No. 32.

FREDERICK CAMPBELL STEWART, Appellant.
Solicitor-General (Sugden)—Adam—Kaye.

STEWART MURRAY FULLARTON, and OTHERS, Respondents.
Brougham—Haldane.

Entail.—**Held, (reversing the judgment of the Court of Session), that although an entail contain a prohibition against selling, yet, if the irritant and resolutive clauses do not apply to sales, the heir in possession is entitled to sell, and is not bound to reinvest the price in other lands.**

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1ST DIVISION.
Lord Alloway.

JOHN MURRAY STEWART of Blackbarony executed, on the 28th of May 1763, a deed of entail of his estate of Ascog, by which, on the narrative that he had resolved, for the standing of his family, to make the same, he conveyed, 'under the burdens, conditions, 'provisions, clauses irritant and resolutive, after expressed,' the lands of Ascog, mansion-house thereof, mill and mill lands, and the place of sepulture and seat in the parish church of the family, to and in favour of himself, and the heirs of his body; whom failing, to Archibald M'Arthur, only son of John M'Arthur of Milton, and the heirs-male of his body; whom failing, (after other substitutions), to George Fullarton of Bartonholme, son of the deceased Robert Fullarton of Bartonholme, and the heirs-male of his body; but expressly providing and declaring, 'that if the lands and others 'foresaid conveyed by virtue of these presents, happen to fall 'and devolve upon any of the heirs-male of the body of the 'said John M'Arthur of Milton in virtue of these presents, or 'the heirs-male of the body of the said George Fullarton, that 'then and in that case they shall be holden and obliged to 'tailzie, as I hereby bind and oblige them to tailzie, the said 'lands of Milton and Bartonholme respective, upon the same 'series of heirs, and under the same provisions, clauses irritant 'and resolutive, that are contained in the present tailzie, and 'cause record the said tailzie in the Register of Tailzies, and 'that within five years after the succession, in virtue of this pre-'sent tailzie, shall devolve upon them respectively.' The deed then contained (among others) the following prohibition:—'That 'it shall be noways leisum or lawful to the heirs of tailzie and 'others succeeding to me by virtue hereof, in no time coming, to 'alter, innovate, and annul this present tailzie, or invert the order 'of succession hereby appointed and settled by me, or which 'shall hereafter be appointed and settled by a writing under my 'hand in manner foresaid, any manner of way, nor to possess

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'the above lands and estate by any other title than by this pre-
'sent deed of entail; and they shall be bound to registrate the same, and an additional settlement or deed relating thereto, in
'the Record of Tailzies and General Register, within six months
'after my decease, and their coming to the knowledge thereof:
'nor shall they have any power or liberty to sell, annailzie, or
'wadset the lands and others foresaid, or any part thereof, ex-
'cept allenarly such a part and portion of the same as shall
'be found necessary for relieving, paying, and satisfying the
'debts and obligements contracted and granted by me, and
'which shall be justly resting by me at the time of my decease,
'or so much of my said debts as shall not be cleared and satis-
'fied by any of the heirs of tailzie out of their own proper
'means and estate, in manner underwritten; with power to any of
'my heirs of tailzie, succeeding to me by virtue of these presents,
'to wadset, under reversion, so much lands allenarly as shall cor-
'respond and have just proportion to my said debts resting and
'unpaid in manner foresaid, and no more, and whereof the mails
'and duties shall not exceed the annualrent of the debt to be paid
'therewith: nor shall the said heirs of tailzie, and others succeed-
'ing to me, in any time coming, have power or liberty to con-
'tract any debts, or sums of money, or even grant provisions to
'younger children, sons or daughters, except as hereafter is pro-
'vided, whereby the lands and others above-written may be any
'ways affected; or grant any heritable or moveable bonds, infeft-
'ments of annualrent, and other rights and securities whatsomever,
'whereby the lands and others foresaid may be any ways evicted
'or carried off, to the prejudice of the next succeeding heir of
'tailzie,' &c. Then followed the irritant and resolutive clauses, in these terms:—'Declaring, likeas it is hereby expressly provided
'and declared, and shall be provided and declared in the charters,
'infeftments, and others to follow hereupon, that if any of the heirs
'of tailzie above-mentioned, or the husbands of the heirs-female,
'shall not use the name and arms of Stewart of Ascog, or shall
'alter and innovate this present tailzie, or invert the succession
'from the order hereby appointed, or which I shall appoint by a
'writing under my hand, or possess the said lands and estate by any
'other title than these presents, or fail to register the same, or any
'additional settlement relative thereto, in manner as above; or if
'they wadset any of the lands and others foresaid, except so much
'allenarly, or such a part or portion of the same, as shall be found
'necessary for relieving, satisfying, and paying the debts and
'obligements contracted, and which shall be justly resting the time

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'of my decease, or so much of my said debts as shall not be cleared 'and satisfied by my said heirs of tailzie their own means and 'estate, in manner foresaid, and which they have power to wadset 'in the terms above provided allenarly; or if they shall contract 'any debts, or grant any provisions to younger children, sons or 'daughters, (except as hereafter is provided), or grant any bonds, 'heritable or moveable, or other rights or securities, whereby the 'lands and others foresaid may be affected, evicted, or carried 'away, to the prejudice of the next succeeding heir, then not only 'shall the deeds so to be done by them be void and null in them-'selves, as if the same had never been granted or done, and shall 'be noways valid for affecting and burdening the lands and 'others foresaid, or any part thereof, to the prejudice of the next 'succeeding heir of tailzie, their peaceable possession, bruiking, 'and enjoying of the same, free of the said debts, deeds, and bur-'dens thereof; but also, the said heir contravening, for him or 'herself alone, shall ipso facto lose and amit the benefit of this 'present tailzie, and the lands and others foresaid shall fall and 'accresce to the next heir provided to the succession as above, 'in the same manner as if the former heir who shall contravene 'had never existed, or had been deceased,' &c.

Although the prohibitory clause was thus directed against selling, yet it will be observed, that sales were not mentioned in the enumeration of the various acts to which the irritant and resolutive clauses apply,—an omission which gave rise to the present question.

Besides the special disposition of the lands of Ascog, the entailer conveyed his whole heritable and moveable property to the respective substitutes, but declaring that they 'shall be holden 'and obliged, in the strictest manner, by their acceptance hereof, 'to convert the said heritable and moveable subjects generally 'above disponed into money, and to uplift the debts and sums of 'money above assigned; and, after payment of my proper debts 'and the legacies, if any be, to ware, employ, and bestow the free 'residue or remainder of my said separate effects, heritable or 'moveable, when so converted, upon purchasing of land in Scot-'land; and to take the rights and securities of the lands so to be 'purchased, in the form of a strict entail, to the same series of 'heirs, and with and under the same conditions, provisions, bur-'dens, reservations, restrictions, limitations, clauses irritant, and 'faculties, as are above set down with respect to my tailzied lands 'herein mentioned; and to put the said tailzie on record, so as the

'lands thus to be purchased, and these my other lands, may be 'conjoined inseparably in all time thereafter,' &c. July 16. 1803.

The deed was duly recorded, and on the death of the entailer Archibald M'Arthur (who assumed the name of Stewart) succeeded, and implemented the latter provision by purchasing the lands of Drumfin, and executing an entail which was duly recorded. Thereafter, on the death of Archibald M'Arthur, the present appellant, Frederick Campbell Stewart, Esq. succeeded as heir-substitute under both these entails.

To ascertain the extent of his powers, he brought an action of declarator before the Court of Session, to which he called the existing heirs of entail as defenders; and in which he concluded to have it found, that he 'has full and undoubted right 'and power to sell and alienate the several lands, mills, teinds, 'fishings, and whole other subjects contained in the two deeds 'of tailzie before-mentioned, in any way he may think proper, 'for a fair price, or other onerous consideration; and that the 'pursuer has full and undoubted right and power to grant and 'execute all dispositions, conveyances, deeds, and writings what-'soever, which may be requisite or necessary for effectually con-'veying the whole, or any part or parts of the said lands and others 'which may be so sold and alienated; and that the pursuer is not 'prevented from selling and alienating, in any way he may think 'proper, for a fair price, or onerous consideration, the lands and 'others before-mentioned by the foresaid two deeds of tailzie, or 'either of them, or by any of the titles under which the pursuer 'possesses the foresaid several lands and others. And, further, it 'ought and should be found and declared, by decreet foresaid, that, 'upon selling or alienating the whole, or any part or parts of the 'said several lands or others contained in the said two deeds of 'tailzie, for a fair price, or other onerous consideration, the said 'Frederick Campbell Stewart, pursuer, has the sole, full, and ex-'clusive right to the price or prices, or considerations thereof; 'that the same are the pursuer's absolute property; and that he has 'full power to use and dispose of the same at his pleasure; and 'that the pursuer does not lie under any obligation to invest, em-'ploy, or lay out the same, or any part thereof, in the purchase, 'or on the security of any other lands or estate or otherwise, for 'the benefit of the said heirs-substitutes of tailzie, or any of them; 'and that the said heirs-substitutes of tailzie before-named, or any 'of them, have no right or title to interfere with or controul the 'pursuer in the use or disposal of the said price or prices, or con-'siderations to be received by him, in any manner of way: And

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In the meanwhile, the appellant had sold part of the lands, and the purchaser brought a suspension. At the same time the heirs of entail raised a counter action of declarator, to have it found ‘ that the said Frederick Campbell Stewart, defender, hav- ‘ ing sold and alienated the foresaid lands and others contained in ‘ the said two deeds of tailzie, that the price or prices, or consi- ‘ derations received therefor, belong to the said Stewart Murray ‘ Fullarton, and the other substitutes called by the said two deeds ‘ of tailzie, and not to the defender to be used by him for his ‘ own private purposes, and that the said defender has not the ‘ power to use and dispose of the same at his pleasure; and fur- ‘ ther, that the said Frederick Campbell Stewart, defender, is ‘ bound to reinvest and lay out the said price or prices, or con- ‘ siderations, and whole parts and portions thereof, in the pur- ‘ chase and security of other lands and estates, for the benefit ‘ of the pursuer, and the other substitutes called alongst with him ‘ under the said two deeds of tailzie, and all of them; and that ‘ the said pursuer has good right and title to prevent the defender ‘ from using and disposing of the said price or prices, or consi- ‘ derations so received or to be received by him, the said defender, ‘ from the purchasers of the said lands and others, to his own ad- ‘ vantage; and also, that in the event of the defender not reinvest- ‘ ing the price or prices, or considerations received, or to be re- ‘ ceived by him, for the lands and others acquired and possessed ‘ by him under the foresaid two deeds of tailzie, in the purchase ‘ of other lands and estates, to be taken to the pursuer and the ‘ other substitutes as aforesaid, the said Stewart Murray Fullar- ‘ ton, and each and every one of the other substitute heirs of tailzie, ‘ under the foresaid two deeds of tailzie, have all and each of them ‘ legal claims and demands against the said Frederick Campbell ‘ Stewart, defender, or against his heirs and representatives, in the ‘ event of the defender's death, for damages and pecuniary repa- ‘ ration, to the extent of the price or prices, or considerations ‘ received, or to be received by the said defender for the sale of the

'said tailzied lands and others, for and in respect of the said sale or sales, or alienations, which have been made and executed, or which may yet be made and executed by the defender, and for and in respect of the said defender using and disposing of the said price or prices, or considerations received, or to be received as aforesaid, to his own exclusive advantage.'

