that probably is sufficient for the determination of this case; but I also agree with your Lordship on the other grounds stated.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for Henry Padwick against Lord Mackenzie's interlocutor of 19th July 1873, Adhere to the said interlocutor, and refuse the reclaiming note: Find the defender, Sir Archibald Douglas Stewart, entitled to additional expenses, and remit to the Auditor to tax the amount of said expenses, and report."

Counsel for Pursuer—Solicitor-General (Clark), Watson, and Keir. Agents—Tods, Murray & Jamieson, W.S.

Counsel for Defender—Lord Advocate (Young), Balfour and Mackay. Agents—Dundas & Wilson, C.S.

Wednesday, February 11.

FIRST DIVISION.

[Lord Gifford, Ordinary.

CATTON *v.* MACKENZIE.

(*Ante*, vol. vii. 250, 410, 687; ix. 425.)

Entail — Erasures — Charter by progress — Crown Charter—Entail Act 1685.

Held (1) that the statutes as to the testing of deeds do not apply to Crown charters; (2) that where words in a Crown charter, written on erasures, are correctly and distinctly written in the signature and precept ordaining the charter to be made and passed under the seal, that gives important security for the authenticity of the charter; (3) that the erasures, &c., occurring in the charter of resignation and confirmation expede upon a deed of tailzie, itself unobjectionable, were not such as to free the party expeding said charter from the fetters of the entail, in respect of the provisions of the Entail Act 1685, cap. 22.

This was the second action brought by the pursuer for the purpose of having the entail of the estate of Dundonnell set aside, and of having it found that the late proprietor, Hugh Mackenzie, validly conveyed that estate by his testamentary writings to trustees, for behoof of the pursuer's late wife, Mrs Mary Mackenzie or Catton, in whose right the pursuer now stands.

In the first action the objections to the validity of the entail were confined to alleged defects in the deed of entail itself, and then, assuming the invalidity of the entail, the pursuer and his wife concluded that the estate was effectually conveyed by Hugh Mackenzie's trust-disposition and settlement.

In this first action a great deal of litigation took place, both in this Court and in the House of Lords. On 7th June 1870 the Lord Ordinary (Lord Mackenzie) repelled the whole pleas in law for the pursuers, and assoilzied the defenders from the whole conclusions of the action; but he explained in his note that he did so on the ground that the entail was a valid and subsisting entail; that the objections to the deed of entail were groundless; and that therefore Hugh Mackenzie's trust-disposition did not operate as a conveyance of the estate or interfere with the destination in the deed of entail. The Lord Ordinary did not find it necessary to consider whether, supposing the deed of entail to be invalid or defective in its fetters, Hugh Mackenzie's trust-deed was sufficient to carry the estate, which on that supposition he would have had power to convey.

Lord Mackenzie's interlocutor was taken to review to the First Division, and on 19th July 1870 the First Division recalled Lord Mackenzie's interlocutor of 7th June 1870; sustained only the second and third pleas for the defenders; and of new assoilzied the defenders. The grounds of this judgment, as appears from the pleas sustained, and from the opinions of the Judges (7 Scot. Law Rep. p. 687) were, that whether the entail was valid or not, Hugh Mackenzie's trust-disposition was not sufficient to convey the estates, that is, even assuming that Hugh Mackenzie had power to do so. The Judges of the First Division gave no opinion as to whether the objections to the entail were or were not well-founded, or whether the entail was a valid and effectual entail or not.

The case then went to the House of Lords, and on 11th March 1872 the House of Lords recalled the interlocutor of the Inner House, except as to expenses, and affirmed the original interlocutor of Lord Mackenzie (9 Scot. Law Rep. p. 425). The judgment of the House of Lords, although disposing of the whole case, proceeded exclusively upon the ground that the deed of entail was in all respects valid and effectual, and this being so, they found it unnecessary to decide the purely speculative question whether, supposing the deed of entail defective, Hugh Mackenzie's settlement was sufficient to carry the lands. The House of Lords therefore recalled the judgment of the Inner House, and simply returned to the judgment of the Lord Ordinary.

The present action had, like the former one, two branches. It first sought to declare the entail invalid, not in respect of defects in the deed of entail itself, for that is completely excluded by the judgment of the House of Lords, but in respect of alleged erasures and interpolations occurring in the Crown Charter of 1842, which followed upon the deed of entail, and then, assuming that the entail was set aside upon this new ground, it repeated or renewed the declarator contained in the former action, that the estate of Dundonnell was validly conveyed by Hugh Mackenzie's trust-deed and settlement.

The following are the averments with regard to the erasures:—First (Cond. 13), "Following the dispositive clause in the Crown charter, the disponee and series of heirs in whose favour the grant of the lands and estate of Dundonnell and others is made are set forth in the following terms, viz.: 'Dilecto Nostro Hugoni M'Kenzie filio natu maximo procreat, inter Murdo Mackenzie Armigerum de Ardross vel Dundonnell et Christy vel Christian Ross ejus sponsam *et hæredibus quibuscunq. ejus corporis* Quibus deficien. Kennetho Mackenzie filio secundo *dict. Murdo Mackenzie et hæredibus quibuscunq. ejus corporis Quibus deficien. Roberto Mackenzie* filio tertio dicti Murdo Mackenzie et hæredibus quibuscunque ejus corporis Quibus deficien.'" The words and letters in italics were alleged to have been written on an erased portion of the deed,

