Then, on the construction of the different clauses of the statute, I do not mean to say anything further on the 127th section. As to the 129th section, it appears to me that the point in dispute is as to where this house is situated within the meaning of that section. It rather appears to me that there may be cases in which houses or buildings may come to be situated in two streets. For instance, a house in Heriot Row may be made to extend back to Jamaica Street. The case may arise hereafter as to whether such a building may be put up with the same height behind as to the Heriot Row frontage. But it is not necessary to decide that question here, because the statute gives no materials for saying to what depth a house may go without affecting its position as in one street only. Taking this house as it is, only partially facing Princes Street, and with its back on Rose Street Lane, I agree with the Dean of Guild that it is to be treated as in one street only, namely, Princes Street, for the purposes of this Act.

With regard to section 163, I am not sure that I concur with your Lordships in thinking that it does not apply to new houses such as we have here—that is, new houses built on ground which has been partly built on before. I rather think that such buildings are new buildings within the meaning of this section. But that question is not essential to this case, for, in the view I take, it is obvious that the 163d section was not intended to provide something for the benefit of the neighbours, but was intended to make provision for the sanitary condition of the house itself. Two things clearly point that way. One is that the Dean of Guild is authorised to dispense to a great extent with the open space in cases where the thorough ventilation of the house is otherwise secured, or under other special circumstances, and the other proviso is, "that in cases of conversion of a house into a building for business premises the Court may sanction the erection of saloons upon such open space of such height and construction as to the Court shall seem proper, such saloons to continue so long only as such building is so used for business purposes," showing that when the house is again resumed as a dwelling-house the Dean of Guild is to look at the building to see that it is provided with the means of ventilation required for inhabited houses. Now, it appears that not only are there these open spaces, which certainly do not look very large, but there are also other arrangements for the ventilation of this intended building, and that being so, I should think it sufficient even in a question with the authorities. But it is not a question in which the neighbours have any right to interfere. It is not very easy to say what the words "rear thereof" mean. If as good ventilation is secured in front, or in the inside of the house, it is difficult to see what these words are intended to effect. They seem to me to be of very little weight. But, on the whole matter, I think the respondents have no title, because this 163d section does not deal with the rights of neighbours.

The Lords adhered.

Counsel for Petitioners (Respondents)—J. P. B. Robertson—Murray. Agents—Smith & Mason, S.S.C.

Counsel for the Respondents (Appellants)—Mackay—Guthrie. Agent—James M'Caul, S.S.C.

Tuesday, January 31.

FIRST DIVISION.

[Lord Adam, Ordinary.

HUNTER *v.* HUNTER-WESTON.

Entail—Irritancy—Surname and Arms of Entailer—Lyon-King-at-Arms.

In a deed of entail, if it is intended that the heirs succeeding to the entailed estate should bear the surname and arms of the entailer, and no other surname and arms, it is necessary that the word "only" or other restrictive words should be added.

The Court will assume the correctness of a patent of arms granted by the Lyon-King-at-Arms unless regular proceedings have been taken for setting it aside.

An entailed estate was held under the condition, duly fenced by irritant and resolutive clauses, that the heirs succeeding to the lands should "be obliged to use, bear, and constantly retain in all time coming after their succession the surname of H. and the coat-armorial of the family of H.; and the husbands of all female heirs succeeding to the estate shall also be obliged to assume, use, bear, and constantly retain the same surname and arms." In 1810 the entailer obtained from the Lyon-King-at-Arms a patent authorising the use of certain arms, and these the entailer continued to use till his death in 1862. His successor in the entailed estate continued to use the same arms till 1865, when, on a petition presented by him, the Lyon-King issued another patent authorising the use of different arms. In 1880 a female heir succeeded to the estate, and she being married to an Englishman, had the arms of the family of H. as in the patent of 1865 duly quartered by authority of the Garter and the Lyon-Kings with those of her husband's family. She and her husband made use of both of their surnames, placing that of the husband last. In an action of declarator of irritancy by a succeeding heir of entail, who did not propose to institute regular proceedings to have the patent of 1865 set aside as incorrect—*held* that there had been no contravention of the conditions of the entail either as regards the arms or the surname of the entailer.

