[30*th July* 1840.]

THOMAS EARL of STRATHMORE, Appellant.[1] (No. 12.)

[*Dr. Lushington — Sir W. Follett — A. M'Neill.*]

SIR JOHN DEAN PAUL and others, (John late Earl of Strathmore's Trustees,) Respondents.

[*Attorney General* (*Campbell*)—*Lord Advocate* (*Rutherfurd*).]

Writ — Vitiation — Erasure — Settlement. — A settlement of heritable estate was made by three relative deeds; viz. 1. a deed of entail; 2. a relative deed of nomination of heirs; and 3. a trust disposition for certain temporary purposes, under burden of which the other two deeds were granted. These deeds were all executed on the same day, and a duplicate of each deed was executed at the same time. There were numerous erasures and superinductions in the deeds and duplicates, but, with two immaterial exceptions, no erasure occurred in the same part of both the deed and duplicate, the deed being entire wherever the duplicate was erased, and vice versâ. No notice of the erasures was taken in the testing clauses of the deeds or duplicates, but in the testing clause of each deed special reference was made to the simultaneous execution of a duplicate, and vice versâ:—Held, in a reduction by the heir at law of the settlor, (affirming the judgment of the Court of Session,) that the deeds were, in the circumstances, unchallengeable, and formed together a valid and effectual settlement.

Costs.— The practice, in Scotland, of allowing costs out of an estate or other fund to a party who has attempted

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[1] 15 D., B., & M., 449.

unsuccessfully to set aside an existing settlement thereof, observed upon, and the reconsideration of it strongly recommended to the Court.

1st Division.

Lords Ordinary Moncreiff and Cockburn.

Statement.

UPON the death of the late John Earl of Strathmore, his trustees, under a private settlement, entered into possession of his Scottish estates. The settlement was constituted by the following deeds: 1st. A deed of entail (under burden of the trust disposition in their favour,) bearing date December 15th, 1815, which disponed the barony and thanedom of Glammis and his Lordship's other Scottish estates in favour of himself and his issue in a certain order, "whom "failing, to any person or persons to be named by "him in any nomination or other writing to be exe-"cuted by him at any time of his life:" whom failing, to certain other heirs. This deed, besides enumerating the lands disponed, contained a general clause disponing "all other lands and heritages within Scotland "presently belonging or which shall happen to belong "to me at my death." (2) A deed of nomination of heirs, dated the same day, and referring to the entail and the reserved power of nominating, whereby his Lordship excluded his brother, the Hon. Thomas Bowes, and John Lyon of Hetton House, and his brother Charles Lyon, from the succession, and appointed another series of heirs. This deed was in form a probative writ. (3.) A trust-disposition of his Lordship's estates, referring to the deeds of entail and nomination of heirs, and conveying the lands to James Farrer and others as trustees, who were directed to hold the lands for thirty years after his Lordship's death, and on certain contingencies for some time

longer, during which period they were to apply the accumulated rents in purchasing and entailing other lands.

On the same day when these three deeds were signed, the late Lord Strathmore also executed three duplicate deeds, purporting to be of the same tenor. The testing clause of each of the deeds in both sets referred to the cotemporaneous execution of a duplicate, in the same manner as in the following example, taken from the testing clause of one of the duplicate deeds of entail:— "In witness whereof I have subscribed this and the "forty preceding pages of stamped paper, written by "John Muir, apprentice to James Dundas, clerk to the "signet, together with a duplicate hereof, written by "James Sutherland, also apprentice to the said James "Dundas, at Edinburgh, the 15th day of December "1815, before these witnesses,—James Macalpine, clerk "to the said James Dundas, the said John Muir, writer "hereof, and William Wilson, clerk to the signet."

Shortly before his Lordship's death he executed a deed, adding another person to the number of his trustees. His Lordship died without lawful issue in 1820, and immediately after his death the trustees put one set of the deeds upon record, retaining the other set in their own custody. An action to reduce the whole deeds was raised by Thomas now Earl of Strathmore, the appellant, who pleaded chiefly, that as they rendered him destitute, though a peer of the realm, and as they provided for an excessive accumulation of rents, they were contra bonos mores and against sound policy. The Court sustained the defences, and assoilzied.[1] This judgment was affirmed on appeal.[2]

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[1] February 16, 1830, 8 S. & D. 530. [2] March 23, 1831.

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Afterwards his Lordship raised a new action of reduction, libelling that the deeds were "fabricated, "simulated, and devised, of false dates, not properly "tested, and want or are defective in the solemni-"ties required by law; and in particular, that the "said deeds, which are alleged to constitute the set-"tlement of the said John Bowes Lyon late Earl of "Strathmore, have been vitiated and altered in sub-"stantialibus after the alleged execution thereof; that "numerous important passages, as they originally "stood, have been erased and obliterated, and new "and different passages have been fabricated, and simu-"lately inserted in their place; that no fewer than 160 "such erasures and new insertions have been executed "on the alleged settlement; and that, in particular, "various of the lands conveyed, as they now appear "ex facie of the deeds, have been so simulately in-"serted on erasures, as well as passages affecting the "destination of heirs and the duration of the trust "thereby created."

A plea of res judicata being stated by the defenders (the respondents) in bar of this action, it was repelled by the Court.[1] The defenders then satisfied the production by lodging the recorded deeds and also the duplicate deeds in a sealed packet. The Lord Ordinary appointed defences on the merits, and "remitted "to Thomas Thomson, Esq., deputy clerk register, to "open the sealed packet now put into process by the "defenders, and that in presence of the parties or their "respective counsel or agents, and to report to the "Lord Ordinary as to the particular state and appear-

[1] May 24, 1833, 11 S., D., & B. 644.

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" ance of the deeds therein contained, in so far as " regards erasures and interlineations, and thereafter " again to seal up the said packet, to be disposed of in " terms of any future order of the Lord Ordinary or " the Court." A report was returned under this order. In their defences the defenders stated that the deeds were in all respects genuine and authentic; and that no erasure occurred in substantialibus, so as to affect their validity, even if only one set of deeds had been executed, but still less were any erasures material where there were duplicate deeds; and they alleged, that although there might be erasures in the duplicate deeds as well as in the others, yet in no material part were there erasures of the same word or words in both of the corresponding deeds.

