage-contract 1721, and the reserved power therein contained, 'to alter and change the order, course, 'and succession of the haill heirs of tailzie above specified, (ex- 'cept the heirs male and female of my son's body, and the heirs- 'male descending of my own body,) and that by writ under 'my hand; and my said son, and his heirs and successors, are 'obliged to take the writs and securities according as the said 'bond of tailzie, and alteration of the succession sua to be made 'by me, in itself more fully bears;' and then bearing—'And 'seeing, that since making the foresaid bond of tailzie of my 'foresaid estate, I have purchased the ten shilling land of 'Blacksholm, &c. and being resolved to adject, eik, and add the 'saids new purchased lands to my tailzied estate above speci- 'fied, with and under the same clauses and provisions mentioned 'in the foresaid bond of tailzie, but with the alteration, change, 'and innovation of the order, course, and succession therein 'contained, and above repeated, in so far as is inconsistent with 'the order, course, and succession under written, which is here- 'by declared to be the order, course, and succession to my fore- 'said estates and lands, both old and new, with and under the 'additional clauses and provisions after specified: Therefore wit 'ye me to be bound and obliged, as by thir presents, with and 'under the express provisions, burdens, reservations, conditions, 'declarations, restrictions, limitations, clauses irritant and reso- 'lutive mentioned in the foresaid bond of tailzie, contained in 'the foresaid contract of marriage, and also with and under the 'express provisions, burdens, and conditions under written, 'hereby appointed to be contained in the writs and securities 'to follow hereupon, I bind and oblige me, my heirs and suc- 'cessors whatsomever, duly and validly to infeft and sease the 'heirs-male of the body of the said William Porterfield, lawful- 'ly procreate or to be procreate of his present or any subsequent 'marriage, (secluding always the said William Porterfield him- 'self from any succession to the said late purchased lands,) and 'failzeing heirs-male procreate or to be procreate of my said 'son's body, Boyd Porterfield, my grandson, and the heirs- 'male lawfully to be procreate of his body; whilks failzeing, to 'the heirs-male of the body of Alexander Porterfield of Full- 'wood, my uncle; whilks failzeing, to the heirs-male of Ga- 'briel Porterfield of Hapland, my cousin, and that because I 'reserve (reserved) to myself a power to name the subsequent 'heirs of tailzie after my son William Porterfield, and his heirs, 'as aforesaid; and that it is known that the estates of Fullwood 'and Hapland, by a clause in their several dispositions, are to

'return to the heirs-male of my family, failzeing the heirs-male 'of their families, by which my ancestors' anxiety to preserve 'their estates and family in their own names and heirs-male 'plainly appears; whilks failzeing, Jean Porterfield, my eldest 'daughter, spouse to James Corbet of Towcrosse, and the heirs-'male lawfully procreate or to be procreate of her body; whilks 'failzeing, Eupham Porterfield, my second lawful daughter, 'spouse to Emanuel Walker, collector of his Majesty's Customs 'at Port-Glasgow, and the heirs-male lawfully procreate or to 'be procreate of her body; whilks failzeing, Catherine Porter-'field, my youngest daughter, spouse to James Baird, merchant 'in Glasgow, and the heirs-male lawfully procreate or to be pro-'create of her body; whilks failzeing, the eldest heir-female law-'fully procreate or to be procreate of the body of the said William 'Porterfield, my son, and the descendents of her body, without 'division; whilks failzeing, the next heir-female of my son's 'body successivè, and the descendants of their bodies succes-'sivè, without division; whilks failzeing, the eldest heir-female 'of the body of the said Boyd Porterfield, my grandson, and 'the descendents of his body, without division; whilks failze-'ing, the next heir-female of the said Boyd Porterfield, and the 'descendents of her body successivè, without division; whilks 'failzeing, the eldest heir-female of the body of the said Alexan-'der Porterfield of Fullwood, and the descendents of her body, 'without division; whilks failzeing, the next heir-female of the 'said Alexander Porterfield, and the descendents of her body, 'without division; whilks failzeing, the eldest heir-female of 'the said Gabriel Porterfield of Hapland, and the descendents 'of her body, without division; whilks failzeing, the next heir-'female of the said Gabriel Porterfield, and the descendents of 'her body, without division; whilks failzeing, the eldest heir-'female of the body of the said Jean Porterfield, my eldest 'daughter, and the descendents of her body, without division; 'whilks failzeing, the next heir-female of her body, and the de-'scendents of the next heir-female of her body successivè, with-'out division; whilks failzeing, the eldest heir-female of the 'body of the said Eupham Porterfield, my second daughter, and 'the descendents of her body, without division; whilks failze-'ing, to the next heir-female of the body of the said Eupham 'Porterfield, and the descendents of the said next heir-female 'successivè, without division; whilks failzeing, the eldest heir-'female of the body of the said Catherine Porterfield, and the 'descendents of her body, without division; whilks failzeing, the 'next heir-female successivè of the body of the said Catherine

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May 24, 1826. 'Porterfield, and the descendents of the said next heir-female 'successivè, without division; whilks all failzeing, the nearest 'heirs and assignees of the said William Porterfield whatsom-'ever, the eldest heir-female always excluding all other heirs-'portioners, and succeeding without division, heritably and 'irredeemably, in all and haill,' &c.

This deed, although it referred to, did not dispone the lands contained in the contract 1721. It reserved the granter's life-rent, and a faculty to alter, but no clause dispensing with delivery; and it did not appear whether it had been delivered by him or not. He died on the 14th May 1743, and a few months afterwards the deed was recorded in the books of Session as a probative writ.

William had been infeft upon the contract of marriage in the Duchal estate, and in the superiorities of Porterfield and Hapland; and he now obtained a charter of confirmation of the marriage-contract, and seisin following on it, as to all the lands, except Overmains, which he continued to possess under the infeftment on the marriage-contract. He died without issue in 1752, and was succeeded by his nephew Boyd, the grandson of Alexander the entailer.

The titles which Boyd then made up were these: 1. As to the lands of Duchal; he expede a general service, as heir-male of provision to William Porterfield, under the contract 1721, and a general service, as heir of line of Alexander; and in 1757, he obtained a precept of clare constat from the superior, proceeding on a narrative of the contract 1721, and engrossing the reserved faculty to nominate heirs, on which seisin was taken in the same terms; but there was no reference to the deed of 1742. 2. He possessed the lands of Overmains on his apparency simply, never having made up any feudal title. 3. With regard to the superiorities of Porterfield and Hapland, he possessed them on apparency till 1773, when, as heir of line of Alexander the entailer, he expede a charter of resignation, proceeding on the contract of marriage 1721, and the deed of 1742, taking the destination in terms of the nomination in that deed, and he was infeft. In claiming enrolment, however, as a freeholder, he laid aside this title, which was said to be defective, as proceeding on his having right, as heir of line of the entailer, to the procuratory of resignation in the marriage-contract; and therefore he claimed, and was enrolled in 1778 on his apparency. And, 4. He made up titles to Blacksholm in fee-simple, disregarding the deed 1742.

Boyd died in 1795, leaving an only son, Alexander, and se-

veral daughters; the eldest of whom, Margaret, was mother of the late Sir Michael Shaw Stewart. Alexander completed his titles to the lands of Duchal, as his father had done, by a precept of clare constat from the superior, engrossing the reserved faculty of nomination of heirs in the contract 1721, and was infeft accordingly. He made up no titles to Overmains, nor to the superiorities of Porterfield and Hapland, but was enrolled as a freeholder, as apparent heir under the charter and sasine in favour of his father Boyd, in 1773. He died without issue in 1815; and Porterfield of Fullwood, and Porterfield of Hapland, (who were named in the deed 1742,) having also died without issue, the succession of the entailed estate of Duchal now opened to that heir who should be next in succession after the heirs male and female of William's body. May 24, 1826.

Two claimants appeared: 1. Sir Michael Stewart, the son of Margaret Porterfield, eldest daughter of Boyd, who claimed to be preferred, on the assumption that the faculty of nomination was not legally and effectually exercised; and therefore that he came in under the seventh substitution in favour of 'the eldest heir-'female of the body of the said Alexander Porterfield, and the 'descendents of the body of the said eldest heir-female, without 'division.' 2. James Corbet, eldest son of John Corbet, who was the eldest son of Jean Porterfield, the eldest daughter of Alexander the entailer; who, assuming that the faculty of nomination had been effectually exercised by the deed 1742, claimed under that nomination, as the heir-male of the body of Jean Porterfield.

Sir Michael Shaw Stewart took out two brieves, by which he claimed to be served as heir of tailzie, and provision to Alexander Porterfield (the son of Boyd), as last vest and seised in the lands of Duchal, and to William Porterfield, the disponee in the marriage-contract, as last vest and seised in the lands of Overmains; and brought a reduction of the titles made up by Boyd in 1773, to the superiorities of Porterfield and Hapland. James Corbett, on the other hand, purchased—1st, a brieve as heir of tailzie and provision to Alexander Porterfield (son of Boyd), in the lands of Duchal; 2d, a brieve as heir of tailzie and provision to William Porterfield, in Overmains; and, 3d, a brieve as heir of tailzie and provision to Boyd, in the superiorities of Porterfield and Hapland.

The brieves having come before the Macers, and two of the Judges of the Court of Session, appointed in common form, as their assessors, a debate ensued on the respective rights of parties, and memorials were ordered to the Second Division. By

May 24, 1826. Sir Michael it was maintained: 1. That the deed 1742 was not a lawful exercise of the reserved power to nominate heirs under the sixth substitution in the deed 1721, the granter having exceeded his powers, and made a new deed altogether; and, besides, it had never been delivered; and, 2. That as the possession of the estate had been all along enjoyed exclusively in virtue of the deed 1721, it formed a good prescriptive title, while the deed 1742 was cut off by the negative prescription. By Mr Corbet it was contended: 1. That although the granter had in part exceeded his powers, yet so far as regarded the nomination of heirs, he had validly exercised them; and, 2. That the deed 1721 formed his title equally as much as that of Sir Michael; because he referred to the deed 1742, merely as evidence to show that he was the party who had right under that of 1721.

The Lord Justice Clerk, after a deduction of the titles, observed.—In deciding in this competition, it is necessary that we should form a clear and distinct opinion as to the nature of the clause occurring in the deed 1721. Upon the most careful consideration of that clause, I am of opinion that it is to be viewed solely as a power to nominate heirs; and, more particularly, that it cannot be viewed, upon any legal principle, as a general power to alter the order of succession. For, attending to the words of that clause, and comparing it with the other clauses of the substitution, it will be seen that the very same language is employed in the substitution in that clause, as in the other branches of the destination. It is a substitution hæredibus nominandis. There are, in this deed, a variety of substitutions hæredibus nascituris. And the same principles that must be applied to give effect to the latter, appear to me to be indispensably necessary to be applied to the former. That this is a legal, a legitimate substitution, I have no doubt. The mode of substitution was common at an early period.

The case of Roxburghe has been appealed to, but it is not similar to the present. That there was a Crown-charter granted in 1643, with a power to the Duke, failing heirs-male of his body, to nominate heirs to succeed him, is a matter of notoriety. Such a power of nomination was common as to honours and dignities in Scotland, and at this moment, a noble Earl, who is present, (Lord Errol,) holds his titles in virtue of such a power, and the exercise of it.

Therefore, as to the power, I have no doubt. I have no doubt it was a legal power, and might be exercised.

It has been said, that this case is the same as that of an entail where the destination is pointed out by a reference to other

entails. The cases are not exactly the same. These cases pro- May 24, 1826.
ceed upon reference to entails existing. That is not the case here.