and it was averred—Second, (Cond. 14) that "The appearance of the parchment or vellum indicates previous erasures in the deed at those parts of it where these words occur. The colour of the ink of these letters and words is of a darker hue than that of the surrounding context; they are written in a much smaller and more cramped character or style of penmanship, and their appearance proves that they were interpolated into the deed as aforesaid, that is, that they were introduced or inserted in the space or portion of it which they now occupy after the immediately adjoining context was written." Third, (Cond. 17) "The portion of the prohibitory clause in the Crown charter applicable to the prohibition against altering the order of succession is thus expressed—'Cum et sub hac speciali limitatione et restrictione quod non licitum nec in potestate erit dict. Hugonis Mackenzie vel ejus hæredum vel ullius talliæ hæredum seu substitutorum supra specificat. innovare mutare vel infringere dict. talliam vel ordinem successionis . . . directe vel *in*directe inferre possit, &c.' The letters *in* of the said word *indirecte* have been interpolated into the Crown charter after the context in which they now occur was written. These letters are written in a much smaller and closer character or style of penmanship than those in the surrounding words of the deed, and an inspection thereof shows plainly that the word now standing *indirecte* in the above quoted clause of the charter was originally written *directe*, and that the letters *in* were subsequently interpolated—*i.e.*, introduced or inserted into the space which then existed between that word and the immediately preceding word *vel*." Fourth, (Cond. 19) "The irritant clause in the said lastmentioned deed is thus expressed, viz.—'And it is also hereby expressly provided and declared that all the debts and deeds of the said Hugh Mackenzie or any of the heirs of entail, or either of them, contracted, made, or granted, as well before as after their succession to the foresaid lands and estate, in contravention of this present tailzie, and provisions, conditions, restrictions, and limitations herein contained, and all adjudications, or other legal executions or diligences that shall happen to be obtained or used against the fee or property of the said lands and estate, or any part thereof, *upon the same*, shall not only be void and null, with all that may or shall follow thereon, in so far as they might anyways affect the said lands and estate, but also the heirs of tailzie," &c.

Pleas were stated for the defenders to the effect that the present action was wholly excluded by the judgments pronounced in the former one, but the Lord Ordinary repelled these pleas to the effect of admitting the present action to go on. His reason was that the objections to the Crown charter were not embraced in the former action, and were not in any way adjudicated upon, and although the conclusion as to the effect of the trust-deed was the same, the question raised by that conclusion was not decided by the House of Lords, and the judgment of the First Division had been recalled. The Lord Ordinary thereupon allowed a proof as to the alleged vitiations in the Crown charter, parties being at issue on various points connected therewith.

On the second branch of the case, namely, whether, assuming the defects in the Crown charter to be fatal to the entail, Hugh Mackenzie's trust-deed was sufficient to carry the lands of Dundonnell, the pursuer raised the question, Whether he was entitled to a proof *prout de jure* of all facts and circumstances tending to show the late Hugh Mackenzie's state of mind and his intentions under his settlement. To raise this question the pursuer tendered an amendment of the record, being the minute No. 41 of process, and the Lord Ordinary, "under the very wide provisions of the Court of Session Act of 1868," allowed the amendment to be added to the record, and heard parties fully on the pursuer's motion to be allowed a proof *prout de jure* of the averments contained therein.

On 10th June 1873 the Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh*, *10th June* 1873.—The Lord Ordinary having heard parties' procurators on the motion of the pursuers to be allowed a proof *pro ut de jure* of the statements contained in the Minute of Amendment, No. 41 of process, and having heard parties on the whole cause, and having considered the closed record, proof adduced, and whole process, refuses the said motion: Finds, 1st, that the erasures, interpolations, and defects existing in and appearing on the Crown charter, No. 16 of process, do not invalidate the entail of the lands of Dundonnell and others, and did not free the late Hugh Mackenzie from the fetters of the said entail: Finds, 2d, that the trust-disposition and settlement of the said Hugh Mackenzie, dated 4th July 1854, and codicil thereto, dated 22d February 1864, are insufficient in point of law to convey the said lands of Dundonnell and others embraced in the entail thereof: Therefore sustains the defences, assoilzies the defenders from the whole conclusions of the libel, and decerns: Finds the defenders entitled to expenses, and remits the account thereof, when lodged, to the Auditor of Court to tax the same and to report.

"*Note* . . . . —Having in view the procedure which took place in the former action, the Lord Ordinary thinks himself bound to decide both branches of the case. This was expressly demanded by the pursuer, and the Lord Ordinary has complied with the demand. Indeed, the defenders made no objections. It is true that a decision in favour of the defenders on either branch of the case would lead to absolvitor, but the Lord Ordinary cannot tell what view may be taken by the Courts of review, and he has therefore considered the whole pleas on record. He has come to the conclusion on both branches of the case that the pursuer's contention is ill founded, and that the defender is entitled to prevail.

"I. The first question is, Do the erasures and interpolations which appear in the Crown charter of 1842 vitiate the entail, and in respect thereof was the late Hugh Mackenzie free from the fetters? The Lord Ordinary answers this question in the negative. He does so without much hesitation.

"The case starts with the finally concluded and settled point that the deed of entail itself is in all respects perfect and unexceptionable. The entailer was Murdo Mackenzie, the father of Hugh Mackenzie, and it is now fixed that Murdo Mackenzie made a perfect and faultless deed of entail. The charter alleged to be defective is a charter not in favour of Murdo Mackenzie, the entailer, but in favour of Hugh Mackenzie, his son, the institute and the first person who took under the entail. Very shortly after the entailer's death Hugh Mackenzie took infeftment upon the charter in ques-

tion. It is not alleged that there is any defect in Hugh's infeftment. The pursuer's sole ground of challenge is that the Crown charter in favour of Hugh Mackenzie is erased and vitiated in certain essential particulars. The Lord Ordinary repels the pursuer's pleas on the following among other grounds:—

"(1) He thinks that Hugh Mackenzie was barred from founding upon defects in a title made up by himself, and for which he alone was responsible, and the pursuer, who claims to be Hugh Mackenzie's universal disponee, is subject to the same personal exception.

"The entailer, Murdo Mackenzie, made a perfect deed of entail. Nothing was omitted in it; nothing was defective or faulty. The destinations, the prohibitions, the fetters, are all complete. By that deed Hugh Mackenzie expressly and the whole heirs of entail are taken bound to possess the estate solely under the entail and on no other title, and to engross the whole destinations, prohibitions, and fetters in all charters and infeftments to follow thereon. This is the usual clause. Now the Lord Ordinary thinks it quite clear that Hugh Mackenzie could not himself transgress this obligation and then found upon his own default as voiding the entail. Creditors or third parties might be in a different position, but plainly a contravening heir could not found upon his own wilful contravention as voiding the entail, and that in a question with the next succeeding heir, for that is the position of the present argument. The case must be taken just as if this had been an action at the instance of Hugh Mackenzie to have it declared that by reason of the defects in the charter in his own favour, and upon which he himself had taken infeftment, he was free from the whole fetters of the tailzie. This would be extravagant. It would put it in the power of any heir of entail at pleasure to defeat the whole provisions of the deed. However defective the title made up by Hugh Mackenzie might be, he himself could not object thereto. If Hugh Mackenzie's title was really defective, he himself might have been compelled at the instance of the next heir to rectify it. It would be vain to answer in such an action that the defect vitiated the entail. In short, it is thought to be clear that an heir taking under a valid entail cannot by his own wrongful act make the entail invalid in a question with succeeding heirs.

