for three years. I do not go into the correspondence; this is a shorter ground for disposing of the case and upon these grounds; I move your Lordships that this judgment be reversed. Sept. 13, 1831.

The House of Lords ordered and adjudged, That the interlocutors complained of be reversed.

Appellant's Authorities.—Bell's Com. B. 3, P. 1. c. 3. sec. 3; Ersk. III. 5. 11, III. 3, 66; Bowman Fleming, 23d May 1826; W. & S. Vol. III. p. 277. Thomson, 11th June 1824; 2 Shaw, p. 347; Grant, Dow, VI. p. 252; 3 Ersk. 66; Fell on Guar. p. 160; 3 Ersk. 366; Fell, p. 176; Stewart, 31st May 1814; Fac. Col. Leslie, 10th Jan. 1665 (2111); M'Millan, 11th Jan. 1729; 6 Geo. IV. c. 120, sec. 10.

Respondent's Authorities.—Hotchkis *v.* Royal Bank, 28th Feb. 1797.

RICHARDSON and CONNELL, — MONCRIEFF, WEBSTER, and THOMSON, — Solicitors.

Sir MICHAEL SHAW STEWART Bart., Appellant.—*Lord Advocate (Jeffrey)—Knight.*

No. 41.

JAMES CORBET PORTERFIELD Esq., Respondent.—*Lushington — Rutherford.*

Entail—Faculty—Prescription.—A party 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; thereafter he 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 hæredibus nominandis; and the estates were possessed for more than forty years on the entail alone, without reference to the deed of nomination:—Held (affirming the judgment of the Court of Session on a remit from the House of Lords), 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.

IN this case (the facts of which will be found ante, vol. ii. p. 369,) the Second Division of the Court of Session had (22d June 1820) found, "That Mr. Corbet Porterfield is entitled "to be served heir of tailzie and provision under the brieves Sept. 23, 1831.

2D DIVISION. INNER HOUSE.

Sept. 23, 1821. " purchased by him; and remit to the macers to proceed in the " services accordingly, and to dismiss the brieves at the instance " of Sir Michael Shaw Stewart, Baronet; and afterwards (15th " May 1821) adhered to that judgment."*

On appeal, the House of Lords (24th May 1826) ordered, " 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 to give and communicate the same; and, after so reviewing " the interlocutors complained of, the said Court do and decern " in the said cause as may be just." Under this remit the Court of Session, " in order to their reviewing generally the inter- " locutors complained of in the appeal, and providing otherwise, " in pursuance of said judgment," appointed parties to give in cases, and it was agreed and directed that the question, " Whe- " ther, on consideration of the whole pleas respectively urged by " the parties, Sir Michael Shaw Stewart or Mr. Corbet Porter- " field is entitled to be served under the competing brieves, or " either of them?" should be put to the consulted Judges.

The following opinions were returned:

Lords President, Balgray, Craigie, Gillies, Corehouse, and Newton.—" The question proposed to the Court, namely, " Whether Sir Michael Shaw Stewart or Mr. Corbet Porterfield " is entitled to be served under the competing brieves, or either " of them?" appears to us to depend on the decision of two pleas in law on which parties are at issue:

1. " Whether the instrument 1742, in so far as it calls Jean

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* Sir Michael Stewart died on the 5th of August 1825, and the appeal was taken by his son Sir Michael, who also took out brieves for service as heir of tailzie and provision to Alexander Porterfield, last of Porterfield, in the same terms with the brieves purchased by his father. These brieves, which were directed to the sheriff, having been opposed by the respondent, the sheriff made avizandum to their Lordships of the Second Division, who (24th February 1826) " In respect that under the " former proceedings in the competition between the late Sir Michael Stewart and " James Corbet Porterfield, the latter was found entitled to be served heir of tailzie " and provision, and has since been actually infeft in and obtained possession of the " estate of Porterfield," remitted to the sheriff to dismiss the brieves.

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Porterfield and the heirs male of her body to the succession of the estates which form the subject of competition, is inoperative from want of power in Alexander Porterfield, the maker? 2. Whether the claim of Mr. Porterfield under that instrument is extinguished by prescription? These pleas are now stated in the natural order of inquiry, but they can be discussed more conveniently by reversing that order.

"If it can be shown that Jean Porterfield and the heirs male of her body held a place, within the years of prescription, as substitutes in the entail 1721, prior to the heirs female of the body of Boyd Porterfield, it is indisputable that their right cannot have been lost by prescription since that period, for William Porterfield and his nephew Boyd Porterfield possessed the estate of Duchal and Overmains by virtue of the investiture under the marriage contract 1721 alone, and therefore could not prescribe against their own title, which bore, in gremio, the sixth substitution to heirs to be named by the entailer, as well as the seventh to the heirs female to be born of his body. On the other hand, if Jean Porterfield and the heirs male of her body were not substitutes under the entail 1721, prior to the heirs female of the body of Boyd Porterfield, but were only entitled to demand execution of a new entail, calling them in that place, it is possible that that obligation, not having been enforced against the heirs in possession, may have been so extinguished.

"According to the argument of Sir M. S. Stewart, if an investiture contains a substitution hæredibus nominandis, and a nomination is afterwards executed, the nominees are not heirs of the investiture unless the instrument of nomination shall be incorporated with it, or a service expeded under the nomination as a title, which he seems to think would render it part of the investiture. We are of opinion that that plea is not maintainable. It is an established principle in the law of Scotland, that heritable property can be conveyed only by certain forms of expression, importing the present disposal of the subject, as in the ordinary style of a procuratory of resignation or disposition; but if the appropriate form of expression is used, it may be effectually conveyed, not only to persons in existence, but to future and contingent persons, substituted to each other in a series of any length, and on that principle the law of entail is founded. In a destination of this nature it is immaterial by what descrip-

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tion the substitutes are called, provided only that means are given to ascertain each as the succession opens to him. They may be designated as the heirs or descendants of persons known, or, without reference to propinquity, they may be pointed out by any other intelligible distinction. On the failure of prior substitutes, if the persons so characterised are in existence, they are entitled to take up the estates as heirs by service or precept of clare constat, as well as if they had been named in the entail. The clause of conveyance, although they were not in esse when it was framed, is the sole foundation of their right, for it is by the form of conveyance alone that the character of heir of provision or substitute can be impressed. A tailzie disponing to A. and his heirs male, followed by a declaration, that after the failure of A. and his heirs male B. and his heirs male should succeed, would be totally inoperative as to B. and his heirs, the words of conveyance being awanting; at least a service as heir would not be competent to B., though he might perhaps be entitled to recover on a decree of constitution and adjudication—in implement against the next heir, under the standing investiture, and in that way complete his right to the estate. But though uncertain and contingent persons may be heirs of tailzie when the succession opens to them, they must resort to that species of evidence which the nature of the case requires to satisfy the inquest that they are the objects of the destination. That evidence may be parole testimony, if the description given has reference to such facts as birth, marriage, or descent; or it may consist exclusively of written documents, if the substitute is designated by a quality susceptible only of that mode of probation; but in neither case is the evidence any part of the conveyance, which must be complete in itself, or totally inoperative.

"One example of contingent conveyance, very frequent in practice, is a substitution in favour of persons to be afterwards named by the entailer. This is convenient, because it saves the trouble of executing a new entail — (a deed cumbrous and expensive, and of difficult preparation,) when additional substitutes are to be introduced, or the previous order of succession to be varied. The contingency is thus made to rest, not on extrinsic circumstances or events, independent of the entailer, but on a resolution to be afterwards formed in his own mind. There is

however no difference in principle between that and any other contingency by which the entailer may think fit to regulate his succession. In the case of a substitution hæredibus nominandis, as in every other case of substitution, the deed of entail, as a conveyance, must be complete in itself, and fit for the transmission of heritable property; while the instrument of nomination, which is not required to contain any conveyance, to impose any obligation, or to be prepared in any technical form, provided it be an authentic writing, is merely evidence that the condition of the previously existing grant is purified. This form of substitution occurs at an early period in the history of the law, and it is given by Dallas, the first and best of our writers on conveyancing, as part of the ordinary style of an entail. Mr. C. Porterfield has cited various cases from the records of this Court, in which persons have been served heirs of tailzie on producing to the inquest instruments of nomination as evidence that they were substitutes under an investiture so framed. Sir M. S. Stewart maintains, that a substitution hæredibus nominandis in an entail is identical with a reserved power to execute a substitution;—that the instrument of nomination is not the evidence of the nominee's right, but the source of it;—that, previous to the nomination, the substitution is a mere blank, and that the nomination, therefore, is a constituent and essential part of the conveyance, or investiture proceeding upon the conveyance. We are of opinion that these positions are entirely unfounded. It has been already observed, that a conveyance to an uncertain and non-existing person is valid, to the effect of constituting him heir of tailzie when he exists and is ascertained; whereas no deed or instrument can operate to that effect unless it contains dispositive and technical words; and that, in the case in question, the whole force of conveyance lies in the entail, the instrument of nomination requiring no words of disposal, and therefore in no respect savouring of the nature of a conveyance. In farther illustration, and as a decisive proof of this point, reference may be made to grants of honours before the union, which, in this respect, were exactly upon the same footing as lands, except that a grant of honours necessarily flowed from the Crown, and could not be extended, varied, or modified by a subject. But, in Scotland, "it was "usual to obtain grants of honour, not only to the grantee and "his heirs male and of tailzie, referring to the particular entail

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" then made, but also to the heirs of tailzie whom he might there-
" after appoint to succeed him to his estate, and even to any
" person whom he should name to succeed him in his honours at
" any time in his life, or upon death-bed." This is certified in the return of the Lords of Session to an order of the House of Lords in 1739. And the return bears, that, " as it is impossible
" to trace through the records such nominations and appoint-
" ments, which, in some cases, may be valid, though not hitherto
" recorded, the Lords of Session are not able to give your Lord-
" ships any reasonable satisfaction touching the limitations of the
" peerages that are still continuing." Accordingly, no doubt was ever entertained of the efficacy of such grants, and various peerages have been held under them. Now, the King is the sole fountain of honours, and cannot delegate the power of conferring them; the royal grant, therefore, in these cases, was of necessity complete before the instrument of nomination was executed; and the nomination, being the act of a subject, could form no part of it, nor serve any purpose, but to point out the individuals to whom the honour so granted belonged.