But it is a case precisely the same in principle with those where we have sustained a power to nominate heirs vested in a third party. There, all that is necessary is a writing by the person who has the power of nominating heirs. If so, then a fortiori such power may be exercised by the granter, who has reserved it to himself. Therefore I have not the smallest doubt, that this is not a mere reserved power of alteration, but is an express reservation, to direct the estate to go to the heirs to be named by the maker of the deed.

Considering the nature of this reserved power,—that it is one which may be legitimately exercised;—and that all that is wanting to give it effect, is an instrument in terms of the power under the hand of the granter, executed by him in liege poustie; it follows, that when a party founds upon such an instrument, we must hold that the original deed is the title to the estate. It is the real feudal title, because it alone contains the feudal grant. The power of nomination may be exercised by any writing that appears upon the face of it to be authentic, and to be duly exercised. It may be by a holograph writing of the granter. It might be in the shape of a writing in a few lines, merely declaring he does what he has power to do in reference to the substitution in the original deed. And, from being a substitution to heirs to be nominated, it becomes, after the nomination, a substitution to heirs to be born, and generally designated. That it is necessary to produce an instrument by the maker of the original deed, showing his intention to do what he had power to do, and not liable to objections, is clear. But, in reference to the question of effect upon the title, it can, on legal principle, be looked upon in no other light than as a document necessary to establish that the nomination has been made.

That a person may be called in a destination by a general description, as heir-female, or heir whatsoever, but that such a person cannot at once step into the estate, we all know. Something must be done to prove the title by evidence. On the one hand, a service as heir-female, and, in the other case supposed, a service as heir whatsoever, must be presented to us. That service puts the party in a situation of saying, Here I am, with evidence that I am the person called by the destination in the titles of the estate, which I now claim. In the case, again, of heirs nomidandis in a substitution, a claimant of the estate under such destination must show the instrument by which he is nominated. That, however, is not the title to the estate, but the evidence of

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his connexion with the feudal grant of the estate, and to him it is the same as the other evidence which I have mentioned is to the heir-female, or heir whatsoever.

If it could be said for a moment, that a person nominated as I have described, is obliged to found upon this nomination as his title, it would be a contradiction in terms. If he produce what cannot be called a feudal title, what is it but evidence to show that he comes within the clause of substitution? And if it be said no person can claim the estate who is not named in the destination, look to the deed 1721. One single person only is called by name there, viz. William Porterfield. Every one else is called by description,—as heirs male or female of William, or of the maker of the deed, Alexander. They are all called descriptive except the eldest son of the maker of the deed. I am therefore of opinion, that supposing there is regular evidence, in the shape of a deed of nomination of persons by name or description as heirs under this clause, that writing containing the nomination cannot be considered as the title to the estate, but as the collateral evidence, showing that persons have been nominated for the particular clause of substitution in the original deed.

Keeping these observations in view, you will observe, that Sir Michael Stewart claims this estate in virtue of the deed 1721, as his title to the estate. He states, that possession had followed upon that title in favour of his ancestors; that he is entitled to avail himself of that title and possession; and that it is exclusive of the title produced by Mr Porterfield,—the deed 1742.

Mr Porterfield states, that his claim to be served heir rests only upon the deed 1721, as the real and fundamental title upon which he pleads; but to show he is entitled to found upon it, he produces the deed executed by Alexander in 1742.

As Sir Michael Stewart wishes to make out to your Lordships, that he has, in virtue of the deed 1721, an exclusive and absolute right to Duchal and Overmains, founded upon the positive prescription, we are bound to decide whether or not there is any foundation for such a plea.

First, He states, that the deed 1742 is void and null, from various considerations. Secondly, That the positive prescription has followed upon the deed 1721, to the utter exclusion of the right of Mr Corbet Porterfield.

1. As to the alleged nullity of the deed 1742, quoad the new lands of Blacksholm, &c., it is a deed of entail which was within the power of Alexander to form. He was not under any restriction as to lands which he should acquire after the date of the deed 1721; and these were acquired by the portion of his

second wife. He vested that portion in land, and made a new entail. As to the destination of heirs in the deed 1742, from whatever motives he may have acted, and though he may have attempted to alter what was unalterable in the deed 1721, yet he might make what destination he pleased in the deed 1742, as to the newly-acquired estate. With regard to it, the destination is unexceptionable. May 24, 1826.

But while this was within the power of the maker of the deed of entail as to the new lands, it is equally clear, that in the due exercise of power reserved to him in the deed 1721, of filling up the sixth substitution, he might do so in such a deed of entail as this deed 1742. There is nothing in that power of nomination which might not be exercised in an entail as to other property, if you have evidence that he meant to exercise the power reserved to him.

Look to the deed 1742, and see whether there is not upon the face of it evidence that it was intended both for the purpose of entailing the new lands, and of exercising the power of nominating the heirs who should take the benefit of the sixth substitution in the deed 1721. This is demonstrated on the face of that deed. It says, he was about to declare the order of succession to both estates, and begins with a recital of the persons. Thereafter, having named Porterfield of Hapland and others, he expressly states, 'And that because I reserve to myself a power 'to name the subsequent heirs of tailzie, after my son William 'Porterfield and his heirs, as aforesaid, and that it is known 'that the estates of Fullwood and Hapland, by a clause in their 'several dispositions, are to return to the heirs-male of my fa-'mily, failing the heirs-male of their families, by which my an-'cestors' anxiety to preserve their estates and family in their 'names and heirs-male plainly appears.' In the first part of the deed there is a correct recital of the deed 1721; and he here says, 'And being resolved to adject and add the saids new pur-'chased lands to my tailzied estate above specified, with and 'under the same clauses and provisions mentioned in the fore-'said bond of tailzie, but with the alteration, change, and inno-'vation of the order, course, and succession, therein contain-'ed, and above repeated, in so far as is inconsistent with the 'order, course, and succession underwritten, which is hereby 'declared to be the order, course, and succession to my foresaid 'estates and lands, both old and new, with and under the ad-'ditional clauses and provisions after specified.' Here you see there is an express reference, not only to the deed generally, but to the power of nomination in the sixth substitution. And, after

May 24, 1826. having so expressed his intentions, you have the nomination to 'Jean Porterfield, my eldest daughter, spouse to James Corbet 'of Towcross, and the heirs-male lawfully procreate, or to be 'procreate, of her body,' and then to other heirs-female of the granter.

I am clearly of opinion, that the argument, so far as rested on the allegation, that there was here an alteration of what was unalterable, is true and well founded. Though the granter calls Boyd Porterfield as his grandson, he takes no notice of him as his heir-male,—he says nothing of his own heirs-male,—and he puts the heirs-female of William behind Jean Porterfield. These alterations were ultra vires of the granter of the deed in reference to the old estate.

But admitting the fact to be so, it is not pretended that there is now any one in the predicament of being excluded by this alteration. If there were, it would be a most obvious and satisfactory statement in his favour, that, under the deed 1721, which regulates as to the old estate, he should be entitled to be preferred against all the world. Any person showing himself to be an heir-male of Alexander, or heir-female of William, by that or any other marriage, would be preferred under the deed.

Although this was an attempt to do what could not be done, the deed 1742 is correct enough so far as regards the interest of any one claiming as a nominee by it, under the sixth substitution in the deed 1721.

Although it is provided, that the five preceding substitutions in the deed 1721 shall be unalterable by the granter, there is not to be found in the deed 1721, any declaration that any deed which he shall make, in which such an attempt shall be made, shall in other respects be void and null. There is no such stipulation in the deed 1721, but a positive declaration that the five first substitutions shall be unalterable. I do apprehend, that, while it is clear, under the deed 1721, that the rights of the persons supposed to be injured would have been secured, it does not follow, and is not a legal consequence of the abortive attempt to alter what is unalterable, that the deed in which it was made should be declared null. There is no authority for such a proposition.

I apprehend that this may be illustrated. Suppose that Alexander Porterfield, by an instrument much simplified from the deed 1742, and declared to be for the purpose of nominating heirs under the sixth substitution in the deed 1721, had named a variety of persons, some of whom were incapable of holding property by the law of Scotland; I ask, if you could be prepared

to say, that with regard to the remainder of the persons who were capable of holding property, this deed of nomination should be void and null? It would not. You must have found in such a case, that the deed of nomination should receive effect, so far as effect could be given it, according to the law of Scotland, supposing it not liable to any other objections. And I can regard this case in no other point of view, seeing the deed 1721 would have regulated the interest of any persons who might be injured by the deed 1742. The question, therefore, is, whether there is evidence that the purpose of the maker of the deed 1742 was to call Jean Porterfield, and those called after her, in virtue of his power under the sixth substitution in the deed 1721. I think it was a valid nomination; and although an attempt was made at the same time, which, I say, was abortive, I am not able to say that the power reserved to Alexander Porterfield by the deed 1721 has been improperly exercised by the execution of the deed 1742. May 24, 1826.

It is urged, that there are other defects and repugnances, that entitle us to hold that the deed 1742 is null and void. It is said there is an attempt to burden the estate. In looking to the deed, you will find there is no such attempt. The reference is to the new lands.

In the same way, I have to observe, that there is no requisition in the deed 1742 to insert the whole stipulations there given in the investitures of the lands contained in the deed 1721.

As to the powers reserved, they are as to the new estate; therefore there is no ground for saying, that in these particulars Alexander Porterfield wished, by the deed 1742, to infringe upon the deed 1721. I cannot hold the deed 1742 to be a null instrument. On the contrary, it appears to be a valid instrument.

2. The second ground of Sir Michael Stewart's claim is, that he has right by the positive prescription.

If I am well founded in the view I have stated as to the nature of the deed 1721, that it is the title to the estate, and the only one by which either party can have any claim;—that it is common to both, and as much the title of Mr Corbet as of Sir Michael Stewart; it must follow, that there is no title,—no basis upon which the positive prescription can be built,—because the possession which followed upon this deed, by the infeftment of William Porterfield, by the charter of confirmation in terms of the deed 1721, by the entries by precept of clare constat,—can amount to nothing but renewals of the investiture of the deed 1721, and may be founded upon as much by Mr Corbet

May 24, 1826. as by the other party. The real title upon which positive prescription is pleaded, is common to both. Mr Corbet acknowledges, that without it he has no case;—for in the deed 1742 there is nothing like a grant of the old estate,—nothing resembling a disposition of it. Without the deed 1721 he obviously has no case. The deed is common to both parties; and all the possessions that have followed upon it, are as much in favour of Mr Corbet as of Sir Michael Stewart.

But it is obvious, that, in order to found positive prescription, both the title and possession must be shown to be exclusive of the titles and rights of Mr Corbet, and peculiar and inclusive to Sir Michael Stewart.

Now, where is an investiture which does not take in the sixth substitution of the deed 1721? That substitution is in every one of the titles that has been made up since; and therefore, it is in vain to maintain, that there is anything like an exclusive title in the case, on which to found the positive prescription.

It was admitted by the counsel for Sir Michael, that if you be satisfied that the deed 1742 is evidence, and not a title, positive prescription cannot apply. I close with that admission. It is fair, and is necessary; and if the fact be, as was assumed only, that the deed 1742 is evidence, and not a title, then, ex concessis, there is no exclusive title at all, on which to found prescription. The only exclusive title, that, it appears to me, could be founded on in a case of this description, would be, an investiture which had been completed posterior to the deed 1742, and was exclusive of that deed, leaving out the whole of the sixth substitution of the deed 1721, and taking up the succession as if such had never existed. If the forty years had run upon such a title, then there would have been something like a title to exclude. But I discover nothing like that; every one of the titles I have mentioned bearing in gremio this clause, which is the real foundation of Mr Corbet's plea.