These actions having been conjoined, the Court, after a hearing in presence of all the Judges, and receiving their opinions, pronounced this interlocutor:—'Find, That as the provisions of the 'Act 1685, c. 22., which regulates all questions with purchasers 'or creditors contracting with heirs of entail, have not been observed or complied with so far as regards sale and alienation, to 'which the irritant and resolutive clauses are not applicable, and 'that the prohibitory or restraining and limiting clause cannot 'per se affect the purchaser, repel the reasons of suspension, 'find the letters orderly proceeded, and decern: But in the declarator at the instance of Frederick Campbell Stewart of Ascog, 'find, That the pursuer is infeft and seized in the estate of Ascog 'and others, in virtue of two deeds of entail, under a provision by 'which it is declared, that the heirs of entail shall not "have any "power or liberty to sell, annailzie, or wadset the lands and others "foresaid, or any part thereof," and that the same is effectual and 'obligatory against the said pursuer, and that he has no right to 'contravene the same; and therefore assoilzie the defenders from 'the whole conclusions of the said action, and decern: And in the 'declarator at the instance of Stewart Murray Fullarton, Esq. of 'Fullarton, and others, heirs of entail to the estate of Ascog and 'others, find, That the said pursuers have, under the foresaid provision or restraining clause, a right to compel the defender, Frederick Campbell Stewart, and that the said defender is bound, to 'reinvest and lay out the price or prices, or considerations of the 'lands sold by him contrary to the said provision or restraining 'clause, in the purchase of other lands or estates, to be settled 'for the benefit of all concerned and interested in the said two 'entails, conformably, in all points, to the provisions and conditions therein contained, and according to the forms and practice 'of the law of Scotland; and find, That the defender is not entitled to apply or use the principal sums of the said prices or 'considerations to his own private purposes, benefit, or advantage, 'and decern.' *

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* Lords President, Justice-Clerk, Hermand, Glenlee, Craigie, Robertson, Balgray, Pitmilly, Meadowbank, Mackenzie, and Medwyn, concurred in the judgment. Lords Gillies, Alloway, Cringletie, and Eldin, dissented. The Opinions will be found in 5. Shaw and Dunlop, 118.

July 16. 1830. Mr Campbell Stewart appealed.*

Appellant.—On general principles of law, an heir of entail, if not effectually prohibited to sell or exercise any other act of ownership, is entitled to do that act. Accordingly the Court below have found, that the appellant is entitled to sell; but while they have done so, they have most inconsistently found, that he must reinvest the price for the benefit of persons who have no right to prevent him from selling. The ground on which this is rested is, that there is an obligation created by the prohibitory clause effectual against the appellant, and, on the other hand, a jus crediti in favour of the respondents. But this is a gratuitous assumption, because there is no such obligation as that which the Court has found to exist, either in the deed itself or at common law. In regard to the deed, the appellant might for the sake of argument admit, that the entailer had an intention to prohibit sales: but a mere intention is not sufficient; and the Court have held, that there is no effectual obligation or prohibition against selling. The question therefore comes to this, whether there is any provision in the deed, to the effect of reinvesting the price? It is not pretended that there is any such express clause, and therefore the judgment cannot rest upon the deed, but upon something else. It has accordingly been maintained, that it must be presumed to have been the intention of the entailer that effect should be given to his deed, and that the only way in which this will can be implemented, is by ordering the price to be reinvested. But this is just introducing the doctrine of implication, which has been by repeated decisions discarded in discussions relative to entails, whether arising with third parties or inter hæredes. Besides, there is no evidence that such an intention was ever in the mind of the entailer. On the contrary, his intention was to preserve the estate of Ascog; an intention inconsistent with the idea of the conversion of these lands into money, and the reinvestment of that money in other land.

Neither under the common law is there any such obligation as that which is contended for. The respondents themselves admit, that it is incompetent either to raise inhibition or to obtain an interdict, to the effect of preserving their alleged rights. But if there were any such rights in existence, they would be en-

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* Pending the appeal he died, and it was revived in name of his testamentary trustees.

titled to the benefit of the diligence of the law to preserve them. The practical conclusion from their argument therefore is, that the appellant is under an obligation, but that it is one which cannot be enforced—a proposition which is in itself a contradiction. Indeed, if the argument were correct, it would apply to the case where there is a defect in the entail in regard to the contraction of debt. In such a case it is admitted, that the estate might be adjudged in payment of the debt; but in order to be consistent, the respondents must go a step farther, and maintain, that they would be entitled to compel him to reinvest, although he had not the means of doing so, and although he had no power to prevent the estate from being adjudged. This, however, is obviously untenable.

Respondents.—There is a material distinction between the effect of an entail, as in a question with third parties, and inter hæredes. One who takes an estate under an entail, takes it by virtue of the will of the granter; and he cannot be permitted to evade the plain obligations imposed upon him by the granter, from the circumstance that the deed may be defective, so as not to protect the estate in a question with third parties. It is true, that fetters which have been omitted cannot be reared by implication; but, on the other hand, the legal effect of restrictions cannot be impaired by the neglect of some of the precautions necessary to render the entail complete. In the present case, the estate was given gratuitously, under the burdens and conditions expressed in the deed of entail; and one of these conditions was, that the heirs should not sell the lands. The appellant took the estate subject to that condition; and in doing so he necessarily came under an obligation that he would not violate, but would give effect to the will of the entailer. Prior to the statute 1685, entails contained nothing but prohibitory clauses; and at that time inhibition or interdict was competent and available, even against third parties. This shows, that the prohibition contained an effectual obligation. But by that statute clauses irritant and resolutive were required, in order to protect the estate against purchasers or creditors; and as the diligence of inhibition or interdict is useful only to prevent the property being sold or adjudged, that diligence necessarily became thereafter inapplicable. But still this did not affect the question, whether there was or was not an obligation on the heir? That there was such an obligation, is shewn by the fact, that such diligence was competent. Besides, it is no test of the non-existence of an obligation, that diligence cannot be done in virtue of it; because, if this were correct, it would follow, that

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provisions to wives and children in marriage-contracts did not constitute obligations. But it is established, that they confer a jus crediti, in virtue of which the wife and children may rank on the estate in competition with creditors. Accordingly it has been decided in numerous cases, and particularly in those of Strathnaver, of Cumming of Pitlurg, of Young *v.* Young, and of Lockhart *v.* Stewart, that an effectual obligation against the heir in possession is created by a prohibition in a defective entail.

The question therefore is as to what is the effect of the obligation, and the nature of the consequent jus crediti vested in the heirs of entail. This is to be ascertained by the will of the entailer. Now it is plain that his object was the preservation and standing of his name and family; and with that view he entailed lands, and ordered others to be purchased which he had never seen. It was thus indifferent to him whether the family was kept up by means of one estate or another. It was not so much the estate of Ascog, as the name of Stewart, which he wished to preserve. Such being his will, the only mode in which effect can be given to it is, by ordaining the price to be reinvested in land, and an entail executed agreeably to that made by the entailer himself. This is not a claim of damages, but a demand that the price, as a surrogatum for the estate, should be applied to accomplish the will of the entailer.

In the course of the argument, the following observations were made:—

The Solicitor-General having commenced to state the case of the appellant,—

Earl of Eldon.—All the Judges were of opinion there was a power to sell; Is that disputed?

Solicitor-General.—No, my Lord.

Earl of Eldon.—As to the conclusions in the summons, there is an alternative one, that all the substitutes should from time to time have actions if the price is not reinvested. The Judges have given no opinion upon that, perhaps not thinking it necessary, there being a majority of the Judges in favour of another point.

Solicitor-General.—So I conceive.

Brougham.—We do not know that the Judges gave no opinion upon it.

Earl of Eldon.—It does not appear that they did.

The Solicitor-General proceeded in his argument, and referred to Young *v.* Young. July 16. 1830.

Earl of Eldon.—Does it appear in what year that case was before this House?

Solicitor-General.—Not at all, my Lord; it was never in the House of Lords; it was not referred to in the Westshiells case, Stewart *v.* Lockhart.

Brougham (for the respondents) was quoting some authorities and a case from Mr Robert Bell, and a dictum of Sir Ilay Campbell.

Earl of Eldon.—Do either of these lawyers say, or are there any authorities that point out the remedy to reinvest the purchase-money?

Brougham.—Certainly they do not.

Earl of Eldon.—It struck me, that though the summons upon your part has an alternative for reinvestment or actions of compensation, the Court has not taken any notice of that part of the summons about compensation.—And that leads to another consideration,—How the compensation in damages is to be recovered —against whom—and at what time and periods?

Brougham.—I am not unaware there may be some difficulties in shewing, at what time, and in what way, and according to what scale of compensation those damages are to be recovered; and I should submit, that that is one reason for adopting the other branch of the alternative, and giving rather an equitable remedy than a legal remedy.

Earl of Eldon.—Do the Judges go on to say what is to be done? It is one thing to say that the heir has done wrong, and another to say what is to be the effect of the act he has done, and how the matter is to be set right.—I will state to you what is the difficulty under the statute, as it strikes me. The difficulty is this,—that if the purchase-money is to be laid out in a new purchase, to be settled exactly in the same way, the moment that new purchase is made under the statute, the heir who takes, may sell again directly: and is he then to be permitted to go on selling, and undoing, and buying, and doing again to all eternity? for I do not see what the remedy is to be, and the Court below, in this case, has given no sort of deliverance upon the claim of damages. I do not know whether it would be the right way to proceed if damages were given; but it appears to me a most extraordinary thing to be said, that entail is to be made after entail every week, so

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that fifty may be made in a year, and that nine-and-forty of them may be dissolved again within the year.

Brougham.—I am quite aware that I have to direct my argument to the case put by one of your Lordships; and I shall, I think, satisfy your Lordships, that there is an answer to the observation, not meaning to deny that that is the strict consequence of my argument:—He then proceeded in his argument to shew, that by serving heir under the deed of entail, the heir in possession bound himself to the conditions of his right.

Earl of Eldon.—If a Scotch estate is entailed after the year 1685, and there happen to be no sufficient clauses to prevent selling, and if a man serves himself heir of tailzie, can you argue, —or rather is not that a question—whether he admits more than this, It is true I cannot part with the estate in any way except by selling it, but (supposing that he is bound by the Act 1685) if I am not prevented from selling, do I admit by serving myself heir of such a tailzie more than that I cannot part with it unless by sale? Then comes the question again, Do I admit, that if I can sell I must invest the money, or be liable to penalties? What is that which by implication he admits if he serves heir of tailzie, except that he is heir of tailzie under an entail, under which you admit that he can sell to a purchaser?

Brougham proceeded in his argument, and stated, that whenever the substitute reinvests, it is for the benefit of the heirs who succeed.

Earl of Eldon.—Must you purchase in Scotland; or may you not let it go out of Scotland?

Brougham.—It could not by the prohibition be settled anywhere else.

Earl of Eldon.—But the money might have an inclination to come to England.

Brougham.—It is possible. If he can be called upon to reinvest it, he cannot reinvest it anywhere else; it could not be carried beyond the jurisdiction of the Court. He only has that estate while he lives; he cannot part with that estate, and pocket the purchase-money. The entailer never meant Black-acres should go out of his family,—he meant that it should never be sold at all; but he has failed in that.

Lord Wynford.—Is there any mode of keeping the money out of the seller's pocket? His security would be very trifling if it could not.

Brougham.—The Court of Session might proceed to execute

their judgment in the usual way. The money is in the seller's pocket, and the seller is proceeded against. If he goes off to America and spends the money, then the substitute has lost his whole chance of redress. There cannot be the least doubt about that. Indeed, what remedy, my Lords, can you have by the constitution of a Court of Equity, except that whilst the person is in the jurisdiction of that Court, or, not being amenable to its jurisdiction, whilst he has property on which you may proceed by distress, you may avail yourself of it? July 16. 1830.

Earl of Eldon.—What we want to know is, what remedy you have against the seller if he does not go away? that is, if he stays, and the money remains in his own hands. I do not mean to say that there may not be a remedy, but I confess I am a little disappointed in not seeing that any of the Judges touched that question, though it is a matter now stated in this House to be one of very great difficulty. What is to be done?