In preparing a record, and before revising his condescendence, the pursuer (appellant) moved for leave to make a farther inspection of the deeds, with the aid of persons of skill, whose names were stated in a notice served on the defenders. The defenders insisted that this motion could only be allowed under such precautions as should protect the deeds against all hazard from farther erasure by any party. The Lord Ordinary (Moncreiff) " allowed the pursuer, by his agent and any of his " counsel, with the assistance of any one of the other " persons mentioned in the notice, such person to be " specified in the intimation herein-after mentioned, to " inspect and examine the deeds under reduction, and " also the duplicates thereof at present sealed up, and " for that purpose remitted to Mr. Thomas Thomson, " deputy clerk register, to open the parcel as sealed up " by him, and at such time and place as he may " appoint, and in presence of the clerk of this process

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" to allow inspection and examination of the said deeds; " but expressly, that no experiment of any kind shall " be allowed to be made on the paper or the ink of " the said deeds; and that after such inspection and " examination the deeds shall be re-inclosed and sealed, " to await farther orders of the Lord Ordinary and the " Court; and appointed the pursuer to give intimation " to the defender's agents of the time and place " appointed for examination of the deeds, at least " forty-eight hours before it is to take place. But the " Lord Ordinary, in the present state of this process, " refused the motion of the pursuer to any greater or " wider extent."[1]

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[1] " *Note.*—In case the pursuer should be dissatisfied with this order, " it is necessary to explain the very peculiar circumstances of this cause.

" The pursuer insists for reduction of the deeds called for, merely on " the ground that they ' have been vitiated and altered in substantialibus " ' after the alleged execution thereof.' The principal deeds were in the " public register, and they have been transmitted to the clerk of the " process, under a warrant from the Court. After this was done, the " defenders put into process a sealed packet, which they stated contained " duplicates of the same deeds, executed but not recorded, and they " moved the Lord Ordinary to make some order by which the precise " state of both sets of deeds, in respect of vitiations or alterations, might " be ascertained, for the future guidance of the Court. The Lord Ordi- " nary made a remit to Mr. Thomson, the deputy clerk register, first, " with regard to the deeds in the sealed packet, and afterwards with " regard to the recorded deeds; and the first remit was specially to ' open " ' the sealed packet now put into process by the defenders, and that in " ' presence of the parties, or their respective counsel and agents,' and " ' to report to the Lord Ordinary as to the particular state and appear- " ' ance of the deeds therein contained, in so far as regards erasures and " ' interlineations,' &c., and thereafter to reseal the packets, to be dis- " posed of by the Lord-Ordinary or the Court. These interlocutors " were acquiesced in, and the deeds having been very minutely examined, " Mr. Thomson made a full and very special report as to the state of " each deed.

" The parties then proceeded to prepare a record in the cause, and a " condescendence and answers have been lodged.

" In this state of the cause the pursuer makes a motion for a further " inspection of the deeds, before revising his condescendence. To this

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An inspection of the deeds was then made by the pursuer's agent, aided by Mr. Lizars, engraver.

The appellant raised a supplementary reduction of the duplicate deeds, on the ground of their being erased in substantialibus, which action was conjoined with the first. As parties were still at issue respecting the number and extent of the erasures, a new remit was made of

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" there may be no objection, if it be regularly conducted and guarded. " But at first the pursuer refused to give any specification of the person " to whose inspection he wished the deeds to be laid open, and insisted " that the order should be made without limitation. The Lord Ordi- " nary having required him to specify the persons, beyond his counsel " and agent, whom he proposed to employ, the notice now produced " was given, and it was manifest, from the four last names in the list, that " the intention is to set, not one, but various engravers and other per- " sons, assumed to be scientific, to an inspection and sifting of these writs " at this stage of the process.

" It will be particularly observed, 1st, That these deeds have never yet " been seen by the Lord Ordinary or the Court.

" 2d, That the remit was made with the consent of both parties for " ascertaining the present state of the deeds.

" 3d, That the report was made by the person undoubtedly the very " best qualified, at least in the present instance, and that it was most " minute and particular.

" 4th, That although the inspection was ordered to be made in pre- " sence of the pursuer and his agent, it is not averred in the condescen- " dence lodged, that there are any erasures or vitiations other than those " reported.

" Nevertheless, it is possible that things may be omitted, and the pur- " suer might be entitled to a further inspection before revising, though " the Lord Ordinary must confess that he should not approve of a multi- " tude of counsel and agents being brought to such a business; and by " the above interlocutor the Lord Ordinary, though with hesitation, has " allowed him to take the assistance of one other person whom he may " suppose to have particular skill. But what he particularly objects to " is the attempt to bring such a number of such persons to such an " inspection at the present moment, whereby a conflict of opinions, " founded, as the Court well knows, very often on mere imagination, may " be raised as to the actual state of the deeds. He owns that he was not " without fear that experiments were contemplated. At any rate he has " thought it necessary to guard against it; and, on the whole, he thinks " the interlocutor gives the pursuer the utmost latitude which he can " possibly expect in the present state of the cause. What may be thought " necessary afterwards is another point."

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consent by the Lord Ordinary (Cockburn) to Mr. Cosmo Innes, advocate, to inspect the deeds, and "report on "the whole erasures." He drew up a report, from which it appeared that in the recorded deed of entail there were forty-two entire words, in various places, written on erasures; and sixty-two letters or syllables, also in various places, written on erasures. Among all these the only erasure and superinduction which also occurred in the duplicate deed of entail was in a part of the name of a parcel of lands called Younies, composing a portion of the barony of Glammis. The description of the whole lands was contained in a procuratory of resignation, and in both duplicate deeds of entail the words "all "and whole the lands, ancient barony, lordship, and "thanedom of Glammis" were free of erasure. These words were immediately succeeded by the following clause: "comprehending the mains and town of Glam-"mis, the town and lands of Balnamoon, Myreton, Easter "and Wester Younies, Arnafoul," &c. In the recorded entail the letters Yo in Younies were written on an erasure; in the unrecorded duplicate the letters You were written on an erasure; and the same partial erasure also occurred in the trust disposition and its duplicate.

The Lord Ordinary (Cockburn) "approved of Mr. "Innes's report, against which no objections have been "lodged; sustained the defences, assoilzied the defen-"ders, and decerned; but found the pursuer entitled "to his expenses incurred to this date out of the trust "funds."[1]

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[1] "*Note.*—The remit to Mr. Innes was made before answer, and of "consent, with an order to him 'to report on the whole erasures,' and "on the parties 'to print the deeds in such a form as to show the whole "'erasures therein.' Mr. Innes reported, and the deeds were so printed;

Both parties reclaimed, the pursuer on the merits, and the defenders as to the award of expenses.