The family of Hunter of Hunterston or Hunterstoun was a family of great antiquity in the county of Ayr, and had been in possession of their estate and had borne the name and designation of Hunter of Hunterston at all events since 1374, when William Hunter obtained a charter from King Robert II. In 1796 the estate of Hunterstoun was in possession of the then heiress and representative of the family Miss Eleonora Hunter, the male line having previously failed. She married her cousin Robert Caldwell, and by their contract of marriage, which was dated the 28th day of May 1796, she conveyed the Hunterston estate to Robert Caldwell and herself in conjunct fee and liferent for her own liferent use allenarly, and to the heirs of their marriage, whom failing to the other heirs therein called to the succession (with this provision, that Robert

Caldwell and all the heirs therein substituted, when the succession devolved on them, should bear and constantly use the name of Hunter and arms of Hunter of Hunterston, and in case of failure to comply with that condition the contraveners should forfeit their right to the estate, and be bound to denude of the same in manner therein mentioned); and further, by the contract of marriage Robert Caldwell bound and obliged himself and his heirs and successors to make, execute, and record a strict entail of the estate, calling to the succession the same series of heirs to whom the lands stood thereby destined.

On 31st March 1810 Robert Caldwell, then known and designed as Robert Caldwell Hunter of Hunterston, matriculated in the Lyon Office in Scotland, and obtained a patent in his favour of the arms of Hunter of Hunterston, the exemplification thereof being as follows:—"Hunter, Robert Caldwell, of Hunterstown, in the shire of Ayr, Esquire—Bears, *vert;* three dogs of chase, *courant argent*, collared *or*, on a chief of the second three hunting horns of the first stringed, *gules:* Above the shield an helmet befitting his degree with a mantling *gules*, the doubling *argent;* and on a wreath of his liveries is set for crest a greyhound *sejant*, *argent*, collared *or;* motto '*Cursum Perficio.*'"

By disposition and deed of entail, dated 2d April 1810, subsequently recorded in the Register of Tailzies 22d February 1838, Robert Caldwell Hunter and his wife, on the narrative of the above contract of marriage and the provisions and obligations therein contained, disponed the estate of Hunterston to Robert Hunter, their eldest son, and the heirs whatsoever of his body, whom failing to their other children in their order, whom failing to certain other heirs, but always with and under the conditions, provisions, restrictions, limitations, exceptions, clauses irritant and resolutive, burdens, declarations, and reservations therein written; and in particular, with and under the condition "that the said Robert Hunter, our eldest son, and the whole heirs aforesaid succeeding to the lands and others above specified, shall be obliged to use, bear, and constantly retain in all time coming after their succession the surname of Hunter and coat-armorial of the family of Hunterston, and the husbands of all the female heirs succeeding to the said estate shall also be obliged to assume, use, bear, and constantly retain the same surname and arms."

Seven children were born of the marriage of Robert Caldwell Hunter and Mrs Eleonora Hunter, of whom the pursuer Margaret Hunter alone survived at the date of the present action. All the pursuer's brothers and sisters died without leaving issue except her eldest brother Robert, who succeeded to the estate of Hunterston on his father's death on 22d August 1826. Robert Hunter on 23d November 1836 married Miss Christian Macknight Crawford, eldest daughter of William Macknight Crawford of Cartsburn, of which marriage there was issue two daughters, viz., Jane Hunter, one of the present defenders, and Eleonora Hunter. Jane Hunter on the 8th July 1863 was married to the other defender Gould Read Weston, who thereafter designed himself as Gould Read Hunter-Weston of Hunterston, a Lieutenant-Colonel on the retired list of Her Majesty's Indian Army. Eleonora Hunter became the wife of R. W. Cochran Patrick, Esq. of Woodside, M.P., and had issue one son and one daughter, after whom the pursuer was the next substitute heir of entail.