"Now, this is really enough to settle the whole question in the present case, for the Lord Ordinary holds that the Crown charter in favour of Hugh Mackenzie must be held as his deed, and he must be held responsible for any defects which may attach to it. No doubt the charter was expede and sealed during the life of Murdo Mackenzie, and it may be the agents acted on his employment. But it was taken for Hugh Mackenzie and for Hugh Mackenzie alone. Murdo Mackenzie never used the charter in any way, and although at one time he seems to have contemplated passing infeftment in favour of his son, he never did so, and the charter was found in Murdo Mackenzie's repositories unacted upon at the time of his death. If it was a bad charter, as it is said to be, Hugh Mackenzie had no right whatever to take infeftment upon it after his father's death. His duty was to get a good charter, and to expede a good infeftment on it—to complete a perfect title in terms of the entail. If he failed in his duty he cannot found upon his own failure as a ground for claiming the estate in fee simple.

"(2) The erasures founded on by the pursuer do not, as occurring in the Crown charter, affect the validity of the entail.

"The objection is, that although the deed of entail itself is perfect, yet essential clauses, by reason of the erasures, do not enter the investiture, and that, as this is required by the statute 1685, the entail is bad. There is no doubt that by the old law the provisions and fetters of an entail to be effectual must not only be contained in the entail itself, but must enter the investiture following thereon, and this is founded on the express provisions of the Act 1685, which declares that 'such tailzies shall only be allowed in which the foresaid irritant and resolutive clauses are insert in the procuratories of resignation, charters, precepts, and instruments of sasine;' and again, in a subsequent part of the same statute, 'if the said provisions and irritant clauses shall not be repeated in the rights and conveyances whereby any of the heirs of tailzie shall brook or enjoy the tailzied estate, the said omission shall import a contravention of the irritant and resolutive clauses against the person and his heirs who shall omit to insert the same.' The effect of these provisions is illustrated by a great variety of cases, which, however, it is not necessary to examine, for in every case where the defect was sustained it consisted in the omission from the investiture of an essential prohibition or irritancy.

"In the present case the erasures do not affect in substance any of the prohibitory or irritant clauses, for the Lord Ordinary thinks that the crowding of the letters in the word 'indirecte' is immaterial, and the omission of the words 'upon the same' does not affect the substance of the irritant clause. The erasures chiefly founded on occur not in the prohibitory, irritant, or resolutive clauses, but in the dispositive clause of the charter,—no doubt a most important and essential clause, but not the clause which the statute had in view in requiring publication in the investiture; for it was the safety of third parties, or creditors dealing with the heir in possession, which the statute chiefly regarded in requiring the provisions and limitations to enter the investiture. An error in a subsequent branch of the destination, subsequent that is to the calling of the heir in possession, would not, it is thought, affect creditors, and would not entitle creditors who are fully warned by the complete insertion of all the conditions and limitations, and clauses irritant and resolutive, to set aside the entail.

"This is the case here. The conditions, limitations, and fetters are substantially complete in the charter, unvitiated and unerased. The erasure chiefly applies to the words calling the heirs of the body of Hugh Mackenzie, and the heirs of the body of Kenneth Mackenzie, the next substitute. It seems plain that the omission even of a whole member of the destination, it may be a remote member, occurring after the calling of the heir in possession, would not, in a question with creditors, affect that heir's right, and far less would entitle that heir himself to set aside the whole entail. If this view is well founded, this also would be a complete answer to the pursuer's challenge.

"(3) The Lord Ordinary is of opinion that erasures occurring in a Crown charter, especially in a Crown charter by progress, not an original grant

are not to be dealt with in the same strict manner as erasures occurring in a private deed, which is the sole expression of the intention, will, or contract of private parties. It was urged with great force by the defenders' counsel that a Crown charter is a privileged deed. It does not require the solemnities which are essential to the validity of private deeds by subjects. It is not subscribed by the Sovereign. It needs no testing-clause—no instrumentary witnesses—no insertion of the writer's name and designation—in short, none of the solemnities which a series of statutes have made essential for private deeds; the reason being that the Sovereign is not bound by any of these statutes, but executes Crown writs in her own imperial way. There seems to be no doubt of this and accordingly, the pursuer scarcely ventured to maintain that the charter was on its face bad. Still, of course, the charter must not be tampered with or vitiated after it leaves the Sovereign, and an *ex facie* vitiation must be accounted for, or shewn to have existed when the charter was sealed.

"The Lord Ordinary humbly thinks it is competent to show this, and he thinks the defenders have completely succeeded in doing so. The whole warrants of the charter have been recovered, and they completely establish that the words which now appear on erasures are the only words which could have appeared, or for which there was any warrant. The signature, the chancery copy of the signature, the precept, and the recorded copy of the charter, are all perfect, and show no erasure whatever in the passages where erasures occur in the principal deed. This demonstrates that the principal deed could have been in no other terms than in those which now appear, and the erasure must have been to correct a clerical error, and not to alter the true terms of the deed. It is absolutely impossible that any other words than those which now appear could have warrantably occupied the place of the erasures.

"The Lord Ordinary cannot lay out of view the proved practice in reference to erasures which prevails in the Chancery Office, and looking to the impossibility of fraud in a case like the present, he thinks it would be carrying the law of erasure much farther than it has hitherto gone to hold the charter in question as vitiated *in substantialibus*, and this not to the effect merely of requiring a new one, but to the effect of absolutely voiding the whole entail. None of the cases referred to in argument appear to be in point. The nearest case is that of *Adam* v. *Drummond*, June 12, 1810, F.C., where in an election case a word written on an erasure in a Crown charter of confirmation was held *pro non scripto*, but the charter was sustained as a good confirmation, creating the vassal a freeholder—but this case does not support the contention of the pursuer.

