he shall have realised his security, shall previously to being allowed to prove a vote state in his proof the particulars of his security and the value at which he assesses the same, and he shall be deemed to be a creditor only in respect of the balance due to him after deducting such assessed value of the security." In the case of *Brett* the question arose whether goods accompanied by bills of lading, and sent home to an agent in this country for sale, were the property of the home-agent who obtained advances from the Bank. The Registrar held that they were not, but the Lords Justices held that they were, in the sense of the rule I have mentioned. This, I think, is a direct authority.

The Court adhered.

Counsel for Appellant—Kinnear—Mackintosh. Agents—Mackenzie & Kermack, W.S.

Counsel for Respondents—Asher—Robertson. Agents—Maclachlan & Rodger, W.S.

Friday, March 16.

FIRST DIVISION.

[Lord Craighill, Ordinary.

THE EARL OF BREADALBANE *v.* JAMIESON (MARQUIS OF BREADALBANE'S JUDICIAL FACTOR).

Entail—Statute, Montgomery Act (10 *Geo. III. cap.* 51)—*Heir and Executor—Liabilities of Heir and Executor to complete Montgomery Improvements in process of execution at Heir's death.*

B., who was heir in possession of an entailed estate, died when in course of executing Montgomery Improvements upon a mansion-house constituting part of the entailed estate, in accordance with plans and specifications previously obtained. Part of the old house was pulled down for that purpose. After his death a succeeding heir of entail brought an action against the judicial factor on B.'s trust-estate, for declarator (1) that the judicial factor was bound to complete the buildings according to the plans, or at least (2) to restore to the ground a building equal to the old house as it stood before the operations were begun.—*Held* (*diss.* Lord Deas) that as B. had acted in all respects within his powers, and had not contravened the prohibitions or conditions of the entail, the action fell to be dismissed, there being no obligation and no liability between an heir of entail in possession and the succeeding heirs which does not arise out of the fetters of the entail.

The late Marquis of Breadalbane, who died upon 8th November 1862, was heir of entail in possession, under a deed of strict entail dated 5th May 1775, of the lands of Breadalbane in Perthshire, and of Netherlorne and Glenorchy in Argyleshire. Taymouth Castle was the mansion-house on the Perthshire part of the property, and the principal residence of the family; but there was also a mansion-house known as Ardmaddy Castle on the Netherlorne property. It existed prior to the year 1834, when the Marquis succeeded to the property, and was an integral part of the entailed estate, and subject to the provisions and fetters of the entail.

Shortly after the Marquis succeeded as heir of entail, in 1834, he had certain repairs and additions made upon the mansion-house of Ardmaddy, and offices were built. During the period between Martinmas 1837 and Martinmas 1839 a sum of £3275, 3s. 7d. was expended. Of that sum £2456, 7s. 8¼d., being three-fourths, was constituted a burden upon the estate by decree of Court, upon the footing that the operations were improvements to the entailed estate under the Act 10 Geo. III. cap. 51. Plans were subsequently obtained by the Marquis from Mr Gillespie Graham, architect in Edinburgh, in furtherance of a resolution the Marquis had formed to pull down a large portion of the old house and to rebuild and reconstruct it. These were not acted upon at the time, but in May 1862 they were laid before Mr Robert Baldie, architect, Glasgow, who prepared additional sketches or plans, with the view of realising the Marquis' intention to rebuild. Schedules of measurement of the different kinds of work, under reference to these plans, were then prepared, with which tradesmen desirous of offering for the execution of the work were furnished; and under that system contracts were entered into for partially taking down the mansion-house and reconstructing it according to Mr Baldie's plans. After the contracts were entered into, further changes were made upon the plans under advice of Mr Bryce, architect, and in accordance with these the rebuilding and restoration proceeded.

The operations were only in course of being executed when the Marquis died. upon the 8th November 1862, and shortly after his death a correspondence took place between the succeeding heir of entail and the Marquis' trustees as to the respective rights and obligations of parties. The trustees ordered that certain of the works in progress should be completed, that the walls should be finished, and a roof put on a portion of the building which was without protection.

This was an action at the instance of Gavin Campbell, Earl of Breadalbane, the second heir of entail in possession since the death of the Marquis, against George Auldjo Jamieson, C.A., Edinburgh, judicial factor upon the Marquis' trust-estate. The summons concluded, *inter alia*, for declarator "(1) that the defender is bound to erect and construct or to complete the erection and construction of the mansion-house of Ardmaddy conform to the plans prepared by Robert Baldie, as the same were altered and adjusted by James Bryce and approved of and settled by the said Marquess of Breadalbane; (4) that the defender, as judicial factor foresaid, is bound to erect and construct a mansion-house on the said entailed lands of Netherlorne, suitable for the said estate, and of such form, structure, and dimensions as our said Lords may fix and determine, and being at least equal in point of size, accommodation, architectural style, arrangement and construction, to the mansion-house on the said estate before it was taken down or dismantled by the said Marquess of Breadalbane in or about 1862; (7) that the defender, as judicial factor foresaid, is bound to restore the said mansion-house of Ardmaddy to the same state or condition as that

in which it was at or immediately prior to the date at which it was taken down and dismantled by the said Marquess of Breadalbane, in or about 1862; (10) that the materials furnished by the contractors or one or other of them under the contract or contracts entered into by the said Marquess of Breadalbane for the rebuilding or restoration of the said mansion-house of Ardmaddy as hereinafter condescended on, which were on the ground of the said entailed lands of Netherlorne in the course of or about the month of February 1863, were heritable, and belonged to the late John Alexander Gavin, Earl of Breadalbane and Holland, the pursuer's father, then heir of entail in possession of the said entailed lands and estates, and that the cost or value thereof at the present current prices for supplying similar materials is now due and belongs to the pursuer as the heir of entail now in possession of the said entailed lands and estates."

The pursuers stated—"Not merely was the said entailed estate not improved by the said operations, but in consequence of the dilapidated and uninhabitable condition in which the mansion-house of Ardmaddy was left by the late Marquess at his death, great injury was done to the entailed estate, and both the late Earl of Breadalbane and the pursuer have thereby suffered serious inconvenience, discomfort, and loss." The Marquis' trustees had refused to proceed with the re-erection of the house in terms of the plans, or to restore the building "to the state and condition in which it was previous to any interference with its fabric by the Marquis." Hence the action had been raised.

The defenders averred, *inter alia*, "that the whole acts and proceedings of the said Marquess with respect to the said mansion-house of Ardmaddy were done and taken within his powers as heir of entail in possession of the said estate, and in particular within the powers conferred by the Montgomery Act. Prior to his said operations upon the said mansion-house the said Marquess had made very extensive alterations and improvements upon and additions to the offices at Ardmaddy, whereby the value of the same was greatly enhanced, and the estate and the subsequent heirs greatly benefited. The whole acts of the said Marquess with respect to the mansion-house itself were also done by the said Marquess in *bona fide*, and within his powers as aforesaid, for the purpose of improving the said estate, and even when the said operations were interrupted by his death the value of the building and other work which had then been performed by him greatly exceeded the value of the buildings which existed before the said operations began, and the entailed estate and the subsequent heirs, including the pursuer, were in fact benefited by what was actually done."

The defenders pleaded—"(1) The pursuer's statements are not relevant or sufficient in law to support any of the conclusions of the summons. (2) The pursuer's whole material statements being unfounded in fact, the defender ought to be assoilzied. (3) The whole acts and proceedings of the said Marquess with respect to the mansion-house in question having been done and taken in *bona fide*, and within his powers as heir of entail, and having been unavoidably interrupted by his death, the pursuer is not entitled to prevail in any of the conclusions of the summons. (4) The pursuer cannot in any view obtain decree as concluded for, in respect that the building and other work performed by the said Marquess upon the said mansion-house prior to his death exceeded the value of any buildings removed or dismantled by him, and that the estate and the subsequent heirs, including the pursuer, were benefited by what he did."

A disentail of the estates in Netherlorne was carried through after this action was raised. The petition for authority to record the instrument of disentail was boxed on the 17th April 1872.

The Lord Ordinary (MURE) on 18th June 1873 allowed parties a proof of their averments "applicable to the accommodation and condition of the mansion-house of Ardmaddy and offices thereto attached at the time when the late Marquess of Breadalbane proceeded to take down a portion of it with a view to its reconstruction, and of the condition and available accommodation of the said mansion-house as altered and partly rebuilt at the date of the death of the late Marquess, and to each a conjunct probation."