Robert Hunter died on 14th March 1880, when the succession to the entailed estate of Hunterston opened to the defender Mrs Hunter-Weston, and she completed a title to and entered into possession of the estate.

From 1810 to 1865 Robert Caldwell Hunter, and after him Robert Hunter, used the arms of the Hunterston family as matriculated in 1810, but on 5th June 1865, on the petition of Robert Hunter, a patent was issued and granted by the Lyon-King-at-Arms, which set forth that by his petition Robert Hunter had represented that the armorial bearings of his family appeared to have varied considerably at different periods (as fully set forth in the petition), and that in 1810 the father of the petitioner placed on record in the Lyon Register the coat which was borne at and some time prior to the commencement of the 17th century, but that the petitioner was desirous to revert to the original arms of the family, which were *or*, three hunting horns *vert*, stringed *gules*, and prayed that the Lyon-King would ratify, maintain, and confirm to him and his descendants the aforesaid ancient arms, with the further distinction of supporters. The patent proceeded to set forth that the Lord Lyon-King-of-Arms having by his depute considered the petition, did, by the said patent, ratify, maintain, and confirm to the said Robert Hunter of Hunterston, and to his descendants, with such congruent differences as might thereafter be matriculated for them, the following ensigns armorial, as depicted on the margin of the said patent, and matriculated of even date in the register, viz.:—"*Or*, three hunting horns *vert*, garnished and stringed *gules;* above the shield is placed a helmet befitting his degree, with a mantling *gules*, doubled *argent*, and on a wreath of his liveries is set for crest a greyhound *sejant* proper, gorged with an antique crown *or;* on a compartment below the shield are placed for supporters two greyhounds proper, gorged with antique crowns *or;* and in an escrol entwined with the compartment this motto, *Cursum Perficio*,—the destination of the supporters being limited to the patentee and the heirs-male of his body." These arms were recorded in the register.

This was a declarator of irritancy of the entail of the estate of Hunterston, in which the pursuer averred—"Since the date of the succession to the entailed estate opening to the said Jane Hunter she has not used and borne the surname of Hunter, nor has her said husband assumed the same surname, in terms of the said deed of entail Further, neither she nor her said husband bears the arms of Hunter of Hunterston in terms of the said entail. They bear a coat-armorial which is not, nor does it quarter, the arms of the family of Hunter of Hunterston as existing at and prior to the said contract of marriage, and particularly matriculated as above mentioned in 1810 as those of the family of Hunter of Hunterston. The pursuer believes and avers that the defender by unwarrantably representing the alleged arms obtained in 1865 to be the arms of the family, and by the exhibition of an isolated clause of the deed of entail of 1810, obtained an order or deliverance of the College of Arms in England as to his as-

suming a particular surname and arms, which, however, is not effectual in Scotland, and does not affect the construction of the deed of entail. In terms of the provisions of the said disposition and deed of entail, it is incumbent on the defenders to assume, use, bear, and constantly retain the surname of the family of Hunter of Hunterston, and also the arms of Hunterston as under the patent of 1810, and referred to in the deed of entail. By their failure to do so they have contravened the entail, and have incurred the forfeiture thereby imposed in that event, and the pursuer has raised the present action for the purpose of vindicating the name and position of the family."

The defenders averred that "the said arms thus duly recorded (*i.e.*, in 1865) are the coat armorial of the family of Hunterston, and in accordance with the laws of Scotland none other can lawfully be borne as the arms of that family than those recorded in the Lyon Office. The said arms were borne by Robert Hunter of Hunterston down to his death, and they and none other have been known and used by him and his family since the date of the said patent. On the defender Mrs Hunter-Weston succeeding (at the death of the said Robert Hunter) to the estate of Hunterston, her husband, Lieutenant-Colonel Gould Weston, bearing her Majesty's commission, and desiring to fulfil in the most full and formal manner the conditions of the entail, obtained, as an Englishman, through the College of Arms in England, the royal license to assume and use the surname of Hunter and the coat armorial of the family of Hunterston in addition to his own, the surname being prefixed and the arms quartered in the second quarter. In obedience to the royal commands, the Garter-King-of-Arms forwarded to the Lyon-King-of-Arms a certificate that the right of Lieutenant-Colonel Weston to bear arms was recognised in the College-of-Arms in England, and the Lyon-King-of-Arms transmitted to the Garter-King-of-Arms an exemplification of the coat armorial of the family of Hunterston. Due record of the quartered arms was made in the College-of-Arms and in the Lyon Office, and patents were issued therefrom in favour of Lieutenant-Colonel Hunter-Weston, and of his wife Jane Hunter-Weston, the Hunter coat being the ancient and true coat restored to the late Robert Hunter and his descendants in 1865 as aforesaid. The defenders thus took the due and appropriate steps incumbent upon them, and they could not lawfully have borne any other arms as the coat armorial of the family of Hunterston."