" and not only have no objections been lodged, but, until the debate had " begun, no proposal or expression of any desire to object was hinted. " In these circumstances the Lord Ordinary holds the report, which is " by a person of skill in his own department, to be conclusive; and he " does so the more readily, 1st, Because a final reference to such a person " was almost a matter of necessity in the circumstances of the case, where " the erasures are said to be about 460, and where the judges of each of " these were certainly to be five, and might be thirteen, each of whom, " if there was to be no final report, would have been obliged to form his " separate opinion of each erasure and alleged erasure. 2dly, Because " his clear impression, at the time of making the remit, was, that it " was understood that the report was to be held on all sides as fixing the " facts.

" Upon the merits, the case is very peculiar in two particulars:—1st, " In the unusual number of erasures. 2d, In the means which the " granter has afforded of enabling the law to dispose of these by an " unusual number of relative and inseparably connected deeds.

" The erasures being so numerous, and the pursuer professing to make " a point of almost every one of them, it is impossible for the Lord " Ordinary to state his opinion of them in detail. He can only say, in " general, that the conclusions he has come to depend on the following " views:—

" 1st. That a very great number, nearly the whole, of the passages ' objected to are plainly immaterial, consisting of words, syllables, or " letters which have obviously been written on erasures, merely in order " to correct palpable clerical errors, a mis-spelling, or such other acci- " dents, and the entire omission of which parts of the deeds would create " no doubt cf the granter's meaning, or of its due expression, especially " considering that some of them occur in parts of the deed which are " merely narrative, or which only describe the contents of the other deeds, " or in which the necessity of absolute accuracy is superseded by the use " of general terms or directions.

" 2d. That though there be passages of more importance, which it is " possible may, in given circumstances, hereafter supersede or otherwise " affect detached portions of some or of all of these deeds, at the instance " of the pursuer, or of any other party entitled to found on these defects, " there is none of them which so vitiates any of the deeds in substan- " tialibus, as that reduction is the necessary legal consequence, even " though each particular deed challenged were to be looked at by " itself.

" 3d. But none of these deeds can be so looked at, because the trust, " the entail, and the nomination of heirs form one general settlement; " and having been executed in duplicate, all in one day, and all bearing " express reference to each other, it is competent, when each erasure is " excepted to, to throw any explanatory light upon it that can be ob-

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Judgment of Court, 1st Feb. 1837.

The Court pronounced this interlocutor:—"1st February 1837.—Adhere to the interlocutor reclaimed "against, and refuse the desire of both reclaiming "notes; and find the pursuer entitled to additional "expenses, to be paid out of the trust fund."

The Earl of Strathmore appealed.

Appellant.—If a deed contain words and lines evidently superinduced on erased paper, parchment, or vellum, more especially if the erasures be executed in such a manner that what was originally written cannot be read, such a document is ex facie void. The legal presumption is, that it has been altered after subscrip-

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"tained from these other writings, signed by the granter, in relation to "that very passage, as to every passage of the deed challenged; and that "this reference from the one to the other is peculiarly competent and "peculiarly conclusive as to the general averment made by the pursuer "in the record, that important words have been obliterated, and different "words inserted after subscription. Of these there has been no proof "beyond what the deeds themselves afford; and when the whole are "taken into view, they negative the assertion.

"4th. That even though effect were given to the whole erasures, to "the extent of holding each erased passage as not written at all, this "would not render the settlement either void or inoperative, and would "at least leave enough to exclude the pursuer from demanding that "total reduction which he now seeks, and upon which all his other "conclusions depend.

"It is needless to refer to cases, because the abstract rules are clear; "and almost the only general result of the decisions is, that in their "application every case depends mainly on its peculiar circumstances. "The Lord Ordinary may only observe, that there is no erasure here, "than which one equally or more important cannot be shown to have "been disregarded in a case at least as strong, and this even when there "was no aid to be got from any collateral deed.

"But, although the pursuer be wrong, the Lord Ordinary gives him "his costs hitherto incurred, because he was warranted, or rather tempted, "to try the question, by what appeared on the very face of the instru- "ments. He had better not speculate, however, on this indulgence being "continued for ever."

tion, and consequently that it is not the deed of the nominal party maker of it. This rule is founded in justice, because no man can be presumed in a matter of importance to sign a mutilated and imperfect written document, especially when, by the erasures, it is rendered impossible to know what the deed truly was that the nominal maker intended to execute. There is a known mode established in the law and practice of Scotland, by which this presumption against a deed may be obviated, viz. that in the testing clause, or elsewhere, it shall be stated in the deed that the words superinduced on erasures (specially described by page and line) were so superinduced before subscription. It is thereby proved that the maker of the deed was aware or was made aware of the defect, and that he was subscribing a document containing imperfections, to which his attention had been specially directed, and which he had specially sanctioned.

The defect is not obviated by making two alleged copies, if each copy contain numerous words and lines superinduced upon erasure, because that is not the remedy, established by law and practice, to cure mistakes committed in transcribing a deed from the draft or scroll; and besides it does not obviate the objection, that where erasures have been dexterously made, the maker of the deed was not aware that he was signing an imperfect document. Thus it does not show the date at which the erasures were made, i. e. that they were made before subscription. It does not satisfy the established rule, that a land estate cannot be alienated, or an heir disappointed of his inheritance, without a regular written deed. Here the proprietor has not by any correct instrument conveyed his estate, but two invalid

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Appellant's Argument.

deeds are founded on, out of which it is proposed that the Court, under the sanction of this House, shall manufacture a valid and regular deed. Neither duplicate in this case made the testator aware of the kind of documents he was subscribing, or shows that he consciously, sciens et prudens, signed documents written, in hundreds of instances, on paper erased with singular dexterity, so as to conceal the original writing. Farther, instruments containing a multiplicity of erasures cannot be received as probative writings. Hitherto this principle has been adopted in the practice of the law of Scotland, and ought not to be departed from. Deeds labouring under such a defect ought to be regarded as ex facie tainted, and therefore annulled by fraud.

The words and lines superinduced on erasures occur in substantialibus of the deeds in question. This is apparent from the fact, that vitiations exist in the trust deed, in the purposes of and endurance of the trust, the parties in favour of whom the trust was granted, and in the lands conveyed. They occur in the entail, in the subjects entailed, the succession of heirs, &c. It is always to be recollected, that an error in substantialibus in either of these deeds must annul the whole settlement. The onus probandi is incumbent on the parties claiming the inheritance of the appellant, to show that they hold a deed not containing erasures in substantialibus; but it is impossible for them to show this, while every deed they hold contains words and lines superinduced. It is not enough to refer to alleged duplicates, and to admit the fact with regard to the trust deed, but to found on another trust deed of similar import, and maintain that, although a word may be superinduced on erasure in the one, the same word is

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not written on erased paper in the other. It is incumbent on the respondents, who claim the appellant's inheritance, to produce a correct deed conveying it. If the deed produced be not a probative writing, it cannot by its testimony convert into a probative writing another document equally defective with itself.