" Various attempts have been made by Sir Michael Shaw Stewart to distinguish the case of hæredes nominandi from that of other contingent heirs, but we are of opinion that all those attempts are unsuccessful. It is said that a disposition to an unborn heir involves but one contingency, whereas a disposition to the heir of a person to be named depends for effect on a double contingency, viz. 1. Whether a nomination shall be made; and, 2. Whether the person nominated shall have an heir. But when it is once admitted that a contingent conveyance is effectual, and the whole law of tailzie rests on that principle, it matters not how many contingencies are combined to form the condition under which any substitute is called, and in practice such combinations are frequent. Next it is said that the nomination must accrue to the tailzie, and constitute a part of it, because it is necessarily an instrument in writing; whereas parole proof is admissible, if the claim of the substitute rests on propinquity, or any other circumstance extrinsic of the conveyance. Every condition under which a substitute is called must be proved to the inquest by that species of evidence of which it is susceptible. If it be a fact, as birth, marriage, or domicile, a proof prout de jure is competent; if it be the possession of an

honour or office, a grant, patent, or record must be produced; if it be connected with any landed right, it must be established by reference to the deed or instrument constituting that right; but the proof which brings an individual under the description of substitute must not be confounded with the substitution itself. Lastly, it is said that an instrument of nomination must be recorded in the register of entails to make it effectual against purchasers and creditors, from which it is inferred that the nomination is part of the entail. There is no authority for that assumption, except a recent decision of a Lord Ordinary, in the Outer House, in a question arising out of this entail. But admitting that decision to be well founded, the inference does not follow. The statute 1685 is remarkable for incorrectness of expression, and in consequence it has given rise to endless litigation. It nowhere provides that tailzies shall be recorded, but that the names of the maker of the tailzie, and of the heirs of tailzie shall be recorded, together with the general designations of the estates, the conditions and provisions, and the irritant and resolutive clauses. Now, it is impossible that the names of heirs should be recorded, if they are not in existence at the time of recording. But the act being for the security of the public, it is expounded in the manner most beneficial for that purpose, and therefore it may be right to require, that when there is a relative instrument containing the names of the heirs, that that instrument, although no part of the tailzie, should also be recorded. This may be convenient for the security of creditors and purchasers; it falls within the provisions as well as the purview of the act, provisions which, in the ordinary case, cannot be literally complied with. But however the point may be decided, it does not in the least affect the question now under consideration.

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" Holding, therefore, that a substitution hæredibus nominandis is essentially different from a reserved power to alter the destination in an entail, with which Sir M. S. Stewart endeavours to confound it, and that the heirs named by virtue of such a substitution are entitled to serve under the original investiture, it remains for consideration whether Jean Porterfield and the heirs male of her body were nominees under the sixth substitution of the entail 1721, or whether, as Sir M. S. Stewart contends, their only claim, if they had a claim, rested on the power

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of alteration reserved in that deed. Any ambiguity on this point arises solely from the circumstance that Alexander Porterfield, instead of applying to a skilful conveyancer to prepare his settlement in 1742, employed a country practitioner, who, from want of experience or motives of economy, resolved to make one deed answer the purpose for which two should have been employed, and expressed in a short member of a short sentence that which would have required some pages fully and correctly to explain. Yet that clause, brief and general as it is, does not appear to us to produce serious ambiguity. The instrument in which it is contained is an entail of the estate of Blacksholm, termed the New Estate, of which Alexander Porterfield was the unlimited proprietor, and placed under no engagement whatever, and accordingly he settles it by a regular disposition, containing precept of sasine, on the series of heirs which he thought fit to call to his succession. But that disposition contains no conveyance of Duchal, which Alexander Porterfield, though no longer fiat of that estate, was unquestionably entitled to execute by virtue of his reserved power of alteration; neither does it impose any obligation on his representatives to execute such a conveyance. It leaves the investiture of Duchal untouched, but it declares that the order of succession set down for Blacksholm shall also be the order of succession for Duchal. Without a conveyance therefore, and without an obligation to convey, what can this declaration import, except that the heirs of Blacksholm are nominated the heirs of Duchal, a proceeding competent under the substitution hæredibus nominandis, but which, without that substitution, would have been totally inoperative?

"Farther, it is particularly deserving of notice in this instrument, that when the entailer, in repeating the destination of Blacksholm, arrives at that substitution in which the heirs not previously named in the entail of Duchal are called nominatim to the succession of Blacksholm, and of consequence to that of Duchal also, he states in terminis that he does this, not by virtue of his reserved power to alter the investiture of Duchal, but of his reserved power to nominate under that investiture; "and "that because I reserved to myself a power to name the sub- "sequent heirs of tailzie after my son, William Porterfield, and "his heirs aforesaid." It appears to us unreasonable to contend that the entailer, having reserved two powers, and declaring here

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that he means to use the one, shall nevertheless be held to have used the other, and that not to support but to frustrate the object of the settlement. It has been said indeed that this expression applies only to the substitution in favour of the heirs male of Fullwood and Hapland, and not to the series of substitutions which follow them, but it appears to us that there is no ground for that observation. Since the entailer refers to one of his reserved powers at the sixth substitution, being exactly that part of the deed where the exercise of power commences, it must be intended that the remaining substitutes are named in the exercise of the same power, because there is no subsequent reference to the other power; and this conclusion is the more satisfactory, because, as already observed, the form of expression in the preceding clause actually imports a nomination under the one power, and not an alteration under the other. In the deed 1742 there is a conveyance as well as an obligation to convey Blacksholm, but there is neither a conveyance nor an obligation to convey Duchal; there is simply a declaration that the heirs of Blacksholm shall be the heirs of Duchal.

"Sir Michael Shaw Stewart founds chiefly on a clause in the deed 1742, which he represents as a declaration that Alexander Porterfield intended that the entail of Duchal should be altered. Having recited the destination of Duchal, he proceeds thus:— "And being resolved to adject, eik, and add the saids new pur- "chased lands" (Blacksholm) "to my tailzied estate above "specified," (Duchal,) "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 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 additional clauses and "provisions after specified: Therefore wit ye me," &c. The entailer expresses his will that the destination of Blacksholm should be different from the previous destination of Duchal, and that the destination of Blacksholm, so changed, should afterwards be observed in Duchal, which is plainly equivalent to saying that the destination of Duchal should be changed, and consequently it is inferred that he had resolved to exercise his power to alter the Duchal investiture, and not his power to nominate under it. We are of opinion that this is only an in-

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genious attempt to catch at the words of the entailer in opposition to his will. The alteration of a substitution hæredibus nominandis into a substitution hæredibus nominatis, especially when that was done by a deed of conveyance, might with propriety be called a change of the Blacksholm destination from the Duchal destination; but when it is declared that in future both destinations should be the same, and when this could be effected, not by framing a new investiture of Duchal, but by holding the Blacksholm heirs nominees under the subsisting investiture of that estate, the form of expression on which Sir M. S. Stewart relies affords no inference bearing on the present question, for it must always be remembered, that it is only by that species of alteration in the line of descent, which requires an alteration of the investiture to give it effect, that the plea of prescription is let in. In common parlance, the destination may be said to be altered when a substitution hæredibus nominandis is converted into a substitution hæredibus nominatis, by means of an extrinsic instrument of nomination. But, until the present case occurred, it never was doubted that an heir serving under such a substitution, on the evidence of an instrument of nomination, was heir of the investiture and of the investiture alone, and we are of opinion that the doubt now raised is unfounded.