The pursuer pleaded—"(1) The pursuer as a substitute heir of entail, and only surviving daughter of the entailer, is entitled to have decree in terms of the conclusions, in respect that (1st) the surname of Hunter, and (2d) the arms and coat armorial of the family of Hunterston, have not been assumed, used, borne, and constantly retained, and are not now used, borne, and retained by the defenders. (3) The defenders are not entitled to found upon the proceedings in 1865 as regulating the matter, in respect that those proceedings did not revoke, and could not lawfully revoke, the proceedings of 1810 or affect the judgment obtained thereon. (4) The defenders are bound to use and bear the arms contained in the patent of 1810, in respect (1st) that they are and have been from time immemorial the true and ancient arms of the family of Hunter of Hunterston; (2d) that they are the arms exemplified and registered by the entailer immediately prior to the execution of the entail, and to which the entail bears reference; and (3d) that they are the arms used, borne, and constantly retained by the entailer and his successors in the entailed estates for upwards of forty years, following upon a judgment of the Lord Lyon."

The defender pleaded—"(2) The defender Lieutenant-Colonel Hunter-Weston having assumed, and both of the defenders using and bearing, the surname of Hunter and coat armorial of the family of Hunterston, decree of absolvitor should be pronounced. (3) *Separatim*, The Lord Lyon-King-at-Arms has sole and exclusive right to determine what is the coat armorial of the family of Hunterston, and the defenders bearing the arms recorded as such in the Lyon Office, they are therefore entitled to absolvitor *de plano* from the action so far as founded on the arms borne by them."

The Lord Ordinary (ADAM) assoilzied the defenders, and added the following note:—"The question in this case is whether the defenders Colonel and Mrs Hunter-Weston of Hunterston now use, bear, and retain the surname of Hunter and coat armorial of the family of Hunterston. If they do not, then it is alleged by the pursuer that Mrs Hunter-Weston has contravened the entail under which she holds the lands and estate of Hunterston, and has forfeited her right to the estate.

"It appears to the Lord Ord'nary that the facts are sufficiently admitted or proved to enable him to dispose of the case without further inquiry.

"By the deed of entail dated 2d April 1810, and recorded in the Register of Tailzies 22d February 1838, under which Mrs Hunter-Weston holds the estate of Hunterston, Robert Caldwell Hunter and Mrs Eleonora Hunter of Hunterston, his spouse, dispone the said estate to Robert Hunter, their eldest son, and the heirs whatsoever of his body, whom failing to the other heirs therein mentioned, of whom the pursuer (who is a daughter of the entailers) is one. The estate is disponed, *inter alia*, under the condition that 'the said Robert Hunter, our eldest son, and the whole heirs aforesaid succeeding to the lands and others before specified, shall be obliged to use, bear, and constantly retain, in all time coming after their succession, the surname of Hunter and coat armorial of the family of Hunterston; and the husbands of all the female heirs succeeding to the estate shall also be obliged to assume, use, bear, and constantly retain the same surname and arms.' This condition is fenced by irritant and resolutive clauses.

"The entailer Robert Caldwell Hunter died in August 1826, when he was succeeded by his eldest son, the said Robert Hunter.

"Robert Hunter died in March 1880, and was succeeded in the said estate by his elder daughter Mrs Hunter-Weston.