The respondents have maintained, that even if the words superinduced on erasures be held pro non scriptis, enough will remain to disinherit the heir; to this it is answered, that nothing can remain to disinherit the heir in a deed which, as has already been shown, is improbative; it is not yet shown that the erasures were made before the deeds were signed, or that the grantor of them was aware of their existence, concealed, as in this case they are, by superinductions dexterously executed.[1]

Respondents Argument.

Respondents.—It is admitted that the deeds in question appear to have undergone clerical correction or erasure in a variety of particulars. It may also be conceded, that much of the legal doctrine regarding vitiations in essential parts of a written instrument, contended for by the appellant, may be supported by authority. But then, in applying that doctrine, the nature and effect of the particular erasures must be carefully looked to.

In these circumstances there are two sufficient answers

[1] *Appellant's Authorities.* — Pittillo, 22d Nov. 1671, Mor. 11536; Brown, 20th June 1701, Mor. 11541; Reid, 24th June 1834, 12 S., D., & B., 781; 3 Ersk. 2. 2. and 20; Bank. 1. 11. 34; Balfour, tit. 1. c. 170; Bell on Testing Deeds, 104. 116; Innes, 10th March 1827, affirmed, 4 W. & S. 379; Grant, 12th May 1830, 8 S. & D. 734; Howden, 10th July 1835, 13 S., D., & B., 1097; Sharpe, 18th April 1835, 1 Sh. & M'L. 619; Davidson, 14th Nov. 1827, 6 S. & D. 8.

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to the case attempted to be made by the appellant. In the first place, the respondents contend that, as the erasures specified in the report of Mr. Innes do not occur in substantialibus of any of the deeds under reduction, and give rise to no doubt as to the true meaning or legal import of any of the provisions, they do not vitiate or invalidate the deeds; for the different deeds are truly parts of one general settlement, executed by the late Earl of Strathmore for the purpose of excluding the appellant from the succession to his Scotch estates; and hence the appellant has no interest to found on erasures in the subsidiary clauses of the deeds, seeing that he is effectually excluded by the leading provisions.

But, secondly, all erasures, whether in important or unimportant parts of a deed, may be remedied by a reference to them in the testing clause; and the testing clauses in each set of the deeds under reduction expressly bear that they were executed in duplicate at the same time, and in presence of the same witnesses. The objections to the erasures, therefore, are completely obviated, the deeds themselves affording conclusive evidence, that none of the erasures were made after the signature of the late Lord Strathmore was adhibited. The effect of the execution of the deeds in duplicate, in particular, is to afford a check still more certain even than the mode usually relied on, of noticing the erasures in the testing clause. An examination of the duplicate shows that none of the material erasures are contained in both sets of deeds. The erasure of three letters in the name of one of the parcels, "Younies," can afford no plea for setting aside the deed; and cannot even

affect the conveyance of a part of the lands, the whole being comprehended and conveyed under the general disposition of the barony.[1]

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Respondents Argument.

Judgment deferred.

Parties having been called on in this and the two preceding cases, the following opinions were delivered:—

Ld. Brougham's Speech.

LORD BROUGHAM:—In dealing with these cases, which, although differing from each other in some particulars, yet all turn mainly on the same principles, it will not be necessary to enter so minutely into several of the points made in each, both below and at your Lordships bar, as it would have been had I been obliged to take the course of recommending your Lordships to alter the judgments appealed from. Moreover, in addressing myself to the grounds of affirmance, it will be, for the most part, my endeavour to consider only the more important ones, and those on which doubts have been raised by the argument, rather than those which have not been broken in upon. The first two cases (Hoggan

[1] *Respondents Authorities.*—Stair, 4. 42. 19.; Gaywood v. M'Eand, 19th June 1828, 6 S. & D. 991; Trustees of E. of Cassillis v. Kennedy, 2d June 1831, 9 S., D., & B., 663; Morrison v. Cauvin's Trustees, 29th June 1829, 7 S. & D. 810; Wright v. M'Leod, 8th Feb. 1672, Mor. 11540; Lyon v. E. of Aboyne, 21st Dec. 1709, Mor. 11544; Cumming v. Presbytery of Aberdeen, 18th April 1721, as reversed on appeal, Robertson's Appeal Cases, p. 364; Maxwell v. Houston, 30th April 1725; ibid. 539; Spottiswoode v. Creditors of Prestongrange, 17th June 1741, Kilk. & Mor. 16811; E. of Traquair v. Henderson, 26th June 1802, F. C.; Kemps v. Ferguson, 2d March 1802, F. C.; Abernethie v. Forbes, 16th Jan. 1835, F. C.; Adam v. Drummond, 12th June 1810, F. C.; as to effect of deeds in duplicate, Ersk. 3. 2. 20; Boswell v. Boswell, 20th Feb. 1708, Mor. 17025; Cubison v. Cubison, 3d July 1716, Mor. 16988.

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v. Ranken and Kedder v. Reid and others) both arise upon the validity of instruments as affected by erasures; —in the one an instrument of sasine, in the other a disposition. The great importance of the decision in the former case, as affecting the title to many estates, caused your Lordships to have the point re-argued. The practice of conveyancers, however, having been found to make them very generally take titles subject to this objection, an act was passed in 1836, the 6 & 7 Will. 4. c. 33., curing the defect in all cases on which no suit was pending before a certain time, and also curing it prospectively. The time, I think, was the 12th of May 1835, and consequently that act did not at all apply to either of these cases. The question is, therefore, now stript of the importance which formerly belonged to it; and the decision below is only material as far as it may be so in its consequences to the parties in the cause, and also as it may possibly connect itself with some general principles of the law.

The appellant (in the first case), as the widow of Alexander Smith, the person infeft upon the instrument of sasine in question, claimed her terce on the lands of which he was so infeft. Her claim was preferred in a process of ranking and sale, brought by the creditors of Alexander Smith the husband's heir-at-law, and they objected to the infeftment of the husband (which was necessary to support the widow's title) on the ground of the word "three" in the year of our Lord being written on an erasure, while the word "third" in the year of the king's reign was written without any erasure. A great majority of the learned judges have held this to be an erasure in substantialibus, and that the fact of all

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appearing right in the register of sasines can make no difference, nor cure the defect.