"On the whole, the Lord Ordinary repels the objections founded on the alleged vitiations in the Crown charter.

"II. The second great question is, Whether Hugh Mackenzie's trust-disposition and settlement is sufficient to carry the estate of Dundonnell, supposing Hugh Mackenzie himself, by reason of the erasures in the Crown charter, to be free from the fetters of the entail? Of course this question only arises in case it shall be found that the Lord Ordinary is wrong in the view which he has taken of the first branch of the case.

"Now, this is the very question which was decided, and unanimously decided, by the First Division in the former action, and although the judgment of the First Division was in point of form recalled by the House of Lords, it was not recalled because the Court of last resort thought the judgment erroneous, but because they decided the case upon another ground. The judgment therefore although not binding as *res judicata*, is as binding as an authority can be, and the Lord Ordinary would not hold himself entitled to pronounce any other judgment than a judgment in conformity therewith. The grounds of that judgment seem entirely satisfactory, and, at all events, it can only be reviewed by the First Division themselves, or by the House of Lords.

"The Lord Ordinary may perhaps be allowed to refer to the recent decision of the House of Lords in the case of *Glendonwyn* v. *Gordon* (reported, Court of Session, 20th July 1870, 8 Macph. 1075), decided House of Lords 19th May 1873. The decision of the Court of Session was affirmed, and the general ground of judgment appears to have been that a subsisting special destination is not evacuated by mere words of general conveyance *per se*, even when the maker of the general conveyance has power to evacuate the destination. If this be so, the judgment in *Glendonwyn* v. *Gordon* is applicable to the present case, for even if the fetters of the entail were bad, it would still remain a special destination, which would require more than a mere general conveyance to evacuate. The pursuer's Counsel (Mr Duncan), indeed, made a most chivalrous attempt to use the vitiated Crown charter as an effectual recal of the special destination in the perfect and unchangeable deed of entail. But however ingenious this attempt was, it is impossible to sustain it for one moment, and therefore *Glendonwyn's* case is a direct authority in the present.

"There only remains to notice the pursuer's new averments contained in his amendment of the record, and his demand to be allowed a proof of these averments *prout de jure*. In substance, the pursuer avers that the late Hugh Mackenzie intended to convey Dundonnell to Mrs Catton, and he asked to be allowed to prove this intention in every way, even by parole proof of expressions and statements of the late Hugh Mackenzie.

"If the proof sought had been limited to Hugh Mackenzie's proper writ, and writ subsequent in date to his deed of settlement, there might have been some nicety. Or if there had been any disputed facts—such as Mrs Catton's relationship to Hugh Mackenzie—the fact that she was his daughter, or any similar fact—there is some authority for supporting the competency of such a limited inquiry. But no such case arises here The pursuer frankly and candidly admitted that what he sought to prove was the intention of the late Hugh Mackenzie, and he proposed to prove this by the whole history of Hugh Mackenzie's acts, and even of his sayings.

"The Lord Ordinary thinks the proof thus asked is incompetent. The only mode of proving the intention of a testator is by his testamentary deed or writ, and any proof which has been allowed in such cases has been limited to the identification of a legatee, or of the subject-matter of a legacy, or of such extrinsic facts and circumstances as might be necessary to put the Court in the position of the testator, so as to enable the Court to read his words aright. The observations of the Lord Chancellor

in the recent case of *Glendonwyn* (if the newspaper reports can be relied on) strongly point to the same conclusion.

"On both branches of the case, therefore, the Lord Ordinary has come to the same result, that the defenders must be assoilzied."

The pursuer reclaimed to the First Division of the Court, and, on the first branch of the case, argued — (1) The words in the Crown charter, which are superinduced or written on erasures, or interpolated as above condescended on, must be held *pro non scriptis*, and, being so held, the provisions and clauses prohibitory, irritant, and resolutive in the procuratory of resignation and alleged tailzie are not inserted or repeated in the investiture following thereon, in terms of the Act 1685, c. 22. (2) In consequence of the non-insertion or repetition of these provisions or clauses, or of one or other of them, as contained in the alleged tailzie, in the Crown charter or instrument of sasine, or either of them, the investiture following on the alleged tailzie is defective within the meaning of the 43d section of the Act 11 and 12 Vict. c. 36; and, in terms thereof, the alleged tailzie is an invalid and ineffectual entail *in toto*, and was so at the date of Hugh Mackenzie's trust-disposition and settlement. (3) In respect of the erasures and interpolations in the clause of destination in the Crown charter above condescended on, the destination came to an end in the person of the said Hugh Mackenzie, the institute or disponee, who, as sole member of taillie, held the lands and estate of Dundonnell and others in fee-simple.

Authorities relied on—Balfour's Practicks (ed. 1754), pp. 187, 652-3; Craig's Jus Feudale p. 194, § 5, 215, § 23; *Smith*, 13 S. 465, and 1 Rob. App. 173; *Monro*, 7 Macph. 250; *Innes*, 5 S. 559; *Adam*, June 12, 1810, F.C.; *Sheppard*, 6 D. 464.

Argued for the defender—(1) The words written upon the alleged erasures are lawfully and properly authenticated; (2) the alleged erasures are not *in substantialibus;* (3) the signature containing the Sovereign's sign-manuel and the precept from Chancery, which form the warrants for the charter, are strictly in terms of the original tailzie, and are not erased; (4) the Chancery Record contains an exact transcript of the charter as it now exists, made before the charter was delivered, and which transcript is to no extent written upon erasure; (5) a crown charter is a privileged deed and does not require the same solemnities of authentication as ordinary deeds.

Authorities relied on—*Gollan*, H. L. 1 Macph. 65; *Holmes*, 13 D. 689; *Borthwick*, 16 D. 37; *Hamilton*, 8 Macph. 323 (per L. P., 344—per L. J.-C., 336); *Cunningham's Trs.*, 14 D. 1065.