"The first question is, whether the defenders, by using the name or names of Hunter-Weston, have contravened the before-recited condition of the entail. It will be observed that it is not thereby provided that the heirs succeeding shall use the surname of Hunter only, nor are there any equivalent expressions. It appears to the Lord Ordinary that the defenders do in point of

fact use the surname of Hunter. They do not the less use that surname because they use along with it another surname—that of Weston—which they are not in any way prohibited from using. The Lord Ordinary is of opinion that as there are no words in the entail restricting the defenders to the use of the surname of Hunter only, they are entitled to use in conjunction with it the surname of Weston, and have not therefore in this respect contravened the entail. (Bell's Lectures on Conveyancing, 1017.)

"As regards the use of the 'coat armorial' of the family, the facts would appear to be that in May 1796 the said Robert Caldwell Hunter, then Robert Caldwell, married Eleonora Hunter, the heiress of the estate. By antenuptial contract of marriage she disponed the estate to him and herself in conjunct fee and liferent for her own liferent use allenarly, and to the heirs of their marriage, under the provision that the said Robert Caldwell and the heirs therein substituted should, when the succession devolved upon them, bear and constantly use the name of Hunter and the arms of Hunter of Hunterston.

"Robert Caldwell thereupon assumed the name of Robert Caldwell Hunter, but it does not appear what coat armorial he used prior to 1810. On the 31st March 1810, a few days before the execution of the entail, he matriculated in the Lyon Office, and obtained a patent in his favour of the arms of Hunter of Hunterston, blazoned (as it is called) as set forth in the fourth article of the condescendence.

"These arms were duly registered in conformity with the Act 1672, and are maintained by the pursuer to be the true and ancient arms of the family which the defenders are bound to use.

"These arms were used by Robert Caldwell Hunter till his death in 1826, and by his son Robert Hunter, who then succeeded him till 1865. It appears, however, to have then occurred to Robert Hunter that a mistake had been made in 1810—that the arms granted at that time were not the true and ancient arms of the family, and that he was entitled to different and, as it would appear, more honourable arms; and he presented a petition to the Lord Lyon praying that the ancient and veritable arms of Hunter of Hunterston might be ratified, maintained, and confirmed to him and his heirs after him. The result was that a new patent of arms was issued and granted to him, which are described in the defenders' statement as being the original arms of the family. Even to an uninstructed eye this 'coat armorial' is quite different from the coat armorial granted in 1810, and it has, in addition, the distinction of supporters.

"These arms were borne by Robert Hunter till his death in 1880. Mrs Hunter-Weston then succeeded, and came under the obligation of using the coat armorial of Hunter of Hunterston.

"Colonel Weston being an Englishman, thereupon applied for and obtained, through the College of Arms in England, the royal licence to assume and use the surname of Hunter and the coat armorial of the family of Hunter of Hunterston in addition to his own, the surname being prefixed and the arms quartered in the second quarter. The Garter-King-of-Arms was then put in motion, and he applied to the Lyon King-at-Arms for an exemplification of the coat armorial of the family of Hunter of Hunterston, that it might be duly quartered on the new arms. The Lyon King transmitted to the Garter King an exemplification of the coat according to the patent of 1865. The quartered arms with these arms duly quartered were recorded both in the College of Arms and in the Lyon Office, and patents thereof were issued to the defenders. These are the arms which they now use, and to which the pursuer objects.

"The Lord Ordinary is of opinion that the defenders took the proper and appropriate course in order to have it ascertained and determined what arms they ought to use in compliance with the deed of entail. They applied to the authorities duly constituted and empowered to regulate such matters, and it is under the authority of the Lord Lyon that they use the arms which they now use as being the coat armorial of the Hunters of Hunterston. These arms were used by Mrs Hunter-Weston's immediate predecessor for fifteen years before she succeeded to the estate. They had been duly recorded in the Lyon Office, and issued to him as the ancient and veritable arms of the family, and the Lord Ordinary cannot see that Mrs Hunter-Weston is contravening the entail in continuing to use them. The Lord Lyon may have been in error in issuing the patent of 1865.