The case is confessedly one encumbered with considerable difficulties; but, on the whole, it does not appear to me that your Lordships can safely be advised to reverse this decision,—hardly as it presses upon the appellant, and open as its groundwork is to considerable observation. None of the cases, which have been relied on against the decision can be said, when examined, to be broken in upon by it, and therefore none of them will be affected by the present judgment. Those cases which come nearest this case are Cassillis v. Kennedy, 2d June 1831 [1], and Gaywood v. M'Eand, 19th June 1828 [2],—which were cases of erasure, not in sasines, but in dispositions,—and Gordon v. the Earl of Fife, 9th March 1827.[3]

In the first of these cases the letter "x" in the word six (the number of pages) had been written on an erasure; and the deed consisted of seven pages, so that it was contended that the statutory requisition had not been complied with, because the word "six" was to be taken as not written at all. But the decision, first of the Lord Ordinary, and afterwards of the Court, turned upon this, that the reference in a marginal note showed the number to have been six when the deed was executed, and that therefore the letters "si," written without erasure, could only mean six, and the erasure was immaterial.

The circumstance of this being a deed on which sasine and possession had followed above forty years

[1] 9 S., D., & B., 663. [2] 6 S. & D. 991.
[3] 5 S. & D. 517.

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before, was also expressly stated in the Lord Ordinary's reasons.

It was a similar objection in Gaywood v. M'Eand; the last letters, "ve," in "twelve" were written on an erasure. It was either a blot or an erasure. This was a case free from all doubt; for these two letters, as the Court, particularly Lord Gillies, observed, were so little necessary that the word would have sufficiently expressed the number of pages without them.

The case of Gordon v. the Earl of Fife[1] was, like the Coblehouse case[2], a question upon a freehold qualification; and the objection taken was, that the instrument of sasine, after stating the date of infeftment, the 7th day of May 1825, and the 8th year of the reign of king George the 4th, proceeded to set forth that sasine was given upon a charter, "per quam cartam dict. S. D. "N. rex dedit," &c.; that is to say, a charter of our said sovereign lord the king, — dicti supremi domini regis, or George the 4th before mentioned; whereas the party (Gordon) claimed to be enrolled on a charter granted by and in the reign of king George the 3d, which he produced. The question there arose, not on any alleged vitiation on account of an erasure, but on the identity of the two charters;—the one referred to in the instrument of sasine, and the one produced by the claimant. And besides an argument, to which the Court did not listen, raised on the grammatical construction of the words "per quam cartam," &c., viz. that "said" (dict.) applied to the last antecedent, and not to the sovereign, it was contended that enough appeared on the face of the instrument to identify the

[1] 5 S. & D. 517. [2] Rose Innes v. E. of Fife, 5 S. & D. 525.

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charter, and to show that there were not two charters, —one of George the 4th and another of George the 3d, —and to prove that the word "dict." was a clerical error, and not material. I cannot regard this as a decision at all applicable to a case where there are two dates, one the year of God and the other the king's reign; and I must fairly add, that I do not go very willingly, or indeed very easily, along with that decision; and that the argument delivered by the Lord President, and in which Lords Gillies, Alloway, Eldin, and Corehouse concurred, would have satisfied my mind had I been to join in the judgment.

But the case of Kedder v. Reid and others seems to be free from all or almost all of the difficulties which are found in Hoggan v. Ranken. Here, although the instrument is a disposition, and consequently may be said to be less under the dominion of strict rules than the actus legitimus of sasine, yet the materiality of the erasure is quite manifest. It is in the name of the grantee, which has been changed from "James" into "John" throughout the deed by thirteen erasures, that is, by an alteration as often as the word occurred; the first letter, "J" only being left, and the grantee being described in one place as "John the younger;" John not being the younger, but James being the younger. They were both, it appears, illegitimate children by different mothers. The grantor's name and the word "younger" being found, there arises a presumption that he must have intended to give it to James; but that either he having changed his mind (for that is one question), or other persons having changed the deed, the name was altered into John, letting the words "the

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"younger" remain, which was not very sensible, there being no John the elder.

There being no doubt whatever that this is an erasure in substantialibus, the only real doubt is raised upon the testing clause, which contains a reference without any erasure to the grantee as "the said John Kedder my "son." This, it is contended, might supply the place of a notice, that the erasure in the body of the deed had been made before execution. Certainly in no other way could it operate, for clearly no title to real estate could be constituted by this clause standing alone. It would, as it appears to me, however be most perilous to suffer any such effect to be given to this testing clause.

The whole argument, as to the effect of the testing clause, rests upon the supposition that the clause is filled up at the time of execution; but this is contrary to the usual practice. Certainly nothing like even a formal practice of filling up at the time has ever been pretended. Now, if it was filled up afterwards, the alteration may have been made after execution, and the clause filled up according to the alteration; nor is it any answer to this to say, that so the testing clause may be filled up to suit an erasure or alteration, when it takes notice of such erasure or alteration in the usual way; because, although this is certainly true, yet on that very account the practice of postponing the filling up is greatly to be discountenanced; and where it is necessary after execution to take notice in the testing clause of an erasure or alteration, such testing clause should not be filled up, unless accompanied with some act by the maker of the instrument evidencing that he was conusant of the notice in the testing clause. The whole

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force and effect of an erasure being mentioned in the testing clause is derived from the supposition that the clause speaks truth when it asserts the making of these erasures before the execution, and any suspicious circumstances on the face of the clause would destroy the credit thus given to it. In this case it is one circumstance of suspicion that the words "writer hereof," the last words of the clause, are written over part of the testator's signature, indicating that in this instance, at least, the clause was written after the execution of the deed. Every consideration shows abundantly that the admission of a notice of erasures in the testing clause without more as proof that the erasures existed before the execution, and were known to the maker of the instrument, is liable to much objection, and exposes the right of parties to great hazard.