But it is said on the part of Mr Michael Stewart, that the deed 1721 takes William Porterfield and the heirs called, bound to insert in the titles to the old estate any nomination of heirs to be named in virtue of the reserved power, and reference is made to irritancies and forfeitures in the deed 1721. That this might have entitled any person founding upon the nomination 1742, to bring a declarator to have it found, that in virtue of that clause a title should be made up, inserting that nomination, and that otherwise the person refusing to make up such title should be subjected to those consequences mentioned in the deed 1721,

may be conceded. Such an action might have been entertained, but was unnecessary, although the party had a title to bring such an action, even without interest; for all the titles that have existed, have embodied in them the substitution in the deed 1721; and nothing has been done to the prejudice of any person who could show, when he came to succeed, that he was nominated under the sixth substitution. May 24, 1826.

When there is a power to nominate constituted in a valid manner, as in the deed 1721, or in the Roxburghe entail, and when it is exercised, the nomination may be produced, when the right to use it has emerged, and the positive prescription cannot apply. Suppose the Roxburghe nomination had been upon a simple paper, and had remained unpublished in the Earl's repositories, and was produced when the heirs became extinct who were entitled to succeed before those nominated in this paper, it would have been lawful, even at the distance of a century, to have produced the nomination in proof of the title to take up the estate by that nomination. In the same way here, where the party founds upon the nomination, when the succession opens to him, and where the sixth substitution has been regularly inserted in every investiture of the property, we have no right to hold that the declarator should have long ago been brought to have had that nomination inserted in the investitures. You will observe, that in the deed 1721 there is no provision to be found, declaring, that if the heirs nominated by Alexander Porterfield shall neglect to pursue a declarator to have an irritancy decreed, in case of non-insertion of the nomination in the titles, they shall lose their right to the estate. There is no such provision or declaration in the deed. Nothing of that kind is to be found in it; and though it be admitted that such a declarator might have been brought, yet the neglect of it does not destroy the right to the estate.

The Counsel of Mr Corbet well stated, that it is the same as if an heir called by description in a certain stage of a destination became entitled to the succession at an earlier part of it, in consequence of any circumstances, and neglected to avail himself of the right; could it be held, that by omitting to bring himself nearer the succession, when it was in his power to do so, he would lose his right to the succession altogether?

When a nominee is entitled to take up the succession under the deed, he will be entitled to have his right ascertained, whether he neglected to bring a declarator or not. I never before heard that the act 1617 made the failure to bring such declarator a ground of forfeiture.

May 24, 1826. Therefore, it appears to me, notwithstanding what has been stated on the part of Sir Michael Stewart, that the positive prescription cannot here apply. That it could apply only in the case of Duchal, is confessed: but it has no foundation at all in this case; and I am for remitting to the Macers to proceed in the service of Mr Corbet.

As to Overmains, the case is still clearer, as there is no foundation for saying that by charters of confirmation or precepts of clarè constat there was any alteration of the deed 1721. To get a charter in ipsissimis verbis of the original right, can indeed import no alteration of the investiture.

The case of Welsh Maxwell must be held favourable to Mr Corbet's plea, and therefore I need not dwell upon it and the others cited.

As to the superiorities, the situation is different from any of the other properties in this case. Boyd Porterfield, in 1773, obtained a crown charter of these superiorities, reciting the destination of the deed 1742. Infeftment was taken upon it in 1774, and he founded upon these deeds to fortify his claim of enrolment. It is clear that his son Alexander produced them as the foundation of his claim of enrolment as heir-apparent to his father, founding upon them as proving his ancestors to have been infeft in lands of the requisite extent.

It is said this charter must be cut down, because in the Quæquidem clause it is stated, Boyd Porterfield had served heir 'of line to Alexander Porterfield his grandfather, instead of heir of provision to his uncle William. But the writer of the charter had fallen into a mistake, though he had before him the real title. I am, however, yet to learn, that the erroneous deduction of titles in the Quæquidem clause vitiates a charter as a foundation for the positive prescription, which, in the dispositive clause, is formal and complete, and which, in every essential of the grant, is liable to no exception. I have seen no authority for that. Having been followed by infeftment, and the destination correct in the dispositive clause, it is a valid title. Upon that part of the case no authority is produced to show that such an error in the Quæquidem is a fatal objection. I think the title is unexceptionable; and as to the superiorities, I think Mr Corbet is entitled to be preferred in this competition of brieves.

Lord Glenlee.—It is scarcely decent not to say something in a case of this kind; and, when once one makes a beginning, there is no saying when he will stop.

The first point to be inquired into is, how far the deed 1742 is good for anything. May 24, 1826.

It appears to me, that the deed 1721, after the fifth substitution, does certainly destine to any other heirs of tailzie that may be named by the granter, by any writing made in liege poustie. There is, also, in the subsequent part of the deed, a power to alter the succession, except as to the first five substitutions, as to the heirs male and female of William, and the heirs-male of the body of the granter. But this gave him no new power; for, from the power to nominate, he might appoint any order of heirs after the first five substitutions. After these first five substitutions, he had the free destination of the entail, and he might name any person he pleased.

Upon due consideration, the title will not appear an onerous one, except as to some of those called in the first substitutions. Strictly speaking, it was only onerous to the heirs of the marriage,—to the heirs of William, but not to any, except in very limited part, of those called substitutes.

Even supposing the title were onerous, it does not appear to me there is sufficient ground for holding that this nomination of heirs should have been expressed in any peculiar style. It was not necessary even to say in the deed of nomination, I appoint A, B, and C, to be heirs after the first five substitutions expire but it was sufficient, if the granter named them to be his heirs; for the very conception of the substitution gave it to them only after these five substitutions. The deed 1721 took care of itself; —these heirs could only take after the first five substitutions.

I do not mean to say, that every deed which the granter should execute, could be held a proper nomination of heirs. There may be cases conceived where there might be room for a very different conclusion. Suppose à minute of sale obliging to grant a disposition to A, B, this could not warrant a claim to come in as heir after the first five substitutions. That would have been a ridiculous plea. It must appear Mr Porterfield meant to exercise the powers he had.

Then it is of no consequence to show an intention to do what he could not do, if it is possible to separate what he could do from what he could not do.

Still more, we are not, because he had not selected the very phraseology that would have occurred to an excellent conveyancer, and had not adopted some elegancies of expression, (for in a certain sense there may be elegancy in conveyancing,) to say the nomination is not valid. Are we to say that it was impossible that Mr Porterfield or his writer should commit any mistakes; and are we therefore to hold that he must have meant

May 24, 1826. something else than, to bring in heirs after the fifth substitution, and that he must have meant to destroy the entail 1721? That is unreasonable, if we can make it practicable to bring in heirs as authorised by the entail 1721.

It appears to me also, that it was not necessary that this deed of nomination should be executed on a separate paper, and contain the names of the heirs to come in after the first five substitutions in the entail 1721. The granter might have merely referred to heirs under another entail; and this is nearly the case that has happened. The only difference is, that the heirs to come in under the deed 1721 are mentioned in an entail afterwards made by the granter himself. The nomination is not in a separate paper, but makes one of the clauses of the deed 1742.

Suppose the heirs of these new lands were all separate and distinct persons from those who had been called in the deed 1721, the construction could not have been, that this was meant as a total alteration of the deed 1721, but merely that these heirs should come in the place where the tailzie 1721 authorised: and it was not necessary for Mr Porterfield to express that, but merely to make a nomination of heirs. The tailzie 1721 points out the place where they should come in.

The whole question is reduced to this;—Could the circumstance of mentioning, in the nomination for the sixth substitution, persons having another place in the destination in the deed 1721, render the nomination inept? That may be a superfluity, and a good conveyancer perhaps would not have proceeded in that way. But there is no difficulty in the circumstance of putting after the five substitutions persons called before; and some benefit might be derived to them from that circumstance. It is a great advantage; for if called by the nomination, a person would only have to prove the nomination; whereas, if he is to claim under the first five substitutions, he must trace a lineal descent to show he is one of the number called in that part of the destination. If Boyd Porterfield's legitimacy had been doubted, then he had no occasion to make out his descent through the former substitutions. If he could make it out, then this nomination did him no harm.

It is therefore plain, that as the thing stands, the result is this;—If the deed of nomination, so executed, and the destination in the entail 1721, is put together in one charter, there is an awkward superfluity, but nothing that would not admit of extrication.

The other objection is ill founded. I mean, the idea that any irritancy could be incurred, by engrossing the nomination in a charter. There might have been an irritancy if the nomination

had been put in a wrong place, but not if put in the proper place, first taking those mentioned in the first substitution, and then the others in their order, the heirs nominated coming in under the sixth substitution. May 24, 1826.

With regard to the objection on the head of non-delivery; it is not a deed which required delivery; and though it did require it, yet, in point of fact, it was out of the repositories of the granter; and Sir Michael Stewart would have to prove that at Mr Porterfield's death it was in his repositories. The legal presumption is delivery.

The whole case, therefore, on Sir Michael's part, depends on the plea of positive prescription; but I do not see termini habiles for prescription. The positive prescription cannot occur except in a competition, where deeds or titles are founded on that are inconsistent with one another. The deed 1721 and the investiture are common to both competitors here; and the question is, which is to have the benefit of them? Sir Michael says, the five first substitutions have failed, and he is now the heir of investiture in the deed 1721. And the other claimant, Mr Corbet, says the five first substitutions have failed; and here is a nomination in terms of the power in the sixth substitution, by which I have now right to the estate.

If you can make out this deed 1742, which connects Mr Corbet with the deed 1721, to be lost by the negative prescription, there might be something in the plea; but there would also be required the positive prescription. During the whole period of possession, those possessing were called both by the five substitutions and this deed of nomination. A remote heir might indeed have brought an action for having the nomination engrossed along with the five substitutions; and no titles might have been made up in consequence of some neglect. Perhaps, then, a good answer might have been made to Mr Corbet. But nothing such has been done. He could not at any time have got anything done that he cannot now; and therefore there is no room for prescription.

In this question of prescription matters stand thus: Here are two persons belonging to different series of heirs, claiming possession of an estate, after certain substitutions are extinct; but the possession has always stood in persons entitled to claim under the deed 1721, and under it connected with the deed 1742. All the irritancies and forfeitures are the same in both titles. It is a settled point of law, that if persons have two titles to their possession, the possession cannot be so applied as to make them prescribe against themselves. If so, where both titles are in fee-simple, why not so in the case of deeds with the

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same fetters? There might have been some difficulty, if one had been more limited than the other; but where, as here, they are one and the same as to limitation, I cannot see why the same principle should not apply as in fee-simple titles. It is appending the same weight to both. I cannot see any difference.

I do not know if the case was ever decided,—but suppose a man executed a tailzie of his estate, and afterwards makes another tailzie in the same terms, except that, after the first substitution, he makes some change in the order of succession,—suppose it to have been thrown aside, and titles are made up under the first deed of entail, and for a long period the possession goes on under it; and at last the two entails split;—I should have no hesitation in saying there was prescription in favour of the one against the other.

But there is no foundation for the plea of prescription in this case.

I say nothing as to the superiorities. The charter may be bad; but where is Sir Michael's title?

Lord Robertson.—Although I am unwilling to occupy much of your Lordships' time, I cannot explain my views in this case without calling your attention again to those clauses in the deeds 1721 and 1742, upon which my opinion is founded.