At advising—

Lord Deas—The late Mr Hugh Mackenzie, who died on the 30th July 1869, was at the time of his death the heir of entail in possession of the estate of Dundonnell, under a deed of tailzie, in the form of a procuratory of resignation, executed by his deceased father Murdo Mackenzie on 14th January 1848. The procuratory bore to be for new infeftment to be granted to Hugh Mackenzie, the granter's eldest son, and the heirs whomsoever of his body, whom failing, to the granter's other sons *nominatim*, in their order, and the heirs whomsoever of their bodies, whom failing, to his daughters *nominatim* and the heirs of their bodies, whom all failing, to the granter's own heirs whomsoever. The deed reserved power to the granter, even although it should be recorded, to alter, innovate, or revoke the same, and it contained warrant and commission to his procurators, "to cause present this deed of tailzie before the Lords of Council and Session judicially, and to procure the same recorded in the Register of Tailzies, and to expede charters and infeftments agreeable thereto, in terms of the Act of Parliament concerning tailzies, and that either in my lifetime or after my death, but under the foresaid reservations, powers, and faculties, conceived in favour of myself."

Upon the granter's application, warrant was obtained to record the deed in the register of tailzies, and it was accordingly so recorded in his lifetime, on 8th December 1838.

A Crown charter of resignation and confirmation was thereafter expede—in the lifetime of the entailer—in favour of Hugh Mackenzie, the institute, written to the Seal and registered 14th September 1842. The entailer died on 9th May 1845, and Hugh Mackenzie thereupon expede infeftment on the precept in the Crown charter, under date the 15th, and recorded in the General Register of Sasines, the 23d of May 1845. Upon this title Hugh possessed the estate till his death in July 1869.

Hugh left a general trust disposition and settlement, dated 4th July 1854, bearing to convey to Wm. Forbes Skene, W.S., and to the granter's natural daughter Mary Mackenzie, afterwards Mrs Catton, then residing in family with the granter, as trustees for the purposes therein mentioned, all and whole the lands of Craigour, a portion of the lands of Strathmasholg, and the lands of Mungusdale or Monkcastle, all therein specially described, "as also all and sundry lands and heritages, goods and gear, debts and sums of money, and in general the whole estate and effects, heritable and moveable, real and personal, of what kind or nature soever," then belonging or which should belong to him at his death. The purposes of the trust were. (1) Payment of debts and expenses; (2) To hold the residue of his said heritable and moveable estate, or the prices or produce thereof, for behoof of his said daughter, "and make payment to her of the free rents, interest, or annual proceeds of said residue" half-yearly until she should attain the age of 25 years complete or be married. (3) Upon her attaining the age of 25, or being married, to dispone, assign, and convey to her, "but exclusive of the *jus mariti* and right of administration of any husband to whom she may happen to be married, the said residue of my said whole heritable and moveable means and estate, including my said estate of Mungusdale and the stocking of my farms, or any of them, should the same not have been sold by virtue of the powers hereinafter written, or the price or produce thereof if sold, it being my intention that my said trustees shall have full power and discretion to retain the said estate of Mungusdale and farm stocking thereof, or stocking of any of my other farms during the subsistence of this trust, or such part thereof as they shall think proper, the free rents or annual proceeds of the same being applied as aforesaid." The trustees were empowered, "if they shall deem such desirable or expedient, to sell and dispose of my said lands and estate of Mungusdale, and other heritages hereby conveyed, or such part thereof as they shall think proper." They were also empowered "to excamb

any part of my said lands particularly and generally above conveyed for other lands adjacent thereto."

By a codicil to this deed, dated 22d February 1864, the granter explained that the conveyance to be made of the residue to his daughter was to be in favour of her, her heirs, assignees, and disponees, it being his wish and intention that she and her heirs should succeed to everything he might leave, and that she should have unlimited power to dispose thereof. The leading object of this explanatory codicil seems to have been to supply the omission in the trust deed of the words "her heirs and assignees," which according to usual practice ought to have followed her name in the direction given to denude ultimately in her favour. It is unnecessary, however, to enter upon that point here.

On 10th December 1869 Mary Mackenzie, who had by that time become Mrs Catton, brought an action, with consent of her husband, setting forth, 1st, that the deed of entail of Dundonnell was defective in certain specified respects, in the prohibitory, irritant and resolutive clauses, and consequently that Mr Hugh Mackenzie had power to convey the estate at his pleasure. 2d. That by his general trust disposition and settlement above mentioned he had intended to convey and had effectually conveyed that estate for behoof of Mrs Catton.

Lord Mackenzie, Ordinary, was of opinion, 1st. that the deed of entail was not defective; and 2d. that, supposing it to have been so, the general trust-deed and settlement would not have evacuated the tailzie and carried the estate. His Lordship accordingly repelled the pleas in law for the pursuers, and assoilzied the defenders. On advising a reclaiming note, presented to this Division of the Court, we thought it expedient to deal, in the first instance, with the question whether the general trust-deed and settlement would have carried the estate, assuming the granter of that deed to have had power to dispose of it; and, being unanimously of opinion that the deed was not intended to have and would not have had that effect although the entail had been defective, we so decided, and held it not necessary or expedient to decide the question as to the validity of the entail, which, in that view, did not arise (7 Scot. Law Rep. 687). On appeal to the House of Lords their Lordships thought it expedient to consider the objections taken to the validity of the fettering clauses of the entail before dealing with the question as to the effect of the general trust-disposition and settlement; and, being of opinion that these objections were not well founded, they so decided, and gave judgment accordingly, and held it unnecessary to enter upon the other question (9 Scot. Law Rep. 425). That judgment was, of course, equally effectual to dispose of that action as an affirmance of the judgment of this court upon the effect of the general trust-disposition and settlement would have been, it being essential to the pursuers' success in the action that they should have established both their propositions.

The present action has been raised after the death of Mrs Catton, at the instance of her surviving husband, as now in her right in virtue of a disposition and settlement executed by her in his favour, and likewise as administrator for his pupil son, born of their marriage, for any interest he may have in the suit. In this action no objection is taken to the terms or clauses of the deed of entail itself, but it is pleaded in substance 1st, That there are certain erasures in the Crown charter of 14th September 1842, and certain discrepancies of expression between that charter and the sasine following upon it, which rendered the tailzied destination ineffectual, and left Hugh Mackenzie at his death fee-simple proprietor of the estate. 2d. That Hugh Mackenzie being in that position, his general trust-disposition and settlement had the effect of conveying the estate to Mrs Catton, whose disposition, again, conveyed it to the pursuer, her husband.