But the course now referred to having been established in practice, and recognized by the decisions, it only remains carefully to prevent it from being extended, and to keep the rules respecting it, already all too loose, from being in any particular relaxed. It would be a considerable relaxation of these rules to regard the words, "in favour of the said John Kedder "my son," as equivalent to a statement that the word "John" had been written throughout the deed on an erasure. It is not necessary certainly that any exact form of words should be used in making a reference to erasures, and it may be admitted that if there is in the testing clause a statement which amounts to the same thing as asserting the existence of the erasures, it is sufficient. But then it must be an assertion of all the erasures, that is, all the material ones, having been made

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and written over before execution. Now, here, this can only be said to be done inferentially by the deed being referred to as "in favour of John Kedder;" the reference by the word "said" is plainly not effectual; if he had been named once, this reference might have satisfied, although the deed would still have had twelve erasures in the very material part of the grantee's name. Then, can we hold the inference arising from the words "in favour" to be sufficient? This we cannot do, unless we hold that a person saying in the testing clause that he has made a deed in favour of A. is equivalent to saying, "in all the instances in which B.'s name is "mentioned in the deed and struck out, and A.'s name "written over it, this alteration was made before exe-"cution;" and even this would not be enough, because there must be a specification of the very erasures in number and position, or such a reference as amounts to a specification.

A reference to another writing, in which the words referred to are not written on erasures, is a very different thing from the present case (Kedder v. Reid and others); and such a reference might be so made as to supply exactly the want here complained of, namely the specification of the alterations; nay, to supply it with more certainty and greater particularity than the usual notice in testing clauses. But such a reference as the testing clause contains in the present case is entirely different, and could not be held sufficient to authenticate the instrument without the most dangerous consequences.

It must further be remarked, that even if the clause were admitted to have been written before the execu-

tion, it would by no means prove the maker of the deed to have been aware of the erasures and superinduced writing.

And with respect to the permission contended for of examining the attesting witnesses to the fact when the alterations were made and the clause written, (which the Lord Ordinary was induced to do,) this was, I think, justly refused by the Court, on the ground, I presume, that such a course would be inconsistent with the nature of probative writings.

Having adverted to the possibility of supplying an omission in the testing clause of reference to erasures, by reference to another writing, it may be as well here to state that this is the distinguishing peculiarity in the case of the Earl of Strathmore v. Sir J. D. Paul and others, where a conveyance of the estates conveyed in that case is sought to be reduced on account of erasures. The deeds constituting the conveyances in question are, as has been justly observed both below and here, prepared in a slovenly manner, the erasures being extremely numerous; but they have been supported mainly upon two grounds: first, that the vitiations were not in substantialibus, the words or parts of words written on erasures not being such as to make the alterations material; secondly, that if they were, the testing clauses in the different sets of deeds refer to duplicates executed of the same dates. The Court below proceeds upon both these grounds, and either substantiated would certainly be sufficient to support the conveyance. As however some of the erasures are in the parcels, the names of the premises settled, and are otherwise so extensive as to make it possible that words of importance have been erased and others superinduced, it rather appears that

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a necessity arises of resorting to the second ground, viz. the reference to the duplicates.

The testing clause is in these words: — "In witness "whereof I have subscribed this and the forty pre- "ceding pages of stamped paper written by John "Muir, apprentice to James Dundas, clerk to the "signet, together with a duplicate hereof written by "James Sutherland, also apprentice to the said James "Dundas, at Edinburgh, the 15th day of December "1815, before these witnesses, James Macalpin, clerk "to the said James Dundas, the said John Muir, writer "hereof, and William Wilson, clerk to the signet." This appears to be very material. The two sets of deeds, when examined and compared, are found to tally exactly, but in this way,—that whatever appears written on an erasure in the one is uniformly in the other written clear and without erasure, unless in two instances, of which one is confessedly immaterial, (the words "a will" in the narrative that the maker of the deed had made a will of the English estates,) and the other, if material in itself, is rendered of no importance by the other words in the deed operating to convey the parcels. Thus supposing the word "Younies" in which there is an alteration of two letters, struck out of the deed altogether, still it would appear to be supplied by other parts of the conveyance where a similar word occurs. The effect then of the statement in the testing clause is exactly to assert that in each case the maker of the deed did on the 15th of December 1815 execute a duplicate, that is, another deed, in precisely the same words. It is an assertion that he had read or was otherwise conusant of both, and knew how they stood in a comparison of the one with the other. It is a reference

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from the one to the other, and is equivalent to a statement that the maker knew of the one being so corrected as to tally with the other, or, that as often as any erasure occurred in the one, the words superinduced were to be found written without erasure in the other. It is therefore the same thing as if in any one deed having erasures, the assertion had been made that there were erasures which would appear in a separate list authenticated by the signature of the maker, and setting forth the words or letters which had been struck out and the words or letters which had been superinduced in each instance, with the page, line, or part of the line where each alteration had been made. Indeed it is equivalent to somewhat more. It seems equivalent to an execution without erasure of every portion of the deed, although on separate papers or parchments; nor could this identity of the two sets of deeds have been effected after the execution by any contrivance, for the portions written without erasure in the one operate as an effectual check upon the filling up of the corresponding passages written on erasures in the other. This is therefore an entirely different case from the one which is now more immediately under the consideration of your Lordships (Kedder v. Reid and others), and the two judgments which have been given below in the two cases may well stand together.

It is impossible to discuss this very important subject of vitiation of instruments, without observing how unfortunate it is that the course of decisions, now too long established to be broken in upon otherwise than by the legislature, should have ever authorized the distinction taken between vitiation and essential vitiation, without satisfactorily fixing the mode of referring to erasures,

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while the law, as an important part of its provisions, recognizes probative writings. When an instrument is objected to on this ground, the question of materiality is raised, and if the vitiation is found material, another question becomes inevitable. Does the testing clause or other notice of the alteration sufficiently cure the defect? The former question is unavoidably in many cases of extremely difficult solution, and must be so from the very nature of the case, especially when the erased words do not appear. The latter question is also often beset with great difficulty. But when we add the practice so generally adopted of filling up the testing clause after the execution, nay at a considerable interval of time, (in one case, Blair v. Galloway [1], the lapse of thirty-two years was not held too long,) nothing can be more clear than that a door is opened to the grossest frauds being successfully and safely practised; indeed, to the extent of a party being made to have executed one instrument, when he in truth executed another,—being made to have given, as in one of the cases at the bar, his estate to John, when, for aught that appears, he intended giving it, and thought he had given it, to James. If, instead of the rule of law being as I have stated it, and as all are agreed it is, the rule were, to consider every vitiation as material, and to require that every alteration should be particularized in the testing clause, and that the testing clause should either be filled up at the time of the execution, or authenticated by the subscription of the maker if written afterwards, his name being subscribed to the last words of the instrument itself, the

[1] 6 S. & D. 51.

dangers would be avoided to which I have adverted, and which have frequently been taken notice of by judges as well as by writers on conveyancing, and which are quite well known to practical conveyancers.