"The Lord Ordinary asked the counsel for the pursuer whether she proposed to take any steps to have that patent set aside, either by reduction or by proceedings before the court of the Lord Lyon or otherwise, but it was stated that she did not propose to take any such steps. But the patent was issued as the result of proceedings *ex facie* competent before a competent court, and cannot be questioned in this action.

"It was further maintained that the deed of entail had reference to the grant of arms of 1810, which was registered a few days before the entail was executed. The entail, however, bears no reference to this particular grant, but merely ordains the use of the coat armorial of Hunter of Hunterston, whatever that may be.

"On the whole matter, therefore, the Lord Ordinary is of opinion that the defenders are entitled to be assoilzied. The Lord Ordinary was referred to the cases of *M'Donell* v. *Macdonald*, Jan. 20, 1826, 4 S. 371; and *Cuninghame* v. *Cunyngham*, June 13, 1849, 11 D. 1139."

The pursuers reclaimed, and argued — The principles of malignant construction usually urged against pursuers of a declarator of irritancy of an entail did not apply here. The fair intention of the entailer was what ought to rule, and according to his intention the defenders were bound to use the name of Hunter alone, and also the Hunter arms as the entailer himself used them from 1810 onwards. These were the true Hunter arms, these in the patent of 1865 being erroneous—Nisbet's Heraldry, vol. i., p. 325. Further, to quarter the Hunter arms with the Weston arms was a contravention of the entail. At all events, the Hunter name and coat ought to have the place of honour, which had not been given here. A husband and wife ought to impale not quarter.

Replied for the defender—The ordinary principles of construction applied here, and the meaning of the deed was clear. There were no restrictive words. If it was intended to impugn the patent of 1865, that, if competent at all,

could not be done by way of exception. There must be a reduction or an advocation. To adopt any other arms than those authorised by the Lyon King would subject the party to the penalties of the Act 1672, cap. 21.

Authorities—*M'Donell* v. *Macdonald*, Jan. 20, 1826, 4 S. 371; *Cuninghame* v. *Cunyngham*, June 13, 1849, 11 D. 1139; Sir George Mackenzie's Science of Heraldry, p. 80; Bell's Conveyancing (2d ed.), p. 1017.

The Lords made avizandum.

At advising—

LORD PRESIDENT—This is a declarator of irritancy presented by one of the heirs of entail of the estate of Hunterstoun, and it proposes to enforce the irritancy against Mrs Hunter-Weston and her husband, she having succeeded her father as heiress of entail in 1880. The complaint is that the defenders have contravened the conditions of the entail regarding the name and the armorial bearings of the Hunterston family. The provision in the deed of entail is, that "the whole heirs aforesaid succeeding to the lands and others above specified shall be obliged to use, bear, and constantly retain in all time coming after their succession the surname of Hunter and coat armorial of the family of Hunterston; and the husbands of all the female heirs succeeding to the said estate shall also be obliged to assume, use, bear, and constantly retain the same surname and arms."

Now, the questions as to the adoption of the name of Hunter and the wearing of the coat armorial of the family are somewhat different. In the first place, as regards the name, when an entailer directs that his heirs of entail shall use and bear a certain surname, that may be understood in different senses according to the circumstances of the case. The name may be assumed by the heir as his only surname, or it may be assumed in addition to another name, putting the assumed name last, or finally it may be assumed along with one or more surnames putting these in some order in which the assumed name shall not be the last. But it rather appears to me that all these cases will fall under the general category of cases in which surnames are assumed. The question is, whether the entailer has required more than that the name of Hunter shall be assumed, there being no further or more precise condition inserted in the deed, and the whole words of it being that the heir "shall be obliged to use, bear, and constantly retain . . . . the surname of Hunter." It appears to me to be clear that that condition is sufficiently complied with if the name be assumed in any of the ways to which I have referred, and therefore as regards that part of the complaint I think it is entirely unfounded.