Brougham.—I should suppose they did not touch upon that, because they took it for granted that the Court would proceed against the seller to reinvest the price exactly by the same course of proceeding by which they obtain performance of any one of their judgments and decreets, if there is no land on which they might go. The party, of course, is liable to the process of Court for refusing to obey the order of Court:—Having afterwards adverted to Young *v.* Young,—

Earl of Eldon.—Does any one know what became of the money or estate in that case?

Brougham.—We cannot trace it. It is ordered that he is to reinstate the money, to re-employ the price, and take security for the term of the entail.

Haldane (for the respondents) having alluded to the question of damages,—

Earl of Eldon.—Suppose it possible that this House should be of opinion that you cannot maintain a claim for investment, but that you must have an action for damages; or that it is a question that might be argued, whether you are not entitled to an action for damages; still, as no judgment has been given in the Court below, the House can give you no opinion on that, for there is no appeal upon that, there being no deliverance on that part of the summons.

Haldane.—That point did not seem necessary.

Earl of Eldon.—The summons puts it in two ways: first, the

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necessity of a right of reinvestment; it also insists, in the second place, on the right to an action for damages. The Judges have delivered their opinions upon the right of reinvestment, but there is no opinion at all as to an action for damages. In their deliverance there is no enforcement of it. The consequence of that would be, that as this House can determine nothing originally, if you can't make out your claim to a right of investment, you can't say a word about an action for damages, because there is no decision on that point appealed from.

Haldane.—I only wished to shew, that in a still stronger case, in the case of application for damages, that that might be founded upon the authority of the case of Bryson *v.* Chapman; and if so, then, a fortiori, we may insist on a claim for reinvestment, which is less, as it appears to me.

Earl of Eldon.—Then you see we get into this difficulty, which the House does not know how to get out of. If you are to argue that you have a right to an action for damages, and to a right of reinvestment, we have no opinion whatever of the Judges below on that point, for as to that the Judges have said nothing. We cannot therefore hear you argue on the ground of your having an action for damages, when we are to decide whether you have a right of investment or not: We certainly can't agitate that question about an action for damages.

Haldane, in the course of his argument, having alluded to the land-tax redemption Acts as bearing some analogy to the point in question,—

Lord Wynford.—In the land-tax redemption Acts it is expressly stated what you are to do.

Haldane.—Supposing too much land was sold, it might be reinvested in order to meet the intentions of the party. I am only meeting the question as to the difficulty.

Earl of Eldon.—In such a case, if a parcel of land were sold, the land-tax redeemed, and an Act of Parliament were to order the money to be laid out again to the same uses, the same question could not arise after the money was laid out to the same uses; but, in the present case, the new owner of the land would have the same title to sell as the present owner of the land insists on. In England, where an estate is limited to A for life, with remainder to B in tail, until that Act of Parliament passed which you mention, no Court thought itself at liberty to refuse, or to do otherwise than to compel the laying out of money in land. That was on this ground, that a tenant in tail could not the in-

stant he received land dispose of it: he must wait till he was able to suffer a recovery, if he were an adult; if he were not an adult, he might wait until he was, and then suffer a recovery. What was done by the Act of Parliament you mention amounts to no more than this, that inasmuch as when a person arrived at an age, and had a capacity of aliening the land, a Court of Equity, on trustees applying to a Court of Equity, might enable the money to be paid over to him, instead of insisting on that operation of the investment of land being gone through. I remember a case, I think it was either of Serle's coffee-house or a house in St James' Square, before that Act passed, being bought pretty nearly thirty times over, in order to suffer so many recoveries to get the money out of Court. That was on this ground, that the tenant in tail, in whom the land might be invested when the money was laid out, might not be able to suffer a recovery even in the course of his own life. It might happen that he might die before he could suffer a recovery, and Courts of Equity have taken a great deal of care to preserve that chance to him. July 16. 1830.

Haldane.—Having referred to the case Young *v.* Young in Lord Monboddo's manuscripts,—

Earl of Eldon.—When was that case first discovered?

Haldane.—Subsequently to the case being argued the first time; and it is noticed I find in the answer to the reclaiming petition before the Court of Session, but had not been before their Lordships previous to the reclaiming petition.

Earl of Eldon.—Would there be any means of seeing the contents of the instrument on which that decision was made? Do the contents of it appear on the record? It is very singular no one should have known of it.

Solicitor-General.—Lord Alloway and Lord Eldin said expressly there was no case in point.

Earl of Eldon.—Nor is it mentioned by the other Judges. It was so understood here formerly in other cases, that there was no case; and no mention was made of this of Young *v.* Young. But I suppose if that judgment were actually pronounced in the Court of Session, there must be some record of it. I should very much like to see what is the nature of the deed on which that judgment was given.

Brougham.—The report of the case states what it was generally, it does not give the summons. We don't quote it in consequence of a search made for the purpose of this cause, but from a book of decisions which is public and general.

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Earl of Eldon.—The extraordinary circumstance is, that none of the Judges whose judgment is now in question took any notice of any such case.

Haldane.—They took notice of it in the addition to their opinions. It is there said, 'we have considered the reclaiming petition, with the answers, and we see no reason to alter the opinion 'we have expressed; on the contrary, it is confirmed by the decision referred to in the answers which have been made public 'since the date of our opinion.' Then a reference is made to the very case, in the margin, Supplement to the Dictionary of Decisions, vol. v. p. 884.

Earl of Eldon.—I see, from what is said in Stewart and Lockhart, that the judgment in the Court below was carried by the narrowest majority;—a term by which we understand here, that it generally means that there is one Judge more on one side than there is on the other side. I wanted to know the value of that case, supposing nothing since to have happened. If you have the papers in that case, we should be glad to look at them. But the case was removed back again to the Court of Session, and it does not appear to have been farther pursued there. The case stands thus:—I think that it was a case in which there was a judgment given by the narrowest majority of the Court of Session, and there was an appeal to this House; and this House could not at that time make up its mind to agree with them; they sent it back ten years ago, and the parties have no farther litigated, as far as we know. What the weight of the case is, must be judged of by circumstances; and perhaps Mr Haldane observed a little severely on the leading Counsel and judicial opinion. This House, I see, is not unfrequently observed upon in the Court of Scotland: there may be a little set-off adjudged to both. When we are told of the weight of authority, numero et pondere, we ought to know what is the number as well as the pondera.

Haldane.—It is stated by the Counsel on the other side, that it was most improperly argued—that it was so imperfectly argued in the Court below, that there was not a greater majority in favour of the rights of the heir-substitute than of the successful party.

Earl of Eldon.—We shall get the House into the same difficulty as James Boswell on one occasion placed me. I had the honour of arguing a case before the bar of the House of Lords with him, and, being senior in the profession, I stated, with all humility, the extreme pressure under which I laboured, for I was

to argue against the unanimous opinion of the fifteen Judges. He came to the bar, (with what degree of modesty is not for me to determine),—but he blamed me to the House for prejudicing the cause of my client; stating, that when the Judges differed, they thought very little about the matter, and when they agreed, they thought nothing at all about it. July 16. 1830.

The Solicitor-General, in reply, having commented on the slender authority of Young *v.* Young, as having never till recently been published,—

Lord Chancellor.—It does not take away the authority of the decision, that it was not published; but if published and known to the world, and acquiesced in, it derives more authority from that circumstance.

EARL OF ELDON.*—My Lords, I speak a language which is not new from the mouth that now pronounces it, when I say, that, with respect to the law of Scotch entails, my mind has been oppressed with difficulties for several years past, and which, at this moment, I confess I feel it difficult to get rid of. My Lords, with respect to the question, whether entails were known to the law of Scotland—whether they were countenanced by the common law of Scotland previous to the Act of 1685,—if I had heard nothing upon the subject of entails but what I can read in that Act of 1685, I should have been disposed to say that entails, after 1685, inter hæredes, as well as with respect to successors, creditors, &c. were to be binding only if they were framed according to that Act; but, my Lords, when I recollect what passed in the case of Stormont, and what passed in other cases actually adjudicated in Scotland, as to entails previous to the Act of 1685, which have been referred to as having constituted the common law of Scotland previous to 1685, I protest it appears to me,—attending likewise to what is to be found, perhaps, however, only after great consideration, whether it was or not to be found in the Acts of Parliament of more modern date,—it does appear to me to be extremely difficult indeed to say, that they did not form a part of the common law of Scotland, which at this moment ought to be regarded as having an effect upon the right of persons claiming under entails inter hæredes. My Lords, with respect to the deed in the case of Stewart *v.* Fullarton, I do not think any man can read that deed, ponder over its contents, and look at all the clauses of it—those clauses of it of which no notice whatever is taken in any part of the summons—without being quite satisfied that the author of that entail had not the least notion in the

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* After the argument was concluded, his Lordship addressed the House.

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world of such a case arising as that one of the heirs of entail should call upon another heir of entail to invest the price of the estate; because I think no man can read that instrument without seeing, that the person who was the author of that entail had not the slightest idea in the world that he had left it in the power of any body to sell the estate. My Lords, we must, however, when we read this entail, judicially apply the strict doctrines of law to the interpretation of it; and it is one thing to be quite satisfied, as I protest I am, that the author of that entail had not the least notion that the estate could be sold, and therefore, could have no notion that the price, which could arise only from the sale if actually made, could be called for in judicial proceedings; but we are, on the other hand, to recollect, that it does not depend upon his notion whether the estate could be sold or not, but upon what is the law of the case; and I observe here, that, according to the summons, the persons who are the pursuers in this cause had a very considerable doubt how to state their claim. In the first place, they contended for that which they could not support, namely, that the party had not a right to sell the estate; but then they say, if he had a right to sell the estate, still there is the money which may be called forth from his possession, and that money shall be laid out again in the purchase of other lands, to be settled to the same uses, and under the same clauses, prohibitory, irritant, and resolutive, as are contained in the original instrument. Now, it is quite impossible, according to the settled law of Scotland, to deny that the Judges were right in a point in which I understand them to have been unanimous, namely, that for want of proper clauses in the instrument, the party may sell the estate that he took. No doubt he may sell the estate. With respect to the decision they have made, and carrying the matter no further, I apprehend this House can have no difficulty at all in deciding that such is the law of Scotland. My Lords, they have however told us, that he is bound to lay out the purchase-money in the purchase of another estate, to be settled in like manner. With respect to that proposition of law I speak with great deference, and certainly bound, I think, to say, that more consideration than I have yet been able to give to that proposition is due to it. But I do confess I am exceedingly disappointed in not being able, in any papers whatever, either in this case or in any other case with which I have had to deal, to learn from the judgments, or from the reasoning of the Judges, how it is that they are to enforce an obligation of that kind to lay out the money. Whatever be their powers, I do not find that there is any instance of such an action having been maintained; and if, upon looking at the whole of the instrument, your Lordships find that this person meant to make his entail under the Act of 1685, and if he has failed in making the entail effectual according to the Act of 1685, you have then to ask yourselves, Whether a common law obligation arises out of such an instrument, in re-

spect of which,—not according to any thing that has hitherto been determined, but according to abstract notions of what is right and what is equitable,—the Court of Session, somehow or other, (I know not how), is to lay out the price, or to order that price to be laid out in the purchase of an estate,—not in the purging the estate from debts contracted, or in other remedies of the hæredes inter se, but in the purchase of another estate,—taking care that after such purchase the money is laid out under an entail, in its contents the same as the original entail; while that estate, so purchased in the morning, is liable to be again sold in the afternoon?—a sort of obligation which may be again enforced by some process in the Court of Session, to apply the money that afternoon in the purchase of a new estate, to be settled again under the same clauses, prohibitions, &c.—the consequence being, that in truth you convert this species of entail, which does not prevent the sale of the estate, into what we in the law of England should call a settlement, with a power of sale and exchange. My Lords, I see, in the course of a learned note which has been laid before me, of the grounds of the opinion of my Lord Balgray, that he is not startled with the difficulties attending the entail of money—he refers to teinds and other circumstances. For reasons that I may have an opportunity of stating when this case is further considered, I apprehend it will be found, that that has not much of application to this subject. July 16. 1830.