The proof was afterwards made more general, in terms of a joint minute by the parties. It was led upon 2d June 1876, and the purport of it sufficiently appears from the Lord Ordinary's note and the opinions of the Court.

The Lord Ordinary pronounced the following interlocutor:—"Finds as matters of fact—(1) That the late John second Marquis of Breadalbane was, in 1862, when the operations on the house of Ardmaddy which are referred to in the record were performed, the heir of entail in possession of the estates of the family of Breadalbane; (2) that the said house was, and for long had been, the only mansion-house on their Argyllshire property; (3) that the extent of this property is about 180,000 acres, and the rental about £23,000 per annum; (4) that the said house, though an old house, was perfectly habitable in 1862, and if repaired from time to time as repairs became necessary, might have continued habitable for many years, but though habitable it was by reason of the fewness of its rooms and the consequent insufficiency of its accommodation not suitable as a residence for the heir in possession of so great a property as the Breadalbane estates in the county of Argyll; (5) that the said Marquis having, under the influence of this consideration, resolved on the erection of a new mansion upon the site of the old house, plans were prepared, and these having been approved of by his Lordship, there were begun in June 1862 the operations which were in progress at his death in the following November; (6) that in the course of these operations the greater part of the old building was taken down, and though the work had been carried on without interruption by the several tradesmen with whom the contracts for the new mansion-house were concluded, the buildings could not, when his Lordship died, be inhabited, and much money must be expended before a habitable house either upon the plans of the new buildings or on the plans of the old—which had, as aforesaid, been in great part removed—can be provided; (7) that the said building, of which the erection was in progress when, as aforesaid, John the second Marquis of Breadalbane died, would, if completed, be in all respects a suitable mansion-house for the heir of entail in possession of the Breadalbane estates in the county of Argyll;

and (8) that the materials brought by the contractors to the ground, and not used in the said building when the Marquis died, were not his property, but were the property of the several contractors by whom these were provided for the work of their respective contracts: In the second place, Finds as matter of law that, the facts being as above set forth, the grounds of the present action are untenable, and that consequently the defender is entitled to be assoilzied; therefore sustains the defences; assoilzies the defender from the haill conclusions of the summons, and decerns, &c.

"*Note.*—The late John second Marquis of Breadalbane was in 1862 the heir in possession of the entailed estates of the family. These estates consist in part of the Perthshire estates and in part of the Argyllshire estates. With the former parties have no concern in the present action. The latter are those to which the inquiry has been directed, and to which the law applicable to the case has to be applied. They are, as mentioned in the interlocutor, 180,000 acres in extent, and their yearly rent is £23,000.

"There was for many years on the Argyllshire estates a residence for the proprietor, known as the House of Ardmaddy. It had been but little used in recent times, and the late Marquis, who appears to have visited it more frequently than his predecessors, lived there for only a short period at a time, and went without what may be called an establishment. The truth is that the house was not such as was suited for the reception of such an establishment as the Marquis, had Ardmaddy been one of his ordinary residences, might have been expected to bring with him, and it was even more unsuited for the reception of visitors. Apart from insufficiency of size, the house appears to have been in no way objectionable. It was old, but if repaired when repairs were required it might have continued habitable for many years to come. The Marquis, however, in 1862 resolved to erect what substantially was a new residence on the site of the old. Plans were procured from Mr Baldie, architect in Glasgow; these were approved of by his Lordship, and in June 1862 the work was begun. The west wing of the old house and the passage connecting the two wings were taken down, and the east wing was unroofed that it might be enlarged. As soon as the ground was cleared the rebuilding of the west wing was begun; but soon after this Mr Baldie's plans were submitted to the late Mr Bryce, and changes upon these, intended to provide for the introduction of more ornament, as well as more accommodation, were suggested by Mr Bryce. The original plans thus altered were approved of by the Marquis of Breadalbane, and thenceforward upon these, so long as his Lordship lived, the work was carried forward. But he died in November 1862, while the house was not only unfinished but uninhabitable. His testamentary trustees in the course of the following winter, while repudiating any obligation to do anything, caused the building to be roofed in, to prevent injury, or, it may be said, ruin to the structure, and from that time to the present things have remained as they were then left.

"It is necessary to add, however, that the several contractors for the work had brought materials to the ground which, when the Marquis died, had not been incorporated in the building, the work contracted for not having been completed. The claims of the contractors were compromised. They, in the first place, were allowed a percentage on all the work included in their contracts; they were also paid for the materials whether used or unused, and such as were unused were resold to them by the trustees of the Marquis.

"In these circumstances the present action has been raised by the present Earl of Breadalbane to compel the trustees of the Marquis (1) to finish the erection of the House of Ardmaddy upon the plans of Mr Baldie as extended by Mr Bryce; or (2) to complete the buildings according to the plans of Mr Baldie; or (3) to restore to the ground a building equal to the old house as it stood at the time the late Marquis began his operations. There is, besides, a conclusion alternative to all these, in which decree is sought for the value of the materials upon the ground still unused when the Marquis died. The Lord Ordinary has assoilzied the defender from all these conclusions.

"The House of Ardmaddy was a part of the entailed estate, but there are in the entail no special provisions by which its existence or its maintenance was fenced. The heir in possession for the time might, without a violation of any condition, express or implied, have left it to fall into ruin; nevertheless it was a part of the entailed estate, and he was not entitled to make spoil of it for his own benefit, and to the loss of those by whom he was to be succeeded. This is a point which was fixed by or was involved in all the cases cited by the pursuer. These are *Boyd* v. *Boyd*, 8 Macph. 637; *Gordon* v. *Gordon*, May 24, 1811, F.C.; and *Moir* v. *Graham*, 4 Sh. 737 (N.E.) And the Lord Ordinary does not consider that anything besides which has any bearing upon the present controversy was settled by any of these decisions. What is the subject of judgment on the present occasion is, in his opinion, a thing which is as much on the one side as on the other unforeclosed.

"The question therefore which has now to be decided for the first time is, whether an heir of entail, who finds the house on the estate unsuitable for the property because it is unsuitable for his occupation in consequence of the insufficiency of its accommodation; who for that reason resolves to replace it by what shall be a suitable residence; who removes it that it may be so replaced; who has shown by his expenditure upon the work the good faith in which it was commenced, and so long as he lived was carried on; but who dies before the building is completed—transmits against his personal representatives an obligation to finish the structure as designed, or at anyrate to restore a building equal to what was on the ground when his operations were commenced? The Lord Ordinary is at a loss to understand upon what principle this contention could be sustained. An heir of entail, so far as unfettered, is full fiar. He is entitled to carry on the reasonable administration of the estate without incurring a penalty for so doing, and the question as to the unsuitability of an existing house, and the propriety or necessity of its being replaced by another, is one of the things upon which he may and indeed ought to decide. How far is the contention of the pursuer to be carried? Must every work that an heir begins be finished by his personal representatives if uncompleted at his death? Suppose that he has

resolved upon the formation of a pond in his park, and while a portion of the estate has been rendered unfit for ordinary use, there is much cost to be incurred before what was intended can be accomplished; or that an old bridge too narrow for convenient use is removed and the new bridge by which it is to be replaced is left unfinished; or that the steading of the home-farm is unfit for modern requirements, and the new one by which an improvement was to be effected upon the property is only partially constructed. In these, or in any of these cases, which are only examples, is there a personal liability undertaken for the completion of the new work, or otherwise for the restoration of things to their original condition? The Lord Ordinary cannot come to this conclusion. In his opinion there is principle as well as policy against such a result, and, so far as he is aware, there is neither legal principle nor a decision by which it is sanctioned. The hardship inseparable from the opposite view, it is scarcely necessary to add, is all the greater that the representatives of a deceased heir have not the privileges of the heir conferred by the Montgomery Act. If they are to finish a mansion-house in the course of construction, the *whole* cost must be borne by them. None of it can be charged upon the entailed estate.

"These are the considerations upon which the foregoing judgment has been pronounced.

"Had the pursuer contended that the old house was suitable or that the new house in course of erection was unsuitable, a different issue would have been raised. But neither of these points is matter of contention. The fact that the primary conclusion of the summons is for the constitution of an obligation against the trustees of the late Marquis, under which they are to be forced to complete the new building begun by his Lordship, contains an implication inconsistent with both.