Following the example set to us in the former case by the House of Lords, the expedient course seems to be to deal, *first*, with the objections taken to the tailzied title; and, if we think these not well founded, to leave (as their Lordships did) what will then be the hypothetical question, what might have been the effect of the general trust-disposition and settlement, undecided. I do not say that the question as to the effect of the general deed would be in all respects the same as it was in the former case, but the reasons which render it inexpedient to enter upon it here, if we repel the objections to the tailzied title, seem to me to be substantially the same.

The objection to the tailzied title mainly pressed at the bar, and which chiefly requires deliberate consideration, is the objection founded on the erasures in the dispositive clause of the Crown charter of 14th September 1842.

It is said that if the corresponding words had been erased in the destination in the deed of entail the consequence would have been to have destroyed the destination in so far as embodied in the erased words, as well as the whole destination following these words, and so to have left Hugh Mackenzie, the institute whose name and designation are not erased, fee simple proprietor of the estate. In support of this view reference is made to the case of *Sheppard* v. *Grant*, 24th January 1844, 6 D. 464. It is farther said that the erasures in the Crown charter, in virtue of which alone the tailzie has been feudalized, have the same effect as corresponding erasures in the deed of tailzie itself would have had.

But what was found in *Sheppard* v. *Grant* was that the erasure of important words in the dispositive clause of the need of entail, (not authenticated in the testing clause) voided the deed entirely. That is not an authority for the pursuer's proposition that if the erasures which occur here in the dispositive clause of the Crown charter had occurred in the dispositive clause of the deed of entail, the consequence would simply have been to destroy the destination in favour of the substitute heirs, leaving the destination in favour of Hugh Mackenzie, the institute, untouched and effectual. Still less is it an authority for holding that the erasures which occur in the dispositive clause of the Crown charter, but do not occur in the dispositive clause of the deed of entail, are to have the effect of altering or destroying the tailzied destination in the deed of entail, and leaving Hugh Mackenzie fee simple proprietor of the estate.

On the contrary, I think the case of *Sheppard* v. *Grant* goes far to support the proposition that erasures of important words in the dispositive clause of a deed, not sufficiently authenticated and not distinctly adopted in other parts of the deed, will in the general case void the deed; and that

it will not necessarily be an answer to such an objection, when taken to a deed of tailzie, that the erasure occurs in the name and designation of the first substitute and not in the name and designation of the institute. I by no means, however, mean to say that where there is an unerased institution and substitution sufficient to constitute a tailzie, there can never be an erasure in the name and designation of a remoter substitute which shall not void the whole tailzie. That question was incidentally considered in the case of *Abernethie* v. *Forbes*, 16th January 1835, 13 S. and D., 263, but did not fall to be decided, because the question there related to the effect of a blank, left apparently for the name and designation of a substitute heir, —which was a very different question in many respects from a question as to the effect of an erasure.

But I refrain from going deeper into the consideration of questions as to the effect of erasures in a deed of entail, because that is not what we have to deal with in the present case. The Dundonnell entail is, in that respect, unobjectionable. The deed as executed and recorded must be admitted to be *ex facie* a valid and effectual entail. If the erasures in the charter of resignation and confirmation be either sufficiently authenticated, as they are alleged to be, according to the practice of the Chancery Office, or if the words written on these erasures be sufficiently sanctioned and adopted by relative writings, according to the principle of the *Strathmore* case (1 Rob. App. 189), then the entail has been validly feudalised by the infeftment which followed on the charter. If, again, the erasures in the charter render it, and consequently render the sasine following upon it, null and void, the result must be that Hugh Mackenzie possessed till his death, not upon the null charter and sasine, but solely upon a valid, although unfeudalised, deed of entail duly recorded; and it cannot, I think, be contended that in that case Hugh Mackenzie, by any deed of settlement whatever, could have effectually evacuated the destination in that entail.

With reference to the question whether the words written on erasures in the Crown charter be sufficiently authenticated, it must be kept in view that the statutes as to the testing of deeds are not applicable to such writs, which neither have nor require to have any testing clause. It is proved that the words on erasures in the charter are authenticated in the manner usual in the Chancery Office, and if some mode of authentication of that kind be not sufficient, it seems difficult to say that words written on erasures in such deeds can be authenticated at all. That would certainly be inconvenient; for although a slovenly practice of writing upon erasures is not to be encouraged, it would, on the other hand, be a strong thing to hold that in writs issuing from the Crown, which have no testing clause, there can be no equivalent for the authentication which a testing clause affords the means of making, either of words written on an erasure or of marginal additions.

In the present case, the words which in the charter are on erasures are all correctly and distinctly written in the signature and precept ordaining the charter to be made and passed under the seal, which by the Treaty of Union comes in Scotland in place of the Great Seal. This, I think, to say the least of it, gives important security for the authenticity of the charter. In the transcript of the original signature, made at the time into the Register of Signatures, the words stand in like manner fairly and correctly written. It was the duty of the Keeper of the Seal to issue a charter in verbatim the same terms with the signature. He had no authority to issue a charter in any other terms. It is not alleged that at the date when the charter left the office the words were not the same as they now are, and that they stood in like manner in the charter at the date of the entailer's death is fairly presumable from the fact of their being engrossed from it into the instrument of sasine expede upon the charter within less than a week after that event by Mr Hugh Mackenzie, who thereby adopted the words as part and portion of the warrant for his infeftment, by which alone the deed of entail can be said to have been feudalised, if it has been feudalised at all.

In the question, therefore, whether the erased words are to be read as contained in the charter, it is not necessary to rest exclusively on the authentication of these words by the Keeper of the Seal upon the one hand, nor upon a comparison of the words with the words in the signature-precept and Chancery record on the other hand. If called upon to decide the question, we should be entitled and bound to combine both considerations, and it would be very difficult, I think—taking the case so,—to say that any good objection lay against the charter on the ground of erasure.