My Lords, the question really is this—Does it appear clearly upon this deed of entail, that the party meant to make his entail according to the Act of 1685, in the execution of which purpose those who advised him, have failed to advise him rightly? or supposing there was authority to make it at common law,—which I do not mean to deny; I think I am bound by the great authorities to suppose there is such authority—Did he mean to make an entail to stand or fall by its assimilation to what was required by the statute of 1685? My Lords, I put the case so, because I think, if you will examine the deed itself, you will find that he could not intend to execute an entail which did not include the estate of Ascog. If you come to look at the obligations upon some of the substitutes, you will see that they are not imposed on them, if they should have possession of any estate that is bought with money produced by the sale of the estates mentioned in the instrument; but they are laid upon those who come to the enjoyment of the Ascog estate and to other estates, which they are ordered to entail if they come into possession of them, together with the estate entailed by this deed. If they come into possession of the estates entailed by this deed, they are to entail their own estates; but supposing they do not come into possession of the estates entailed by this deed, where is the obligation then that is laid upon them? Here also you must have, by implication, obligations carried a great deal further than the terms of the deed itself, (which admits of no

July 16. 1830. construction by implication), that expresses the obligation intended to be created. My Lords, what I am still totally uninformed of is this—What are the powers of the Court of Session with respect to this money? Can they order it to be paid to trustees? Can they make themselves the trustees? How is the money to be preserved? How does it happen that we never have had an action of this sort till of late years?—How are all those questions to be answered? or how is this House to do its duty, unless it can be informed how it can be done by the power of the Court of Session itself? How can this House do its duty, but by prescribing to the Court of Session what they are to do? and I do not apprehend the House will ever take upon itself the obligation of prescribing to that Court what they are to do, if they have no assistance in that Court to point out to them their course of action.*

Earl of Eldon.—My Lords, The cause in which I will take leave to move your Lordships to proceed to judgment, is the cause in which the appellant is Frederick Campbell Stewart, Esq. of Ascog, and the respondents are, Stewart Murray Fullarton, Esq. of Fullarton, and others, heirs of entail of the estate of Ascog; and I proceed to state to your Lordships the facts of the case.

My Lords, it appears that a gentleman of the name of John Murray of Blackbarony, otherwise denominated John Stewart of Ascog, executed a deed of entail of the 28th of May 1763. The appellant's Case states part of that deed of entail, and the respondents' Case also states part of that deed of entail. It occurred, however, that it might be material in a case of this importance to see the deed of entail itself; and, in the course of what I have to offer to your Lordships, I shall state presently some parts of that deed of entail not noticed, I think, in the printed Cases.

I proceed to mention to your Lordships, that the appellant is represented as having succeeded to the lands contained in the deed of entail, as a substitute heir of entail under the destinations contained in it. I should state also, that there were two deeds of entail—that of the lands of Ascog and others; and the other was of land that was to be purchased with the clear residue of the entailer's heritable and personal estate, converted into money and laid out in the purchase of lands. These other lands so purchased were, as the Cases represent, to be entailed in the same manner as the Ascog estates and others, so as that the lands so purchased, and the other lands, might be conjoined inseparably in all time thereafter.

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* The further consideration of the cause was then adjourned; and thereafter judgment was given at the same time in this and the two following cases.

My Lords, there was a summons and supplementary summons instituted by the appellant, which sought to have it found and declared that the appellant, who had succeeded to the lands in both entails, had full and undoubted right and power to sell and alienate the several lands, &c. contained in the deeds of tailzie, in any way he might think proper, for a fair price or other onerous consideration; and that the pursuer had full and undoubted right and power to grant and execute all dispositions, &c. whatsoever, which might be requisite or necessary for effectually conveying the whole, or any part or parts of the said lands and others, which might be so sold and alienated; and that the pursuer is not prevented from selling and alienating in any way he may think proper, for a fair price or onerous consideration,—(What do those words, 'onerous consideration,' mean? If they mean any thing but a fair price, I am unable to say precisely what they mean),—the lands and others before-mentioned; nor from granting and executing the dispositions and others before-mentioned by the foresaid two deeds of tailzie, or either of them, or by any of the titles under which the pursuer possesses the foresaid several lands and others. And, further, it ought and should be further found and declared by decreet, that, upon selling or alienating the whole, or any part or parts of the said several lands or others, contained in said two deeds of tailzie, for a fair price or other onerous consideration, the said pursuer has the sole, full, and exclusive right to the price or prices or considerations thereof; that the same are the pursuer's absolute property, and that he has full power to use and dispose of the same at his pleasure; and that the pursuer does not lie under any obligation to invest, employ, or lay out the same, or any part thereof, in the purchase or on the security of any other lands or estates, or otherwise, for the benefit of the heirs-substitute of tailzie, or any of them; and that the said heirs-substitutes, or any of them, have no right or title to interfere with or controul the pursuer in the use or disposal of the said price or prices, or considerations to be received by him, in any manner or way; and also that they, or any of them, have no claim or demand of any description against the pursuer, or against his heirs and representatives in the event of the pursuer's death, for or in respect of the sales or alienations which may be made, or dispositions or other writings which may be granted or executed by the pursuer, in the manner and on the terms before specified, or for or in respect of the pursuer's using or disposing, at his pleasure, of the said price or prices or considerations to be received as aforesaid. July 16. 1830.

I have taken the liberty of troubling your Lordships to state all this at large, because it may be material to advert to what is the effect of the judgment of the Court upon the whole matter of the summons. Your Lordships will observe, that these summonses are large enough to include these propositions;—namely, that he has a clear right to sell these estates; that he has a right to apply the price

July 16. 1830. as he thinks proper to apply it; that there can be no demand on him for reinvestment of price in the purchase of another estate; that there can be no demand upon him in respect of his having applied the money he has sold the estate for to his own use;—and what he asserts is, in effect, an assertion, that he would not be liable to damages, any more than he was liable to be called upon to lay out the money in the purchase of another estate to be settled to the same uses.

My Lords, defences were lodged for the respondents, in which it was denied 'that the pursuer could make an effectual sale;' and, secondly, it was maintained, 'that esto that he could, he was bound 'to reinvest the price in lands, to be held under the conditions of the 'entail, and in favour of the same series of heirs.' Here your Lordships may observe, that, according to this defence, the proposition which it contends for is, that the pursuer, if he had a power to sell, was bound to reinvest the price in lands, to be held under the conditions of the entail, and in favour of the same series of heirs. I have learned in the course of many years, in this House, that, in Scotch causes, there is nothing more material, with a view to your Lordships forming a right judgment, or more for the benefit of the lieges of Scotland, than to endeavour, if possible, to apply the mind strictly to the matters contained in the summonses and defences; and that this House should proceed distinctly, and only, upon what is stated in the summonses and what is stated in the defences, and what is done in the judgment of the Court below with regard to what is to be found in the summonses and in the defences; and not to deal with matters to which the pleadings do not extend.

My Lords, the respondent, one of the defenders, brought another action, which was remitted to the other proceedings. This summons states the entail, and sets forth, that Mr Fullarton is one of the heirs of tailzie to the foresaid lands and others before described, under each of the two deeds of tailzie before narrated, and is thereby entitled to prevent the said lands and others, so tailzied, or any part thereof, from being carried off, or the provisions in favour of him and the other substitutes called along with himself by the said two deeds of tailzie, destroyed and rendered of no avail to him or any of the substitutes, by the said tailzied lands and others being sold, and the consideration money being applied to other purposes than what are provided by each of the foresaid two deeds of tailzie.

It may here be asked, what are the purposes to which the consideration money, if a sale is made, is provided to be applied by the deeds of tailzie? If any, they must be implied purposes, as it does not seem that any are expressed in case of a sale being made.

The summons then subsumes that Mr Stewart of Ascog, (the appellant), as heritable proprietor of, and lawfully vested and seized in, and in possession of the whole lands and other subjects before by virtue of titles made up in his person, as heir-substitute of tailzie

therein under the two deeds of tailzie before-mentioned, is prevented by the said deeds of tailzie or otherwise, (referring the prevention to some other causes of prevention if the said deeds do not prevent him), from selling or alienating the said lands and others, and from disposing of the price or prices, or consideration received or to be received on the sale and alienation of the said lands and others, or any part thereof, unless, upon making such sale or sales, he, the defender, reinvests the price or prices, or consideration to be received on said sale or sales, in the purchase of other lands of equal value, and to be conveyed by him to the pursuer and the other substitutes called alongst with him as foresaid, and under,—(I beg your Lordships' particular attention to this),—' and under the same provisions, conditions, ' limitations, and otherwise, as the defender himself possesses the fore-' said lands and others under the foresaid two deeds of tailzie.'

It may here be mentioned as a fact, that the defender had sold part of the entailed lands, and therefore the summons proceeds thus:—' And as the defender has already sold and alienated the foresaid ' lands and others, the price or prices of which he is threatening, or ' has threatened, to apply to his own exclusive advantage, which ren-' ders it necessary for the pursuer to prosecute this action of decla-' rator;' and that therefore it ought to be declared, that, having so sold or alienated, the prices or considerations belong to Fullarton and the other substitutes in the entail, and not to the defender: That he is bound to lay out the prices in the purchase of other lands, for the benefit of the pursuer and other substitutes under the deeds of tailzie, and all of them; and that he and they have right to prevent the defender from using and disposing of the price or prices, or considerations received or to be received by him from the purchaser, to his own advantage.

This summons, so far as it is stated, is a negative upon the appellant's alleged right to apply the purchase-money to his own use; and then it proceeds to advert to his not so investing the price, or other considerations; and in that case its conclusion is, or further conclusion is, ' that the said Stewart Murray Fullarton, and each and every one of ' the other substitute-heirs of tailzie under the foresaid two deeds of ' tailzie, have all and each, and every one of them, legal claims and de-' mands against the said Frederick Campbell Stewart, defender, or ' against his heirs and representatives in the event of the defender's ' death, for damages and pecuniary reparation, to the extent of the price ' or prices, or considerations received or to be received by the defender ' for the sale of the said tailzied lands and others, for and in respect of ' the said sale or sales, or alienations, which have been made and ex-' ecuted, or which may be yet made and executed by the defender, and ' for and in respect of the defender using and disposing of the said ' price or prices, or considerations received or to be received as afore-' said, to his own exclusive advantage.'

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Your Lordships will here observe, that each and every heir-substitute is here assumed to have a claim of damages if the price or prices are not invested: If part be invested, it follows that, for such part as is not invested, they and each of them, and, as it should seem, born or not born, have, and each and every of them has such a claim for damages, and against assets if not made good, against the defender;—the summons certainly not informing us whether one is to proceed for all substitutes, or each for himself; or how assets, after death, are to be dealt with, or how actions are to be brought and proceeded in from time to time;—and, according to the language of the summons, each and every one of the substitutes, it is asserted, has a claim to the extent of the price or prices received for the estate sold, and not merely to the extent of what each and every one respectively had suffered by the sale.