"As regards the materials upon the ground, the case appears to the Lord Ordinary to be plain. These were not the property of the late Marquis at the time of his death. They were not brought to the ground by him, and they might without his leave have been removed from the ground. This, as the Lord Ordinary thinks, is plain upon the proof, and consequently he is unable even to conjecture a reason for which they should be declared to have become by dedication or by any other consideration a part of the entailed succession."

The pursuer reclaimed, and argued—I. The defenders were bound to complete the building according to the plans and specifications which had been obtained. That was so because (1) there was a manifestation of such a purpose on the part of the Marquis; and (2) he had entered into contracts under which he had bound himself to execute the repairs, and there was thus a legal obligation upon him. It was settled that if a person had incurred personal liability at the time of his death his executors were bound to discharge it. If one died after the execution of a contract of sale of heritage, the heir must sell, and the proceeds went to the executor. There was here a *jus quæsitum tertio*. The obligation was to rebuild, and if it was to be held that that fell by death, the succeeding heir would thereby be exposed to the risk of dilapidation. There was no obligation on the latter, and none could be put upon him except under the statute. II. The amount of the expenditure by the Marquis did not affect the claim of the pursuer to have a habitable house. The work should be completed, on the footing that the executors recovered nothing, or at most three-fourths of their expenditure. But the charge could not be constituted upon the estate after the death of the Marquis.

Authorities—Bell's Principles, 1475; *Johnson* v. *Dobie*, Feb. 25, 1783, M. 5443; *Malloch* v. *M'Lean*, Jan. 29, 1867, 5 Macph. 335; *Robson* v. *Denny*, Feb. 2, 1861, 23 D. 429; *Cooper* v. *Jarman*, Dec. 4, 1866, 3 L.J. Exch. 98; *Brotchie* v. *Stewart*, July 10, 1869, 7 Macph. 1031; *Boyd* v. *Boyd*, March 2, 1870, 8 Macph. 637; *Moir* v. *Graham*, June 20, 1826, 4 S. 730; *Todd* v. *Moncrieff*, Jan. 14, 1823, 2 S. 113, 1 W. and S. (H. of L.) 217; *Douglas' Trustees* v. *Douglas*, Jan. 17, 1868, 6 Macph. 223; *Heron* v *Espie*, June 3, 1856, 18 D. 917; *Christie*, Dec. 22, 1704, 2 Fount. 250, M. 5531, Erskine's Inst. ii., 2, 14; *Arbuthnot*, June 23, 1773, M. 5225; *Gordon* v. *Gordon*, Jan. 24, 1811, F.C.

Argued for the defenders—(1) The first ground taken by the pursuers was not tenable. It would hold equally if there had been no house in existence before, and was based upon the law of succession, which did not affect the present question. (2) The doctrine of implied obligation was foreign to entail law. The position of an heir of entail was that of a full fiar, except in so far as he was restricted by the fetters of the deed of entail. His powers of administration were large; and so long as he committed no contravention of the entail no exception could be taken by the heir. It was not said that there had been a contravention in this case. An interdict might have been asked, but only on grounds of suspicion and a reasonable apprehension of a contravention. The present action was irrelevant. (3) If there was any obligation it was that the heir of entail should not leave the estate worse for his successor. But the subject upon the evidence was more valuable now than before it was destroyed. By the disentail which had been carried out the estate was now still more valuable.

Authorities—*Eglinton* v. *Montgomerie*, Jan. 22, 1842, 4 D. 425, 2 Bell's Apps. 149; Chalmer's Note, Append. II., 4 W. and S. Apps.; *Torrance* v. *Crawford*, Dec. 1, 1820, F.C., and May 26, 1826, 2 W. and S. 429; *Morison* v. *Earl of Kintore*, June 30, 1847, 9 D. 1394; *Marquis of Huntly*, June 12, 1857, 19 D. 818.

At advising—

Lord President—I do not think it will admit of dispute that the house called Ardmaddy Castle is the proper mansion-house of the Argyleshire estates of the Breadalbane family. It is true that these Argyleshire estates are held under the same entail with the Perthshire estates, and that the estates in these two counties very nearly adjoin one another, if they are not absolutely contiguous, and that on the Perthshire estates there is a very fine and suitable mansion at Taymouth. But even supposing that the estates in Perthshire and Argyleshire were to be considered as one entailed estate, there would be nothing at all inconsistent with the ordinary rules applicable to such cases in holding that there might be two mansion-houses belonging to estates of the extent and value of those which we are considering. That I

think is quite settled in the well-known case of the *Marquis of Ailsa*, Jan. 21, 1853, 15 D. 308.

Taking it to be clear, then, that Ardmaddy Castle is the mansion-house of the Argyleshire estates, or (which is the same thing) one of the mansion-houses of the combined estates in the two counties, it follows, I think of necessity, that this house is an essential part of the entailed estate. That is settled in the case of *Gordon of Ellon*, which is reported under date 24th January 1811, in the Faculty Collection. The heir of entail in possession, therefore, is not entitled to alienate or put away the mansion-house any more than he would be entitled to alienate or put away one of the farms on the estate. He must hand down the mansion-house to his successor just as he does the entailed lands. But that obligation is not inconsistent with his altering the mansion-house in the way of improvement, or even pulling down the mansion-house with a view to rebuilding upon the same site in a manner more suitable or equally suitable to the entailed estate.

In this case the Marquis of Breadalbane, who seems to have spent some of his time in Argyleshire, living in this house of Ardmaddy Castle, was of opinion that the house was not suitable to the estate—that it was too small and inconvenient—the estates in the county of Argyle being of very large extent, about 180,000 acres, and yielding a rental of about £23,000 a-year. It was quite within his power to reconstruct this mansion-house either in the way of additions or in the way of demolition and restoration, and he was entitled to make the expense of these operations a charge upon the entailed estate to an amount not exceeding two years' free rent of the estate, under the provisions of the Montgomery Act. Now, it is not disputed that what the Marquis did was quite within his power as heir of entail in possession, and that down to the day of his death he was doing no wrong and committing no violation of the provisions or conditions of the entail. He had plans prepared for the building of the new mansion, and these plans required that a considerable portion of the old house should be pulled down. This was done, and without any delay or interruption the work of reconstruction proceeded from the date at which it began down to the date of the Marquis' death in 1862. The operation of rebuilding and completing the mansion-house had not been finished at the time of the Marquis' death, indeed it had not proceeded so far as to substitute for the old house another inhabitable house, but a good deal of money had been spent, more than the value of the old house, and a good deal more was intended to be spent if the Marquis had lived. It is quite obvious therefore that in doing what he did the Marquis of Breadalbane was exercising his undoubted right as heir in possession of this estate. He was not violating any of the prohibitions of the entail, but he was doing what any heir in possession would have been entitled to do.

He had therefore committed no wrong, and the question which is raised in this record is, Whether, in respect that he left the mansion-house unfinished at the time of his death, his executors and his general estate are liable to a pecuniary claim of an amount requisite to finish and complete that mansion, or at least to proceed so far with its completion as to make it a habitable dwelling for the heir who has succeeded? It appears to me that this raises a question of very great importance in the law of entail. It is in some respects a new question, but I think it is to be solved by a reference to principles which are very well established. It is trite law to say that an heir of entail in possession is absolutely free as fiar of the estate, except in so far as he is expressly limited by the prohibitions and conditions of the entail, but it is quite necessary to start with that general prohibition, because it is the foundation of the law applicable to a question of this kind. If an heir of entail in possession violates one of the prohibitions of the entail, then the appropriate remedy is a declarator of contravention and irritancy, to be brought by the next or any subsequent substitute of tailzie; and I think for such a wrong done by the heir of entail in possession that is the only remedy which is provided by the law. It is the remedy provided by the Statute 1685, and by the terms of every perfect deed of entail. I think the law knows no other remedy for an act of contravention. In saying so, I am not leaving out of view that the next heir of entail may be very well entitled to interdict a threatened act of contravention. But an application for interdict is not, properly speaking, a remedy. It is a preventive proceeding—to prevent a wrong being done—and not a proceeding to give a remedy for a wrong that has been done. At all events there can be no doubt that the very existence of the right to bring a declaratbr of contravention upon the wrong being done naturally presupposes the right of the next heir or any other substitute to prohibit that act of contravention before it is done. But with the exception of a declarator of contravention or irritancy, or an interdict to prevent an act of contravention, I think there is no remedy whatever against an heir of entail in this position. On the other hand, if the heir of entail does not commit an act of contravention, but does something which is not an act of contravention, then I think it necessarily follows that he has done no wrong, and that nobody is entitled to challenge or interfere with what he has done, or to interdict it before it is done; ; in short, in respect he is not contravening any of the prohibitions or conditions of the entail, he is acting as a fee-simple proprietor might do, and is quite as free and unlimited as that fee-simple proprietor.