"Taking this clause therefore in literal sense, it does not import that Alexander Porterfield intended the deed 1742 as an alteration of the Duchal investiture, or that the substitutes in question should not take as nominees; his intention evidently was the same as if he had executed two deeds, the one an entail of Blacksholm, the other a nomination of the heirs in it to be also heirs of Duchal. But farther, we think that the mode of construction resorted to by Sir M. S. Stewart, as applied to a mortis causâ deed, and more particularly a deed ex facie the work of an unskilful and uneducated conveyancer, is altogether unwarrantable. Such deeds are to be expounded so that the will of the maker shall be enforced, or, in the words of the maxim, verba debent intelligi cum effectu, ut res magis valeat quam pereat. There is no dispute here that Jean Porterfield and the heirs male of her body were the hæredes prædilecti of the entailer called to the estates whenever the succession opened to them, however distant that event might be. Considering the probability that a long period would elapse before the failure of

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the prior heirs, it is not presumable that he would expose their right to the hazard of prescription, having so simple a mode of preventing it. His will being clear, and his power as clear, we do not think that one ambiguous phrase, supposing it ambiguous, should be made the ground of inference that he attempted to do in an uncertain and imperfect manner that which he might certainly and perfectly have accomplished. But in truth there is no ambiguity, for the context proves that a nomination was intended; the operative words expressly import nomination; there is a total absence both of actual alteration and the imposition of an obligation to alter. Holding Jean Porterfield and the heirs male of her body nominees under the substitution hæredibus nominandis in the entail 1721, which was the foundation of William Porterfield's investiture, and upon which Boyd Porterfield made up his title to Duchal, and possessed Overmains in apparency, we are of opinion that the possession of both of those individuals was a possession in favour of the remaining heirs of entail, and consequently that the right of Mr. Corbet Porterfield is neither excluded by the positive nor lost by the negative prescription.

"The second plea maintained by Sir M. S. Stewart is, that the deed 1742, in so far as it calls Jean Porterfield and the heirs male of her body to the succession of Duchal, is null for want of power.

"By the marriage contract 1721 Alexander Porterfield reserved power to regulate the succession of that estate, except in so far as the heirs of the body of his son William and the heirs male of his own body were concerned; but in the entail of Blacksholm in 1742, an estate entirely in his own power, he preferred the heirs female of his own body to the heirs female of William's body, and he declared at the same time that the succession should be the same in both estates. William never had heirs female of his body; but as they were in posse in 1742, it is said that this declaration was ultra vires of Alexander the entailer, and vitiated the whole nomination in reference to Duchal. We are of opinion, in the first place, that it was not the intention of Alexander, in the deed 1742, to prefer the heirs female of his own body to those of William's body in the estate of Duchal. In the narrative of that deed he recites the obligations contained in the contract 1721, and in particular he recites

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fully and distinctly the obligation in question, a recital inconsistent with the supposition of his intending to violate that obligation in the very next clause of the deed. It is true that he calls his own daughters and their issue male before the heirs female of William's body to the succession of Blacksholm, as he was entitled to do; it is also true, that in brief and general terms he appoints the succession in both estates to be the same; but, on the principles already explained, principles universally recognised in the exposition of deeds, that appointment must be construed secundum subjectam materiam, and the generality of the terms restricted by reference to the context. When he declares that the order of succession shall be the same in both estates, it must be construed that he intended it to be the same, only in so far as he had right and power to make it the same, and not in so far as he had neither right nor power to do so, as he had expressly admitted in the sentence immediately preceding. It is unnecessary to cite examples of such a construction in restricting general terms to a specific meaning, or otherwise modifying words which go beyond the will of the maker of the deed. They are familiar to every one acquainted with the practice of equity in this or any other civilized country; and recent cases in the law of entail, of great magnitude and importance, have been decided on that ground in this Court and in the House of Lords.

" But granting in argument what it is impossible to admit in fact, that Alexander Porterfield intended by this deed to violate an obligation the subsistence of which he had so expressly declared, we are of opinion that an abortive attempt to confer the preference in question would not annul the deed, in so far as it was within his power. There is nothing to prevent a separation of the good substitutions from the bad, such separation being matter of daily practice in enforcing the provisions of entails. Many precedents might be referred to of this nature, and in particular that of Mackay against Lord Reay, alluded to in the argument for Sir Michael Shaw Stewart. In that case a destination in one part within and in another beyond the power of the entailer was sustained in part, and in part reduced. The distinction attempted to be taken by Sir Michael Shaw Stewart we consider unfounded. In the present case,—quoad the jus disponendi—the power of regulating the succession of the estate,

Alexander Porterfield was an absolute fiar, as much as Lord Reay was in the other case; both were restrained as to certain substitutions, and quoad ultra both were unlimited. If Alexander's power had been conferred by constitution instead of reservation, the case might have been different. We are of opinion, therefore, that there is no excess of power in the deed 1742 of the nature alleged by Sir Michael Shaw Stewart, and although there had, that it would have been immaterial in the present competition. Sept. 23, 1831.

"These views, which have been stated in reference to the lands of Duchal and Overmains, apply, à fortiori, to the superiorities of Porterfield and Hapland, to which Boyd Porterfield completed a feudal title, bearing express reference to the deed 1742.

"Therefore, in answer to the question proposed, we are of opinion that Mr. Corbet Porterfield is entitled to be served heir to William Porterfield in the lands of Overmains, to Boyd Porterfield in the superiorities of Porterfield and Hapland, and to the late Alexander Porterfield in Duchal."

Lord Mackenzie.—"I had made up, as prefatory to my opinion, a statement of the circumstances of this case; but it is so long, and so little necessary where these circumstances are so fully and fairly before the Court, and have been stated so often already, that I prefer omitting this statement, and coming at once to the opinion which, after very full consideration, I continue to entertain.

"1. I shall, in the first place, endeavour to explain the view I have of the original nature and effect of the deeds 1721 and 1742.

"Alexander Porterfield, under the deed 1721, had undoubtedly a power of nomination as well as of alteration. These were different in their nature, and in consequence of the base infeftment taken, which carried the property, came to be different in their modes of operation. The power of nomination did not enable Alexander Porterfield to take out from the destination any heir or class of heirs, or to change their place in the destination, but merely to insert heirs at a particular part of the destination. The power of alteration enabled him to do any thing he pleased with the destination, so far as subject to that power, and most eminently to change the places of heirs or classes of heirs. Again, the power of alteration, after the base infeftment had been taken, could not operate without new infeftment. When

Sept. 23, 1831. an investiture is once constituted by infeftment, whether public or base, whatever power any person may have to alter the destination of it, that alteration cannot be completed without the extinction of this investiture, and the creation of a new one by new infeftment, with a destination agreeable to the alteration. Accordingly, Alexander Porterfield had provided for this by the obligation which he inserted, binding William Porterfield and his heirs to make up titles agreeably to any alteration of the destination he should make under his power to alter. It may be argued that this obligation was broader, and that it extended even to the power of nomination, not trusting to the efficiency even of that power without new investiture. But I do not think necessary to found upon that. This, at least, is clear, that, in relation to the power of alteration, it was necessary, because Alexander was himself divested of the fee, and had no power himself to obtain new infeftment. In regard to the power of nomination of heirs under the substitution hæredibus nominandis, I am inclined (though even here there are difficulties) to hold that the base infeftment had not a similar but a stronger effect. I am inclined to hold that the effect of the due execution of that power of nomination must have been, to communicate immediately to the heirs nominated under it the same benefit that was held by the heirs nominated in the other substitutions of the deed 1721, and that without any new infeftment being taken, or any occasion for exercise of the obligation to make up new titles imposed on William Porterfield and his heirs. When I consider the principles admitted into our feudal law in the constitution of rights by confirmation, and looking to the practice, so far as I have been able, I think that a substitution hæredibus nominandis in a feudal grant, on which infeftment has been taken, is not merely a power to name additional heirs to be brought into the investiture by new infeftment, nor even this power joined with an implied obligation on the superior granting the infeftment to receive these heirs (as in a regress), but is a power to the nominator actually to name heirs who shall take under the existing investiture, as if the superior himself had named them in the original grant before infeftment was taken upon it,—the deed of nomination thus connecting with the deed referring to it, and forming part of the completed investiture, along with the original grant and sasine, just as a base infeftment

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that is confirmed by the proper superior does. This seems to be the view taken, not only in the Roxburghe entail, which was ratified by the Scotch Parliament, but in various other important deeds of the same kind, some of which have been stated by Mr. Porterfield, and others are in Dallas's Styles. In this way I think, that although a base infeftment was taken on the deed 1721, yet that if a proper nomination, in terms of the substitution hæredibus nominandis, had been made by Alexander Porterfield, this would immediately and of itself have qualified the infeftment 1721, and put the heirs so nominated in pari casu with the heirs nominated in the deed 1721 itself. Their right would still have been subject to the power of alteration (so far as it extended), and would still have been only the right of heirs under a base infeftment, but it would have been of the same sort in this respect as the right of the other heirs of the deed 1721, excepting in so far as these were exempted from the power of alteration by express provision of that deed.