As regards the other part of the case which deals with the coat armorial of the family of Hunterston, there are other considerations which require to be dealt with. The complaint of the pursuer is that the coat of arms now adopted by the defenders is not the proper coat of the Hunterston family. She says that the coat of arms which the Hunterston family now bear was assigned to Mrs Hunter-Weston's father by the Lyon King in 1865, but that the Lyon King was misinformed and misled by the heir of entail who asked to have the coat assigned. That is not a very intelligible statement, because I think it must be taken for granted that the Lyon-King-at-Arms knows more about coats of arms than any other person, whether the heir of entail himself or anyone else. He is the proper officer for the purpose, and by his judgment and authority anyone who bears the coat armorial is bound. And I know of no authority for taking to another Court, and bringing up as a side issue, the decision arrived at on such a point by the Lyon King, without having in the first place had recourse to the regular proceedings by which such a decision can be reviewed.

There have been cases in which the judgment of the Lyon King has been brought under review by advocation or reduction, and if a party has a proper interest he will be entitled to be heard upon the merits on such a matter. But to disregard as unimportant the judgment which was pronounced upon this matter in 1865 is unprecedented, and I do not see how any judgment could be pronounced by this Court which could effect the pursuer's purpose without at the same time involving a reversal of the decree of 1875, and without determining what in truth are the proper insignia of the Hunter coat armorial. As the matter now stands, no heir is entitled to use any other coat armorial than that settled by the decree of 1865, and if he did he would render himself liable to the penalties specified in the Act of 1672. It would be a strong thing if we were to direct this heir of entail to revert to the coat armorial which was borne by the family previously to 1865, and were thus impliedly to subject him to the penalties imposed by the Act of 1672 as a condition of his holding this estate. Yet that is what the contention of the pursuer amounts to. As the case stands, I think it must be assumed by the Court that the true coat armorial of the Hunterston family is that conferred by the patent of 1865.

But it is further said that when Mrs Hunter-Weston succeeded to the estate in 1880 there was what may be called a tampering with the coat armorial of the defenders, and that by the fact that the coat armorial of the Hunter family was quartered with the coat armorial of the Weston family, and that thus there has been a contravention of the entail. That contention is not raised upon record, which is one objection to it. But I am unwilling to give it no further answer, because I am very clearly of opinion that Colonel and Mrs Hunter-Weston could do nothing more than what they did, and that what they did they did rightly. We are told that in 1880, when Mrs Hunter-Weston succeeded to the estate, her husband, desirous of fulfilling "in the most full and formal manner the conditions of the entail, obtained, as an Englishman, through the College of Arms in England, the royal licence to assume and use the surname of Hunter and the coat armorial of the family of Hunterston in addition to his own, the surname being prefixed and the arms quartered in the second quarter. In obedience to the royal commands, the Garter-King-of-Arms forwarded to the Lyon-King-of-Arms a certificate that the right of Lieutenant-Colonel Weston to bear arms was recognised in the College of Arms in England, and the Lyon-King-at-Arms transmitted to the Garter-King-of-Arms an exemplification of the coat armorial of the family of Hunterston. Due record of the