Now, in the present case I think it is not disputed that there was no contravention of the prohibitions or conditions of the entail. No doubt if the heir of entail in possession pulled down the mansion-house without any purpose of rebuilding it, there would be undoubtedly a contravention, as was found in the case of *Gordon*, to which I have already referred. But if he pulls down a part of the mansion-house, as he did here, or even the whole of it, for the purpose of clearing a site for a new house, which he forthwith proceeds to build, then he is doing right and not wrong; he is doing what is desirable for the benefit of the estate, and not what is a contravention of the prohibitions of the entail. No man, therefore, can stop him from doing that, and just as little can anybody bring against him an action of contravention and irritancy. Now, it seems to me that as between an heir of entail in possession and the next heir about to succeed him

there can be no obligation and no liability except that which arises out of the fetters of the entail. The heir in possession is free except in so far as fettered. The fetters are the sole protection of the heir who is next to succeed. If, therefore, the fetters cannot protect the heir next to succeed against what his predecessor has done, it seems to me to follow of necessity that the heir next to succeed can have no ground of complaint and no claim of any kind in respect of that.

It was said, no doubt, in argument that when a man pulls down the mansion-house, being the heir of entail in possession, he comes under an implied obligation to rebuild it, and that if that obligation is not fulfilled during his own lifetime his representatives must fulfil it as coming in his place. Now, I am humbly of opinion that as between an heir of entail in possession and the heir next to succeed there can be no implied obligation. A deed of entail is not to be interpreted in such a way as to extract from it any obligations by implication. It is *strictissimi juris*. If you cannot find the obligation expressed upon the face of the deed of entail it is worth nothing in entail law. And therefore the heir of entail in possession pulling down a part or the whole of the mansion-house, and proceeding to reconstruct it, is not, in my opinion, under any implied obligation. In proceeding to rebuild he is only doing that which is necessary to show that in demolishing he has not been committing an act of contravention. The interference of the next heir by a declarator of contravention and irritancy is thereby prevented, but no obligation by implication is raised, which I think is impossible in a deed of entail.

It appears to me that for an act so done, being a perfectly lawful and right act, and no contravention or violation of the entail, there can be no remedy to the next succeeding heir, and that under no circumstances, so far as I can see, can there ever arise a pecuniary claim to the heir next succeeding against the executors of the last heir in possession. It has been held in the well-known cases of *Ascog* and the *Queensberry* leases (*Stewart* v. *Fullerton*, and *Marquis of Queensberry* v. *Queensberry Executors*) and *Bruce* v. *Bruce*, all of which occurred in the House of Lords about the same time, and are reported in the 4th vol. of Wilson and Shaw, and in the more recent case of *Eglinton* v. *Montgomery*, Jan. 22, 1842, 4 D. 425—it has been held in all these cases that although a contravention may have been committed by the heir in possession, which has damaged the estate in consequence of the entail not being recorded, or in consequence of a defect in one of the prohibitions, that can only open the remedy of a declarator of contravention and irritancy, but can found no pecuniary claim whatever at the instance of the next succeeding heir against the representatives of the heir in possession. Now, surely if the next heir succeeding cannot have a claim of reparation against the executors of the party who committed the act of contravention, still less can he have any claim against the executors of an heir who committed no act of contravention, but did that which he was entitled to do as an unfettered fiar of the estate. In short, it seems to me that the principle involved in these cases is quite sufficient for the decision of the present case. I think that the principle is, that the only measure of right and liability between the heir in possession and the next succeeding heir is to be found in the express prohibitions of the entail, and that the only way in which the obligation of the heir in possession can be enforced, and the only remedy competent to the next heir or any succeeding heir, is, as I have said before, a declarator of irritancy; but beyond what is secured to the succeeding heirs by the prohibitions of the deed of entail, they have no right and no claim whatever against the heir in possession or his executors. For these reasons I entirely concur in the judgment of the Lord Ordinary.

Lord Deas—The late Marquis of Breadalbane was for a number of years prior to his death on 8th November 1862 heir of entail in possession of the Breadalbane estates, which comprehended, *inter alia*, the lands and estate of Breadalbane in the county of Perth, and the lands and estate of Netherlorne in the county of Argyle. When the Marquis succeeded there were and had long been two mansion-houses on the entailed estates,—the one being the castle of Taymouth in Perthshire, and the other the house of Ardmaddy on the Netherlorne estate in Argyleshire. The lands in both counties are understood to have been held under the same entail, but that is of no moment here, because the rental of Netherlorne alone is admittedly about £23,000 a-year, and no approximation is alleged to have been made in expenditure upon the mansion-house of Ardmaddy to the two years' rent contemplated by the statute commonly called the Montgomery Act, 10 Geo. III. cap. 51, § 28.

The late Marquis, after he succeeded, expended between Martinmas 1837 and Martinmas 1839 £3275, 3s. 7d. in repairing and improving the mansion-house of Ardmaddy and in building offices in connection with it. For £2456, 7s. 8¼d., being three-fourths of that sum, the Marquis obtained decree of constitution under the statute just mentioned on 19th July 1844.

But although the house of Ardmaddy had been thus put in full repair, the Marquis appears to have soon afterwards come to think that the accommodation it afforded was short of what it ought to be, considering the rank of those by whom it was meant to be occupied, and the extent and value of the estate. Accordingly the Marquis from time to time obtained plans for rebuilding or reconstructing the house of Ardmaddy, first from the late Mr Gillespie Graham, architect in Edinburgh, and after his death from Mr Robert Baldie, architect in Glasgow, who prepared working-contracts early in 1862, and obtained estimates for the execution thereof, amounting in whole to £5647, 0s. 9d. Thereafter the late Mr David Bryce, architect in Edinburgh, was consulted, and he suggested additions to and improvements on the plans, which increased the estimates to £7298, 11s. 3d.; and upon the footing of these increased estimates the Marquis entered into contracts with the different classes of tradesmen for taking down and re-erecting a great part of the mansion-house, and upon these contracts the work of demolition and re-erection was commenced in June 1862. In the course of these operations it was found necessary, with a view to strength and safety, to authorise the workmen to take down considerably more of the building than had been anticipated,

and the consequence was that at the death of the Marquis, in November 1862, the greater part of the old house had been taken down, while the re-erection was only partial. The sum expended by the Marquis between the commencement of his operations on 12th June 1862 and his death on 8th November same year was £1964, 17s. 6d., and the Marquis having, so far as regarded that expenditure, complied with the requisites of the Montgomery Act, his executors obtained decree of constitution for three-fourths thereof after his death. In addition to this sum an expenditure was found necessary of £1995, 19s. 4d., which was disbursed by the executors to cover and protect the building as it stood from the effects of the weather,—leaving the house still uninhabitable. In the meantime a compromise had been made with the different contractors, and arrangements were also made about the unused materials, the particulars of which I need not enter into.

In these circumstances, and without noticing in the first instance the disentail and other procedure which took place after the death of the Marquis, the important question arises for consideration, Whether, as contended for by the Earl of Breadalbane, the Marquis laid himself under, and transmitted to his trustees and executors, an obligation either to finish the house of Ardmaddy in conformity with the contracts which he had entered into and begun to execute in his lifetime, or, at all events, (alternatively) to make the house as good and sufficient as it was before his operations for its demolition and re-erection began.

The opinion I have formed is that the Marquis did incur for himself and his executors this last or minor obligation.

But the contention of the executors is that the Marquis laid himself and his general representatives under no obligation to do anything more with reference to the mansion-house than he had done in his lifetime,—that having *bona fide* intended to restore and indeed greatly to improve the mansion-house, and having done all that time and circumstances permitted to carry out that intention, his death, while it terminated his right to the rents and beneficial enjoyment of the estate, terminated also all his duties and obligations connected therewith, and devolved them on the heir of entail who then entered into the beneficial possession.

The Lord Ordinary has given effect to this contention, basing his judgment, as appears from his note, upon the principle that "an heir of entail, so far as unfettered, is full fiar," and observing that "He is entitled to carry on the reasonable administration of the estate without incurring a penalty for so doing; and the question as to the unsuitability of an existing house, and the propriety or necessity of its being replaced by another, is one of the things which he may and indeed ought to decide."