" Another view has been taken, which (though certainly not without much diffidence) I feel myself not able to adopt. This is, that the deed of entail 1721, or any other similar deed having a substitution hæredibus nominandis, is in itself instantly a full and completed conveyance, even in respect to the destination of heirs; and that the after nomination of heirs is not at all of the nature of a continuation of or addition to the conveyance of right, but merely an extrinsic act, creating, in point of fact, persons, and evidence of the existence of persons, qualified to take under the previously completed substitution to a particular class of heirs called heirs nominandi, but in no degree adding to or qualifying the deed or investiture of conveyance itself, just as marriage and its consequences are extrinsic acts, creating persons qualified to take under substitutions to heirs male or female of the body, &c. I think this is going too far. It appears to me that the nomination, under a power to do so, of persons to be heirs of tailzie under a particular entail, can never be viewed as an act extrinsic to the entail; but that, whether executed immediately or at some distance of time, it must be viewed as a conveyance warranted by the original deed, forming the complement of that deed, and together with that deed constituting the whole entail. For this reason, I think that it is necessary that such nominations shall be provided to be made, and shall be made by a deed written and

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probative as part of the conveyance of land, and shall not be so provided or made as to be left to parole evidence, as extrinsic facts affecting the operation of the conveyance are, such as marriages, births, continuance in life of persons qualified to be heirs, deaths of other persons, &c.; and farther, I think it necessary to register such nominations under clauses in entails in the register of entails. Suppose, for instance, an estate entailed on A., whom failing, on the heirs to be named in a writing under the entailer's hand, I do not think that the act 1685 would be obeyed by producing nothing to the Court of Session, and putting nothing in the register of entails but this deed, containing the name of the disponee, and keeping the whole destination of heirs in a sealed paper, to be opened perhaps after many years. Still less do I think it would be competent to destine a landed estate to A. and heirs to be named by the disponer in any way he pleased, and then execute the nomination by a verbal declaration, and prove it by witnesses as a mere extrinsic fact, not forming part of the conveyance, or consequently requiring a probative writing to establish it. I cannot see that any such view as this was ever entertained by the makers of destinations hæredibus nominandis. In the Roxburghe case the nomination was undoubtedly viewed as a part of the conveyance, for it contained the entailing clauses. The same remark applies to the case of Crailing. In the case of Douglas it is expressly provided, that the deed of nomination is to be holden as if expressed in the original deed. The case of Rutherford, where an entail of one estate referred to the destination in the entail of another, is not exactly in point; but still of that case, as far as it affords any light, the same view must have been taken, for the entailing clauses are contained in the deed referred to.

" So in the instrument given as a style by Dallas where the grant is, " to any other person or persons to be destinat and " nominat by the said V. any time during his lifetime, even " on death-bed, by whatsoever writ or schedule apart under his " hand, (and which writ is declared by the said charter to be " as good and fundamental right and title to the said heirs of " tailzie so be destinat and appointed as said is, succeeding " heirs of tailzie in special, in the lands and estate after men- " tioned, and to be infeft thereupon, as if they were expressed " by name and sirname therein.)" So in the style, page 582,

the grant is, " to the heirs female, procreat or to be procreat " of his own body, or descending of his own body, (the eldest " being always preferable, and succeeding without division,) " whilks failzieing, to such persons, one or more, whilks the " said S. J. N. has nominat and designed, or shall nominat, " design, or subscribe (in any writ by him subscribed or to be " subscribed), to be heirs of tailzie, and to succeed to him in " the estate after mentioned, failzieing of heirs male and female " descending of his own body, and with and under such pro- " visions, conditions, and restrictions as to the said S. J. N. " shall seem expedient, which the person so designed or to be " designed shall be holden to perform and fulfil; and the " said writ shall be als valid and sufficient as if in thir presents " insert and ingrossed." In the style, page 623, there is simply a destination hæredibus nominandis. All of these seem styles of signatures of entails of importance, and seem, if not the whole, the principal, having clause in favour of such heirs contained in Dallas. Sept. 23, 1831.

" These deeds appear to me to be quite consistent with the view I have adopted, and with that view only. Indeed, I think that this view is adopted in the very able case for Mr. Corbet Porterfield, where it is said, " The deed of nomination, as soon " as executed, accrues to, and in effect becomes a part of the " original investiture;" and the case of Douglas is referred to as showing this.

" Entertaining the view of the nature of a destination hæredibus nominandis that I have above explained, I come to the question (an important one in this cause), whether the deed 1742 can be regarded as a nomination at all, or so far as to avail the respondent.

I have already observed that Alexander Porterfield had in him two powers,—one of nomination of heirs under the branch of destination hæredibus nominandis, the other of alteration, innovation, and change. These powers were distinct and different. If he executed a nomination under that branch, this could not be regarded as an alteration, but as the completion of the destination provided in the original deed. So, if he executed an alteration, that could not be taken as a nomination under that branch, for, if so taken, it would no longer have been an alteration, and must necessarily have reduced the deed into a

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state of the most absurd inconsistency, the altered part of the destination being thus made to remain in the deed after the alteration. In respect to the form of execution, these powers were equally distinguished. The execution of the power of nomination was of course to be by a deed declaring the entailer's intention to name and then naming heirs to take under the branch hæredibus nominandis, the alteration was by a deed declaring the entailer's intention to alter and altering the destination, which of course, by virtue of the obligation previously constituted in the deed 1721, bound William Porterfield and his heirs to make up new investitures accordingly.

" With these observations I turn to the deed 1742; and I feel compelled to say, that though I have looked over that deed again and again, I cannot find any thing in it to show that Alexander Porterfield either intended to exercise or did exercise in it any power but that of alteration, and still less any power of nomination under the branch hæredibus nominandis that can avail in this question. In that deed, after a full narrative of the marriage contract and the acquisition of new land, the entailer proceeds:—" And being resolved to adject, eik, and add the " saids new purchased lands to my tailzied estate above specified, " 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 " hereby declared to be the order, course, and succession to my " foresaid estates and lands, both old and new, with and under " the additional clauses and provisions after specified." Here is an express declaration of intention to make use of the power of " alteration, change, and innovation," but not a hint of any intention to make use of the power of nomination under the branch hæredibus nominandis. It has been argued, that the declaration here is the exercise of that power of nomination. That, however, seems to me impossible to be received; for I cannot understand how a man, saying I am to alter my destination, and when so altered declare it to extend to two estates can be held to have done any thing, or even expressed any intention, referable to a power distinct from that of alteration. Accordingly the deed proceeds, in conveying the newly-ac-

quired lands, to state the altered series of heirs who were to take both estates, but without any words implying that this series was to take the old estates as heirs named under the branch hæredibus nominandis. It is true, that after the words, "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 successors whatsomever, duly and "validly to infeft and sease the heirs male of the body of the "said William Porterfield, lawfully procreate or to be procreate "of his present or any subsequent marriage (secluding always "the said William Porterfield himself from any succession to "the said late purchased lands); and failzieing heirs male law-"fully 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 failzieing, to the heirs male of "the body of Alexander Porterfield of Fullwood, my uncle; "whilks failzieing, to the heirs male of Gabriel Porterfield of "Hapland, my cousin." This deed interjects these words,— "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 dispo-"sitions, are to return to the heirs male of my family, failzieing "the heirs male of their families, by which my ancestor's "anxiety to preserve their estates and family in their own names "and heirs male plainly appears." But it rather seems to me that this reference to the power of nomination is for the purpose of stating the motives or reasons of the entailer only, not with any view to an exercise of that power, even in favour of the Porterfields of Fullwood and Hapland, and that even they are left to be brought in by new infeftment in the way of alteration, which was perfectly competent and ordinary. And this at least seems clear, that these interjected words have no reference at all to the afterpart of the destination, which alone is of any consequence in the present question; it is manifestly the introduction of the Porterfields of Fullwood and Hapland only to which the words "and that," &c. have any application at all, whatever be contended to be their effect. Indeed, if these words afford any inference as to the other heirs, it must be, that in

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respect to them the power of nomination was not looked to, since the reference to it is confined to the Porterfields of Fullwood and Hapland only. If they are to be held as nominees under that clause by virtue of the reference to it, it appears that then they are so nominated in contrast to the rest of the series in relation to which no such reference is made. The deed proceeds, after these interjective words, to state the rest of the destination, which is in itself a complete destination, containing and exhausting, though under altered arrangements, the same series that were in the destination 1721, the order and course of which he had declared he was to alter. It will particularly be observed, that, with exception of the Porterfields of Fullwood and Hapland, and their heirs, the destination in this deed 1742 contains no new heirs, but merely new-arranges those that were in the deed 1721, nor does it omit any that were in that deed. Then this altered destination closes with "the nearest heirs and assignees of the said "William Porterfield whatsomever," contemplating that here the destination of the entail was to terminate, and most undoubtedly not contemplating that the part of the altered destination 1721, which came after the branch of hæredibus nominandi (in that deed) was to remain and come in after heirs whatsoever, and after the very same heirs contained in that part of the destination 1721 had been called already in the altered destination before heirs whatsoever, which must however have taken place if this deed was to operate as a nomination. It is not said that in the rest of this deed there is one word pointing at any exercise of the power of nomination. It may be further observed, that it could be of no use to mingle together the exercise of these two different powers. The deed 1742 being indubitably to some extent an alteration of the entail 1721, that required new infeftment to make it effectual. If new infeftment was to be taken at all, why not include it in the whole destination, or of what use could it be to leave part of it to operate in a way different from the rest? On the whole, then, I think that this is a deed of alteration merely, and neither intended nor expressed at all as a deed of nomination under the substitution of hæredes nominandi; and, à fortiori, I think that it is a deed of alteration only in respect to all the heirs excepting the Porterfields of Fullwood and Hapland, *i. e.* all the heirs in relation to whom the question is of any im-

portance in this cause. The question then comes to be, whether when a party having two powers, one of nomination, the other of alteration, executes a deed appearing to be intended and expressed only as an alteration, this deed shall nevertheless be held to be a nomination under a particular clause, in order that it may have effect as such, in case it shall by prescription or otherwise lose its effect as an alteration? And I feel obliged to answer this question in the negative. I cannot make the deed other than what the party himself intended to make it and has made it. If I were to do so, I never can be sure that I do not produce an effect which the maker intended should not be produced, and I am quite sure that I must produce it in a way he did not choose to adopt. I should do for him quod non fecit at least. Sept. 23, 1831.