My Lords, there was a hearing in the presence of both Divisions. The Judges were divided in their opinions, the majority certainly being of opinion with the pursuer Fullarton; and their judgment is to this effect:—'The Lords having considered the information for Frederick Campbell Stewart, Esq. of Ascog, pursuer, and for Stewart Murray Fullarton, Esq. of Fullarton, and others, heirs of entail to the estate of Ascog and others, under two several deeds of entail produced, defenders, conjoin the processes; and in the process of suspension find, that as the provisions of the Act 1685, c. 22.' (which your Lordships may recollect is an Act with respect to entails in Scotland), 'which regulate all questions with purchasers or creditors contracting with heirs of entail, have not been observed or complied with as far as regards sale and alienation, to which the irritant and resolutive clauses are not applicable, and that the prohibitory or restraining and limiting clause cannot, per se, affect the purchaser, Repel the reasons of suspension, find the letters orderly proceeded, and decern. But in the declarator at the instance of Frederick Campbell Stewart of Ascog, find, That the pursuer is infeft and seized in the estate of Ascog and others, in virtue of two deeds of entail, under a provision by which it is declared, that the heirs of entail shall not have any power or liberty to sell, annailzie, or wadset the lands and others foresaid, or any part thereof, and that the same is effectual and obligatory against the pursuer, and that he has no right to contravene the same; and therefore assoilzie the defenders from the whole conclusions of the said action, and decern: And in the declarator at the instance of Stewart Murray Fullarton, Esq. of Fullarton, and others, heirs of entail to the estate of Ascog and others, find, That the pursuers have, under the foresaid provision or restraining clause, a right to compel the defender, Frederick Campbell Stewart, and that the defender is bound, to reinvest and lay out the price or prices or considerations of the lands sold by him contrary to the said provision or restraining clause, in the purchase

'of other lands or estates, to be settled for the benefit of all concerned 'and interested in the said two entails, conformably in all points to 'the provisions and conditions therein contained, and according to 'the forms and practice of the law of Scotland; and find that the de- 'fender is not entitled to apply or use the principal sum of the said 'prices or considerations to his own private purposes, benefit or ad- 'vantage, and decern.'

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Your Lordships see, therefore, that whatever these summonses sought to have declared in judgment, nothing more is declared in judgment, except that this gentleman is bound to lay out this money in the purchase of other estates, to be settled to the same purposes. With respect to that part of the summons which speaks of damages upon the part of the defender, as contradistinguished from the obligation to lay out the money for which the lands have been sold in the purchase of other estates to be settled to the same uses, this judgment is entirely silent: the consequence of that is, that the only point which can be now considered as being in appeal before your Lordships is, Whether this gentleman, Mr Stewart, is bound to lay out the money which has been the price of the estates he has sold, in the purchase of other estates to be settled to the same uses? It may possibly be, that the same principles on which your Lordships find that he is to lay out the price of the lands sold in the purchase of other estates, to be settled to the same uses, may govern the decision on the question, whether an action for damages would, at the suit of one, or all and each of the heirs-substitute, be maintainable against Mr Stewart, or his assets in case of his death? but it is apprehended, that all regularity of proceeding here upon appeal suggests, that, there being before us no deliverance upon that part of the summons by the Judges below, and there being no appeal to us on that point, your Lordships' consideration must be confined to the only point which is raised. The judgment, I understand, admits that Stewart of Ascog may, consistently with the deed, sell,—that of course the purchaser may buy,—but that it must be understood that the deed itself, in some part of the terms found in it, or by law, as it relates to entails, requires the seller to lay out what he has received or shall receive from the buyer, in the purchase of other lands to be settled to the same uses; and which, when bought, may also be sold, and the money arising from the land so also sold being to be also laid out; and, in like manner, sale and purchase may be made again and again, reinstating from time to time the purchase-money as often as sales shall be made.

My Lords, the question, whether the Judges are right or wrong in the judgment which they have pronounced, and which I have read to your Lordships, it would very ill become me to consider not to be a question both of the greatest importance and greatest difficulty, recollecting that the Judges of the Court of Session have been very much now and before divided in opinion upon that species of question. Judges

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of great name and of high character have thought and think differently from each other upon this subject; and therefore all that I could do in this case was to give to it the most anxious consideration before I presumed to state my own opinion; and I take leave to say, that I do not address your Lordships until I have given that anxious consideration of this most important and difficult case.

My Lords, it is not my purpose to state to your Lordships the various arguments upon points arising in former cases which have come by appeal before this House, or the various arguments which are to be found in the papers printed in the former cases, or in this case, or the various arguments which your Lordships have now heard at your bar, or upon the various points discussed in reasoning, to be found in printed opinions of the learned Judges in the Court of Session: To consider them anxiously, to reconsider them all most anxiously, has been a duty which I hope has been duly attended to; and to state the result of that consideration, and that which appears to me to be the better opinion for your Lordships to express in judgment, is what I propose—not to discuss all the matters suggested in argument in the various papers and proceedings alluded to. This species of case is not new to me. Some years ago there was a case before your Lordships in which we had points of a like nature to consider; and, when we had that case before us, it was urged or contended, that if the question was inter hæredes, and not between heir and purchaser, the heir,—though the deed did not contain all the clauses prohibitory, irritant, and resolutive, and though purchasers would be safe,—the heir selling would be answerable to the substitutes (having a species of jus crediti, or some right by law) for the price for which the heir sold, and the damage which they sustained by alienation of the estate. When that case was before us I took the liberty of observing, that, considering that the statute of entails was made so long ago as the year 1685, and that a great many cases had most probably occurred in which claims of this nature might have taken place, considering the length of time the statute had been in force, and attending to the settled doctrine about implication, it was very extraordinary that no case could then be cited to us in which a judgment to that effect had been given and applied in the Court below; and the cause was therefore remitted back to the Court of Session to reconsider. What it was that led to the total inactivity of the parties after that cause was remitted, I am not prepared to say, but the cause never came back to us. If my recollection is correct, there was great difference of opinion among the Judges in that case, and the judgment was pronounced by the narrowest majority. I think the principal case since mentioned was that of Young v. Young, and a very extraordinary case it is. In all the debates and arguments that were held in this House when that former case was heard, and in all the debates in the Court of Session, and until about the time the present case came up here, that case of Young v. Young has slept in the repositories of the Court of

Session, and nobody seems to have known any thing of it. What the particulars of the case were, or what opinion the House might have formed upon that judgment, I cannot presume to say; but I think I do not go too far when I intimate, that if that case of Young *v.* Young had been brought by appeal to this House, it would probably have found its way to the Court of Session for further consideration, as the case I have alluded to did. It is proper, however, to observe, that the Judges appear, from passages in the printed papers, to have considered the present case with reference to the fact, that a remit had been made in the former case alluded to. July 16. 1830.

My Lords, if this case depended upon the effect of the deeds of entail only, and such principles as we apply in this part of Great Britain in the construction of deeds, we should have nothing to do but to look at the deeds; and I apprehend that it would be perfectly clear that this gentleman might sell the estate, and, selling it, that no demand could be made against him in respect of the price, nor would it be suggested that he had done that which he was not entitled to do. But we must look to the law of Scotland to determine, whether that law raises such a demand against the party as this judgment sanctions, attending to what is the acknowledged effect of this deed, which, it is admitted, does not prevent the party from selling, and to sell without limit as to the number of sales; upon each sale the party being however supposed to be obliged to buy another estate, to be settled to the same uses; a right in him to sell from time to time, and in the purchaser to buy from time to time, without limit as to the number of sales and purchases; the obligation from time to time to buy an estate, to be settled in lieu of that sold, arising either from a proviso in the deed against selling, or a sort of jus crediti which the heirs and substitutes are supposed to have from what is called or represented as part of the law of Scotland, independently of the words of the deed.

If such be the effect of this deed, I cannot bring myself to believe that the author of the entail had the least notion that his intention would fall to be considered as an intention that the party might sell parts of the entailed lands, consistently with the legal effect of the deed of entail, complying with an obligation supposed to arise from requisitions not sufficiently expressed in the deed, but imposed by law an obligation to buy other estates, to be entailed in lieu of those which had been sold. That this would not be according to the entailer's intention, it is difficult to doubt; but if the judgment is right, it should seem that this is an intention which the law must impute to him as his actual intention, though he has not expressed it,—must imply to have been his actual, though not his expressed intention,—not the expressed intention of an entailer, who has declared that the lands to be purchased with his personal estate should be conjoined inseparably with those his other lands, (Ascog and others), which he had himself actually entailed; and the deed of the entail of Ascog containing passages which likewise point to inseparable conjunction of the actu-

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ally entailed lands with other lands required to be entailed. If the deed intended to give the power of selling, and he has expressed in the deed nothing whatever with respect to the money which arises from the sale—prima facie, at least, one should think that he to whom he had given the power of selling would have the power of disposing of the money which is the produce of the sale. It is true, that the author of the deeds has said, that the heirs shall not have power or liberty to sell, annailzie, or wadset the lands;—the other prohibitions he has guarded with irritant and resolutive clauses. The effect of those clauses, if the other prohibitions were violated, is well understood. The deeds of entail apply no irritant or resolutive clauses to the prohibition against selling. The deed, therefore, admits of an effectual sale; but the author of the deed, without expressing that such shall be the effect of a sale, is understood to mean that, of which he has not said one word, viz. that if the heir does sell, he shall buy another estate with the price, and so sell and buy as often as he pleases to sell and buy; and that the mode in which he is to compensate the other heirs, is not by recompensing each to the extent of the damages which each may sustain, if any of them can claim compensation in that mode, but, selling as often as the heir chooses to sell entailed estates, so often entailing other estates to be bought with the prices for which the original and subsequently purchased estates sold. It is to be argued, that though the deed has not applied the irritant and resolutive clauses to the act of selling, yet there is law, not expressed in the deed, but to be found out of the deed, which sanctions and requires that which in this case the judgment requires. This has not been established satisfactorily, if I may presume so to say; but of this your Lordships are to judge. The author of the deeds seems to have made his deeds the law between the parties to take under them; and he seems to have thought that his estates, entailed by his deeds, and to be entailed by the purchases which he himself directed, were conjoined inseparably in all time thereafter. There is evidence of this in the deed of entail itself of 1763. The author of the deeds may have mistaken the effect of them, but, if he thought that he had by his own deeds irrevocably conjoined the estates which he entailed and directed to be entailed, and yet, by not applying irritant and resolutive clauses against selling, has authorized sales, he has not irrevocably conjoined the estates which he meant should be so conjoined. By mistake, if it be so, he has not executed his own purpose; and it is for your Lordships to judge, whether, taking this to be a mistake, you in judgment can rectify it. Whether the omission of a resolutive clause against selling was intentional or unintentional, it bears strongly, it should seem, against the judgment. The deed entailing Ascog also appears to afford evidence, that he thought that Ascog was, and that he meant it should be, inseparably conjoined with the estates entailed, or which he required to be entailed. I am resolved, he says, having designated himself John Stewart of Ascog, for the standing of

my family, to make the settlement underwritten, with and under the conditions, burdens, provisions, conditions, and clauses irritant and resolutive, herein-after expressed. There is difficulty in contending, that a man who tells us he meant to make a settlement, 'under the 'burdens, conditions, provisions, clauses irritant and resolutive after 'exprest,' means to make it under conditions not all equally effectual. He has not expressed that he really meant—in addition to the mere words of the condition not to sell without making that condition effectual by irritant and resolutive clauses affecting purchasers—that an heir effectually selling to a purchaser should be both liable to what the judgment renders him liable, and also at liberty to do what, consistently with the judgment, he is from time to time fully at liberty to do. It is for your Lordships to judge, whether clearly settled law exposes the heir selling to such liability, and nevertheless leaves him entitled to such liberty; and that you are bound to imply that the author of the entail meant to impose an express condition by the deed, and instead of enforcing the observance of it, as he enforced the other provisions by irritant and resolutive clauses, that he relied upon some supposed clearly settled law to do what he might have directed by this deed, but as to which he is perfectly silent, namely, from time to time, upon every selling, to require the heir to buy another, and entail to the same uses. The entailer, Stewart of Ascog, proceeds to convey All and Haill the three pound land of Over and Nether Ascogs, with the miln thereof, miln lands, multures and sequels of the same, and waulk-miln thereat, the loch Ascog, and aqueduct thereof from the said loch to the said milns of Ascog, with the 'mansion-house of 'Ascog, yards, and haill inclosures thereto belonging;' then he mentions the parish church, and the place of sepulture he has there,—and he proceeds to add a great many other lands which he had. After going through the mention of the heirs called before M'Arthur of Milnton and Fullarton of Bartonholme, he limits the estates he was entailing to Archibald M'Arthur, only son of John M'Arthur of Milnton, and the heirs-male of his body; and in a subsequent limitation, on the failure of him and those who come after him, to George Fullarton of Bartonholme, only son of the deceased Robert Fullarton of Bartonholme, and the heirs-male of his body: Then he concludes with other limitations. I have mentioned these limitations to Archibald M'Arthur, the only son of John M'Arthur, and then to George Fullarton, the son of the deceased Robert Fullarton, whom he substitutes in the course of this entail, with a view of observing on a passage which occurs in the subsequent part of this deed. It appears to me important, as shewing that he meant that the very lands which he had himself entailed should be conjoined with those which he requires to be entailed with them; not only those to be purchased with the produce of his own property, but those also of Milnton and Bartonholme: For you further find in the deed this proviso, 'It is hereby expressly 'provided and declared, and shall be provided and declared in the

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'charters and infeftments to follow hereupon, that if the lands and 'others foresaid,' that is, the very lands which he had himself entailed, 'by virtue of these presents, happen to fall and devolve upon any 'of the heirs-male of the body of the said John M'Arthur of Milnton, in virtue of these presents, or the heirs-male of the body of the 'said George Fullarton, that then and in that case they shall be holden and obliged to tailzie, as I hereby bind and oblige them to tailzie the said lands of Milnton and Bartonholme respective, upon the 'same series of heirs, and under the same provisions, clauses irritant 'and resolutive, that are contained in the present tailzie, and cause 'record the said tailzie in the Register of Tailzies; and that within five 'years after the succession, in virtue of this present tailzie, shall devolve upon them respectively.'