Upon the occasion of the marriage of William the eldest son of Alexander, a marriage-contract was entered into, by which the estates of Alexander Porterfield were destined to a series of heirs in succession; 1st, To the heirs-male of the marriage of William with Julian Steel; 2d, to William's heirs-male by any other marriage; 3d, To Alexander's heirs-male; 4th, To the eldest heir-female of the body of the said William Porterfield, and the descendants of the body of the said eldest heir-female; 5th, To the next heir-female successivè of the body of the said William Porterfield and the descendants of the body of the said next heir-female successivè, all without division; and, 6th, To any other heirs of tailzie to be nominated and appointed by the said Alexander Porterfield, by writ under his hand, at any time in his lifetime, in his liege poustie; which last clause has given rise to the present question.

Matters rested on the footing of this entail till 1742, when Alexander executed the other deed now under consideration. During the lifetime of William, and when he might have had heirs-female of his body, Alexander executed this deed, proceeding upon the narrative of the deed 1721. And it is remarkable, that though it proceeds upon a narrative of the limited power

of Alexander to make a substitution in the sixth part of the clause of destination, and his limited power of altering the order of succession, yet it contains an innovation and alteration contrary to such limited powers. May 24, 1826.

In considering the effect to be given to the deed 1742, we must attend to the character and description of the deed 1721. It was not a gratuitous tailzie, executed by Alexander in favour of his son and the series of heirs. It is a deed of tailzie to be strictly viewed, not only because there is a contract of marriage, but because there is a mutual entail in the case; because, in consideration of the marriage, and the provisions made by Alexander, the father of Miss Steel paid a tocher, and executed an entail of his lands upon the heirs of the marriage, first to the heirs-male of the marriage, then to the eldest heir-female of the marriage, and last, to the heirs whatsoever of William Porterfield.

I take it, that Alexander Porterfield was denuded, by the deed 1721, of this estate, reserving his liferent over part of the subjects, and power to make this substitution which I mentioned, and his power of making an alteration of the order of succession; but always without prejudice of the rights of the heirs male or female of the body of William, and the reservation of power to burden the estate for wives and younger children; therefore, I think his power is not to be largely interpreted, as in the case of a gratuitous entail, but to be strictly interpreted, on account of the onerous nature of the deed of entail executed in 1721.

I conceive this is a question of powers. What are the powers reserved to Alexander by the deed 1721, and how were they executed? Although he had reserved a power of altering the order of succession, it was without prejudice of the heirs male and female of the body of William, and to be executed in terms of the reservation.

In judging of the exercise of a faculty of this kind, we must consider the situation of the party exercising the power at the time the deed was executed. Suppose that, the day after the deed of 1721 was executed, a deed similar to that of 1742 had been executed, proceeding upon a narrative of the deed 1721, and that Alexander cut out, not only the heirs-female, but the heirs-male of his son William; can it be doubted, that the deed so executed at that moment, was, not only ultra vires of Alexander, but in fraud of the entail just before executed? and, would it have been an answer to say, though William afterwards lived thirty years, and might have had an heir-female, that because

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he died without the existence of any such, this deed, which was ultra vires of the granter, and in fraud of the mutual entail and onerous contract, could revive, and receive effect? I cannot enter into the idea of that.

In a question of power, we must consider the power when exercised: When this deed was executed in 1742, William was alive. He survived his father, and therefore, down to Alexander's death, what Alexander had attempted to exercise was a faculty beyond the power reserved in the deed 1721, and contrary to the faith of the contract entered into at that time.

Taking this view of the deed 1742 as an exercise of a reserved power; and being of opinion it was ultra vires of the granter at the time it was executed, it may not be necessary to enter into the other questions, on the supposition that the deed were good.

The question would arise, How far Sir Michael Stewart is secured, in consequence of the positive prescription, or the claim of Mr Corbet cut off by the negative prescription? If it could be shown, that the deed 1742 is a part of the deed 1721, the argument as to the positive prescription could not aid Sir Michael much; for then it might be said, that all the titles made up under the deed 1721 comprehend the deed 1742, and all its provisions. But as I am of opinion that this deed 1742 cannot be considered part of the deed 1721, I see nothing in the way of Sir Michael's title under the deed 1721. For though the exercise of a reserved faculty in terminis of the deed 1721, might be considered part of that deed; yet, if it vary from the reserved power, it cannot be considered a part of the original deed.

Neither can I consider this as of the nature of a conditional substitution, for the heirs-female of William are called in a different place in the destination from that of the deed 1721.

With regard to the title made up in 1773,—the charter proceeds on the service of Boyd Porterfield as heir of line of Alexander, the granter of the deed, which could give him no right to the grant to William; and the making up of an erroneous title cannot be considered as an acknowledgment of the deed 1742, or an interruption of the prescription. The title to the superiorities labours under a great defect; not only the Quæquidem, but the whole of the charter goes for nothing, as proceeding on a service not to the grantee, but the granter.

Lord Craigie.—It appears to me, that we are almost agreed as to the plea of prescription, and that, if the power to nominate heirs in the deed 1721 was duly exercised by the deed 1742, Mr Corbet must be preferred in this competition. It appears to me,

that the power was duly and warrantably exercised, to the effect of calling Mr Corbet to the succession. May 24, 1826.

I am ready to meet Lord Robertson on the question, as occurring with William, the eldest son of the granter, and the heirs of nomination. Suppose it were made out that the deed 1742 was intended to make a new destination; that which was done beyond the powers reserved to Alexander by the deed 1721, would be set aside, and what was within his powers would be valid.

Seeing any error or omission as to the deed 1742 has not affected the rights of any persons under the preceding substitutions; I think the deed of nomination is a sufficient exercise of the power,—I do not so much say of naming heirs, but of giving effect to that substitution in the sixth place of the destination in the deed 1721, under which Mr Corbet now claims the estate. *

The Court therefore, on the 2d July 1817, found, 'That the 'claimant, James Corbet Porterfield, is preferable, and entitled 'to be served heir of tailzie and provision under the brieves pur-'chased by him. Repelled the objections to his title, and dismiss-'ed the brieves of Sir Michael Shaw Stewart, and remitted 'to the Macers to proceed accordingly.'

Against this judgment Sir Michael reclaimed, and James Corbet having died, his son, James Corbet Porterfield, obtained new brieves under the titles that had been claimed on by his father, and avisandum having been made with them to the Court, and answers lodged by him,

Lord Bannatyne observed,—The opinion I have formed in this case, is different from that of the majority of the Court. The parties have gone into a very extensive field of discussion; but it appears to me that the question lies within a very narrow compass.

Alexander Porterfield, by the contract of marriage in 1721, settled his whole property on his son and the heirs-male of the marriage; whom failing, his heirs-male of any other marriage; whom failing, his own heirs-male; whom failing, his son's heirs-female, and their descendants; and after that, he reserves a power to nominate any heirs he may choose, by a deed to be executed by him in liege poustie, then to the heirs-female of his own body, and then to the heirs and assignees whatsoever of William his son. Besides that reserved power to call other heirs, after the heirs-female of his son, he reserved a general power to

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* Lord Bannatyne did not deliver his opinion, as he had not heard the pleadings.

May 24, 1826. alter the whole order of succession, except as to the heirs male and female of the body of his son, and the heirs-male of his own body. The estate then stood descendible, (unless he executed such a nomination of heirs,) failing the heirs-female of William's body, to the heirs-female of his own body. Alexander, however, did not allow the matter to stand on that footing. He acquired additional property, and he executed a new deed. He had it in his power, either to make a nomination of heirs to succeed after the heirs-female of his son, or to make a general settlement altering the order of succession after these heirs. But, in place of making a simple nomination of heirs after the heirs-female of his son, he executed a complicated deed, which proceeded on the narrative of both powers, to nominate heirs, and to alter the order of succession. In place of making a simple nomination of heirs, and in place of referring either specially or by general reference to the power, he executed a new settlement, with a declaration, that he meant the old and the new estate to descend to the same series of heirs, and under the same conditions. In fact, it was a new entail of the estate, and it was supposed to qualify the fee in the person of William. I have no doubt of that. The alteration he made went beyond his powers; for, in place of naming heirs, after the heirs-female of William, he brought in the other heirs, in preference to these heirs-female, and William was still alive. The deed thus going beyond his powers, could not operate as a nomination of heirs, because it materially interfered with the right of the female-heirs; therefore, that intention could not qualify the fee in William's person, at the time, and I don't see how it could do so in any other event. My view of the case is this, that this deed being beyond his powers, I cannot see how any after event could make it effectual.

Lord Craigie.—The opinion now delivered, has been confined to one of the many points in this cause, and I have written out notes upon the different points, with which I am willing to furnish the parties; but I don't know if it is necessary for me to advert to the other points. I will do my duty, I think, sufficiently, as the case has been heard most fully, and opinions delivered formerly by your Lordships, if I state my opinion on the point spoken to by my brother.

It appears to me, that the judgment is still well founded, even as to the objection now stated. I must say, in general, as to the execution or fulfilment of the power given by the entail, that the power is one which ought to be construed bona fide, if it was executed in a fair honest manner, to fulfil the stipulations of the marriage-contract. If there were any room for construction,

that is the construction that ought to be applied; and even if there were a looseness in it, it ought to be construed according to the true meaning of the party. But in this case there is no room for construction. Though it is a complicated deed, and not well expressed as to the reserved power, yet it is clearly and decisively a deed, in which we can discover the intention of the maker of it, and that he has used, though not perhaps the best, yet words fully adequate for the purpose. In the first place, it appears to me, on looking into the words of the settlement, that there was this error in the framer of the deed, that instead of prefacing that part of the deed with the reserved power to fill up the substitution, he has given it as a reason in the heart of the settlement. But, according to my interpretation, the meaning of it is the same as if he had said, 'whilks failing, as I have power to nominate 'heirs for filling up that substitution, I call the heirs-male 'of Porterfield of Fullwood, and of Porterfield of Hapland.' That slight transposition would make the meaning of the party clear. As to the excess of power, it appears to me not to be admissible in a case of this kind. I conceive, that where a man does a thing which he has a power to do, and also does a thing which he has not power to do, it is the duty of the Court to separate what he has done beyond his power, from what he has done under proper authority. There is no difficulty as to that here. But there may be a different case, where he blends a power he has, with a power he has not, in such a way that they cannot be separated, the one from the other; in that case they must both be destroyed. But what he has done here confessedly in execution of the power reserved by the entail, he has done in such a way as the Court may give effect to it. If, in this case, Alexander Porterfield, in the deed 1742, had said nothing about the prior substitutions, it would have been perfectly good, because the substitutions in the deed 1742 would have applied to the power, and the rest is mere surplusage. I cannot leave out of view that, at the time and ever after, there were no parties injured by going beyond the power; and further, if there had been any injury, Boyd Porterfield might have objected; but he acquiesced, and appealed to the deed 1742 as an effectual deed. On the whole, in a deed of this kind, in the exercise of a right reserved by a marriage-contract, in a question with heirs, we would do a monstrous injustice, if we were to take hold of irregularities in the deed, in order to destroy what the party really intended to do.

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Lord Justice Clerk.—Having again considered this case, I am

May 24, 1826. in the situation of my brother who spoke last, that I can see no reason to alter the interlocutor; and, as I delivered my opinion at perhaps too great length, when it was formerly brought before us on full papers, it is not my intention to go over the case again in detail, but I will just state the most prominent parts of my opinion.

I am not moved by the argument on the nature of the power, nor by the argument as to the onerosity of the marriage-contract in 1721, and the unfavourable, nay strict interpretation to be put on the exercise of the power. I am quite clear, that the plea of onerosity is not applicable to anything but the first five substitutions; and as to the rules of construction applicable to such a power, a party divesting himself of his estate, and naming certain substitutes, with a reserved power to make, what I hold to be, the sixth substitution, I know no rule of law, by which to apply a strict construction to such a power. It is argued, as if we were now in a question as to the fetters of an entail; but this is a question inter hæredes, in which a favourable construction is to be applied. But I do not contend for a favourable construction, but only for a fair construction.