In supplement of this view, it has been argued that the act of the Marquis in pulling down the mansion-house of Ardmaddy must either have been an act of contravention of the entail, which inferred forfeiture, or a lawful act, which inferred a mere conditional obligation, namely, to complete or restore the mansion-house if he lived and enjoyed the rents till this had been done. I am not satisfied by this reasoning.

I have not the most remote idea that the Marquis ran any risk of forfeiture, or that what he was in the course of doing could have been interdicted as unlawful. His good and generous desire in what he did, and intended doing, to support the dignity of those who were to inherit the ancient family title after him, were palpable. But I demur to the inference that because there could be neither forfeiture nor interdict there could be no obligation. The contrary indeed is involved in the very terms of the argument. The act was not struck-at by the entail. It was a lawful act. Nevertheless it admittedly implied an obligation—conditional it is true, but still an obligation—and the question consequently simply is, What was the obligation which this lawful act implied? In my opinion it was an unconditional obligation to restore the mansion-house to at least as good a condition as that in which it was before it was pulled down.

I do not dispute the doctrine that an heir of entail in possession is fiar so far as not fettered. But he is fiar only during his life. He ceases to be fiar the moment the breath is out of his body, and a new fiar comes in his place. That new fiar does not, like an heir-at-law or a *mortis causa* disponee, derive his rights from the deceased fiar. He has rights of his own, which come into instant operation, and which the deceased fiar could not touch. No personal obligations undertaken by the deceased fiar can be devolved by him upon the new fiar, either directly or indirectly. He cannot, on the one hand, impose upon the new fiar an obligation to rebuild the demolished mansion-house. Nor can he, upon the other hand, deprive the new fiar of the mansion-house which he previously had, any more than he can deprive him of any other portion of the estate. The conclusion seems irresistible,—that he must restore the demolished mansion-house at his own expense. The lawfulness of his act is no answer to the binding nature of his obligation. It was that obligation alone which made the act lawful.

The new fiar had no choice. He must either restore the mansion-house at his own expense,—which he certainly was not bound to do,—or he must do without it. According to the contention of the executors there was thus imposed by the voluntary act of the deceased fiar an obligation on the new fiar to restore the mansion-house at his own expense, under the penalty of having no habitable mansion-house on the estate. I think the deceased fiar had no more power to impose that penalty than he had to bind the new fiar in express terms to pay the expense of the restoration. It would be of no relevancy to say that the new fiar might have laid three-fourths of that expense upon the estate or succeeding heirs under the Montgomery Act. He certainly could not do so if it be his right, and consequently his duty, to the succeeding heirs to recover the amount from the general representatives of the deceased heir, which is the question now to be decided. At common law the heir in possession could not burden the next heir or the estate with the expense of any improvements whatever, which he had either made or undertaken to make on the estate. If the burden now in dispute really rests on the succeeding heir, it has not been shown how he either can or could lighten that burden under the Montgomery Act, and, indeed, any plea of that kind would be subversive of the leading argument for the executors in the case.

A clause in the building-contracts bearing to bind the next heir or the estate for the expense which might necessarily be incurred under the contracts after the contracting heir's death, would neither have enabled the contractors to recover from the next heir nor freed the executors of the contracting heir from being liable to the contractors without relief against the succeeding heir. It would be very anomalous if the contracting heir, who could not bind the next heir directly, could do so indirectly by subjecting him to the loss of a part of his estate (namely the mansion-house) if he did not take upon himself the burden of its restoration.

The accommodation which the old house of Ardmaddy afforded before it was pulled down is set forth in detail in the condescendence, and the accuracy of that statement is admitted in the answer. The parties are further agreed that, in addition to all the money expended by the late Marquis and his executors, a sum of £1500 is still required to restore the mansion-house of Ardmaddy to the condition in which it was before the Marquis commenced his operations of 1862. I think it very clear that by no act of the Marquis, however lawful, could he impose the burden of that restoration on his successor in the entailed estate. He could not have done so even if it had been the cost of meliorations for the benefit of the next heir. Far less could he do so when it is not the cost of meliorations at all, but simply the cost of replacing things as they were. I think it also clear that by no act of the Marquis, however lawful, could he impose upon his successor in the entailed estate the obligation to accept a mansion-house which required £1500 to be expended upon it, in place of a mansion-house which required no such expenditure.

I have attended to the various cases which have arisen under leases. But I think the only cases of that class which have a bearing on the present question are those which relate to liability for the expense of meliorations made under leases granted by an heir in possession and which expired after the succession had opened to the next heir. These cases seem to me to be examples of the principle on which my opinion proceeds, and I shall therefore notice some of them in the order of their dates.

In the case of *Dillon* v. *Campbell*, 14th January 1780 (M. 15,432), the lease granted by the heir in possession bore that the tenant was to be entitled at the end of the lease to the value of buildings to be erected by him during its currency. In an action against the succeeding heir at the instance of the tenant, for the value of the buildings, Lord Braxfield (Ordinary) assoilzied the defender, in respect he did not represent the granter of the lease otherwise than as heir of entail, "which entail contains the usual prohibitory, irritant, and resolutive clauses *de non alienando vel contrahendo debita.*" Against this judgment it was pleaded that—"By the improvements in question the defender enjoys an addition to his fortune and income. To that extent therefore, independently of any passive title, he must be liable, upon the principle *quod nemo debet cum aliena jactura fieri locupletior.* Nor can the Statute 1685, by which heirs of entail are prevented from selling or burdening the estate, be understood to bar claims of this equitable nature."

It was answered, in substance, that no debt could be made to affect the succeeding heir of entail which could not be also made to affect the estate, and consequently that to bind the next heir, even for improvement debts otherwise than under the Montgomery Act, would infer a contravention of the clauses of the entail against the contraction of debt, the efficacy of which could not be recognised.

The report bears—"The Lords at first, moved by the equitable nature of the pursuer's demand, found the defender liable in the prestations of the lease, but upon advising a reclaiming petition they returned to the judgment of the Lord Ordinary"—that is to say, they affirmed the principle of Lord Braxfield's interlocutor, that the heir in possession has no common law power to bind the succeeding heir for the expense of improvements, however much these may have increased the value of the estate, because this would be equivalent to contracting debt on the estate contrary to the terms of the entail.

The principle thus sanctioned by the high authority of Lord Braxfield will be found to have been carried out to its legitimate consequences under the varying circumstances of subsequent cases of leases granted in the ordinary course of administration. The obligation to reimburse the tenant for the cost of buildings to be erected by him is construed as binding the granter of the lease and his general representatives only, and not the heir of entail, because to construe it otherwise would infer a contravention of the entail.

In *Webster* v. *Farquhar*, decided in December 1789 (Bell's 8vo Cases of 1790–91, No. 7), the lease granted by Mr Thomas Farquhar, the heir in possession, in 1722, for 19 years after Michaelmas of that year, bore—"And in respect there are no houses at present upon the foresaid ground, the said John Webster or his above written are to have liberty to build a barn, byre, stable, or other houses they may judge necessary thereupon, it being hereby agreed that, immediately upon such houses being built and finished the same shall be appraised by men mutually chosen by both parties; and whatever the houses shall be thereby valued at the said Thomas Farquhar hereby obliges himself, his heirs and successors, to pay the amount thereof to the said John Webster or his foresaids at the expiry of this tack."

The granter of the lease died in 1789 without any general representative, and was succeeded in the entailed estate by John Farquhar, who declined to name a valuator at the end of the lease, and consequently Charles Webster, the son of the original tenant, brought an action against John Farquhar, the heir then in possession, for the value of several houses which had been erected on the farm. The Sheriff sustained the claim, and gave decree accordingly. In an advocation it was pleaded for the tenant that the obligation imposed by the lease on the granter's successors to pay for the houses did not fall under the prohibitions of the entail, and must therefore be applicable to the heir in possession of the estate; and, besides that, as the heir in possession was *locupletior factus*, he must be liable for the improvements. Lord Henderland (Ordinary) found that the defender represented the granter of the lease only as heir of entail, and therefore assoilzied him, and the Court by a majority adhered.