In order to finish what it may be necessary to state respecting the case of the Earl of Strathmore v. Sir J. D. Paul and others, (for I omit some parts of the case, which are less essential in themselves, and some parts of importance upon which less doubt has been raised in argument,) it may be observed that in that case there is a reduction of the whole settlement. The appellant has brought his action with that view alone; he does not complain as heir at law, that, by a conveyance in which there are material vitiations, certain parcels of the estates have been carried away from him,—those parcels which are described by words written over erasures; but he demands to have the whole settlement reduced on account of erasures which he contends are fatal to it altogether. Now, independently altogether of the argument derived from the testing clause, and its reference to the execution in duplicate, and supposing the erasures were in no way whatever cured, it is clear that there are not any which go to this extent. The objection to those affecting the destination has been sufficiently answered; and those which appear to be most important only affect the parcels in one or two instances, as that of Younies, to which reference has been already made, and the erasure on which the words between "sheriffdom" and "of Eassie" are superinduced. The former, it will be remembered, is one of the only two examples of there being the same erasures in the duplicates, and consequently not falling within the scope of the argument drawn from thence; and of

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this it may be observed, that even if the two letters written upon the erasure be admitted to be material, and not to be supplied by the other parts of the conveyance where a similar word occurs, still there are words without any erasure conveying the barony; and Younies, or whatever it may be, is described as comprehended within that barony; consequently it will pass under the general words, and the only question that can arise on this would be one of parcel or no parcel. But suppose it were otherwise, and that in consequence of the erasure this particular parcel did not pass, nothing hence arising could touch the validity of the deed in its other parts. The appellant may, upon the supposition made, have a title to succeed the maker of the deed in the parcel thus admitted not to be validly conveyed away from him, and he may prevail in obtaining that parcel; but in this action he cannot succeed, unless he shows such a vitiation as entitles him to reduce the settlement altogether. He can only by the supposition and admission now made, have the vitiated part struck out of the deed, but he cannot set the deed aside. In the same way as to the erasure between the word "sheriffdom" and before the words "of Eassie," on which I recollect suggesting during the argument, that we could not tell what may formerly have been written on that space, that e. g. the words erased may possibly have been "save and except the "lands of Eassie," which, instead of working the heir at law's disherison, as the clause now standing there does, would expressly prevent his disherison. The utmost effect of supposing that this material vitiation was not cured by the reference in the testing clause or otherwise, would be that quoad the lands of Eassie the

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settlement is inoperative, and that to these lands the appellant has a right to succeed in so far at least as that portion of the conveyance is concerned. I wish it to be clearly understood, that I am applying my observation only so far as this particular correction is in question.

The course which it appears to me your Lordships should be advised to take in these three cases is this:— In Hoggan v. Ranken, to affirm the judgment of the Court below, not only to the effect that the sasine of the husband in the lands of Monygryle and Pointfoot was invalid (to which the question of the erasure in the instrument of sasine is confined,) but also that he had not a valid sasine in the dominium utile of the lands of Knocksting. There were no costs given below, most properly, and none certainly ought to be given here.

In Kedder v. Reid and others to affirm; but the interlocutor of the Court appealed from altered, so far as it alters the interlocutor of the Lord Ordinary, which had allowed the pursuers (respondents) their costs, and found no costs due; and there could be no cross appeal on costs.[1] If John Kedder has been all these years in possession, he should pay the costs of this appeal.

In the Earl of Strathmore v. Sir J. D. Paul and others, I would move your Lordships to affirm the interlocutor appealed from which assoilzies the defenders, but give the costs of the pursuer out of the estate, as was done both below and here in the former action for reducing the late Earl's settlement on other grounds.

Complaint is made by the appellant of the interlocutor of the 11th of March 1837, as not allowing his costs

[1] Clyne's Trustees v. Dunnet and others, 25th Feb. 1839, M'Le. & Robin. 28.

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in a manner sufficient to work out the intention of the Court in its former interlocutor[1]; but your Lordships cannot, I think, be advised to make any alteration in that.

Earl of Devon's Speech.

Earl of Devon.—My Lords. As I attended the hearing of the first of these cases (Hoggan v. Ranken), it may be right that I should state that I entirely concur in the view taken by my noble and learned friend. Upon the argument of the case, and with reference to all that appears in the text books and decided cases with regard to the question of vitiation, I came to the conclusion that the law was such as the Court of Session have declared it to be; and a re-examination of those cases, with a reference to the books again upon the present occasion, has certainly led me to think that that was a correct opinion.

Unquestionably the case of Hoggan v. Ranken showed, perhaps as much as any case can show, the hardship with which the doctrine of the Scotch law might occasionally press upon individuals; but we have nothing to do but to see what is the strict rule of law. I therefore concur in the proposal to affirm the judgment appealed from. I was not present at the argument in the two other cases.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, not having been in the House when the first of these three cases was argued at your Lordships bar, I am not in a situation to offer any opinion upon it. But having heard the two latter cases, I fully and entirely concur in what my

1 The ground of appeal as to costs was, that the costs as taxed and decerned for "were under the due and actual amount."

noble and learned friend (Lord Brougham) has stated. Indeed, upon looking back to my own notes I find that in both these cases I had made a note at the time leading to the conclusion which my noble and learned friend has now stated to your Lordships.

With regard to the case of Kedder v. Reid and others two points were made:—first, whether upon the face of the instrument itself it was not invalid? Secondly, whether any defect apparent upon the face of the instrument itself could be made good by an examination of the attesting witnesses? The Lord Ordinary (Moncreiff) did not decide the first. He expressed an opinion that that was a matter of considerable doubt; but he thought the parties ought to have liberty to examine the attesting witnesses to the deed, to remove the irregularity apparent upon the face of the instrument.

Now it appears to me that to admit of this would be entirely destructive of the nature of a probative instrument, because it assumes that upon the face of the instrument it is not good. There can be no use in examining witnesses to sustain that which is unimpeachable upon the face of it. On the other hand, if it is not good, then it is not a probative instrument, and does not carry that evidence of its being an authentic document in conformity to the law of Scotland, which that law requires. The opinion of the Lord Ordinary upon the point now mentioned was not sanctioned by the Court, the opinion of the Court being that that was not a proceeding which ought to be adopted.