I have not been able to alter my opinion, and this was also the opinion of Lord Glenlee, that this is a substitution to be filled up, hæredibus nominandis, the same as where there is a substitution hæredibus nascituris, under which every person who could verify their right under such a substitution, would be entitled to make it good. In the same way, under this sixth substitution, 'to any other heirs of tailzie to be nominated and appointed by the said Alexander Porterfield, by writ under his hand at any time in his lifetime in his liege poustie,' all persons who can show legal evidence of their right by a legal instrument in liege poustie, will be entitled to succeed; and the only question is, if there is such legal evidence here, that he availed himself of the reservation.

I am also clear, that there is nothing in the argument as to the nomination being only an alteration of the order of succession. The counsel for Sir Michael places all the force of his argument upon it as an alteration of the order of succession. But I look on it as a nomination of heirs, and as the law does not require it in any precise style, the only question is, the evidence of this being a legal valid instrument. It was executed in liege poustie, for it appears that he lived for half a year after its execution, and it was entered in the public record. If I am right in this, the next question is, Whether it was a valid deed originally at the time it was executed? Though I think it is possible to make out that there were deviations in some of the substitu-

tions, and particularly as to the heirs-female; yet it is material, that there never has been any insinuation that there was any party to avail themselves of the objections on that account; and if there were not, it would be strange if other parties, standing no doubt in connexion with the deed, should be entitled to be heard on these objections. It is the interest of the five first substitutes alone which could be affected. The deed 1742 not only proposes to make an alteration of the order of succession, which was carried into effect as to the 7th and 8th substitutions; but I concur with Lord Craigie in thinking, that when this deed is deliberately considered, in order to discover its true meaning, no doubt can be entertained, that besides the intention of altering the order of succession, there is a purpose of making the new nomination of heirs for the sixth substitution. May 24, 1826.

But it is said that this deed was not delivered. The answer to this, if indeed it required any answer, is quite satisfactory, that it must be presumed to have been delivered. But delivery was not necessary. The maker had an interest himself in the deed; he had a liferent in part of the lands, and he had a power to alter some of the substitutions. It does not follow, that, if he executed one deed, he was functus. If he executed a deed in liege poustie, it would be effectual. But besides, post tantum temporis delivery must be presumed. It was not the title of the estate; it was the evidence, the proof, the demonstration that the power was exercised.

If I am right in this view of the case, the question that remains is only,—whether in such a situation, where it is not the title, not the investiture on which Mr Corbet claims, but merely the evidence of his being in the right of that substitution, there is ground for the plea of prescription, which was considered formerly a good plea for the baronet, but which has no foundation. Mr Corbet says, 'I found on the deed 1721, on which the whole 'possession has followed ever since, and I only support it collaterally, by referring to the deed executed in 1742 in liege poustie.' How it can be said, that because titles have been made up on the deed 1721, these titles can be set up as a title in favour of any other heirs, is incomprehensible to me; for, down to the death of Alexander Porterfield, there was no title but the deed 1721, which is the foundation of Mr Corbet's title:—a great part of the time the estate was held on apparency, but the titles, when made up, were on the deed 1721, with the exception of this, which I cannot consider in the same light with Sir Michael Stewart, the proceedings of Boyd Porterfield in 1773. This is a most material part of the case; for, with regard to this deed, which is said to have been latent, it appears that that person

May 24, 1826. makes the deed 1742 the grounds of his Crown charter, and makes claim on that ground in the court of freeholders; and then Alexander, his son, makes a claim on his right of apparency, and produces the Crown charter. There has been no contrary possession; but we have every evidence that the estate has been enjoyed under this deed 1721, and of which we have evidence by the proceedings in 1773. Has any other title been made up? If a title had been made up after this substitution had come in, there would have been ground for prescription. But, has anything of that kind happened? Nothing of the kind; for the moment that Alexander Porterfield died, when there was room for the sixth substitution, this claim for Mr Corbet was made, and there has been no interference with the title on which this person claims. I am very clear, that it is our duty to find that James Corbet is entitled to be preferred.*

The Court accordingly, on the 22d June 1820, found, 'that 'Mr Corbet Porterfield is entitled to be served heir of tailzie 'and provision under the brieves purchased by him, and remit- 'ted to the Macers to proceed in the services accordingly, and 'to dismiss the brieves at the instance of Sir Michael Shaw 'Stewart, Bart.' As this was only a first judgment in the question with James Corbet, the son, Sir Michael presented another petition; on advising which, with answers—

Lord Robertson, after mentioning generally the nature of the deed of entail in 1721, observed,—This is a contract of marriage—it is a strictly onerous deed, in so far as affects the interests of William, and the descendants of his body; and Alexander could do nothing to affect their interests. But, in 1742 Alexander executed another deed, proceeding on a narrative of the deed 1721; and he thereby altered the order of succession, and brought the sixth substitution into operation. He thereby put the heirs-female of William in a less favourable situation in the order of succession, than they had been in by the deed 1721, and this was clearly ultra vires—the deed 1721 being onerous, he could not affect any one under the tailzie.

Although that alteration might have been challenged by any heir-female of William, as none such existed, a question occurs, how far such challenge can be made by Sir Michael Shaw Stewart, or any other.

When the case was formerly under consideration, I enter-

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* Lords Glenlee and Robertson were absent.

tained the opinion that the deed 1742, as ultra vires at the time of execution, could be considered as of no effect, although no such heir-female ever existed. I have altered that opinion. The heirs-female of William, if any such ever had existed, had a jus crediti under the deed 1721, which Alexander could not defeat; but as none such existed to challenge the deed, the deed is perfectly good to the heirs next instituted. The deed 1742 is not absolutely null, in consequence of Alexander having altered the deed 1721, in a way he had no power to make alterations, although such deed would have been null at the instance of an heir-female, if any such had existed. May 24, 1826.

I agree, the deed 1742 must be held as an unum quid. The deed 1742 might be effectual as a nomination, although as an alteration it would not have been effectual. The destination to heirs to be named, as in the sixth clause of the deed 1721, becomes part of the original deed. It is not a reserved power, but is truly a substitution, and it is introduced by the words, 'which 'failing,' &c.

The deed 1742, I think, did not require delivery—it is just a part of the deed 1721.

In considering the question, we must keep in view, that there are not here two different titles, the one limited, and the other unlimited; or two titles, both of which are limited, but where the limitations are different. There has been, in truth, but one title, for the nomination in 1742 is just a part of the deed 1721, the title upon which the possession has all along been held, and upon which both parties must found.

The negative prescription cannot apply; for the very title upon which the estate is now claimed, was the ground of possession of those who had the estate.

Lord Bannatyne.—Although Alexander went beyond the reserved powers that belonged to him, in so far as he made a nomination to the prejudice of the heirs-female who might be born of his son William's body, I think that was only challengeable at the instance of those heirs themselves—and, upon that ground, I now think Mr Corbet's claim is good in law.

Lords Justice-Clerk and Craigie adhered to their opinions; but Lord Glenlee was declined by Sir Michael, in consequence of his second son having married his lordship's daughter.

The Court, therefore, on the 15th of May 1821, adhered to their former judgment.*

Mr Corbet Porterfield then proceeded in that service before

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* See 1 Shaw and Ball. No. 6.

May 24, 1826. the Macers, and was served nearest and lawful heir of tailzie and provision in special, in terms of the original tailzie of 1721, and relative deed of nomination of 1742, to Alexander Porterfield, last of Porterfield, in those parts of Duchal holden of the Earl of Glencairn; and to Boyd in the lands of Porterfield and Hapland, that held of the crown, and entered into possession.

Sir Michael Shaw Stewart having died in August 1825, his son, Sir Michael, appealed against the above judgments.

Appellant.—Upon the death of the last Alexander Porterfield without issue, the late Sir Michael Shaw Stewart was, and the appellant now is, the heir of the investiture under which the lands of Duchal have been held since the date of the contract of marriage 1721, and of the personal right by which the Overmains have been held since the death of William Porterfield, in 1752. It is a mere evasion for the respondent to say, that the sixth substitution in the marriage-contract, in favour of the heirs to be nominated by Alexander, the entailer, is an actual substitution, which, upon the nomination taking place, can render the nominees, in the eye of law, the heirs of the original investiture. Such a substitution, when followed by nomination, may confer a right of succession on the nominees, which, if urged in proper time, may be effectual, but it does not render them the heirs of the original investiture itself. They only thereby acquire an obligation against the proper heirs of the investiture. A substitution of heirs to be named, though in form a substitution, is no better than a blank substitution, with a reserved power to fill it up. The investiture itself is not the source of the right of the nominee—for it contains no description of him whatever—it is the deed of nomination that is the source of his right. The respondent, therefore, was not entitled to serve, under the investiture 1721, to Alexander Porterfield, the individual last vest and seised in Duchal, or to William, the person last vest and seised in Overmains; and this view is strengthened by a consideration of the particular circumstances under which the nomination was executed. But the deed 1742 is not a deed of *nomination*—it is a deed of *alteration*; and it is quite clear, that a deed of alteration of a destination cannot render the party in whose favour the alteration has taken place an heir of the altered investiture. The entailer was entitled, under his reserved power, to nominate and to alter. If he nominated, all he had to do was to fill up the sixth substitution. But he could not, under the power to nominate, extinguish the seventh. By the deed 1742, however, the seventh and following substitu-

tions are discharged. He, perhaps, could do so by a deed of alteration; but then the person claiming under the deed of alteration must abandon all title to claim under the deed altered. The rights vested in the heirs of the destination in the marriage-contract 1721 could not be impaired by any deed of Alexander Porterfield, the entailer, and which was not exactly agreeable to the powers reserved by him. But the deed of nomination 1742 was a deed exceeding those reserved powers. The instant that the entail was completed by infeftment in the person of the institute, a vested right was created in favour of the substitutes, which could not be recalled even by the joint act of the disponee and institute, although as to these substitutes the entail were quite gratuitous. This vested right, however, could be affected in two ways, under the two separate reserved powers—either by filling up the sixth substitution, leaving untouched the seventh and following substitution—or by altering the order of succession; and in this also the entailer was limited, because heirs male and female of his son's body, and heirs-male descending of his own body, were excepted from that power. But the period for estimating whether the deed was infra or ultra vires of the disponer, is the period of his death. At that period William was alive, and might have had heirs-female of his body; and yet, by the nomination, parties are called before these heirs-female, whom it was not in the power of the entailer to disappoint. The deed 1742 was therefore clearly challengeable by William's heirs-female, when they existed—it was challengeable by William himself, and by the whole substitutes in the deed 1721, whether called before or after the sixth substitution, containing the power to nominate. The deed is thus null and inoperative; and being so at the death of the granter, it could not be revived and become valid, because, after a lapse of years, the accidental event supervened, that William died without issue-female. The consequence is exactly the same, if the deed 1742 be considered as a deed, not of nomination, but of alteration; for it commences at a period higher than permitted by the contract 1721, and is equally ultra vires. In neither case had the entailer power to call the heirs-male of Fullwood and Hapland before William's heirs-female. This nullity cannot be remedied by compounding the two deeds together, and cutting off the excrescences. It cannot be invalid to some particulars, and valid as to others. It must stand or fall as an integer, or unum quid. Besides, the nullity and inefficiency of the deed has been uniformly assumed and acted on by all parties, as well those against whom as those in whose favour it could be supposed to operate; and the presumption of abandonment has, by

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May 24, 1826. acquiescence and taciturnity, been created. Near a century has elapsed from the date of the deed, and now an attempt is made to call it into operation, in face of the conduct of all the parties who have, since its appearance, taken up the property. But, independent of this general presumption of abandonment, it is cut off by positive and negative prescription. Even supposing the currency of the prescription to commence only at the time of the death of the entailer, the lands of Duchal have been possessed under a title in which the appellant is now heir, and under no other destination for more than forty years. His jus crediti as a substitute has been placed beyond the reach of challenge, by the possession and infeftments which have followed and been enjoyed during that period. But, on the other hand, supposing that the deed 1742 gave the nominees a claim to step in to the sixth substitution, (for it could not in that shape create a real burden on the infeftment of William Porterfield, and the other fiars successively taking the estate,) they should have enforced it; but not having done so, that obligation against the substitute in the deed 1721 is extinguished by the negative prescription. The heirs successively possessing, had a clear interest to prefer possessing on the deed 1721, rather than on the deed 1742; and there cannot be a more gratuitous fallacy, than to maintain, that the possession held under the investitures, made up agreeably to the tailzie 1721, was a possession beneficial to the nominees under the deed 1742, and preserving from prescription the rights of the substitutes under that deed. The estate of Duchal was possessed during the years of prescription, not on the deed 1721, in conjunction with the deed 1742, but on the deed 1721 as opposed to the deed 1742. If the rights of the heirs under the nomination are lost in regard to Duchal, they must be equally unavailing as to Overmains.