But, if objectionable at all on that ground, I think the objection must go the length of voiding the charter entirely. I can see no principle upon which the erasures in the charter can be held to import a revocation of the whole destinations in the deed of entail, except the destination to Hugh Mackenzie and the heirs of his body, so as to leave him, failing such heirs, fee-simple proprietor of the estate. The charter is neither a deed of entail nor a fee-simple conveyance by the proprietor of the estate. An entail may be made by a procuratory of resignation on which a charter is to follow. Or a simple destination may be created in the same way, either in favour of one party or of several parties in succession, if that be the desire of the party resigning, and the terms of the procuratory are framed accordingly. But neither the Crown nor a subject superior can, *cum effectu*, issue a charter of resignation containing any other destination than the destination contained in and authorised by the procuratory. Here the only destination authorised by the procuratory was a tailzied destination in favour of Hugh Mackenzie and the substitutes named in the procuratory; and if the Crown had issued a charter containing any other destination, it would have been a charter without a warrant. It is idle to say that the entailer, by receiving the charter into his custody, which no doubt he did, without objecting to the erasures, received and adopted it as a charter which made Mr Hugh Mackenzie fee-simple proprietor. Even if the entailer had so regarded it, it would have been inept for such a purpose, being disconform to its warrant, —just as an infeftment would be inept in which the destination, fairly and correctly written in the disposition and precept, was written upon an unauthenticated erasure in the instrument of sasine. But there is no ground whatever for saying that the entailer ever adopted the charter as a charter limiting the destination of the estate to Hugh Mackenzie and the heirs of his body, and consequently making Hugh Mackenzie, failing these

heirs, fee-simple proprietor. There was nothing to have prevented the entailer, had his attention been directed to the erasures, and if he could have satisfied the Court that they constituted a grave irregularity, from reducing the charter and obtaining another which would correspond with the procuratory, or from getting the charter cancelled with consent of the Crown, and replaced by another, on the narrative of that irregularity. So long as infeftment had not been taken upon the charter of resignation, the fee, as familiarly explained by Mr Erskine (2, 7, 22 and 23), remained in the granter of the procuratory, and the charter was a mere personal and incomplete right, which might be followed out or not at his pleasure. Of this the case of *Grant* v. *Campbell*, 22d February 1760, F.C. and M. 8740, affords an example, The first individual who created any obstacle to the competency of rectifying the irregularity, by the mere joint consent of the Crown and the granter or holder of the procuratory themselves, without any action of reduction, was not the granter of the procuratory, but Hugh Mackenzie himself, who took and recorded infeftment upon the charter, but which infeftment at the same time purports, upon the face of it, to feudalise not a fee-simple but a tailzied destination.

Even after Hugh Mackenzie had expede that infeftment, I see nothing to have prevented him from reducing the charter and his own sasine following upon it, had it suited his views to do so. Nor do I see anything to have then prevented, or even now to prevent, a substitute-heir from reducing that charter and sasine, provided in each case it could be shown to the satisfaction of the Court that the words in the charter written on erasures are not sufficiently identified or authenticated as part and portion of the original deed. The case of *Drummond* v. *Drummond*, as decided in this Court on 17th May 1793, F.C. and M. 6936, and in the House of Lords 26th April 1795 (3 Paton's App. 557) affords ample illustration of the competency of thus rectifying discrepancies between the destination in a procuratory of resignation and the destination in the charter following upon that resignation, by means of a reduction, or, in some cases, even by a declarator. We are not called upon to point out how the tailzied title may be best cleared, but if the defender were to bring an action concluding to have it found and declared that the words in the charter, written on erasures, were to be read as part and portion of the deed, and consequently that the tailzied destination was validly feudalised by Hugh Mackenzie's infeftment, or, alternatively, that the charter and infeftment ought to be reduced as null and void. I do not at present see any good objection to the competency of such an action.

Be this, however, as it may, it seems impossible to hold that Hugh Mackenzie possessed the estate at his death upon a fee-simple title. He was either validly infeft upon a tailzied title or his infeftment was altogether inept. The Crown Charter without infeftment was not a title of possession at all. Its terms are inconsistent with the supposition that it was intended either as a new entail or as an alteration of an existing entail; and, without a procuratory of resignation in terms to warrant it as such, it could not possibly operate either as the one or the other. Even then it would have been the procuratory and not the charter, which would have formed the new or altered entail, and would have fallen to be recorded as such in the Register of Entails. To have recorded the charter and not the procuratory would have been an adventurous proceeding, unexampled in the history of entails, supposing the Court to have authorised it, which could only have occurred *per incuriam*, if at all.

Taking this view of the nature of the charter, it is unnecessary to take any separate notice of the objection founded upon the fact—which in itself is apparent enough—that in the prohibitory clauses, as set forth in that deed, the word "*directe*" has in one instance been converted into "*indirecte*," by the interpolation of the letters "*in*." The interpolation would have founded no good objection to the sufficiency of the prohibitory clauses if it had occurred in the procuratory of resignation itself. The prohibitory clause would have been quite complete not only without the word "*indirecte*" but without any of the general words in connection with which the word as so altered is used. If I am right in holding that even where there are important discrepancies between the charter and its warrant, the terms of the warrant must still be the rule, it cannot be neccessary to observe further upon this particular discrepancy, which in no view can be here regarded as material.

As to the plea stated in the record to the effect that, in respect of the erasures in the dispositive clause of the charter, the prohibitory, irritant, and resolutive clauses of the tailzie cannot be held to have been inserted in that charter as required by the statute 1685, c. 22, it is not very easy to understand what is meant by it as a separate objection and I do not think it was insisted on as such in the discussion before us. The whole of these clauses are fully engrossed in the charter, and, unless it be maintained that the effect of the erasure in the dispositive clause is to prevent anything whatever which follows the erasures from being read as part of the deed, the objection seems unintelligible. If, on the other hand, such be the meaning of the objection, it necessarily imports that the deed is a nullity. I can understand the argument—although I think it unsound—that if the primary destination be held *pro non scripto* because written on erasures, the subsequent destinations must necessarily also be held *pro non scriptis*, and yet that the rest of the deed shall continue to be read according to its terms. I can likewise understand the argument that, because in this view the destination in favour of Hugh Mackenzie is a fee-simple destination, the irritant and resolutive clauses cannot effectually limit the fee conferred on him. But I cannot understand how it can be said that the irritant and resolutive clauses, which *are* in the charter, are *not* in it, and that there is, in that respect, a violation of the statute 1685, c. 22. These clauses are undoubtedly in the charter as well as in the sasine following upon the charter. They are applicable to the destination embodied in these writs, whatever that destination may be held to be. The pursuers say it is in its terms a fee-simple, and not a tailzied destination. To that contention I have already spoken. But I see no room for a separate and substantive objection founded on the statute 1685, c. 22.