"I have already observed, that supposing the insertion of certain new heirs, and the expression by Alexander Porterfield of his reasons for naming them, could be regarded as an exercise of the power of naming heirs under the substitution hæredibus nominandis, yet this could go no further than the appointment of these new heirs. The insertion of these new heirs, with a special reference to the power of nomination, could never convert into a mere nomination of new heirs, under such substitution, the whole of the rest of the destination, which contains nothing else but a new arrangement of the order of succession among the old heirs, made without any such special reference, but, on the contrary, made after a preamble that he was to exercise his right of alteration. Unless, however, the whole destination 1742 can be made nomination under the substitution hæredibus nominandis, it seems plain that the substitution of Jean Porterfield and the heirs male of her body, in virtue of which the respondent claims, can as little be made such as any other part of it. She and the heirs male of her body were just like all the others, excepting those of Fullwood and Hapland, *i. e.* they had been called before in the deed 1721, though not in the same manner nor in the same place. Even if we could view part of the destinations 1742 as nomination under the substitution hæredibus nominandis, the calling of this lady and her heirs male can never be held as included in that part, in which case the argument for nomination is one which the respondent has no interest to maintain. It is asked whether, supposing there had been no other power reserved

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to Alexander Porterfield than that of naming heirs, this deed 1742 must not have been sustained as a nomination? I do not think it material to answer that question, because it supposes a case essentially different from the actual case, and one that I think really not possible to have happened; I mean, that I think it not possible that any man, having merely a power of nominating heirs under one branch of a destination, should have executed a deed in such terms as this.

"2. Viewing the deed 1742, then, as an alteration of the deed 1721, not as a nomination under the substitution hæredibus nominandis, at any rate not as a nomination under that power in respect to any heirs but the Porterfields of Fullwood and Hapland, which could be of no moment in this cause; the next question is, whether that alteration can be availing to the respondent in this process? Now, in so far as relates to the superiorities of Porterfield and Hapland, the alteration seems fully operative, for it appears to have passed into the investiture by the titles made up in 1773, which stand unreduced as yet, and I think are now not reducible. Under these titles, forming the investiture in these estates, the respondent seems to be the heir entitled to succeed; and as the process before us is a competition of brieves, it appears to me that he is entitled to be preferred therein. So far as relates to these subjects, I concur in the opinions of the Second Division of the Court.

"In regard to Duchal and Overmains, the observation recurs, that the process before us is a competition of brieves for service under the existing investiture. Now the existing investiture as to Overmains is under the deed 1721, and base infeftment thereon merely, and of course the alteration can have no effect in the competition for being served heir as to Overmains. And then it is not denied that the appellant, not the respondent, is the preferable heir under the infeftment, if held to stand unaltered by the deed 1742. In respect to Duchal, the existing investiture is under the deed 1721, and infeftment thereon, and the confirmation of that base infeftment, which confirmation is wholly without mention of any alteration whatever. Of course, therefore, that alteration can be of no effect in this competition of brieves, in so far as respects Duchal, any more than in respect to Overmains; so that, taking the investiture as it stands under the infeftment 1721, and holding it to be unaffected by the deed

1742, the appellant is the preferable heir under that investiture to Duchal as well as to Overmains. On these grounds, without going further, I think that, in relation to Overmains and Duchal, the interlocutors should be altered, and the appellant preferred in the competition. Sept. 23, 1831.

"In this view, it is perhaps not necessary to enter into the question respecting the original validity of the alteration, or its liability to prescription. As the question has however been fully argued, I must say,—

"1. That I think the alteration was certainly not valid in toto, but that I think the bad part of it separable. *i. e.* the alteration, in so far as related to the heirs female of William Porterfield. Over these heirs Alexander Porterfield in 1742 had no power, and therefore his express insertion of them in a latter place of the destination, and his expunging of them from their proper place, must both be held as null. But, with this correction, I think the rest of the alteration might have originally been made effectual.

"2. That in respect to prescription, I do not see how there could be any prescription during the life of Alexander Porterfield, who held the power of alteration during his life. Till his death it was never finally exercised, nor could be operative. On his death there appears to have been an immediate obligation binding William Porterfield and his heirs to make up titles agreeably to the alteration, which was liable to the negative prescription, like any other obligation, provided there existed in the obligee a sufficient interest to prescribe against it. And I think William Porterfield had a sufficient interest, as merely heir of entail in possession, in as far as the alteration brought in additional substitutes of entail, every heir of entail having an interest to get rid of after-substitutes of entail as far as he can, and particularly an heir in whose heirs and assignees generally the destination terminates. And further, William Porterfield had a sufficient interest to prescribe, in as far as by the alteration his own heirs female were postponed to a number of heirs who previously were postponed to them, or not in the entail at all. Boyd Porterfield had interests just similar to those of William, *i. e.* to get rid of the additional substitutes, and also of the postponement of his own heirs female to other heirs, who in the original entail stood postponed to them. Alexander Porterfield, 2d,

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seems also to have had similar interests to prescribe. Perhaps it may be held that the first of these interests was extinguished by the deaths, without issue, of Porterfield of Fullwood and Porterfield of Hapland, at some time not precisely stated; but at least the other interest remained all along. I do not therefore think it necessary to inquire whether, independently of any special interest of this kind, an heir of entail in possession upon an investiture destined to himself and any set of heirs of entail, and bound by an obligation to obtain new infeftment in favour of himself and any other set of heirs of entail, has not, from the very circumstance that this is an obligation to do what is not for his own advantage, and whether he chooses or not, sufficient interest for extinguishing it by prescription, if he shall choose not to fulfil or to acknowledge it? I certainly feel inclined to answer the question in the affirmative; but it is not necessary to decide upon that general and abstract view here. I may observe, however, that I do not think the case of Welsh in point, that case having been considered as one in which there was no immediate obligation to take new infeftment, but only to hold the estate on the title of the entail, which was held to have been sufficiently done. I think, then, that the obligation to execute the alteration was liable to and is lost by the negative prescription; and in that case the obligation must perish altogether, since the alteration is not made, and nobody is bound to make it.

"The opinion which I have yet given, it will be observed, is applicable to the deed 1742, viewed as an alteration only, not on the supposition that it could be regarded as a nomination under the substitution hæredibus nominandis. In that view the cause assumes an aspect somewhat different. In that view I consider the two deeds 1721 and 1742 as forming two parts of the entail of Duchal, &c. left by Alexander Porterfield. These parts I consider both as conveyances, not as mere evidence of any fact intrinsic, to the conveyance of entail. Then I consider these deeds so far distinct deeds, that the existence and full effect of the first nowise depends upon or necessarily implies the existence of the second. The deed 1721, even in this view, was a sufficient effective settlement in itself, an entail liable to no objection on that account, although no such deed as that of 1742, nor any nomination under the power of nomination, ever had been

executed. The deed 1742 was executed, and I shall suppose was immediately operative as a nomination of heirs under the power of nomination in the deed 1721; yet still the deed 1721 remained a deed in itself ex facie sufficient and valid as a title to the estate, and therefore a perfectly good ground of positive prescription, provided it was followed with proper possession attributable to it alone, exclusive of any other, and particularly of the deed 1742. Then I think that, in respect of Duchal, a title by infeftment was made up by Boyd Porterfield in 1757 under the deed 1721 alone, omitting all mention of the deed 1742, and the like title was continued after him by Alexander Porterfield; and on this title the peaceable possession continued to be held by these parties down to 1815, when this competition arose. I think, therefore, that in relation to these lands the positive prescription took place, for I see no reason to doubt that an heir of entail, peaceably possessing lands for forty years upon an entailed infeftment to himself and a certain class of heirs, prescribes positively in favour of himself and that sort of heirs, whether against a stranger asserting a right to the estate superior to that of the entailer, or against any other party, alleged disponee or alleged heir, pretending right contrary to that infeftment, and to the disadvantage of the possessor or the heirs of the infeftment. In regard to these last in particular, I cannot see that it makes any material difference whether they claim under a new disposition or obligation of entail, for which it is alleged the entail left power, or under a deed of nomination, for which it is alleged the entail left power. The positive prescription seems to me equally to exclude all such pretensions to disturb the existing investiture. The reasons of the statute of prescription, particularly the danger of forgery, apply just as much to one as the other. It is argued by Mr. Corbet Porterfield, indeed, that the possession must be ascribed, not to the deed 1721 alone, but to it as qualified by the deed 1742; and no doubt, if that were the case, there would be no prescription. But I cannot adopt that view. I do indeed think that an heir of entail may serve, or take a precept of clare constat, under a nomination of heirs, for which room has been preserved by a destination hæredibus nominandis; but then he must do what has been done in the case of Roxburghe, and other cases of that sort, *i. e.* his service or precept of clare must mention the deed of nomination, not merely mention

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the deed containing power to make the nomination, which is a quite different thing from the existence of a deed in actual exercise of that power. If nothing is mentioned in a service, or precept of clare constat, but a deed with a substitution hæredibus nominandis, it seems that the inference must be, that the service is a service, or precept of clare constat, under that deed only containing the power, but not under any deed containing an actual exercise of that power. I cannot, therefore, adopt the argument of Mr. Porterfield on this point. I do not consider the case of Douglas to be applicable, since in that case there was mention (which, though vague, was held sufficient for designation,) of the deed of nomination actually executed under the power.