Now, my Lords, see what the object here was,—that if those persons took the lands and others aforesaid, that is, the lands of Ascog and others comprized in Stewart of Ascog's entail, then they should likewise add to that tailzie of those lands the lands that belonged to them in the places he mentioned. But if the lands of Ascog and others, entailed by himself, could be disposed of by sale, that sale might be made effectually soon after his death, or before the succession to Ascog and others fell to those who were to entail their lands, and then the case could not arise in which the lands settled by his entail could fall and devolve upon the heirs of M'Arthur and Fullarton. I do not apprehend that it would answer the real actual intention of the author of this tailzie of Stewart of Ascog, that lands purchased anywhere in Scotland, with the money arising from a sale of the Ascog and other lands entailed by himself, should be entailed with the lands of M'Arthur and Fullarton. He probably meant, that inseparable conjunction of his lands with their lands which he ordained as to the lands he had, and those which should be purchased with his other property.

He had before mentioned the mansion-house, the parish church, and the place of sepulture he had there in Ascog. He directs also, that heirs-substitute are to bear the name and arms of Stewart of Ascog; that they are to keep up the parish church of Ascog. These and other circumstances denote an intention that this entailed property should remain unsold, and that he was not declaring or providing for any such purpose as would allow the heirs-substitute to part with what he had entailed, and to entail other lands by laying out the sum arising from the sale of entailed lands. I take it, my Lords, to be reasonably clear, and I cannot but think that the party to this deed had not the least notion that the heirs-substitute might sell the entailed estates. I infer this from his having prohibited sale in terms, though ineffectually, adding to that consideration his extreme anxiety inseparably to connect what he had entailed with the lands which he directed to be purchased and entailed, and with his requisition that some of his heirs-substitute should entail in like manner their lands, if they succeeded to his; meaning that they, when they became Stewarts of

Ascog, should enjoy together his Ascog estates and their own former estates, under the same entail or species of entail. But whatever may be that opinion, thus expressed, judicial opinion must hold that he intended us to prevent any sale (speaking of intention, it is to be collected from his deed) which he has effectually by his deed prevented, and that only. He must be considered as not having prevented by his deed, what probably he really by mistake thought he had prevented, viz. sale of his entailed estate; and accordingly the Court of Session all agree that a purchaser may buy the estate, and, buying it, destroy all that union and conjunction of estates which he meant to secure, and seems to have been most anxious to secure. His mistake, if there has been a mistake, it is difficult to say that a Court can correct; but it may be said, that though buying the estate is an act permitted to the purchaser, because not sufficiently prohibited by the terms of the deed, it is (somehow only conditionally) allowed, if not actually prohibited as to the heir-substitute selling,—that he has accepted upon terms which he is under obligation to comply with,—that he can only sell upon condition that he lays out the money arising from the sale in the purchase of other lands, to be settled to the same uses,—and that, observing such a condition, he may sell and repurchase lands as often as he pleases, making from time to time similar entails: that such is the state of the law 'inter hæredes;' that, as to heirs, there is a sort of jus crediti, a sort of obligation, that they should so act with respect to each other; and that the author of this deed of entail must, as to his intention, be supposed to mean not only what he has expressed in the terms of his deed, but something which the law requires,—not to be found in the expressions of the deed, but which nevertheless the law does require,—the benefit of which he must have meant his heirs-substitute to have, though he said nothing in his deed respecting it; and that he must be taken to mean that his heirs should have the advantage of that law, though he has not so declared. July 16. 1830.

One great difficulty in this case, as to this, seems to be of this nature,—that if you impute to the author of this deed, that he meant both what this judgment says is the law which the heir is to observe, and that he meant also to effect all that has been stated to be the meaning of what he has actually directed, expressed, and declared to be his meaning in the expressions of, and in what he requires to be done by his deed, as to conjoining indifferent properties inseparably, it is difficult, and perhaps it may be most reasonably said it is impossible, to reconcile the expressed and implied meaning with each other; and that, whatever may be said to be the intention of an entailer, as to be collected both from the expressions in his deed and by some law not mentioned, but some law supposed to be settled and intended by him to be observed, it seems exceedingly difficult, if not impossible, to suppose that this entailer,—regard being had to the expressed provisions in his deed with respect to the lands which he entailed, and those which he directed to be entailed, and which he required to be

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inseparably conjoined, and those which he seems to have required some of the heirs-substitutes to add by entail to his entailed lands,—it seems difficult, if not impossible, to suppose that he thought that any law, not expressed in his deeds, would sanction the sales of the entailed estates, if the money produced by such sales was laid out in the purchase of any lands anywhere in Scotland, to be sold and exchanged, again and again, for any other lands there. His intention seems to have been, that his deed was to regulate the whole; he seems to have thought, that by this deed he had prevented sale of the entailed estates. In that he has been mistaken: the defect of the deed it is difficult to supply by that judgment which is under your Lordships' consideration, unless it can be made out to your Lordships' satisfaction, that that judgment pronounces the law of Scotland upon the effect by expression, or some settled doctrine of law with reference to which the entailer made his settlements, though in his settlements he refers not to that doctrine.

I cannot easily persuade myself to think, that either the party to this deed, or his professional adviser, really thought of giving efficacy to some parts of this deed by penalties and forfeitures, and to the most material part, as to selling, by prohibitions only, which are ineffectual as to forfeiture of the estates, and leave the heirs, in case of sale, to a remedy in damages, reparation, or surrogation, or by what other name the party selling, and the other substitutes, could agree to apply to recompense for the act done, if agree they could.

Let us shortly again observe, that the question in this case which we have to determine is, not whether there has been a breach of obligation entitling the heirs-substitute to recover damages, estimated and calculated by reference to what loss every and each of the heirs-substitute may sustain by sale of any of the entailed lands; but whether it is the law, that, if a sale is made, the price should be laid out in lands in like manner, such lands when bought being again liable on like terms to be sold, sale and reinvestment to be following each other as long as the heirs shall think proper to make sale and reinvestment; the liability to damages, to be calculated for the benefit of each and every one of the heirs in manner mentioned in the summons, taking place according to that summons in the event of the parties not reinvesting the price in the purchase of other lands, upon which question of eventual liability to such damages, the Court in judgment I understood to have expressed no opinion. The question, therefore, before us is simply, whether the party is compellable by law to lay out the price or prices of what has been sold in the purchase of other lands? and, if I understand the judgment, the Court has not proceeded to state any thing respecting what is demanded as damages if reinvestment is not made. The Court declares, indeed, that the defender is not entitled to apply the principal sums of the prices or considerations for his own benefit. The actual circumstances of the case made it possibly unnecessary to express any judgment as to what

should be done, if the defender had applied or should apply the price to his own benefit. If a case of this sort happened, as it might have happened, it might have been exceedingly material for your Lordships' information to have learnt how damages would have been estimated as to all, each, and every one of the heirs-substitute born, or hereafter to be in being. July 16. 1830.

To estimate damages in such a case, in such manner as damages are asked, does not seem to be obviously just, assigning as damages to each heir the whole extent of price.

To proportion the damages amongst all heirs, seems to be matter of difficulty not easily overcome. It may not be improbable altogether, that if the price had been wholly applied to the defender's own use, he might have been held liable to invest, in the purchase of other lands, money to the amount of the price. As to this proposition also, there are difficulties attending it of weight; but it is probable that the Court might have held this.

I own, my Lords, I am unable to persuade myself, that by a mixture of law not to be found in the deed, but of law understood to be settled, with the provisions of the deed,—(the act of selling is a legal act—the act of buying is a legal act),—that the act of selling can neither be prevented by interdict, inhibition, forfeiture, or other means, but yet that the heirs-substitute are to take their chance of having the sale prevented, not by a real obligation preventing it, but by a personal obligation to lay out the price for which the sale is made in the purchase of other lands, to be sold again and again upon reinvestment of prices; and particularly when regard is had to what appears to be the meaning of this entailer as to what were the very lands which he means to entail.

Your Lordships have had a great deal of discussion at the bar as to the state of the entails prior to the statute of 1685, and even discussion, whether there were any valid entails before that statute. It seems impossible to deny that there were entails before that statute. We read of simple destinations,—of the introduction of prohibitory clauses,—irritant clauses,—resolutive clauses,—into entails. In the course of what has passed here, we have heard of Acts of Parliament recognizing entails prior to that statute. We have heard of the use made of inhibitions and interdicts, as it should seem longer in use, than it is now thought consistent with that statute that they should have continued in use.

We have been referred to text writers, to dicta, to authorities, unquestionably of great weight, imputing, in effect, that there were valid entails, at least valid inter hæredes, before the statute, and to the Stormont case. Let it be assumed, therefore, that there were valid entails before the statute. It is also not capable of being denied, that much and weighty authority has been referred to, for the purpose of maintaining that the statute was also intended only for the benefit of purchasers, creditors, &c., and that it was not intended to

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operate so as to authorize, especially if there was a prohibitory clause, some of the hæredes to disappoint the expectations of the other hæredes; but as between heirs, the entails, though defective as to others, created obligations, personal if not real, capable of being enforced somehow. It is difficult under such circumstances to undertake to pronounce, that it was the intention of the statute, with respect to entails made after that statute, to enact that the question of their validity should depend merely and only, as between all persons, upon their conformity to that statute. So, often, it has been declared by great and grave authorities, that such was not the intention of the statute as between heirs. The history of decisions, perhaps, authorizes an assertion, that it is also however very difficult to state, what is the remedy which the heirs-substitute were meant to have against heirs violating a prohibition not enforced by irritant and resolutive clauses, especially considering what is now stated to be the law as to inhibition and interdict? which seems to prove, that those who maintain the obligation or duties between heirs-substitute, must admit that the statute meant to take away, and has taken away, some of those means of preventing a breach of these obligations or duties; and it seems not to have been clearly or to be easily settled, what are precisely the remedies established by law, in case of a breach of such obligation or duty.