Respondent.—By the deed of nomination 1742, the entailer's three daughters (through the eldest of whom the respondent claims), and their issue-male, were called to the succession in preference to his heirs-female (through the eldest of whom the appellant claims); and as the prior substitutes have all now failed, the respondent, as heir-male of the entailer's eldest daughter, is entitled to take up the succession in preference to the appellant, the entailer's eldest heir-female. Neither the appellant, nor any other succeeding heir-female, has any right or title to object to the deed 1742. The nomination was quite valid—a conveyance or destination of a landed estate may be made in favour of heirs, or persons to be named by the disponer, with equal competency as one in favour of heirs to be

born of the institute, or of any of the substitutes specially named in the deed. It is an actual substitution, carrying a legal right to the inheritance. It was thus perfectly competent for Alexander Porterfield to name, by reference to the entail of Blacksholm, the heirs who, on failure of the hæredes prædilectæ, he meant should succeed to the estate of Duchal. As to the alleged excess of power, in postponing the heirs-female of William's body, the disponer merely has called in the sixth some of those already called in the fifth substitution. At the worst, it was an oversight of the conveyancer, and a very venial one, since William had no daughters, and no prospect of any family; at all events, the mistake cannot be injurious to the other heirs named in the sixth substitution. The reserved faculty is not one of strict interpretation, as against the entailer, or capable of being executed only forma specificata; on the contrary, it is to be liberally construed—or if it is to receive a strict construction, it is against the heirs under the seventh substitution, who in truth are mere gratuitous donees. It is an entire misstatement to represent the deed 1742 as not a deed of nomination, but of alteration, under the reserved power to alter. No two modes of introducing successors to a tailzied inheritance can be more different, both in their nature and effect. In the one, the feudal grant is made by the original deed; in the other, by the new grant: In the one, the favoured party takes by service; in the other, by declarator and adjudication in implement. In the present instance, it seems impossible to consider the deed 1742 as an exercise of any but a power of nomination. Even if it were an exercise of the power to alter, the deed would carry the estate to the respondent, and affords no ground of challenge to the appellant. It would have been incompetent for any of the hæres prædilectæ to have challenged the deed beyond what was necessary for their own interest, and much more incompetent must it be, for any of the heirs of the postponed substitution to challenge the deed. The plea of nullity, open to the parties postponed, is obviously jus tertii to parties not postponed. The excess is quite easily separated from the due exercise of the power. There are no termini habiles for the operation of the positive or negative prescription; for the title under which the estate was possessed, from the death of the entailer, was not more exclusive of the respondent's right than of the appellant's, but was common to and in favour of both, being the deed 1721, which contained in gremio the destination hæredibus nominandis in the sixth, as well as that to the heirs-female of the body of the entailer in the seventh substitution. It is quite indisputable, that to enable a party to claim

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the benefit of the statute 1617, possession must have, for forty years, followed on a title which is sua natura inconsistent with, and exclusive of, the right in the deed claimed upon—there must be a diversity of title between the one possessed on, and the one claimed under. But here there is only one title; and as to the negative prescription, there must have been in the party excluded a valentia agere cum effectu. Thus the succession must have opened to him, or the person possessing must have contravened, and nothing have been done for forty years to prosecute the right; but that was not the case in the present instance. Besides, the negative prescription implies, from non-prosecution, an abandonment of a jus crediti. But here, the deed 1742, though an entail of Blacksholm, and creating as to that estate a jus crediti, was, as to Duchal, a mere nomination of heirs, giving nothing to the respondent but a spes successionis, which, whether arising jure sanguinis, or vi provisionis, is never subject to negative prescription.

The House of Lords ordered and adjudged, 'That the said 'cause be remitted back to the Court of Session in Scotland, to 'review generally the interlocutors complained of: And it is 'further ordered, That the Court to which this remit is made 'do require the opinion in writing of the other Judges of the 'Court of Session, on the whole matters and questions of law 'which may arise in this cause, which Judges are so to give 'and communicate the same; and after so reviewing the inter-'locutors complained of, the said Court do and decern in the 'said cause as may be just.'

Lord Gifford.—I will now call your Lordships' attention to a case which was discussed at your Lordships' bar a short time ago, in which Sir Michael Porterfield Shaw Stewart, Bart. is appellant, and James Corbet Porterfield, Esq. respondent.

My Lords, it appears that in the year 1721, Alexander Porterfield of Porterfield was infeft and in possession of certain estates, first, the lands known by the name of Duchal, held of the Earl of Glencairn, which formed the most important part of his property; secondly, the lands of Overmains, held of another superior; and thirdly, the superiorities of Porterfield and Hapland, held of the Crown. All these lands had been settled by his contract of marriage with Lady Catherine Boyd, in 1693, upon the heir of the marriage. Mr Alexander Porterfield had a son of the name of William Porterfield, who was his eldest son, and in the year 1721, that gentleman married Julian Steel. Upon that marriage, he settled the above-mentioned estates directly to his son William, and a series of heirs, under the fetters of a strict entail; and by that deed, Mr Alexander Porterfield bound and obliged himself and his heirs, 'duly and validly to in-

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'feft and seise the said William Porterfield, his son, and the said Julian 'Steel, spouses, and the longest liver of them two, in conjunct fee and 'life-rent, and the heirs-male procreate, or to be procreate, of the mar- 'riage betwixt the said William Porterfield and Julian Steel; whilks fail- 'ing, the heirs-male of the body of William Porterfield, of any other mar- 'riage; whilks failing, the heirs-male of the body of Alexander Porter- 'field; whilks failing, the eldest heir-female of the body of William Por- 'terfield, and the descendants of the body of the said eldest heir-female, 'without division; whilks failing, the next heir-female successivè of the 'body of William Porterfield, and the descendants of the body of the said 'next heirs-female successivè, all without division.' Then comes, 'whilks 'failing, any other heirs of tailzie to be nominated and appointed by Alex- 'ander Porterfield, by write under his hand, at any time during his life- 'time, in his liege poustie; whilks failing, the eldest heirs-female of the 'body of Alexander Porterfield, and the descendants of the body of the 'said eldest heir-female, without division.'

The subsequent part of the deed, contained a power, termed in the law of Scotland a faculty, to Alexander Porterfield, at any time in his life- time, he being in liege poustie, 'to alter, innovate, or change the order, 'course, and succession of the haill heirs of tailzie above specified, except 'the heirs male and female of his son's body, and the heirs-male descend- 'ing of Alexander Porterfield, his own body; and that by write under 'his hand, notwithstanding the present right of fee and infeftments to fol- 'low hereupon, in favour of the said William Porterfield, and the heirs of 'tailzie above-specified, declaring always, likeas it is hereby expressly 'provided and declared, that William Porterfield, and his heirs and suc- 'cessors, should be obliged to take the rights, securities, and infeftments 'of the said haill lands and others above-mentioned, with the burden of 'the irritancies and provisions herein contained, to and in favour of such 'heirs of tailzie as Alexander Porterfield shall so nominate and appoint, 'failing the heirs male and female of William Porterfield his body, and 'the heirs-male of the body of Alexander Porterfield.'

My Lords, some time after the execution of this deed, Alexander Porterfield acquired lands which are called the lands of Blacksholm; and, by a deed executed by him in the year 1742, he tailzied that estate of Blacksholm. I must call your Lordships' attention to the contents of that instrument, because one, and indeed the principal question in this case, turns upon the effect of that deed. By that instrument, Mr Alexander Porterfield, after reciting the contract made upon the marriage of his son with Miss Steel, and the reservations in that settlement, and reciting the power which I have just read to your Lordships, contained in the marriage-settlement, and then reciting his purchase of the lands of Blacksholm, states, that 'being resolved to adject, eik, and add,' &c.—(His Lordship then read the deed, to the part of it where the next heir-female of Boyd Porterfield is called.)

There are then a variety of other substitutions, and it concludes with this limitation,—'whilk all failzeing, the nearest heirs and assignees of 'the said William Porterfield whatsomever, the eldest heir-female always

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'excluding all other heirs-portioners, and succeeding without division, he-'ritably and irredeemably.' Then follow the usual clauses and reservations contained in deeds of tailzie.

Alexander Porterfield died on the 14th May 1743, and it appears that soon after his death, the deed which I have last stated to your Lordships, was recorded in the books of Session. It is stated in the Case, that it is not known by whom it was so recorded, but that circumstance is unimportant. I should mention to your Lordships, that Alexander Porterfield had, besides the son William, in whose favour, and in favour of whose issue, the deed was made, a second son, called John. William, the eldest son, died without issue, either male or female, in the year 1752. John, his second brother, had predeceased him, but he died leaving an only son. It appears, that on the death of William Porterfield, he was succeeded by his nephew, Boyd Porterfield, who made up titles to the lands of Duchal, by serving heir of tailzie to his uncle, under the marriage-contract, and taking a precept of clare constat from Lord Glencairn, the superior, but, it is said, without any reference whatever to the nomination of 1742. With regard to the lands of Overmains, Boyd Porterfield completed no title, but continued to possess them on apparency as heir of his uncle, under the investiture completed in the deed of 1721. With respect to the lands of Blacksholm, Boyd Porterfield, instead of making up titles to that estate under the deed of 1742, was, in the year 1757, served heir of line of his grandfather, Alexander; and thus, taking up the procuratory of resignation granted by the seller of the lands to his grandfather, obtained a charter of resignation, and was infeft in the lands of Blacksholm, in fee-simple. He thus incurred an irritancy under the deed of 1742, if that had been an effective deed. With respect to these lands, there is no question in this cause; it is admitted on all hands, that in consequence of the acts of Boyd Porterfield, he had acquired the fee-simple of those lands, freed from the conditions of the tailzie. With regard to the superiorities of Porterfield and Hapland, which, though contained in the marriage-contract, had not been taken up by William Porterfield, the disponee; it is stated that Boyd attempted to make a title in the year 1773, but that the title so attempted was completely erroneous, and that this blundered title is the only one which makes any mention of the nomination of 1742.