"In regard to Overmains, in this view of the nature of the deed 1742 as a nomination merely, the case seems different. It does not appear that any title was evermade up to these lands excluding the deed 1742. Base infeftment indeed was taken of these lands on the deed 1721 when it was first granted, and before the deed 1742 existed; and this was afterwards confirmed by the superior, without any mention of any actual deed of nomination; but I do not consider that as exclusive of any subsequent deed of nomination to be executed by Alexander Porterfield. There is some difficulty in this; but I think I can go so far as to hold that a superior, giving a charter to a person and the heirs to be named by him in a subsequent deed, does grant an infeftment that does invest those heirs (as such) when the nomination is finally left effectual. That is quite a different thing from a service and infeftment after a nomination has been made, taking no notice of it, but only mentioning the deed containing a clause of power to make such nomination. In the former case the superior makes all the mention of the nomination that can possibly be made, *i. e.* he mentions it as a deed to be made in future. In the latter case the service, though the deed of nomination has actually been made, makes no mention of any such deed having been made or existing, but speaks only of the deed, with the clause of power to nominate, exactly as it would have spoken if no such nomination had ever been made. I do not think therefore that there is any inconsistency in holding that the nomination in the one case is excluded, and not in the other. It is true that afterwards, in 1746, William Porterfield took confirmation of the deed 1721, and infeftment on it, without mention of the

deed 1742; and I do think that this confirmation was exclusive of the latter deed; but then I conceive that the prior base infeftment, though not confirmed, continued to exist, and has never been in any way extinguished, but now (in this view of the deed 1742) is availing to Mr. Porterfield as heir of William Porterfield, in which capacity he now claims. In this view, then, of the deed 1742, as a mere nomination, I think there is no room for prescription as to Overmains, and in respect to it Mr. Porterfield must prevail; but I need hardly repeat that I do not myself adopt that view of the deed 1742. In respect to the superiorities, I do not see that the adoption of this view of the deed 1742 makes any difference."

Lord Meadowbank.—"I concur in every part of the judgment as delivered by Lord Mackenzie."

Lord Medwyn.—"I concur in the foregoing opinion, in so far as it considers the deed of 1742 as an exercise of the power of alteration reserved by Alexander Porterfield in the marriage contract 1721, except perhaps as to the nomination of the heirs male of Fullwood and Hapland,—and that it is not to be held as the filling up of what has been termed the sixth substitution by the nomination of heirs between the heirs female of his son William's body and the heirs female of his own body; and as to the result deducible from this, that Sir Michael Shaw Stewart is entitled to be preferred in this competition so far as regards the estates of Duchal and Overmains. Perhaps I do not differ materially from the views contained in the latter part of the opinion; but as it is unnecessary to enter upon them in consequence of the view I take of the deed 1742, that it is an exercise of the power of alteration, I rather wish to decline offering any opinion as to the consequences of the alteration having gone beyond the powers reserved in the deed 1721, and as to what would be the effect of the deed 1742 on the rights of the parties, viewing it as a nomination under the substitution hæredibus nominandis."

Lord Cringletie.—"The question now before the Court is relative to the estate of Porterfield, the succession to which was claimed by Sir Michael Shaw Stewart in opposition to James Corbet, Esquire. The Lords of the Second Division decided in favour of the latter; and, on appeal by the former, the House of Lords remitted to the Court to reconsider the question, and to require the opinions in writing of the other Judges of this

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Court. In obedience to this remit, the Second Division have required the opinions in writing of the Judges of the First, and the permanent Lords Ordinary, on the question which of the two competitors is entitled to be served heir under the brieves respectively taken out by them from Chancery.

" In compliance with this requisition, Lord Cringletie offers the following opinion :—The matter in dispute is purely a question inter hæredes, arising out of the settlements of Alexander Porterfield of Porterfield, and therefore is to be decided according to the will of the granter of these deeds, in so far as it is not opposed by conflicting principles of law. Alexander Porterfield of Porterfield had a son named William who was married to Miss Juliana Steel, daughter of the Rev. William Steel, minister of the parish of Lochmaben. On that occasion a contract of marriage, dated 19th and 21st October 1721, was executed by the parties, in which Alexander Porterfield disponed his estates of Duchal, Overmains, and the superiorities of Porterfield and Hapland, to himself, in life-rent and in fee, to the following series of heirs, viz.

" 1. To his said son William and the heirs male of the marriage. 2. To heirs male of William by any other marriage. 3. To heirs male of Alexander's own body. 4. To the eldest heir female of William's body. 5. To the next heir female successive of William's body. 6. Whilks failing, any other heirs of tailzie to be nominated by the said Alexander Porterfield by writ under his hand at any time in his lifetime, in his liege poustie; which failing, 7. To the eldest heir female of the body of the entailer. 8. To his next heir female successive. 9. To heirs whatsoever.

" Alexander also reserved to himself, at any time of his life, while in liege poustie, power " to alter, innovate, or change the " order, or 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 the said Alexander " Porterfield, his own body," &c.

And it was declared in said contract, " That the said William " Porterfield, and his heirs and successors, shall 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 favours of

" such heirs of tailzie as the said Alexander Porterfield shall so " nominate and appoint, failing the heirs male and female of " the said William Porterfield, his body, and the heirs male " of the said Alexander Porterfield, as said is," &c. From this deed it appears that Alexander Porterfield reserved two powers, viz. one to interpose heirs between the heirs female of his son's body and those of his own body; and, 2d, to alter the course of the latter's succession entirely. But in both cases he describes the exercise of the faculty as a nomination of heirs; for, in the clause last quoted, William and the heirs succeeding to him are taken bound to take the investitures of the lands " to and " in favour of such heirs of tailzie as the said Alexander Porter- " field shall so nominate and appoint." This clause immediately follows the power to alter the course of succession in the manner before mentioned; so that it is quite clear that, in the understanding of parties, the deed to be executed by Alexander, in whatever form conceived, was held to be a nomination of heirs, whether it was made under the one power or the other. Alexander married a second wife; and, having acquired the lands of Blacksholm, he executed a deed, dated 5th November 1742, wherein, after reciting the two powers reserved to him in his son's contract of marriage, he subsumes that, since the date thereof, he had acquired said lands last mentioned, and some others which he was resolved to add to his other estate; " but " with the alteration, change, and innovation of the order, course, " and succession therein (viz. the contract of marriage) con- " tained and above repeated, in so far as is inconsistent with the " order, course, and succession under written, which is hereby " declared to be the order, course, and succession to my foresaid " estates and lands, both old and new," &c.

" He therefore disponed, under all the clauses of a strict entail, his lands of Blacksholm,—1. To the heirs male of his son William's body (secluding William himself); which failing,—2. To the entailer's grandson, Boyd Porterfield, by his second son John, and the heirs male of Boyd's body. 3. To the heirs male of the body of Alexander Porterfield of Fullwood. 4. To the heirs male of the body of Gabriel Porterfield of Hapland; and that, " because I reserve to myself a power to name the subse- " quent heirs of tailzie after my son William Porterfield, and

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" his heirs as aforesaid," &c. 5. To the entailer's own daughters in their order of seniority, and the heirs male of their bodies. 6. To the heirs female of his son William's body, and the heirs of their bodies. 7. Which failing, to the heirs female of Boyd's body, and the descendant of their bodies, of whom Sir Michael S. Stewart is one.

" From the above detail these observations occur:—1. That Alexander exceeded the power reserved to him, in so far as he postponed the heirs female to be procreated of his son William's body to the heirs of the bodies of Alexander and Gabriel Porterfields, and to his own daughters and the heirs of their bodies; so that had any heirs female of William's body existed, it is quite clear that they had a right to challenge that deed of their grandfather, in so far as respected the lands specified in the contract of marriage; but it is equally clear that, if they had done so, they must have abandoned Blacksholm, because their grandfather was entitled to dispose of it ad libitum, and in the succession to it they were postponed to the others already mentioned. 2. It is equally clear that, in so far as regarded the heirs female of Alexander's own body, he was under no restraint to interpose other heirs before them; and when I look to the deed 1742 I do not think that there is any alteration of the course of succession in the contract 1721, except the postponement of the heirs female of William's body. To that extent there can be no doubt there is an alteration which might have been set aside by these ladies if they had existed. Quoad ultra, the deed 1742 merely interposes other heirs between the heirs of William's body and the heirs female of Alexander's own body by calling his own daughters before those of his son Boyd, and adds after them a few more heirs, which is a nomination, and cannot be called an alteration.