Then, in *Taylor* v. *Bethune of Balfour*, decided shortly afterwards, viz. in 1791 (Bell's 8vo Cases, No. 8), the lease granted by the heir in possession bore—"In regard that the houses on the said farm have been appraised by two neutral persons at Martinmas last, therefore it is agreed by both parties that if the same are found to be of less value at the expiry hereof, in that case the tenant shall be obliged to pay up the difference; and if they shall be found to be of greater value the said proprietor shall be obliged to pay up the difference to the tenant." The appraised value of the houses at the end of the lease exceeded the appraised value at the commencement, and the tenant claimed the difference out of the last year's rent due to the succeeding heir, who was by that time in possession. The Sheriff gave effect to the claim, as the meliorations were in *rem versum* of the defender, but Lord Braxfield (Ordinary) recalled this judgment, and the Court adhered to his Lordship's interlocutor.

Some points which I should say were plain enough as matter of inference from the above cases were made matter of express decision by this Court and the House of Lords in *Moncrieff* v. *Tod & Skene*, which is fully reported under date 27th May 1825, 1 W. and S. 217. In that case the lease, granted by the heiress in possession for the ordinary period of 19 years, at a time when she was 87 years of age, expressly bound her "or the then proprietors of the lands at the end of this lease," to pay to the tenant at the expiry thereof the sum of £620 which the tenant had agreed to expend and did expend, in erecting a new steading on the farm, he being allowed a deduction of £21 a-year out of his rent on condition of keeping the steading in repair during the currency of the lease. The action brought by the tenant was directed against the executor of the deceased granter, and the executor brought an action of relief against the new heir of entail, who was by this time in possession, so that all parties were in the field.

The executor pleaded in the House of Lords that the granter had not bound her heirs, executors, and successors, but only the proprietor of the lands at the end of the lease—viz., the heir of entail—that "he alone will derive all the benefit arising from the improvements, and consequently ought to pay for them so far as thereby benefited," and that the Act of Geo. III. has merely the effect to render the heirs liable whether they are *lucrati* or not; but at common law when an heir is *lucratus* a liability is affixed to him."

To this it was answered that the obligation undertaken by the granter could have been enforced against her personally, and consequently could be equally so against her representative. "The entail contains a prohibition against contracting debt or burdening the lands with sums of money, and therefore Mrs Skene had no power to do so; and as she did not avail herself of the statute no claim can be made against the respondent Mr Skene, who does not represent her. Besides, the general question has been settled by a series of decisions in which the pleas urged by the appellant both in law and equity were repelled."

In this Court Lord Gillies (Ordinary) decerned against the executor, and, in the process of relief assoilzied the heir of entail. The Court adhered (2 S. 104), and the House of Lords affirmed the judgment.

There are a number of subsequent decisions to a similar effect. Among them I may mention—*Fraser* v. *Fraser*, June 7, 1825 4 S. 73, *Do.* v. *Do.*, May 29, 1827, 5 S. 722, *Do.* v. *Do.*, January 29, 1830, 8 S. 409, affirmed on appeal, February 25, 1831, 5 W. & S. 69.

It is obvious that the principle given effect to by this train of decisions is a principle of general application, arising from the nature and terms of a deed of strict entail. It was based upon that general principle by Lord Braxfield and the Court in the early case of *Dillon*, and this has been followed ever since. Each heir of entail is fiar during his life so far as not fettered. But the very terms and nature of the entail prevent the heir in possession by any voluntary act or deed of his from either depriving his successor of any portion of the estate or laying him under an obligation either to make or to pay for meliorations on that estate otherwise than under and in terms of the Montgomery Act, extended as it has been by the Entail Amendment Act, 11 & 12 Vic. cap. 36 (Rutherfurd Act).

The present case, in the view I take of it, is *a fortiori* within the principle of the above cases. It is not a case of meliorations, but of simple restoration. What the late Marquis did was, undoubtedly, voluntarily done on his part. It was lawfully done, because he undertook restoration, and neither he nor his representatives can, I think, escape from fulfilment of the obligation to restore which alone made his act lawful.

The death of the Marquis of course prevents his executors from obtaining decree of constitution under the Montgomery Act for any expenditure incurred or falling to be incurred subsequent to his death, and I have considered very attentively whether the claim against the executors might not be equitably restricted to the same amount as if the whole necessary expenditure had been made and duly vouched by the Marquis in his lifetime, as required by the Montgomery Act. But I am reluctantly satisfied that the law has provided no equivalents for the relief competent under that Act.

I am still more reluctantly satisfied that the disentail of the estate after the death of the Marquis can make no difference on the result. It is true the present summons was raised and is insisted in by the Earl as heir of entail, and he is now neither heir of entail nor the representative of the other heirs in an entailed estate. He is fee-simple proprietor, and the money to be recovered will go into his individual pocket. The intention to disentail was intimated before the present summons was raised, and the disentail followed as a matter of course, no consents being necessary. But I have come to think that the claim must be regarded as at the date when it arose, and that no subsequent proceedings lawfully adopted, by disentail or otherwise, can take away the right and title of the Earl to sue for and recover the full sum claimed of £1500.

We have nothing here to do with such cases as arose out of the *Queensberry* leases, or with other cases of that class, in respect of acts of contravention. There has been here no contravention. The claim arises out of a lawful act of administration. Not an act of ordinary administration it is true, such as the granting of a nineteen-years' lease with conditions as to buildings, but an act of extraordinary adminis-

tration with respect to the mansion-house,—a difference which surely cannot be in favour of the executors. Neither can it make a difference in the principle applicable to the case that the necessity for expending £1500 arises from an act done by the Marquis, which obliges the Earl to come forward as pursuer, in place of from a contract of lease granted by the Marquis, which would have left the Earl, in the first instance at all events, in the position of a defender. The circumstances of the case are new, but the principle applicable to it is not new. The heir in possession cannot by his act, any more than by his written deed, affect the succeeding heir with any burden with which he could not equally affect the estate, except in so far as competent under the Montgomery Act. The Marquis could, certainly, not affect the estate with the burden in question,—namely, the cost of restoring the mansion-house to as good a state as that in which it was before it was pulled down,—and it is not to be presumed that he intended to do what he could not lawfully or effectually do. The fact that the executors are defenders and not pursuers cannot change the nature of the question, which really comes to be, Whether the late Marquis could burden the estate with the £1500 necessary to replace what he took away from it? That would have been to burden or contract debt upon the estate contrary to the fetters of the entail as clearly, or more clearly, than if the £1500 had been the expense of meliorations, as in the various cases which I have cited above. If the Marquis had meant to limit his obligation to rebuild the mansion-house to his own lifetime, that would have been to devolve the burden on the estate, contrary to the tailzie. There is no presumption either of law or of fact in favour of that view. The Marquis meant to perform a lawful and laudable act of administration, and he must be held to have undertaken the obligation which the law exacted from him in order to make that act lawful, namely, an obligation that the mansion-house should neither be thereby dispoiled nor the estate burdened to preserve it from being so.

I am therefore for recalling the Lord Ordinary's interlocutor, and decerning for the £1500, with an alternative, if the defenders desire it, of themselves restoring the mansion-house to as good and habitable state as it was in before the Marquis pulled it down.

Lord Mure—I do not think the parties are much at issue on the broad leading facts on which we are called upon to decide. It appears to me that it is quite distinctly made out upon the evidence and upon the allegations on record that what was done by the late Marquis of Breadalbane was not only within his power, but that it was done in perfect *bona fides*, and with the full intention of improving the mansion-house on the estate of Ardmaddy. I find no allegation on the record that that was not the position of the Marquis at the time of his death. In taking the steps which he did he was exercising a power conferred upon him by statute. He acted with a view to the benefit of the entailed estate; and he was not only authorised to do what he did, but the statute is so framed as to show that it was intended to encourage heirs of entail to make improvements of that description. The 27th section of the Montgomery Act proceeds upon the allegation that it frequently happens that mansion-houses on entailed estates are not suitable for the position of the parties occupying these estates, and that it would be for the benefit of the estate and of the heirs of entail that they should be authorised to lay out money in building or improving or adding to these mansion-houses, and that they were to be entitled if they did so to charge the larger proportion of that money against the succeeding heirs of entail. Now, I understand Lord Breadalbane was proceeding to avail himself of the power conferred by that clause of the statute, and if he had completed the large improvements which he contemplated, as appears from the plans prepared by the late Mr Bryce, he would have put up not only a much larger house, but one of a description that would have enabled him to charge a very considerable sum against the succeeding heirs of entail.