quartered arms was made in the College of Arms and in the Lyon office, and patents were issued therefrom in favour of Lieutenant-Colonel Hunter-Weston and of his wife." It is said that in order to comply with the terms of the clause of entail it is not enough to use the Hunter arms quartered along with the arms of another family, but that the arms of Hunter of Hunterston must be used alone in order to satisfy these terms. That is a matter upon which one wishes to have authority, and the only authority which has been quoted is a very direct and conclusive one against the pursuer. Sir George Mackenzie (Science of Heraldry, chap. xxiv.) says—"The learndest *Antiquaries* and *Lawiers* (who call quartering *cumulatio armorum*) do observe that the quartering of coats did proceed at first from the vanity of Kings and Princes, who added the arms of the conquired or acquired kingdoms to these which they bore formerly . . . . and they conclude that when a person leaves his estate to another, upon condition that he shall bear the disponer's name and arms, he who is to succeed is not by condition obliged to lay aside his own name and arms, but may quarter his own arms with these of the disponer, except the disponer do in the institution prohibit the bearing of any arms beside his own . . . . and the heir in marshalling his own and the disponer's arms may use what order he pleases, by giving the first quarter either to his own or to the disponer's, except the contrary be exprest in the institution . . . . upon which condition Piercy got the estate of the Lucies in England." No doubt that quotation is applicable to the case of a person succeeding in his own name to an estate destined to him under such a condition. In the present case we are dealing with an heiress of entail and her husband. According to the contention of the pursuer, this paragraph from Sir George Mackenzie's work which I have just read is not applicable to the present case. Her counsel says that it is the paragraph which follows which ought to regulate the present case, and that when a man assumes the arms of his wife the way to emblazon the shield is to impale and not to quarter the arms of the two families. Now, it would be rather a remarkable conclusion if the Court were to hold that upon such a matter the Garter-King-of-Arms and the Lyon-King are wrong, and they must be wrong if the contention of the pursuer is right. I am not disposed to impugn their authority, and on the whole matter, therefore, I am of opinion that the Lord Ordinary's interlocutor ought to be adhered to.

Lord Deas—This is an action of declarator of irritancy, and I have no doubt that the irritancy clause upon which the pursuer founds is to be construed just as stringently as in the case of any other irritancy arising under a deed of entail. It is founded upon two things. In the first place, it is said that there is a contravention of the condition which the deed imposes in regard to the assumption of the name of Hunter by the heirs of entail. I entirely agree with your Lordship that the condition may be observed either by making the surname of Hunter the only surname, or by using it as one of several surnames, and by so using it as either the first surname or the last. There is nothing in the deed of entail to show that the name of Hunter and no other surname is to be used by the heirs of entail. There is therefore an end of that argument.

In the second place, there is a condition that the heirs of entail must use the coat-armorial of the family of Hunter. As your Lordship has said, it has been found by the proper authority—the Lyon-King-at-Arms—that the coat-armorial now borne by the defenders is the correct coat-armorial of the family of Hunter of Hunterston, and the arms of Hunter of Hunterston and of the Weston family were duly quartered by the authority of the Lyon-King-of-Arms and the Garter-King-of-Arms. I do not see any ground for holding that both the Lyon-King and the Garter-King are wrong in this matter, and I agree with your Lordship that before we can give effect to the pursuer's contention, and ordain the defenders to revert to the coat-armorial which the family used prior to 1865 it will be necessary to have the patent issued in that year by the Lyon-King reduced.

Lord Mure—I have come to the same conclusion. It appears to me that in regard to the main question—what are the requirements of the provision in the deed of entail relating to the use of the name and arms of the family of Hunter of Hunterston—the words of the entail itself are very clear. The words are, in my opinion, quite insufficient to imply any obligation upon the husband to abandon his own name and to adopt that of Hunter exclusively. It is said to be implied, but when I am asked to treat this as an irritancy under an entail, there appears to me to be no ground upon which that contention can be maintained, and there is nothing which can be said to imply that the heirs of entail are to bear no other name than that of Hunter. Upon this matter the law is thus stated in the last edition of Mr Bell's Lectures on Conveyancing, p. 1017—"We have, in general, first an obligation to bear the surname, arms, and designation of the entailer. If it is intended to preserve a separate representation, the word 'only' will be added, or the words 'and no other name, arms, and designation.'" Without these restrictive words the heirs may conjoin any other surname, arms, and designation with those prescribed by the entail. The word "alone" or "only" not being found in the clause here in question, and there being no other similar words of limitation, I think that the pursuer must fail in this ground of action.

As regards the armorial bearings, it appears to me that there is nothing to prevent the defenders from using those which have been sanctioned by the Lyon-King-of-Arms and the Garter-King-of-Arms. I do not think that we can here call in question the decision of these authorities.

Lord Shand—I am of the same opinion.

The Lords adhered.

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Counsel for Defenders—Lord Advocate (Balfour, Q.C.)—Solicitor-General (Asher, Q.C.)—J. P. B. Robertson. Agents—Thomson, Dickson, & Shaw, W.S.