Neither—for analogous reasons—do I see any room for a separate and substantive objection founded on the 43d section of the statute 11 and 12 Vict., c. 36. That enactment is to the effect that if any one of the three cardinal prohibitions be invalid and ineffectual "in consequence of defects either of the original deed of entail or of the

investiture following thereon," then the tailzie shall be invalid and ineffectual as regards all the prohibitions. The present is not the kind of case provided for by that enactment. The objection is not to the validity of any one or more of the prohibitory clauses, if there be a tailzied destination. The objection is that there is no tailzied destination, and consequently that, although there is no defect either in the entail or the investiture as regards the prohibitory clauses, there is nevertheless no entail. That is precisely the question to which I have already addressed myself, and which I need not resume.

The other Judges concurred.

The Court accordingly pronounced the following interlocutor:—

"The Lords having resumed consideration of the reclaiming-note for the pursuers against the interlocutor of Lord Gifford, Ordinary, dated 10th June 1873, with the record as amended since the date of the said interlocutor, proof adduced, and whole process, and heard counsel—Recall the said interlocutor: Find that the erasures, interpolations, and superinductions occurring in the Crown charter, No. 16 of process, have not in law the effect of invalidating the entail of the lands of Dundonnell and others, and had not the effect of freeing the late Hugh Mackenzie, as institute of tailzie, from the fetters of the said entail; therefore assoilzie the defenders from the whole conclusions of the libel, and decern: Find the defenders entitled to expenses in so far as not already disposed of: Allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuer—Dean of Faculty (Gordon), J. M. Duncan, and Rhind. Agent—Robert Menzies, S.S.C.

Counsel for Defender—Solicitor-General (Clark), Balfour, and Hunter. Agents—Skene, Webster, & Peacock, W.S.

Saturday, January 31.

FIRST DIVISION.

COLIN MACCULLOCH, PETITIONER.

Act 36 *and* 37 *Vict. c.* 63—*Notary Public—Exchequer Fees.*

Held that a law agent, enrolled in terms of the Act 36 and 37 Vict. c. 63, is only bound to pay the stamp-duty of £20 on enrolment as notary public.

Mr Macculloch, solicitor in Greenock, enrolled law agent in terms of the Act 36 and 37 Vict., cap. 63, presented the following petition to the First Division.

"That of this date (Jan 7, 1874), your Lordships admitted the petitioner to the office of a notary-public, and remitted to the Clerk to the Admission of Notaries, to mark his protocol, and take his declaration *de fideli administratione*, and granted warrant to the said clerk to enrol him as a notary-public.

"That the petitioner having applied to the said Clerk to the Admission of Notaries to enrol him as a notary-public, the said Clerk refuses to do so except on payment of the sum of £11, claimed by the Queen's and Lord Treasurer's Remembrancer as fees due to Exchequer on the admission of every notary, stating as his ground for such refusal that the said Remembrancer has intimated to him that he is bound to collect and account to Exchequer for said fees. That the petitioner submits he is entitled, in virtue of sect. 18 of the Act 36 and 37 Vict., cap. 63, to be enrolled as a notary-public on payment only of the stamp-duty of £20 presently exigible by law from a notary-public on admission, without any further payment to Exchequer.

"May it therefore please your Lordships to grant warrant for service of this petition upon the said Clerk to the Admission of Notaries, and upon the Queen's and Lord Treasurer's Remembrancer, and to ordain them to lodge answers thereto, if so advised, within four days after service; and on resuming consideration hereof, with or without answers, to ordain the said Clerk to the Admission of Notaries to enrol the petitioner as a notary-public on payment of said stamp-duty of £20, and in event of opposition hereto, to find the party opposing liable in expenses; or to do otherwise in the premises as to your Lordships shall seem proper."

The Court ordered intimation of the petition to be made to the Queen's and Lord Treasurer's Remembrancer, and continued the case in order to give him an opportunity of lodging answers if so advised. He failed to do so, and the Court, on resuming consideration, granted the prayer of the petition.

Petitioner's Counsel—Mackintosh. Agents—Stuart & Cheyne, W.S.

Saturday, January 31.

FIRST DIVISION.

TANNETT, WALKER & CO. *v.* HANNAY & SONS.

Process—Expenses—Auditor's Report.

(1) Charges of an agent for attending examination of havers at a distance, disallowed: (2) Amount of Commissioner's fee fixed: (3) Double fees to Counsel allowed, in respect of the nature of the case: (4) Charge for two accountants allowed: (5) Unsuccessful party, *held* not entitled, by the fact of paying for them, to get the models which had been prepared by the other side to be produced in the case.

This case came before the Court on objections by the pursuer and defender to the Auditor's Report, which was in the following terms:—

ABSTRACT OF ACCOUNTS.

	As stated.	Taxed off.
I. Messrs Hunter, Blair, and Cowan's accounts—		
(1) For action at instance of Messrs Tannett, Walker & Co. *v.* Hannay & Sons,	£96 8 2	£21 19 8
(2) For action at instance of Hannay & Sons *v.* Tannett, Walker & Co.,	73 12 11	11 2 0
(3) For conjoined processes,	1673 2 3	667 12 7
	£1843 3 4	£700 14 3
II. English solicitor's account,	650 14 9	373 16 2
III. Payments to witnesses,	1299 16 4	656 18 10
	£3793 14 5	£1731 9 3
Taxed of,	1731 9 3	
	£2062 5 2	