Now, in that position of matters, and before these improvements were completed, he died, in 1862, and the question which we have to consider is, Whether, the half of the mansion-house having been pulled down, and the rest of it being in the meantime rendered incapable of beneficial occupation, the executors of Lord Breadalbane can be called upon at the expense of his personal estate to complete this erection upon the entailed estate? That a very considerable benefit was being done to the estate is plain, because it appears from the evidence of Mr Baldie that for £1500 a house could now be put up so as to put it in as good a condition as it was at the time it was pulled down. Therefore, apparently all that Lord Breadalbane did was to destroy a house of the value of £1500. The sum actually expended by him and the executors was far greater, considerably exceeding the £1500, which was the value of the house pulled down.

I concur with your Lordship in the chair as to the principle upon which this cause must be disposed of. It appears to me that the remedy of the next heir must be found either within the terms of the entail itself or within the terms of the statutes under which such proceedings are made lawful for heirs of entail; and being of the opinion expressed by your Lordship, that the principles which were laid down in the House of Lords in the cases of the *Queensberry* leases, of *Ascog*, and the later case of *Montgomery*, are applicable to a claim of this sort, I should have been content to abstain from entering into any further detail, and simply stating that I concur in the grounds on which your Lordship has proposed to decide the case. I think that the remedy in cases of that sort must be an irritancy for contravention, or that there may be cases, such as the case of *Gordon*, where an interdict may be applied for to stop a party from doing what would be a contravention of the entail; and I should have said nothing more had it not been that when the case originally came before me, and when I allowed a proof, I pronounced an interlocutor indicating certain views on the questions raised, though without committing myself to these views. That was on 18th June 1873, and I see I stated that as then advised I was disposed to think that the pursuer, "even upon the assumption that the allegations upon which he and the defenders are at issue are well founded, would not be entitled to demand the reconstruction of the mansion-house in question according to the

plans prepared for and approved of by the late Marquis of Breadalbane, whatever expense that reconstruction might involve." That was with reference to the first conclusion of the summons, that the plans of Mr Bryce were to be carried out at the expense of the defender. But I added, that having regard to the special circumstances of the case, and more particularly to the fact that the mansion-house taken down had been recently repaired, and that the expense of that was charged to a certain extent against the estate, I indicated that there might possibly be in equity some claim on the part of the present Earl of Breadalbane with a view to reimburse him of the charges then made against the estate, and to have at all events a mansion-house of a habitable description replaced at the expense of Lord Breadalbane's moveable estate; and I allowed a proof of the facts. That is the view which, without committing myself, I indicated. But now, upon looking into the matter, and apart altogether from the grounds of law on which your Lordship proposes to dispose of the case, I am satisfied that there is really no injury, in the special circumstances of this case, done to the succeeding heir by refusing the remedy which has been asked. If Lord Breadalbane's original plan had been carried out, or even if it were done in the more moderate way now proposed, what would have been the position of the succeeding heir? The sum actually expended by the late Marquis and his executors amounts to about £5600, and it would require about £2500 to put the west wing into a habitable condition, and to connect it with the east wing, which has not yet been pulled down. Now, if that had been done by the late Lord Breadalbane during his life, and he had availed himself of the 28th section of the statute, he himself would only have been liable for one-fourth part of £7000, and the estate or the succeeding heir would been subjected in the payment of the interest of the other three-fourths. Lord Breadalbane would have had to spend £1700 out of his own pocket, and £5300 would have been constituted against the next heir of the entailed estate. Now, what is the position of the next succeeding heir? Upwards of £5660 has been expended on building a new west wing to the mansion-house, and all that is required to complete it is £2400. Therefore the entailed estate has been benefited already to the extent of £5600 by what has been done, and all the injury that is sustained by the succeeding heir of entail by what has been done is this, that assuming the estate to remain entailed, then to put the house in proper order he would require to expend out of his own pocket £611, and he would be entitled to charge the other three-fourths of the £2500, viz. £1800, against the succeeding heirs of entail. I am therefore quite satisfied, dealing with the matter simply on these considerations, that no injustice is done to the pursuer by refusing this claim. I am clearly of opinion that your Lordship has put the decision upon sound grounds in law; but having indicated these views in my note in 1873, I think it right to explain that on the evidence led I am satisfied that there is no ground for the claim on equitable considerations.

Lord Shand—I am of the opinion of the majority of your Lordships. I think there are two settled principles of entail law which are sufficient for the decision of this case. The first is that an heir of entail in possession is the fiar or proprietor of the property, in so far as he is not limited and restricted by the deed under which he holds the estate; and the second, which perhaps follows from this, is that the rights of heirs *inter se*, and the remedies competent to them, are to be ascertained from the deed itself.

It may be convenient to state these principles somewhat more fully before considering the particular case, and I cannot refer to any passage in which the first of them is more distinctly put than to a passage in the opinion of Lord Brougham in the case of *Montgomery* v. *Eglinton*, 4 W. & S. Apps. p. 185, where his Lordship says—"An heir of entail in Scotland is never considered a trustee for the subsequent heirs of entail. He is considered as a fiar in all respects whatever, except in so far as he is tied up, bound down, and fettered, and I have often had occasion, both at the bar in your Lordships' presence and since I have come upon the bench, to explain the great difference—I may rather say the contrast—between the Scotch law and the English law in that respect. If I here make a tenant for life by settlement, he is tied up *eo ipso*, and he can do nothing that shall endure beyond his own life-estate, unless in so far as I add powers to his estate. But in Scotland it is the very reverse. The heir of entail is the fiar,—he is free. Here the tenant for life is fettered except so far as he is freed by powers. In Scotland the heir of entail is free except so far as he is fettered by the provisions of the entail. He is the fiar,—he is in possession of the fee-simple of the estate in every particular, except in so far as he is tied up by the entail. This is the governing principle, and it is upon this governing principle that all the decisions have gone." And I observe that Lord Campbell, referring to the passage I have just read, says, at p. 193 of the report—"I entirely concur in the distinction which my noble and learned friend so forcibly pointed out between the English and Scotch law with reference to the subject of entails. By the English law the tenant for life has no power except what is expressly conferred upon him beyond his own life, whereas the heir of entail in Scotland is armed with every power except that which is expressly taken from him."

The other principle which seems to result from this is very well stated, I think, in a sentence in the notes by Mr Chalmers, which were referred to by the counsel for the defenders in this case, as the result of the judgments in the cases of *Ascog* and *Tillicoultry*, and similar cases, and which notes have been repeatedly referred to with judicial approval. At p. 31 of the appendix to Wilson and Shaw's Appeals the principle is thus stated—"The rights of the several parties interested under the deed, and the remedies in case of contravention, can only be ascertained by what the deed itself contains. Judges are not at liberty to go out of it either to give or to take away, however plausible or seemingly equitable the construction may be." Having these principles in view, it appears to me to be clear that at the time when the Marquis of Breadalbane proceeded to take down this mansion-house, which I take to be the mansion-house of the estate, he was acting entirely within his powers as the proprietor of these estates. If, instead of having it in

contemplation to improve or rebuild the mansion-house, it had been his intention simply to take down the house and dispose of the materials, it is clear that that would have been a contravention of the entail under which he possessed the estate; and the authority of the case of *Gordon of Ellon* shows that in that state of the facts an heir proceeding avowedly to contravene the entail would be restrained by preventive diligence from doing so. But if an heir had succeeded in demolishing the house and removing its materials, I know of no authority in the law for the view that there is no remedy whatever against an heir who has so acted, by way of a pecuniary claim, or any remedy except that of an action of declarator of irritancy and forfeiture founded on the contravention. If, then, the question which is now raised had arisen in the form of an interdict presented against the Marquis of Breadalbane when he began this proceeding, and it had been conceded that his intention then was to proceed to improve the mansion-house or to put up another mansion-house, and that with that view he was partially taking down the present house, I take it to be clear that the interdict would have been refused, on the ground that the Marquis of Breadalbane was doing nothing that was not within his powers as fiar of the estate. It may be that even after that interdict had been refused, if subsequently the Marquis having removed the house had refrained from putting up another — if he had ceased in his operations for a considerable time, so that it became evident that he had no intention to put up another—he would have been liable to an action, but the action in that case would not have been an action to restore the house, but an action founded on his having violated a prohibition—an action of irritancy and forfeiture for the contravention. There was no room for any such action so long as the Marquis lived, for it appears that from the time the house was removed until he died he went on carrying out his intention of restoring the mansion-house by putting up the building which at great expense is now upon the property, although in an unfinished state. And therefore I take it that at his death there was no action competent at the instance of the heirs of entail in respect of what had been done. He had either committed a contravention by what had been done, in which case the remedy was an action of irritancy founded on that contravention—but the right to bring such an action ceased with his death—or he had not committed a contravention, in which case he was exercising his powers as a fiar in possession—a proprietor dealing with his own estate—and he came under no obligation in consequence of these acts. This last view I take to be the right one, because it has not even been maintained on the part of the pursuer that there was an act of contravention up to the time of the Marquis' death. It has been maintained in argument that having died without finishing this building, it must be held that in law there was an implied obligation to complete it. I cannot find any ground for that contention in the deed of entail upon which the Marquis possessed, and I think the whole stream of authorities goes to negative that view.