If the authority I refer to did not lead me to abstain from confidently stating that opinion, I should have said that the language of the statute 1685 satisfied me, that it was the intention of the Legislature to make this statute apply to all future entails at least, and that the statute was to regulate them. It is in these terms:—'Our So-'vereign Lord, with the advice and consent of his Estates of Parlia-'ment, statutes and declares,' (not that it is lawful to his Majesty's subjects, but) 'that it shall be lawful to his Majesty's subjects to 'tailzie their lands and estates, and to substitute heirs in their tailzies, 'with such provisions and conditions as they shall think fit, and to 'affect the said tailzies' (having made their tailzies with such provisions as they think fit) 'with irritant and resolutive clauses, whereby '(that is, by those irritant and resolutive clauses) it shall not be law-'ful to the heirs of tailzie to sell, annailzie, or dispone the said 'lands, or any part thereof, or contract debt, or do any other deed 'whereby the same may be apprized, adjudged, or evicted from the 'other substitutes in the tailzie, or the succession frustrate or inter-'rupted; declaring all such deeds to be in themselves null and void, 'and that the next heir of tailzie may immediately, upon contraven-'tion, pursue declarators thereof, and serve himself heir to him who 'died last infeft in the fee, and did not contravene, without necessity 'any ways to represent the contravener. It is always declared, that 'such tailzie shall only be allowed in which the foresaid irritant and 'resolutive clauses are insert in the procuratories of resignation, char-'ters, precepts, and instruments of sasine, and the original tailzie

'once produced before the Lords of Session judicially, who are here- July 16. 1830.
'by ordained to interpone their authority thereto, and that a record
'be made in a particular register book to be kept for that effect,
'wherein shall be recorded the names of the maker of the tailzie, and
'the general designations of the lordships and baronies, and the pro-
'visions and conditions contained in the tailzie, with the foresaid ir-
'ritant and resolutive clauses subjoined thereto, (the tailzier stating
'his own conditions and provisions, and inserting his irritant and re-
'solutive clauses), ad perpetuam rei memoriam; and which provisions
'and irritant clauses shall be repeated in all the subsequent convey-
'ances' (this part of the statute does not mention resolutive as well as 'irritant clauses,' but there can be no doubt I apprehend as to the intention) 'of the said tailzied estate to any of the heirs of tailzie;
'and being so insert, his Majesty, with the advice and consent afore-
'said, declares the same to be real and effectual, not only against the
'contraveners and their heirs, but also against their creditors, ap-
'prizers, adjudgers, and other singular successors whatsoever, whe-
'ther by legal or conventional titles.' Then it is declared, 'That if
'the said provisions and irritant clauses' (that is, such as had been inserted originally) 'shall not be repeated in the rights and conveyances
'whereby any of the heirs of tailzie shall brook or enjoy the tailzied
'estate, the said omission shall import a contravention of the irritant
'and resolutive clauses,' (not only of the irritant, but the irritant and resolutive clauses), 'against the person and his heirs who shall omit
'to insert the same, whereby the said estate shall ipso facto fall, ac-
'crue, and be devolved to the next heir of tailzie; but shall not mili-
'tate against creditors and other singular successors, who shall hap-
'pen to have contracted bona fide with the person who stood infeft
'in the said estate without the said irritant and resolutive clauses in
'the body of his right.'

The language of this statute seems therefore to import, that the Legislature was not only ordaining a law for the benefit of creditors and other singular successors, but also a law which was to operate between and for the benefit of heirs; and in its language also to require certain observances, a non-attention to which should affect the right of heirs, though not the rights of creditors or singular successors; and this occurring in an Act of Parliament which ordains how it shall be lawful for his Majesty's subjects to tailzie their lands.

It surely is not very presumptuous to say, that it is difficult to suppose that the Legislature, thus providing the most effectual means that could be devised for protecting future heirs-substitute against the acts of prior heirs-substitute, and adopting such language as is adopted in this statute, might not feel the necessity, with respect to entails thereafter created, for any other provisions of law in favour of heirs-substitute than such as were in the statute expressed; or that if a person set about making an entail, he was in want of any other means of enabling him most effectually to complete his purpose, than

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such as this statute afforded him. It seems to me that he might lay aside all intention to take the benefit of the Act of 1621, if indeed it can be said that that Act has any application to the subject, or to take the benefit of any preventive processes, or any remedial suits which the law, before this statute passed, furnished against violations of his entail. Some of these preventive remedies, we have been told, inhibition, &c. were for a time, but only for a time, understood to be applicable against a party intending to sell, and not restrained from selling by irritant and resolutive clauses; and the judgment in question negatives the right to prohibit the sale. Statute law, we have been told, has not ascertained what is the remedy, the precise nature of the remedy, which the substitute-heir has against a prior heir having a right to sell, being under no real, but supposed to be under some personal obligation not to sell,—an obligation which cannot be enforced, as we have been told it cannot, as a real obligation might have been enforced before the statute.

In the absence of statutable remedy, some have told us, that for the breach of personal obligation damages are recoverable; by whom, in what manner to be estimated as to each and every person who may be damnified, we have not been told in argument or statement, except as we find damages in a given case stated in the summons. We are told, that what the appellant calls damages is not damages but reparation. We are told, that it is neither damages nor reparation, (indeed it is difficult to distinguish the one from the other), but that the price for which the entailed estate is agreed to be sold is a surrogatum for the estate sold—not, however, to be enjoyed according to the species of property of which that price consists, but to be laid out in land, with an incontrollable power in the heir-substitute for the time being to re-sell and re-purchase, as often as re-sale and re-purchase shall according to his pleasure be made; and, unless I mistake the effect of the information we have received, the remedy ordained to be due by this judgment, is a remedy hitherto not awarded in judgment in such a case as this.

But, whatever be the right opinion as to the effect of the statute of 1685, with respect to entails created before that Act, or since that Act, I cannot bring myself to think that this entailer, executing a deed in all its contents such as this entail is, has created such a right (as between the heir in possession and the other heirs-substitute) as this judgment affirms that heirs-substitute possess, or are adjudged to have by the application of the price which it ordains to be made.

The doctrine of non-implication, as applied to Scotch entails, may have gone a great deal too far. I think it has; but it must now be supported. That we are to contend that it was in the contemplation of the author of this deed, that each heir-substitute might sell; that every person that would deal with him might buy; that though he had a right to sell, and every such person a right to buy, yet that, after he had so sold, he was under an obligation, perfect as being capable of

being enforced, to lay out the price in the purchase of another estate, and so toties quoties;—to suppose all this, attending to all that in provision and expression is found in the deed as to the estates which he entails, seems, if not to be considered as construing by implication, to be liable to objections of the same nature as implication is exposed to, or at least liable to them in a considerable degree—as will open to others which we have heard in the arguments, and read in the papers in this case. It amounts in its possible effect to this, that an entail of these lands, which Stewart of Ascog seems to have been determined that future Stewarts of Ascog should possess at Ascog and elsewhere, conjoined by his deed inseparably in all time coming, might in process of time, according to law, so operate to make these heirs, heirs under a tailzie which had ceased to affect any of those lands, and which comprehended different property in every or any other part of Scotland. Looking at the whole and every part of this deed, I cannot but think that the party meant to make a strict entail of the lands under the authority of the statute; that his purpose was as effectually to guard against sale as against the breach of his other prohibitions; but through mistake of himself or his man of business, he omitted necessary clauses as to the act of selling. If it was a mistake, perhaps it was more likely in 1763 not to have been thought such, than it might have been after some decisions respecting entails subsequently made. July 16. 1830.

At any rate, my Lords, I cannot bring myself to think that law, written or unwritten, has been brought before us, to authorize us to adopt, on the consideration of the rights of the heirs-substitute as amongst each other under this deed, that judgment which has been pronounced in the Court of Session; which in truth amounts to the gift of a power to every heir to sell and exchange lands as oft as he pleases, in despite of an ineffectual proviso entailing from time to time any other lands which he may prefer to those which had been originally entailed upon him, and in the meantime keeping the money for which he sells the original lands under a species of entail, or something like an entail, either in his own possession, or that of a Court, if diligence can get it out of his hands into the possession of a Court. For such a former decision as matter of authority I have inquired—I have asked whether the bar could furnish any; but we have been referred only to what are mentioned in the Cases on your table.

I have not been able to satisfy myself, that if damages, reparation, compensation, or surrogatum, can be called for after the statute 1685, if the entail is not complete according to that statute, that this judgment in this case can be supported.

My Lords, I have before said, that it is not my purpose to consider the various arguments to be found in former cases in the papers printed in this and former cases; the arguments now and heretofore urged at your bar in this and former cases; or in the very learned opinions stated in what has been brought before us in point as the opinions of the learned Judges in this or former cases;—all have been with me

July 16. 1830. subjects of most anxious consideration, as I doubt not they have been with all such of your Lordships as have attended throughout the hearing of this cause. It is a painful duty, my Lords, to express an opinion touching a doctrine, with respect to which so many learned, able, and experienced Judges have differed in opinion, It is a duty, however, which must be discharged; and because it must be discharged, I find myself obliged to state to your Lordships, that I agree in this case with the minority of those very learned Judges, in thinking that this judgment of the Court of Session cannot be sustained. I pass over also the dicta and cases that have been cited to your Lordships, and which are all observed upon in the papers upon your table very fully.

Bound to assist your Lordships in giving judgment in this case, I have stated my opinion. If I should happen to differ with my noble and learned friends, or other Lords who heard the cause, I can only say, that, because it was my duty to state my judicial opinion, I have troubled your Lordships by stating it; most cheerfully submitting to whatever may be the opinion of the House.

LORD WYNFORD.—My Lords, I entirely concur in all that has been said by my noble and learned friend; and after the very elaborate judgment that he has pronounced, it will not be necessary for me to trouble your Lordships at any length. By the law of England, an estate can only be entailed for the lives of persons who are in being, and until some one that is at the time of the making of the entail unborn shall attain the age of twenty-one. This rule of our law would be easily defeated, if the settler of an estate might impose a condition, that, if the person on whom an estate was settled sell the estate, that he should be a trustee of the proceeds of the sale of such estate for those to whom the estate would have descended if the entail of it had not been barred.

Our Courts held, that such a condition was against the policy of our law, and on that account void; and although a tenant in tail took an estate with such a condition annexed to the grant of it, he might bar the entail, sell the estate, and do what he pleased with all the proceeds of the sale, without being in any manner accountable to those who would have succeeded to the estate.

By the law of Scotland, an estate may be continued in the line or lines designated by the settler, so long as any of those lines are in existence, if the deed of entail be in conformity with the statute of 1685, and the prohibitions which it contains be guarded by irritant and resolutive clauses.

I doubted whether, considering the difference between the laws of England and Scotland, although void in England, it might not in Scotland create such a moral obligation, that the person who accepted the estate on that condition, would be obliged to reinvest the money for which it was sold in the purchase of other lands, to be held for the benefit of those who were the objects of the settler's bounty. An

apprehension that the habits of an English lawyer might lead me into a train of reasoning not warranted by Scotch law, according to which your Lordships are to decide the question submitted to your judgment by this appeal, occasioned this doubt. Your Lordships will not be surprised, that I should pause in a case in which there has been so great a difference of opinion in the Court below; but I protest against what has been said in another place, namely, that English lawyers are not competent to advise your Lordships on a question of Scotch law. As well might they say, that one who had studied logic in Edinburgh would not be able to reason on any question of morality or policy that arose in England, although in possession of all the circumstances connected with the case to be discussed. One who is acquainted with the general principles of jurisprudence, and has been in the habit of investigating legal questions, of interpreting written laws, and weighing the authorities on which unwritten laws depend, will be fully competent to decide points arising under the laws of any country. Such a person would make up for his want of familiarity with the subject brought before him, by the additional caution and attention which the novelty of the case would naturally excite. If he has not so much knowledge of the subject as Scotch lawyers may have, before he has heard and considered the arguments and authorities, he will decide on such as are adduced without any preconceived prejudice. If I am wrong in this, our Government withholds from our colonies the greatest advantage that those colonies have to expect from their dependence on it, namely, a just administration of the laws of each colony; for a single English lawyer decides, at the Privy Council, cases arising under almost every system of law that prevails in the world. I have devoted much of my time and attention to this case, and, in the consideration of it, I have forgotten that I was ever connected with English judicature. I have formed my opinion on Scotch authorities only. July 16. 1830.