My Lords, the view I have taken of this case, which your Lordships will learn presently from the observations I am about to make, will perhaps render it unnecessary for me to trouble your Lordships with any of the specialities as to those lands. For the principal question discussed at your Lordships' bar, depends upon the effect of that instrument of 1742, and certainly also depends on the nature of the titles which have been subsequently made up. Boyd Porterfield died in 1795, leaving a son, Alexander, who completed his titles to the lands of Duchal, as his father had done, by a precept of clare constat from Elizabeth, Countess of Glencairn, in the very same terms as his father had done in 1757, and which was followed by infeftment, both referring exclusively to the marriage-contract of 1721.

Alexander Porterfield died in 1815, without issue, and upon that event, by which the lines of succession in the two deeds of 1721 and 1742 separated, a competition arose betwixt the late Sir Michael Shaw Stewart, the father of the appellant, and the late Mr Corbet, the father of the respondent. Sir Michael Shaw Stewart was the son of Margaret Porterfield, the eldest daughter of Boyd. Mr Corbet was the descendant of Jean, who was the daughter of Alexander Porterfield, the original disponer. Mr Corbet claimed to be served heir under the limitations contained in the deed of 1742. Sir Michael Shaw Stewart claimed to be served under the limitations in the original settlement of 1721; and then the question came before the Court of Session on a competition of brieves, which of these two gentlemen was entitled to be served heir under the then existing investiture of the estate? In that proceeding, the first interlocutor appealed from on the second of June 1817, was to the following effect. (His Lordship then read the interlocutor, preferring Mr Corbet, and stated the subsequent proceedings.) May 24, 1826.

My Lords, the first question in the cause, and which was discussed in the Court below, and at your Lordships' bar, was upon the effect of that instrument of 1742. Your Lordships will have collected that, in the original settlement, after five limitations, terms, or substitutions, was a substitution to any other heirs of tailzie, to be nominated and appointed by Alexander Porterfield by a write under his hand, at any time in his lifetime, in his liege poustie. That substitution followed the limitations to William Porterfield the son, and his wife, and the heirs-male of that marriage; which failing, to the heirs-male of the body of William Porterfield by any other marriage; which failing, to the heirs-male of the body of Alexander Porterfield; which failing, to the eldest heir-female of the body of William Porterfield, and the descendants of the body of the said heir-female, without division; then to the next heir-female successivè of the body of William Porterfield, and her descendants successivè, also without division; then to the heirs of tailzie, to be called as I have stated; so that this power of nomination was subsequent to the limitations to the heirs male and female of William Porterfield. In a subsequent part of that settlement, was contained a power to Alexander Porterfield to alter, innovate, or change the order or course of succession of the whole heirs of tailzie thus specified, except the heirs male and female of his son's body, and the heirs male and female of his own body. Your Lordships will perceive the difference between these two powers: The one was a mere power of nominating heirs to succeed after the heirs male and female of William Porterfield, leaving subsequent substitutions in the settlement to follow and take effect, if they could, after the interposed substitution which had been made by Alexander Porterfield;—the last power in the deed enabled him, without touching the estate limited to the sons and daughters of William Porterfield, to alter the whole order of succession which had been settled in the settlement of 1721.

Your Lordships will recollect, that, in the year 1742, Mr Alexander Porterfield having purchased the lands of Blacksholm, executed a tailzie

May 24, 1826. of them; but, in doing that he recites the power of nomination, and also the power of alteration, and proceeds then to state the limitations to which the estate of Blacksholm was to be settled; and intending that it should go to the same series of heirs, he limits the substitution which he intends to take effect with respect to the estate of Blacksholm. Now, the first question upon the effect of that instrument is, whether it is to be considered with reference to the settled estate, as a deed of nomination of heirs to take under the former deed, or a deed of alteration under the reserved power to alter? If as a mere deed of alteration, then the question is, whether it operates so as to render the nominees heirs of the original destination, or only as an obligation on the proper heir of investiture that they should be added to the succession? In short, whether the party nominated is enabled to serve as an heir of investiture under the original deed, considering the deed of nomination as evidence to show that he is the person to whom the description applies; or whether the deed is to be considered as a deed of alteration. And your Lordships see that this is an extremely important distinction. If it is to be considered as a deed of alteration, then the question arises, whether it was not ultra vires? For your Lordships will perceive, that, in this deed of 1742, he has passed over altogether the heirs-female of William. William had no heirs-female at the time of the alteration; but I apprehend that the validity of this deed must depend upon its being valid or not at the time of its execution; and if it was at that time ultra vires of him to execute this deed, it cannot become valid by a subsequent event, showing that there was no heir-female who could take under the original settlement.

Then, if it were ultra vires, another question would arise, whether it was void altogether, or void only as to the excess; and whether it was challengeable by all the persons named in the subsequent limitations, or was only challengeable by the heirs-female; and as there were no such persons to challenge the validity of that deed, whether it was not good as against all other persons claiming under the original settlement. But still supposing that the respondent is correct in either of these views,—namely, first, in establishing that it was a deed of nomination, or, if it were not a deed of nomination, that it was a deed of alteration, affecting none but the heirs-female,—the appellant contends, that the respondent is barred by prescription; because, for more than forty years, the titles have been made up by the Porterfields without any reference to that deed of alteration or nomination, and without that deed of alteration and nomination ever appearing in the investiture; and therefore the appellant contends, that whatever was the effect of that deed, whether it was a deed of nomination, or a deed altering the tailzie under the power of alteration, still he says that he is entitled to be served heir, because those deeds never appear in any investiture. No reference, as he says, was made to them, except in making up titles to a part. With respect to the other portions of the lands, no reference was made to these deeds, and therefore the respondent is barred by prescription.

Now, my Lords, with respect to the effect of this deed, whether it was

a deed of nomination or a deed of alteration, your Lordships must perceive how important it is that every word contained in the deed should be well weighed. Your Lordships will perceive that certainly it was the object of Alexander Porterfield, at the time he executed that deed, and executed the deed of tailzie of Blacksholm, that those lands of Blacksholm, together with the estate, should go together in one course of succession. He recites the deed of settlement in 1721; and, in reciting that deed of settlement, he recites, as I have already taken the liberty of stating to your Lordships, the power of nomination, and also the power reserved to him of altering and changing the course of succession under the deed; and then he states, 'And being resolved to adject, eik, and add the said 'new-purchased lands to my tailzied estate above-specified, with and under 'the said clauses and provisions mentioned in the foresaid bond of tailzie, 'but with the alteration, change, and innovation of the order and course 'of succession therein contained, and above repeated, in so far as is in-'consistent with the order, course, and succession underwritten, which 'is hereby declared to be the order of succession to my foresaid estates 'and lands, both old and new, with and under the additional clauses and 'provisions after specified; therefore, wit ye me to be bound and obliged 'as by these presents, with and under the express provisions,' so and so. May 24, 1826.

My Lords, if this deed operate as a deed of nomination, your Lordships perceive that all the substitutions of this settlement must be considered as having been introduced, in the sixth place, in the original settlement of 1721. Now, if they are so introduced, your Lordships will perceive, with respect to some of the material limitations, namely, to the heirs-male of William Porterfield, and to the heirs-male of Boyd Porterfield, that they were already provided for in the anterior limitation; but it is said that surplusage will not injure the effect of this; and that he might nominate in the sixth substitution under the original settlement as many heirs of tailzie as he pleased, and that he might do so after the order of succession to which the estate had been previously limited; but still, if interjected between the fifth and seventh limitations of this settlement, the parties bringing themselves within this original settlement of 1721, would be entitled, as heirs nominated by him, to take the succession in that place in the original settlement in which he had a right to introduce them. On the other hand, it is contended, that that could hardly be the intention of the deed of settlement 1742; because, when you look at all the limitations in that settlement, they are completely an innovation on the deed of tailzie. With respect to this estate of Blacksholm, it is admitted on all hands that the order of succession with respect to it, supposing that it had not been affected by prescription, must have been precisely according to the order of limitation in the deed 1742, which contained a complete set of limitations in tailzie of the estate of Blacksholm. In addition, it is said, that supposing William had had female issue, they would not have been affected by this deed of nomination, because they would have taken under the anterior limitation as heirs-female of William.

My Lords, upon this case coming before the Second Division of the

May 21, 1826. Court of Session, the Judges were at first very much divided upon this important question. The majority of them thought that this was to be considered as a deed of nomination. They said, that powers of this sort were to be construed liberally; that although this was not very formally drawn as a deed of provision, yet it appeared to be clearly the intention of Mr Alexander Porterfield that the parties should succeed in the order he had there stated; and that although he had omitted the heirs-female in that limitation, that would not affect this deed as a deed of nomination.

The Lord Justice Clerk, who delivered a very elaborate and able judgment upon this case, when it first came before the Court of Session, was of opinion, that looking at the whole of this instrument, it was to be considered as a deed of nomination; and if as a deed of nomination, the party claiming, according to the limitation therein contained, had a right to make up his titles under the original investiture, because this deed of nomination had merely the effect of showing who was the party who was to succeed; and it was not necessary that it should form part of that investiture, and many cases were put. It was said, that it is considered that if an heir is marked out, the right passes by the law of Scotland to that heir when born; and then when he comes to claim under the investiture, all he has to show is, that he is the person who has been born, and that he is entitled to claim under the original investiture. So it is said here, that when Mr Porterfield comes to claim under the original investiture, he shows his title under the deed containing the substitution hæredibus nominandis; that he produces an instrument by which Alexander Porterfield has nominated him to take in the succession; that that is not an alteration, but that the root and foundation is the original deed; that the deed of nomination shows his character to succeed under the original settlement, and that he is entitled to do so under the original settlement, although the deed of nomination does not form a part of his title, but is merely evidence of his title. When the case came first before him, he says, 'I am 'clearly of opinion that the argument, so far as rested upon the allegation 'that here was an alteration of what was unalterable, is true and well found-'ed, for (he says) though the granter calls Boyd Porterfield as his grand-'son, he takes no notice of him as his heir-male; he says nothing of his own 'heirs-male, and he puts the heirs-male of William behind Jean Porter-'field. These alterations (he says) were ultra vires of the granter of the 'deed in reference to the old estate. But then (he says) admitting the 'fact to be so, it is not pretended, in point of fact, now that there is any 'one in the predicament of being excluded by the alteration. If there 'were, it would be a most obvious and satisfactory statement in his fa-'vour, that under the deed of 1721, which regulates as to the old estate, 'he should be entitled to be preferred against all the world. Any person 'showing himself to be an heir-male of Alexander, or heir-male of Wil-'liam, by that or any other marriage, would be preferred under the deed 'of 1721. Then, he says, although this were an attempt to do what 'could not be done, the deed of 1721 is correct enough, so far as regards 'the interest of any one, claiming as a nominee by it, under the sixth

'substitution in the deed of 1721.' So that I understand the Lord Jus- May 24, 1826.
tice Clerk to state, that in his opinion this was a valid nomination under the deed of 1721. But he says, that even if Alexander Porterfield was to be considered as having exceeded the power given him by the deed of 1721, as there was no one to challenge the excess of that deed, it could not affect the right of Mr Corbet, who claims under the effect of that deed.

Lord Glenlee concurred in the opinion expressed by the Lord Justice Clerk, that this was a deed of nomination; and he concurred with the Lord Justice Clerk in opinion, that if this were a deed of nomination, Mr Corbet was entitled now to serve under the original investiture, and that there was no foundation for the plea of prescription, although there was no delivery of that deed; and was of opinion, that the titles which had been made up, containing that power of nominating, were not inconsistent with Mr Corbet's title; and that, therefore, there were no termini habiles for prescription; for the title made up must be inconsistent with that under which the other party claims. If the title made up is inconsistent with that under which the other party claims, and there was enjoyment under the title for 40 years, then he says prescription would run; but then it is said, that inasmuch as in this case the succession of the estate was according to the original settlement, there is nothing inconsistent. Boyd Porterfield died without issue in 1815; and till then there was nothing to raise the question of prescription.