" Alexander died 14th May 1743; soon after which the deed 1742 was recorded in the books of this Court, but by whom is unknown. William was infeft, on the precept of sasine in the marriage contract, in the lands of Duchal and Overmains, and obtained from Lord Glencairn, the superior of Duchal, a charter in 1746, confirming the contract of marriage and subsequent infeftment, the effect of which was merely to convert the base holding into a public one. As to the lands of Overmains, he

possessed them on apparency. Porterfield and Hapland being mere superiorities holding of the Crown, William made up no titles to them. Sept. 23, 1831.

" William died in 1752 without issue, when he was succeeded by his nephew Boyd, who made up titles to Duchal by serving heir of tailzie to his uncle under the marriage contract, and taking a precept of clare constat from Lord Glencairn, referring to the infeftment and destination hæredibus nominandis therein contained, but without taking any notice of the deed 1742, which had not then come into operation, in respect that Boyd Porterfield was entitled to succeed before any of the heirs newly called by that deed, viz. the heirs male of Fullwood and Hapland, or the tailzier's own daughters and the heirs male of their bodies. With regard to Overmains, he possessed it in a state of apparency, as heir of his uncle, under the sasine taken on the contract of marriage.

" As to Blacksholm, Boyd entirely disregarded the deed 1742. He served himself heir of line to his grandfather — took thereby the procuratory of resignation in the disposition to that gentleman—passed a charter thereon—was infeft and held the lands in fee simple; so that the investiture being now secured by prescription, there is no question about these lands.

" The superiorities of Porterfield and Hapland were taken up by Boyd, who, of the same date with his service as heir of line, also served himself heir of tailzie and provision of his uncle William, by which he got right to the unexecuted procuratory of resignation of these lands in the marriage contract; and he obtained a charter of resignation from the Crown, dated 6th August 1773, granting these subjects to him, and the heirs particularly called by the deed 1742, which is expressly referred to in the charter; and on this he was infeft 14th January 1774. Boyd Porterfield died in 1795, and was succeeded by his son Alexander, who completed his titles to Duchal precisely as his father had done, without reference to the deed 1742. I understand that he possessed Overmains on apparency, and made up no titles to Porterfield and Hapland; but he was enrolled as apparent heir to his father Boyd, on which occasion he produced and founded on the said Crown charter and sasine.

" He died in 1815 without issue; after which arose the present competition between Sir Michael Shaw Stewart, as eldest heir

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female of the entailer's body, being the son of Boyd Porterfield's eldest daughter, and the late Mr. Corbet, the grandson and heir male of the entailer's eldest daughter.

" It is said that the quæquidem of the charter to Boyd Porterfield sets forth that he had right to the unexecuted procuratory of resignation in the contract of marriage in virtue of his service as heir of line to his grandfather, which rendered the charter inept, as he ought to have taken the charter to himself as heir of tailzie and provision. There can be no doubt of the blunder, which might have been objected to in proper time; but I apprehend that this defect may be and has been wiped away by the positive prescription; for, if the service as heir of line did not give him a title to the unexecuted procuratory of resignation, the charter, granted on the narrative that it did confer a right, is still a prescriptive title; it is surely no worse than a charter granted à non domino, which will be a good title if followed by possession for the prescriptive period. In this way I think that the succession to Porterfield and Hapland devolves to Mr. Corbet in virtue of the order of succession contained in Boyd's charter, passed on the deed 1742.

" As to Duchal, Sir Michael Shaw Stewart pleads, 1st, That the deed 1742 is not to be considered as one of nomination, in terms of the reserved power to interpose heirs between the heirs of William Porterfield's body and the heirs female of Alexander's own body, but as one of alteration of the order of succession, made in consequence of the reserved faculty to alter; that the alteration was ultra vires of Alexander, in so far as it postponed the succession of William's daughters to the other heirs preferred to them; and, being ultra vires to that extent, is altogether void and null.

" If this were well founded, there would be an end of the question; Sir Michael must be preferred in this competition. But I cannot assent to the proposition that the deed is ipso facto void and null. I think that it was only reducible at the instance of the party injured by it, if they had existed; and if that party did not choose to challenge it, or if they had chosen to ratify it, I think that it would have made an additional nomination to the destination in the contract 1721. Put the case that Alexander Porterfield the entailer had died, having no children but William; that the latter had no sons, but had left daughters; these

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might have set aside the deed 1742, and taken all the lands in the contract 1721; but, if they did not choose to quarrel it, I think that the first male heir called by it might have served heir of provision under that contract, as enlarged by the deed 1742, and the title would have been good. But that could not be the case if the deed was absolutely null. It seems a solecism to say that a nullity cannot be ratified. What is reducible only may be ratified, but what is ipso facto null is no better than a blank sheet of paper, and cannot be ratified. This satisfies me that the deed 1742 was not null, but reducible only, and that by those only who were injured by it. Quoad ultra, the granter had a right to make it, and nothing is so simple as to separate the challengeable from the unchallengeable in it. The heirs female of William's body, if they had existed, might have set aside the deed, in so far as it was to their prejudice, and when they became all extinct the nomination would take effect; nor is there any thing more outré in this than the succession of heirs general to the last heir of entail, which, in a long order of succession, may not happen till at the end of 200 years. As, therefore, the said heirs female never existed, whereby there could be no challenge of the deed 1742, I think that, even viewing it as a deed of alteration in so far as they are concerned, it is otherwise unexceptionable, if it be not cut off by prescription.

"But, farther, it occurs to me that the deed 1742 has a double character, and was so intended by the granter. Of this there can be no doubt, for he says so himself; he quotes both the reserved powers in the contract, viz. the one to name the heirs who shall succeed on the heirs male and female of William's body and the heirs male of his own, and the other to alter the order and course of succession, as the inductive cause of executing the deed. Now, the only alteration was that which, even according to Sir Michael Stewart, Alexander had no power to make, viz. the postponement of the heirs female of William's body. Let that be laid out of the question, and the rest of the order of succession is truly a nomination or interposition of heirs between the 5th and 7th substitutions; for he called the heirs male of the bodies of his uncle and cousin, and, failing them, his own daughters, before those of his son or grandson. The deed was therefore an alteration improperly done, and a nomination which he had full powers to make, for I think no one can

Sept. 23, 1831. deny that by the deed 1742 the respondent and his class of heirs were called to the succession of Duchal in preference to the tailzie's heirs female, because he declared the order of succession to be the same to both estates; and what was that but a nomination of heirs? I have always understood that, when a person executes an entail, in which he makes a perfectly feudal and technical conveyance of his estate to certain heirs therein named, whom failing, to any others whom he may afterwards appoint to succeed, he is entitled to call additional heirs by a separate deed, which he can competently declare shall be held to be a part of his tailzie, and as such to be observed by the heirs succeeding to him; and that it would be competent to the heirs called in that separate deed to insist that, on the renewal of the tailzied investitures, the nomination of heirs, or the order of succession made by the separate deed, shall be engrossed in them Now this proves beyond dispute that the nomination by a separate deed is lawful and competent; but, although the nomination should not be engrossed in the titles of the prior heirs, that circumstance surely would not prevent an heir in the separate deed, as soon as the succession opened to him, from claiming to be served, and producing the deed as evidence of his right, provided that the right of succession under that separate deed has not been lost by prescription, to which I shall advert in the sequel. To me this seems quite clear; but to illustrate it, put the case, that an entailer calls his son and the heirs of his body, whom failing, A. and the heirs of his body; whom failing, such other heirs as he should afterwards name, and reserving full power to change the places of the different heirs by a separate writing under his hand; and suppose that he chooses to prefer B. to A., and executes a separate deed for that purpose, and that, at his own death, his son has been dead without children, can there be any doubt that B. could claim to be served heir to him under the investitures taken on the tailzie, and produce the separate deed naming himself, and preferring him to A.? I imagine there can be none. What else was the case of Rutherford? Sir Alexander Don took the investitures of that estate to his second son Alexander, and certain other heirs specified; whom failing, to the heirs contained in the tailzie of Newton. What else was this than a destination to heirs designated in a separate deed? There is surely no difference, and this was found

to be sufficient both in this Court and the House of Lords. The same is proved by the cases of Roxburgh, and the competition for the estates of the Duke of Douglas, all referred to in the pleadings of Mr. Corbet. The deed of nomination becomes a part of the entail applicable to it, and joins to the feudal conveyance therein contained. In this way it appears to me that Mr. Corbet is entitled to found on this separate deed 1742 as a nomination entitling him to succeed in preference to Sir Michael Shaw Stewart. Sept. 23, 1831.