Then, upon the face of the instrument itself it appears to me perfectly clear that it is an instrument which cannot stand. A great part of the argument at the

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bar proceeded on an endeavour to find in other parts of the instrument words which would be sufficient to justify the omission of the word "John," on the ground that it was written on an erasure; but the objection is not that there is the word "John" written on an erasure, where you cannot discern what the original word was; the instrument has a very different aspect, for from it it appears not only that "John" is written upon an erasure, but that the word "James" remains visible, although the word "John" is written over it; and there is, in addition to this, the circumstance, to which my noble and learned friend adverted, that in one instance it is "John junior," whereas there is no John junior, James being the only person to whom the word "junior" could refer, the author of the deed himself having borne the name of James.

It appears then that the word originally written throughout the deed was "James," and that that word has been scratched out wherever it occurred, and the word "John" written on the erasure. Now the vitiation thence arising might have been cured if the testing clause had taken notice of this erasure, and the witnesses had testified that the deed was executed after the erasures had been made and the name of "John" substituted. The word James was undoubtedly in the deed originally; the question is, whether it still remained in the deed, or whether John was the word in the deed at the time of the execution? Now the testing clause takes no notice at all of the alteration, but it does that which is very unusual,—it attests the fact of execution, adding the words "in favour of my son John." The addition of these words, however, does not go at all to prove that when the deed was executed the word

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" John," was substituted for " James." It may possibly be supposed that the word " James" stood part of the deed at the time when the author of the deed executed it, and either that it was discovered to be a mistake, or that his intention was altered previously to the attestation, and that then this clumsy contrivance was resorted to for the purpose of making the deed answer the purpose by substituting one son for another,—John instead of James. Then, at the time of the attestation, the intention, no doubt, would be to give the estate to John; but the question is not what the intention was, but how the deed stood at the time it was executed. Now if the party had intended that these alterations should take place, and if the witnesses had intended to pledge their credit to the fact that these alterations had taken place before the author of the deed affixed his name to it, they might have expressed that; but that not having been done, and it appearing to me to be an alteration in a most important part, namely in the name of the party who is to take the benefit of it, and there being nothing by which your Lordships can be satisfied that the alteration took place at a time anterior to the execution of the deed, I am of opinion that it cannot be made valid by the aid of parole testimony.

My Lords. The case of the Earl of Strathmore v. Sir J. D. Paul and others appears to me to be clear of any of those objections; and singular it is, that considering how numerous the alterations in that case are, every one appears to carry its cure along with it. In the first place, it would be difficult to make out that any one of them is so material as to invalidate the instrument. But if any question arose about that, you always find another instrument containing the word erased. Wherever there

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is an alteration which might have operated against the deed if it had stood by itself, the other instrument contains the word not upon an erasure, and proves, therefore, that the deed in which the erasures are found was the same in form at the time the party executed it. It was upon these two grounds that the validity of the deed was maintained at the bar: first, that the alterations were not material; and, secondly, that if they were, there was another instrument referred to in the testing clause, which showed that the alterations in question formed part of the instrument at the time it was executed.

The result therefore is, that it is wholly free from the objections which arose in Kedder v. Reid and others. I therefore concur in the proposition which my noble and learned friend has made, that your Lordships should affirm the interlocutors appealed from.

There is some difficulty as to what ought to be the course with regard to costs in the Earl of Strathmore v. Sir J. D. Paul and others. But your Lordships having taken the course which has been referred to in a case in 1831[1], you may perhaps think it right to follow that precedent, although it certainly appears to me to be contrary to principle, that where a party fails in impeaching the title to property, that property should bear the costs; but probably the best course in the present case will be to follow the precedent referred to.

Lord Brougham.—I agree there is a difficulty about costs, and I shall look further into that.

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[1] Earl of Strathmore v. Earl of Strathmore's Trustees, 1 W. & S. 402.

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On a subsequent day (3d August 1840) the following opinions were expressed by their Lordships on the subject of costs.

Lord Brougham.—On looking into the cases which I undertook to do, it appears that in 1831 the costs were directed to be paid to Lord Strathmore, as well those incurred in the Court below as in this House, out of the trust funds. The same course ought to be followed in the present case.

The claim made to have costs in Hoggan v. Ranken paid out of the fund collected for distribution among the creditors cannot be admitted.

There are cases, no doubt, where the Court below have gone a great way in allowing costs to parties when they sought to set aside the whole deed, not seeking to set aside a part and affirm a part, and where they failed in that attempt. The strongest of those cases is that of Morrison v. Cauvin's trustees[1] which very much resembled this Strathmore case. There the letters "ing" in the word "preceding," and the letters "ges" in "pages" in the testing clause were written on erasures, and the word "of" introduced after the word "pages," and that was held not sufficient to set aside the deed, but notwithstanding that the party failed in setting aside the deed the Court gave him costs out of the fund. The Scotch practice of allowing costs out of an estate or other fund subject to a deed which the party so allowed costs has been attempting, and that unsuccessfully, to set aside altogether, proceeds upon views extremely different from those which guide the Courts in England in

[1] 7 S. & D. 810.

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such cases. Those views may possibly require to be reconciled when other occasions arise; for the present they have been adopted, and they were, as I stated, also acted upon in a former question arising out of the same settlement. The cases of Stainton v. Stainton's Trustees[1] and of Morrison v. Cauvin's Trustees[2] are very strongly in favour of the course taken, especially the last; and acting as a Scotch court, and according to the Scotch practice, your Lordships, both in the last Strathmore case in 1831 and in Miller v. Black in 1837[3], gave the costs of the appeal in like manner.

I would, however, strongly recommend this question to the reconsideration of the Court below, and also of your Lordships when next a case shall present itself for the application of the principle, and that sureties or parties about to become sureties should regard the continuance of the practice as by no means a matter of certainty.

Ld. Chancellor's Speech.

Lord Chancellor. — I quite agree with what my noble and learned friend has said. The rule which your Lordships acted on formerly is a sufficient reason for applying the same rule to the present case of the Earl of Strathmore v. Sir J. D. Paul and others. But in ordinary cases, when a party attacks the title to property and fails, that that property should bear the burden of his attack, which seems to have been the course in some of the cases referred to, is to me a matter of some surprise; and I am sure that your Lordships will feel that it is not a practice which ought to be encouraged in future cases. There is however, in my opinion, sufficient to justify it in the present case.

[1] 6 S. & D. 363. [2] 7 S. & D. 810. [3] 2 S. & M'L. 866.

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The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors, in so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the costs of all parties in the cause be paid out of the estate in question.

Deans and Dunlop—Spottiswoode and Robertson, Solicitors.