My Lord Robertson differed from the other Judges, and he delivered a very able opinion, as it appears to me, upon that occasion. He stated the nature of the different instruments, which I will not trouble your Lordships with going over again; and then he said, 'In a question of 'power we must consider the power when exercised;' and in that I must concur, as I took the liberty of stating at the outset, that the validity of a deed is not to be determined by subsequent circumstances, but it must be good or bad at the time it was executed in 1742; and though there was no female issue of William in 1742, and no probability of female issue, it is to be considered the same as if it had been taken exception to the very day after; and although it was said that there was no probability of issue in 1742, I cannot but observe, in that very deed of 1742 there is a limitation to heirs-female of William Porterfield in a subsequent part of the deed. Then Lord Robertson says, 'the question would arise, How far 'Sir Michael Stewart is secured in consequence of the positive prescrip-'tion, or the claim of Mr Corbet cut off by the negative prescription? If 'it could be shown, that the deed of 1742 is a part of the deed of 1721, 'the argument as to the positive prescription could not aid Sir Michael 'much, for then it might be said, that all the titles made up under the 'deed of 1721 comprehend the deed of 1742, and all its provisions. But 'as I am of opinion, that this deed of 1742 cannot be considered as part 'of the deed of 1721, I see nothing in the way of Sir Michael Stewart's 'title under the deed of 1721; for although the exercise of a reserved fa-

May 24, 1826. ‘ culty in terminis of the deed 1721 might be considered part of that deed, ‘ yet if it vary from the reserved power, it cannot be considered a part of ‘ the original deed ; neither can I consider this as of the nature of a condi- ‘ tional substitution, (and this is a circumstance I must call your Lord- ‘ ships’ attention to,) for the heirs-female of William are called in a differ- ‘ ent place of the deed of nomination, from that in the deed 1721.’ My Lord Robertson, therefore, was of opinion, on the whole of his judgment, that this deed of 1742 was to be considered as a deed of alteration, and ultra vires of Alexander Porterfield, and that therefore Mr Corbet Porterfield could not claim under that deed.

My Lord Craigie concurred with the two learned Judges, the Lord Justice Clerk and Lord Glenlee, in his view of the case. His judgment is very short, and I will read it to your Lordships.—(His Lordship then read the opinion.)

On that occasion, Lord Bannatyne gave no opinion, not having heard the argument ; but on the case coming on again on the 22d of June 1820, he delivered an opinion, and then he concurred in the view which Lord Robertson had taken.—(His Lordship then read the opinion.)

My Lord Craigie delivered an opinion confirmatory of that which he had given before ; and the Lord Justice Clerk did the same. It then came on a third time ; and on its thus coming on a third time, both my Lord Robertson and my Lord Bannatyne altered their opinions.—(His Lordship then read these opinions.)

Your Lordships perceive that the result of the opinions of this Division of the Court of Session was, that that deed of 1742 was a good deed of nomination ; or that if it exceeded the power which Mr Alexander Porterfield had, it was only challengeable by the heirs-female of William ; that none having existed, Mr Corbet was entitled to serve under the original investiture, as having been properly nominated by that deed of 1742.

My Lords, on the question of prescription, it was contended, on the part of Sir Michael Stewart, that even if this was a deed of nomination, still Mr Corbet, claiming under it, was barred by prescription, for the reason I have stated,—that that deed never made its appearance in any of the investitures ; and that although there was a reference to the power of substitution, yet it was necessary to show that that power had been acted upon. It was said, that it was a little difficult to contend, that, because in a subsequent title it was narrated that there was in the original settlement a right to nominate, that would save the right of heirs nominated at the time. It was also said, that in order to save their rights, they ought to have appeared in the investitures, made up under the deed of 1721 ; and it was stated, that in consequence of that investiture not having been made up under the deed 1742, it would have been competent for any of the parties claiming under the deed of 1742, to have compelled the party to make up his title under that deed, and therefore, according to the law of Scotland they were valentes agere cum effectu—and that both

the negative and positive prescription had occurred. On the other hand, it was contended—most powerfully contended, at your Lordships' Bar, (for I may take the liberty of stating, that I certainly never, since I had the honour of a seat in your Lordships' house, and of assisting your Lordships, heard a case argued so luminously and at so much length, as this case, both on the part of the appellant and on the part of the respondent,) it was contended upon the part of the respondent, that the titles made up until the death of Alexander Porterfield in the year 1815, (the last male in that line of succession,) were perfectly consistent as well with the original settlement as the deed 1742; that it was not until that time there was any failure of issue-male of Alexander Porterfield, and that there was no title inconsistent with the claim of the respondent, and therefore it was impossible that prescription could affect it; and that was the opinion of the Court of Session. May 24, 1826.

My Lords, other points were argued at your Lordships' Bar, of very minor importance, with which I will not trouble your Lordships. I think, even from the imperfect view which I am afraid I have given your Lordships of this case, your Lordships will perceive that the questions involved in this cause are questions, to say the least of them, of extreme nicety and difficulty. Far be it from me to say, that the question upon the effect of that instrument is not a question of very considerable difficulty. If a question similar to this had occurred in England, in the construction of English settlements, and upon the effect of English instruments, I am satisfied that your Lordships would not proceed to a judgment upon this question without calling to your assistance the Judges of the Court below, and having their opinion upon it, and into which it would also be incumbent upon your Lordships' House to examine yourselves. I have felt, since I have had the honour of assisting your Lordships in this House, great regret that in questions of difficulty and nicety occurring on Scotch law, your Lordships, or those having the honour to assist you, have frequently not the advantage of knowing what the opinions of the different Judges of the Court of Session are upon the questions which have been brought here by appeal, and I have felt, and have taken the liberty of so advising your Lordships, that in those cases you should obtain that aid which you endeavour to obtain here by requiring the assistance of English Judges, by calling for the opinions of the other Division of the Court of Session. My Lords, where cases occur in which it does not appear that any point has escaped the attention of the Court below, or that any advantage could be obtained from requesting a further consideration on the part of the Court of Session, I would not advise that that step should be adopted; but when a case of the great importance of the present has received the attention of only one Division of the Court of Session, I have felt (perhaps I may have been in error) that when you are called upon to review opinions of Judges, as the opinions of the Court of Session, your Lordships should possess yourselves most fully of these opinions, and should call for the judgment of the whole Court upon the case; and where that is done, it is desirable to avoid as much as possible prejudicing the opinions of the

May 24, 1826. learned Judges who have not yet had the case before them. If I were now to call upon your Lordships either to affirm or reverse this judgment, I trust your Lordships would believe that I should have discharged my duty without reserve. I should have felt it my duty in that case, not only to have troubled your Lordships with a narrative of the case, (which is almost all I have done on this occasion, except to say that the questions appear to me most important,) but I should have felt, however imperfectly I might discharge that duty, that it was my duty to examine most minutely the effect of the various learned arguments in those papers which were delivered at your Lordships' Bar, many of them extremely difficult points of Scotch law—those particularly with reference to prescription, and to have canvassed the authorities relied on the one side and on the other, as bearing on that question. My Lords, I abstain from doing that now, for the reasons I have given to your Lordships, because if your Lordships concur with me, I think that this is a case in which it would be extremely desirable, not so much from the value of the property, which I understand is at stake in this cause, (because the value of the property is immaterial to your Lordships, if the points are perfectly clear,) but in consequence of my feeling, as I do confidently, that there are points of very great importance, as affecting not only this particular case, but some of them as affecting general questions of Scotch law, and more particularly with reference to the modes of making up titles under such instruments as these, whether they are to be called deeds of alteration or of substitution; and also with respect to the effect of prescription in such a case, on which it would be desirable your Lordships should be fully informed of the opinions of the learned Judges of the Court of Session.

My Lords, under these circumstances I should humbly propose to your Lordships, that this case should be remitted to the Second Division of the Court of Session, for the purpose of enabling them to review the interlocutors which have been complained of; and that your Lordships in sending this case back for that review of the Division of the Court of Session before which it was heard, should direct that they should, upon the points of law which occur in this case, take the opinions of the Judges of the other Division of the Court, in order that if the case should hereafter come up to your Lordships for judgment,—it is not for me to anticipate, or for your Lordships to anticipate, what may be the effect of such a remit,—the judgment which may be pronounced may be satisfactory to the parties, and your Lordships may never hear of the case again; but that if the cause should be brought before your Lordships again on another occasion, your Lordships may have the advantage, which you have not at present, of knowing not only the opinions of the particular Judges who constitute that Division of the Court in which the cause is pending, but that your Lordships may have the benefit, before you decide upon this important and difficult case, of knowing what the respective opinions of the Judges of the other Division are upon this question.

My Lords, when I stated that we should be desirous of receiving the opinions of the Judges of the Court of Session, I meant certainly not to con-

fine myself to the two Divisions, but to include the other learned Judges —the Lord Ordinary for instance, who is called into the Inner House on some occasions. It would be very desirable to have his opinion also upon this occasion, and the more so, because one cannot but perceive, that in a proceeding which has taken place before one of the Lords Ordinary, arising out of the title to this estate, an opinion, as far as can be collected from his interlocutor, has been expressed not coinciding with the opinions expressed in this particular case.* May 24, 1826.

All I should therefore humbly propose to your Lordships upon this particular occasion would be, that this cause be remitted to the Second Division of the Court of Session, for them to review the interlocutors they have pronounced; and with a direction that they will take the opinions in writing of the other Judges upon the whole matter; after which your Lordships will be the better enabled to dispose satisfactorily of the cause.

Appellant's Authorities.—Gordon, Jan. 25, 1771, (15579.)—Ross, March 7, 1765, (Monboddo's Dec. 909.)—Ker, Jan. 23, 1747, (12987.)—M'Neil, Jan. 27, 1826, (4 Shaw and Dunlop, No. 266.) 3 Ersk. 7. 29.—Lookup, Feb. 20, 1754, (1635.)—Wallace, Jan. 9, 1759, (1637.)—Stewart, July 15, 1760, (1638.)—Wemyss, June 13, 1766, (1644.)—M'Dougall, July 10, 1739, (10947.)—Bruce, Dec. 6, 1770, (10805.)—Ayton, July 31, 1756, (10956.)—Maxwell, June 21, 1808, (F. C.)—Sinclair, Dec. 23, 1724, (4123.)—Ogilvies, June 21, 1737, (4125.)—Douglas, July 28, 1737, (Elch. No. 3. Res. Fac.)—Richardson, July 8, 1760, (4141.)

Respondent's Authorities.—Kennedy, July 13, 1722, (1681.)—Don, Feb. 5, 1713, (15591, and Rob. Ap. Ca. p. 76.)—Lawrie, July 4, 1764, (15613)—Dundas, Jan. 2, 1706, (4083.)—Rennie, July 4, 1712, (4093.)—Maxwell, June 21, 1800, (F. C.)—Lumsden, June 13, 1811, (F. C. affirmed March 14, 1816.)—Reay, 25, Nov. 1823. (2 Shaw and Dunlop, No. 509.)

J. RICHARDSON, MONCRIEFF and WEBSTER, *Solicitors.*

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* His Lordship, it is believed, referred to a judgment pronounced by Lord Mackenzie, and adhered to by Lord Eldin, in an action by Mr Corbet Porterfield, involving a question as to the effect of his titles, but which was not under appeal.