" Sir Michael pleads that the right of succession conferred by " the deed 1742 has been extinguished by the positive and ne- " gative prescriptions. But when I consider that a destination in " an entail hæredibus nominandis may be created by a separate " deed nominating these heirs, I do not think there can be room " for prescription till the succession shall open to these heirs. " There can be no room for the positive prescription, because the " destination ' to such heirs as the said Alexander Porterfield " shall nominate and appoint ' is uniformly repeated in every in- " vestiture of the estate; and as Mr. Corbet claimed as soon as " the succession opened to him, there can be as little room for the " negative as the positive prescription; for it is well observed by " Mr. Corbet's counsel, that, when Sir Michael comes to prove " his claim to the jury, he must show that all the substitutions in " the tailzie have been evacuated prior to that which calls him- " self; but when he comes to that one of hæredibus nominandis, " he cannot show that no heir was named, because the contrary " would be distinctly proved by Mr. Corbet. Now, had that " substitution been left out of the investitures for the years of " prescription, Sir Michael would not have had to encounter it; " but being in every investiture, it meets him, and leaves it " equally open now to apply the deed of nomination to the sub- " stitution, and make it a part of the order of succession, as it " would have been at Alexander Porterfield's death if all the prior " heirs had then been dead, and to prove by that deed that the " heirs named prior to Sir Michael have not failed.

" On these grounds it appears to me that Mr. Corbet is entitled " to claim under the sixth substitution in the contract of mar- " riage 1721, being that hæredibus nominandis, and to complete " the substitution by uniting with the tailzie the nomination " contained in the deed 1742, and therefore I am of opinion that

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" he is the person who is entitled to be served heir of tailzie and " provision to William Porterfield in the lands of Overmains, " to Boyd Porterfield in those of Porterfield and Hapland, and " to the last Alexander Porterfield in the lands of Duchal."

The cause having been put out for advising by the Second Division, Lord Glenlee, who had declined (his daughter being married to Sir Michael's brother), did not vote; Lord Cringletie retained his opinion; Lords Fullerton and Moncrieff, having been counsel in the cause, and having written the cases on which the judgment of the Court proceeded, did not return any opinion; and Lord Justice-Clerk and Lord Pitmilly expressed their entire concurrence in the opinion of the majority of the consulted Judges; and the Court thereon (13th Nov. 1829) * found, " That " the respondent James Corbett Porterfield is the person entitled " to be served heir of tailzie and provision to the deceased " William Porterfield in the lands of Overmains, to the deceased " Boyd Porterfield in the superiorities of Porterfield and Hap- " land, and to the late Alexander Porterfield in the estate of " Duchal; therefore adhere to the interlocutor of the 15th of " May 1821 appealed from."

Sir Michael Shaw Stewart appealed.

Lord Chancellor.—My Lords, this is a case of very considerable importance, whether we consider the large amount of property at stake, the principles of law involved in it, touching the construction of the instruments on which the parties rely for their title, or the length of time during which certain of the parties have been in possession. The case has been argued at great length, with a zeal which the importance of the question at issue might have been expected to excite, and with the ability and learning which your Lordships must have felt sure would be brought to the discussion, from the names of the learned counsel on either side. I had occasion, in the course of last sitting in this house upon the same subject, to fling out an observation during the arguments of learned counsel respecting the great weight as well as number of authorities on the bench of Scotland, whose decisions, when pronounced, had been supported after consideration by your Lordships; and undoubtedly, on a question which is not one of general law, but which regards the particular jurisprudence of that part of the United

* 8 Shaw and Dunlop, p. 17.

Kingdom and is confined to the law of real property—a question, strictly speaking, of Scotch conveyancing—it is natural for your Lordships to have a leaning,—and those who, in matters of law, are to advise your Lordships, (as all those who have preceded me have uniformly experienced,) feel that in executing this task in the face of such authorities as are sometimes to be reviewed, they have a leaning in favour of the judgments which have been pronounced by those Scotch Judges, whose learning and ability adorn the present bench. It would be very difficult indeed to conceive a case where all the Scotch Judges together had on a point of purely Scotch law concurred, in which your Lordships would feel yourselves justified in reversing the decision; nevertheless, even in such a unanimity, examples are not wanting of reversals (or at least of remittals almost amounting to reversals), the house differing in opinion with the unanimous or almost unanimous opinion of the Court below. In some of those cases (and they are remote in point of date) there were good reasons for supposing, that although great learning had been brought to the decision of the Court, and in many instances very great ability and acuteness, yet that perhaps an entire want of bias on the part of those very learned and acute persons, sometimes possibly of a national kind, was not wholly wanting, but had cast, as it were, its shadow across what ought to be unclouded clearness of the judicial path. But ever since I have attended to these matters my observation has led me to few, if any instances, where so great a union of opinion as exists in the present case has been set at nought by a contrary decision on a question regarding the law of real property in Scotland. There is no case in which such weight of authority has been held so light in the scale as to be counterbalanced by your Lordships' opposing opinion, or has been set at nought by a reversal of a judgment so supported. Nevertheless I am far from saying that the case may not arise where, for instance, all the Judges save three having a clear opinion, or where all the Judges, the most eminent for their sagacity, for their learning, and for their experience as lawyers conversant with the Scotch law of real property, might not be on one side, your Lordships may yet take part with a very small portion in point of numbers and even in point of weight, in the Court below. If such a case should arise it is your Lordships' bounden duty to meet it, and to follow your own opinion because it is your opinion, and not to bend to the authority of the Court below; for else, if there were a Court composed of a much smaller number of Judges, where absolute unanimity might be much more frequently expected, a contrary supposition would amount to an ouster of the appellate jurisdiction. I only throw out these general observations for the pur-

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pose of introducing one or two remarks, with which I am about to conclude. The notice, as it were, which I at present offer to your Lordships, is, that undoubtedly, if I were upon my present knowledge of the case, and after the attention I have been able to bestow on the arguments at the bar, and also on the very voluminous and elaborate papers in which those arguments have been submitted to your Lordships, I should have no hesitation in affirming the judgment. Nevertheless, my Lords, I deem it my duty to go through these once more; I deem it to be my duty specially to direct my attention to several of the topics which are to be found in an able and judicious opinion of Lord Mackenzie, one of the smaller number of Judges who had disposed of this case in Scotland, particularly one branch of the argument, which I have not seen answered on the face of this case. That (and one or two other points made by that able and acute Judge, whose arguments on all occasions are deserving of minute attention,) will occupy my attention. One word as to appeals. My Lords, it is in vain to say—while there may be points of law which may be of some difficulty, as well as of importance to the interests of the parties—that any general rule can be laid down with respect to the discretion which should be exercised in appealing from the Courts below. One should say, generally speaking, that on a question of purely Scotch law, as this Court is constituted without the assistance of Scotch Judges—as it is a foreign Court of Justice sitting to decide on foreign law, in the practice of which none of your Lordships are educated, but only take it up as it is presented to you at the bar of this house,—a leaning to a decision on a question of purely Scotch law, where such a preponderance of opinion and authority is to be found on one side, might be expected; nevertheless the number of appeals would rather lead to a doubt of that position. But, again, I have to say, generally speaking, if I were a professional man in that part of the kingdom, I should not be very ready to persuade parties, where there was so great and preponderating a balance of opinion in favour of one party, on a question of purely Scotch law, to seek the chance of a reversal. As to the present case, it is my bounden duty to go through it with the balance as perfectly equal as if I did not know that the Judges had been so divided. I shall lay that out of view, and betake myself to the anxious consideration of the opinion of Lord Mackenzie, and doubtless I shall find some answer to the difficulties he raises; if not, my opinion, such as it is, must alter. In the meantime I move that your Lordships' judgment be postponed.

On a subsequent day.

Lord Chancellor—My Lords, in this case I had some doubt upon one point, in consequence of the learned and ingenious opinion of

Lord Mackenzie. There appeared to me a topic raised, if not an important argument in the cause, that had not been sufficiently dealt with in the Court below, as far as I was favoured with the opinions of the Judges who decided the cause, and I postponed advising your Lordships to affirm till I examined the reasons given to support that view of Lord Mackenzie's. I will not say that the result of my reading upon the point, and looking into the authorities upon it, has entirely removed the difficulty from the way, or taken the doubt out of my mind which the views of Lord Mackenzie were calculated to raise. Nevertheless, though he certainly still may be said to have raised a difficulty, it is not so insuperable as to overbalance the authorities which I find on the other side, and although this is a question of strict Scotch law conveyance, and upon a question touching the rights of real property, if I found that their Lordships had taken a view that was contrary to the best opinion I could form upon balancing their own reasons, and upon examining the authorities upon which they assumed to be bottomed, I should, as I stated before, have had no hesitation conscientiously to give that difference of opinion in favour of the party entitled to the benefit of it, and have advised your Lordships to reverse the judgment below; yet as I do not see that the difficulty is insuperable, I shall humbly advise your Lordships to affirm the interlocutor appealed against. Sept. 23, 1831.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

RICHARDSON and CONNELL — MONCRIEFF, WEBSTER, and THOMSON, Solicitors.

JANET and ELIZABETH KIBBLES, Appellants.—*Mr. Murray*—*Dr. Lushington.* No. 42.

JOHN STEVENSON and others, Respondents.

Sasine.—*Writ.* 1. Found (affirming the judgment of the Court of Session), that a precept of seisin is not exhausted by an unrecorded infeftment. 2. What discrepancy between the signature of a witness to a marriage contract and the name in the testing clause held not to invalidate the contract, or, on that ground, to render null an infeftment taken upon the contract.

JAMES STEVENSON married Marion Spreull, the eldest of three sisters, heirs portioners and infeft in the lands of Braehead Sept. 23, 1831.

1ST DIVISION.
Ld. Mackenzie.