There have been two classes of cases in which practically the same argument that we have had here has been presented, and in both the Court have rejected it. I mean, in the first place, the cases of *Ascog*, *Tillicoultry*, and *Montgomery* v. *Eglinton*, and in the second, the case of the *Queensberry* leases. The argument in the first of these cases was that as the heir of entail had sold the estate, contravening the entail in a question *inter hæredes*, he was bound, by an implied obligation to be gathered out of the entail, to re-invest the price. But the Court held—and that was the principle upon which the cases were decided—that no such obligation could be implied or reared up out of the entail—that what the Court had to deal with there was the express terms of the prohibition of the entail, and that the remedy, and the only remedy, for a contravention was an action of forfeiture and not a pecuniary claim. The case of the *Queensberry* leases was of the same character. The heir of entail in a question *inter hæredes* had contravened the entail, and the next heir said that there was an implied obligation to be gathered from the entail that as his predecessor had let certain farms at too low a rent, and thereby injured the succeeding heirs of entail, the executors should be liable in damages under that implied obligation. But, again, the answer was that implied obligation is not to be found in an entail unless you can bring the case within the express prohibition, and take the remedy applicable to that prohibition. The person complained of having been fiar of the estate, you have no other remedy against him, and so I think these cases on principle exclude the notion that an implied obligation such as is here insisted on may be reared up from the prohibition of an entail. I think this case is practically within the principle of these, and if such a claim were to be sustained, it is very difficult to say where it should end. Suppose an heir of entail has cut down the old trees that surround the family mansion, and which are of great importance to the family mansion—suppose he has done a damage or injury which never can be restored, and dies after having done so—is it suggested that because there was an implied obligation on him from the entail to keep up these trees, his executors would be liable in damages for the act so done? I think that would necessarily follow from the argument which has been submitted here on the part of the pursuer. The cases of improvements or meliorations under leases in the case of entailed estates,—with very great deference indeed to my learned brother Lord Deas,—do not appear to weaken, but rather to confirm, the view which is now to receive effect by this decision, for I think the principle which is at the root of the decision of these cases is this, that the express provisions of the entail in questions are decisive between the heirs, and that nothing can be founded on implied obligation to be reared out of these. The contention there substantially was this, that because one heir had died improving an estate, there was an implied obligation that his successor should pay for these meliorations, but the Court held that no such implied obligation existed. I think that, just as the succeeding heir cannot establish pecuniary liability against the representatives of his predecessor for the acts of his predecessor while in possession, so the heir in possession cannot by his acts impose pecuniary liability on his successor beyond what the deed of entail authorises, and that that is the principle on which these cases were decided. No case has been referred to in which pecuniary liability has

been established, and this would certainly be the first case in which it would be established against the representatives of a prior heir for acts done by him in dealing with the estate, and I confess if it were sustained I do not see to what length that principle might not go. I am therefore of opinion with your Lordship on the general grounds stated, that this claim cannot be entertained.

We had a good deal of argument upon another point pleaded by the pursuer, who maintained that even if they were not entitled to succeed under this doctrine of implied obligation to restore the house, that because of the Marquis of Breadalbane's actings, in having entered into contracts with builders, and having materials on the ground and otherwise, there was some vested right in the pursuer to have these acts continued. That argument was founded upon cases as between heir and executor, in which class of cases the question arose between parties who had a legal right to the succession of the estate with reference to the particular position in which the testator had left his estate. I am of opinion—and I presume in saying so I express the opinion of all your Lordships—that these cases have no application to the present, and that there was nothing in the actings of Lord Breadalbane which could give these pursuers the right as beneficiaries or *quasi* beneficiaries to insist on this building being completed if there be no legal obligation to do so. I have noticed that point in case it should be observed that the argument had not received full notice, but I rather believe your Lordships' reason for not commenting upon it was that you did not think that that was an argument that could be maintained.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—Kinnear—Lorimer. Agents—Davidson & Syme, W.S.

Counsel for the Defenders (Respondents)—Balfour—Graham Murray. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Friday, March 16.

FIRST DIVISION.

[Sheriff of Lanarkshire.

STEEL & CRAIG *v.* THE STATE LINE STEAM-SHIP COMPANY.

Ship—Contract of Affreightment—Liability—Exception—Negligence.

Terms of a bill of lading which were *held* sufficient to free shipowners of their liability at common law for damage done to goods through the negligence of the seamen employed by them.

Opinion, that conditions of such a nature must be distinctly expressed, and that the clauses of the bill of lading must be construed *contra preferentem*, although not to be subjected to a critical verbal interpretation.

This was an action brought against the State Line Steam-ship Company by Steel & Craig, grain merchants in Glasgow, for a sum of £4000, being the amount of the damage done to a cargo of wheat shipped by the pursuers on board of one of the defenders' ships for transit from New York to Glasgow. The sum concluded for was afterwards by minute restricted to £2793, 4s. 6d. The bill of lading, after narrating the quantity shipped, &c., ran thus—"Not accountable for leakage, breakage, sweating, rust, rain, spray, decay, or damage by vermin, slightness or insufficiency of packages, stowage, or contact with or smell or evaporation from any other goods, inaccuracies, obliterations, or absence of marks, numbers, address, or description of goods shipped, injury to wrappers, however caused. Not responsible for the bursting of bags, or consequences arising therefrom, or for any of the following perils, whether arising from the negligence, default, or error in judgment of the pilot, master, mariners, engineers, or persons in the service of the ship, or for whose acts the shipowner is liable or otherwise—namely, risk of craft or hulk, or transhipment, explosion, heat, or fire at sea, in craft or hulk, or on shore, boilers, steam or machinery, or from the consequences of any damage or injury thereto, howsoever such damage or injury may be caused, collision, straining or other peril of the seas, rivers, navigation or land transit, of whatever nature or kind soever and howsoever caused, excepted." Issues were adjusted, and the case was sent for trial by jury, but by agreement of parties a special verdict was returned. In so far as material, that verdict is quoted in the Lord President's opinion. The damage was found to have been caused by the negligence of some of the mariners employed by the defenders; and, on the motion of the pursuers to enter-up the verdict for them, the question came to be—Whether the terms of the bill of lading did or did not include damage so caused among the things for which the shipowners declared themselves not responsible.

The pursuers argued—The clause of the bill of lading must be read in three, or at least in two, distinct sentences—the first beginning with the words "not accountable" and going down to "wrappers, however caused;" the second, from "not responsible," to "may be caused;" and the third, from "collision" to "excepted." If there are only two branches, the second will begin at "collision." By this reading, the words "peril of the seas" will not be affected by the clause as to the negligence of the shipowners' servants. Now, if that be so, this accident is not excepted; for it cannot be said that it was caused by a "peril of the sea"—that always presumes some extraordinary violence of the elements, which certainly did not occur here. In a contract of insurance "peril of the sea" might have a much wider meaning, but it is quite settled that in contracts of affreightment and of insurance the term is used in different senses. Unless there is express discharge of liability for the negligence of servants, it cannot be presumed to be discharged.

Authorities—Story on Bailments, p. 512; Parsons on Contracts, ii. p. 307; Addison on Contracts, p. 730; *Lloyd* v. *The General Iron Screw Collier Coy.*, L.J. 33 Excheq. 269; *Moes, Moliere & Co.* v. *Tromp*, July 5, 1867, 5 Macph. 988; *Stevenson* v. *Henderson*, Nov. 25, 1873, 1 Rettie 215, H. of L. June 1, 1875, 2 Rettie 71; *Grill* v. *General Iron Screw Collier Coy.*, L.R. 1 Com. Pl. 600, and 3 Com. Pl. 476; *Ohrloff* v. *Briscall*, 1