I have no doubt that the printed Cases, and the arguments at the bar, have furnished us with all the authorities that bear on the point to be decided. Since I have had the honour of assisting in Scotch appeals, I have always found that the talents, the learning, and industry of the Scotch bar, have given, in the best and clearest manner, all the information that this House can require for the decision of any question submitted to its judgment. My opinion is formed on grounds taken by a learned Judge in the Court below.

Lord Cringletie in his excellent judgment says, ‘ A prohibition is a ‘ mere restraint, and does not constitute any obligation whatever either ‘ in law or equity.’ I agree with Lord Cringletie, that an imperfect prohibition, as that not to sell in this case, constitutes no obligation either in law or equity. It raises only one of those imperfect obligations which no Court of law could enforce: it can create no such trust as any person can be compelled to perform; and it is admitted, that there is nothing to prevent the owner from selling the estate,

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neither is there any thing that prevents him from making what use he pleases of the proceeds of the sale. Where there is a legal right, there must be a complete legal remedy. There is no legal means of securing this supposed right to have the purchase-money reinvested, or in any manner used for the benefit of those who, according to the order of succession, would have become entitled to the estate if it had not been sold. If you cannot prevent the person in possession from selling the estate, and getting the proceeds of such into his possession, and cannot impound the money whilst in his hands, you can have no sufficient remedy for the securing such money; for the vendor will get rid of the money, and a personal action against him, after the acts are done, will be more expensive than profitable. It is admitted, that the vendor cannot now be restrained from selling by an inhibition. The judicature of Scotland would be defective, if those who would succeed to the estate have a right to the proceeds of the sale of the estate, whilst they can have no inhibition to restrain the owner from selling until he has given security duly to apply the purchase-money. There is no instance where a party may be remediless after an act is done, in which the law will not give him the means of preventing its being done, until he is completely indemnified against the consequences. If your Lordships will attentively consider the statute of 1685, c. 22. you will perceive that, in this case, the vendor can be under no obligation to reinvest the proceeds of the sale of the estate. That statute forms the law of entails now in force in Scotland. If there is nothing in it which ties up the proceeds of the sale of an estate, the vendor must be at liberty to dispose of them as he pleases.

Now, according to this statute, an estate, and every thing belonging to it, is at the disposal of its owner, unless the person who has conveyed it to him has restrained his power of disposing of it in the manner prescribed by it. It is not unreasonable, that a man should be permitted to preserve his estate for the benefit of persons for whose welfare he may feel an interest, as, for instance, for the unborn children of the settler's children, or of those who are the immediate objects of his bounty: But there are few countries in which property is allowed to be continued in particular families, for the vain purpose of preserving a name; and Lord Cringletie tells us, that in Scotland an entail is strictissimi juris tolerated by the law under certain conditions. Property, therefore, is free from the entails, unless the law imposing such fetters is fully complied with.

The Scotch statute of entail says, that it shall be lawful to tailzie lands and estates, and to affect the said tailzies with irritant and resolutive clauses, whereby it shall not be lawful to the heirs of tailzie to sell, annailzie, or dispone the said lands, or any part thereof. The word 'whereby,' in this passage, (which refers to irritant and resolutive clauses), shews, that these only prevent the sale or other disposition of an estate. That no other tailzies have any effect, either with regard to an estate or the price of it, is clear from the following

words: 'Such tailzies shall be allowed in which the foresaid irritant 'and resolutive clauses are insert.'

If no tailzies are allowed which have not these clauses, tailzies that are without them can have no effect whatever. But the statute contains these other words: 'And being so insert,' (that is, these clauses being insert in the various instruments necessary to complete an entail), 'his Majesty, with the advice and consent foresaid, declares 'the same to be real and effectual, not only against the contraveners 'and their heirs, but also against their creditors, comprisers, adjudgers, and other singular successors whatsoever.' The words, 'their heirs,' answer the argument that has been addressed to your Lordships, to prove that irritant and resolutive clauses, and the registration of the deeds containing them, were intended only to protect purchasers and creditors; and that an entail would be effectual against heirs without them. Without these clauses there is no real or effectual obligation on any one, and the prohibiting part of the deed is entirely inoperative. The judgment of the Court below admits the inefficacy of the prohibition as to the estate, but holds it obligatory on the proceeds of it. According to this decision, the object of the Legislature in passing the law of entail, was only to prevent a change of the lands settled; the settler having a right, independent of this statute, to tie up the value of those lands. Such an object would be hardly worthy of the interference of the Legislature; but the rendering it more difficult to keep property out of the market, has been considered as good policy in Scotland as well as in England. Where the words of a statute are clear and intelligible, a series of decisions, from the time of its becoming law down to the present hour, would not authorize your Lordships, sitting judicially, to give a judgment inconsistent with it. Where a law is doubtful, decided cases may assist your Lordships in putting a construction upon it; but where there is no ambiguity in a statute, your Lordships will take the law from the Legislature, and not from Courts of Justice. Your Lordships will however find, that the balance of authority supports the construction which I humbly recommend your Lordships to put upon this case. The latest decision upon this point is opposed to the judgment of the Court below. The Judges who pronounced that decision had under their consideration all the previous cases, and it was pronounced when the spirit of the statute of 1685 was better understood than it had been in old times. Sir Thomas Hope and Sir George Mackenzie seem to consider the irritant and resolutive clauses as substitutes for the remedy by inhibition, and as intended to save the trouble and expense of that diligence. Lord Stair considers restrictions, without the addition of irritant and resolutive clauses, as mere personal obligements. Erskine makes the same observations on such restrictions. The opinions of these learned writers would, if unopposed by any authority of greater weight, be entitled to much consideration. But to these opinions are opposed the judgment of a Court, and the still higher authority of the

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Legislature, expressed in the statute of 1685. Indeed, the commentator on Lord Stair does not seem to be satisfied with his Lordship's opinion; for he has introduced another very important condition, not found in the text of Lord Stair, nor in the works of the other writers, nor in the deeds now under consideration, namely, 'and that all deeds 'shall be null and void.' Lord Kames says, 'Justice permits no man 'to take the benefit of a deed, without fulfilling the provisions and 'burdens imposed by the deed.' This observation is correct, if it be considered as applicable only to legal provisions and burdens; but the prohibition in this case is not a legal provision, and, therefore, there is no legal obligation to comply with it. Whatever opinion moralists may entertain in such a case, Courts of Justice know of no obligations except such as are allowed by law. There are many cases in which, considering only the individuals concerned in them, promises and conditions that have been made in such cases ought to be performed, but in which the policy of the law, looking to the general welfare of the community, will not permit the performance of such conditions or promises to be enforced. It is the policy of the law to prevent the accumulation of property, and the perpetuating the possession of it in families. Acting on that policy, the Legislature has said, that an estate shall not be entailed, so that it cannot be sold, but in a particular manner. No man can bind himself, either by an implied or expressed promise, not to sell his estate, unless that promise be in the form, and accompanied with the sanctions, specified by the law. The old cases to which your Lordships have been referred, were decided before it was settled, that one, who stood in the order of succession, could not have an inhibition to restrain the person in possession of a tailzied estate from selling or encumbering it. It was, however, admitted to be law, before the case was decided to which I shall presently have the honour of referring your Lordships, that an inhibition could be obtained under such circumstances. The case of Bryson and Chapman had indeed gone further, and had established, that an inhibition obtained on a prohibition to sell, would not prevent the party inhibited from making a good title to the purchaser of his estate. It has been attempted to weaken the authority of this decision, by shewing that Lord Kames differed from the other Judges, and that there was a reservation in it to A, to insist in an action of damages against B, when his right should take place by the succession opening to him. These words only prove, that the majority of the Judges confine their decision to the point raised for their judgment, and would give no opinion on what those who should be Judges when this case might come before the Court again in a different shape, ought to do. A few years after this decision, the case of Lord Ankerville against Saunders and others was decided by the Court of Session. It has been attempted to distinguish that case from the present, because the obligation not to sell, in that case, was contracted by the party himself, and not, as in the present, created by the settler of the estate. But this circumstance

makes no difference. The assent of the person in possession of the estate to the prohibition in the deed conveying it to him, implied by his taking the estate, was considered as constituting the obligation on him to observe that prohibition. He is bound, therefore, by his own contract only, in the one case as well as in the other: and, unless an implied obligation has a different effect from one that is expressed, the cases are precisely the same; the decision in that case governs this, and shews that, unless the restriction be guarded by irritant and resolutive clauses, it is wholly inoperative. This is the last case, except one, in which the judgment was appealed from, and which does not appear to have ever been finally decided, in which the point was ever much considered by any Court. If the decisions of Courts of law could outweigh the authority of a statute, there is not on this point such an uninterrupted series as should prevent your Lordships from looking at the statute, and putting your own construction upon its terms.

I might safely rest my opinion on the broad ground on which I have put it; I will add, that I can discover no evidence that the settler intended to restrain the sale of this estate. If he had this intention, he has not expressed it, and your Lordships may apply to the case the maxim, quod voluit non dixit. It would be a dangerous precedent, if your Lordships were to supply this want of a provision for the regulation of his property. It is not within the province of a Court of Justice to make conveyances perfect: you are to take them as they are, and to put such a construction on them as the terms of such conveyances will warrant. Courts of Justice supply defects in conveyances in favour of wives, children, and creditors; but these are excepted cases. A lawyer looking at this instrument will be bound to say, that the settler could not mean to restrain the person in possession from selling the estate. It is a general maxim, expressum facit cessare tacitum. The settler has prevented the person in possession, by irritant and resolutive clauses, from doing certain acts, but he has not used the same means to prevent the person in possession from selling this estate. In the case of Gordon the Judges say, 'that 'all presumptions drawn from implied intention are to be rejected; 'that fetters are not to be raised on inferences, nor extended by ana-'logy from cases expressed to cases not expressed, however similar; 'and that no effect is to be given to intention, unless expressed in 'clear terms.' Your Lordships will overrule every syllable of this opinion of the Judges of Scotland, if you support the judgment appealed against. You will act on the presumption of implied intention, without any evidence to raise such presumption, instead of rejecting it if it were raised. You will raise fetters for this estate on inferences extended by analogy from cases expressed to cases not expressed. Lastly, you will give effect to a supposed intention, no such intention being expressed in terms either clear or ambiguous.

I have not kept the promise that I made to your Lordships in the

July 16. 1830. commencement of my address, and I am afraid that I have troubled you too long; but I felt, as I proceeded in my argument, the importance of the case in which I was offering to you my humble advice. I perceived that your decision would affect the whole of the landed property in Scotland, and I became anxious to explain myself fully and distinctly. For these reasons, and for those which have been so ably given by my noble and learned friend, I concur in the motion which he has submitted to your Lordships, that the judgment of the Court below should be reversed.

LORD CHANCELLOR.—My Lords, After the very full discussion which this case has undergone on the part of my noble and learned friends, I do not feel it to be necessary or proper to enter at large into the consideration of it; and I shall therefore trespass only for a few minutes on your time, in stating shortly the grounds upon which I think this judgment ought to be reversed.

This was an entail created in the year 1763; and, in considering the deed, it is obvious that the party who prepared it did so with reference to the statute of 1685. It is an estate tail, created plainly with reference to that statute. It is declared by the deed, that the heirs of entail shall not have any power or liberty to sell, annailzie, or wadset the lands contained in this entail.

The irritant and resolutive clauses, however, do not extend to the whole of that prohibition. They do not extend to the prohibition against selling. The consequence of this is, that, by the law of Scotland, as settled by the decisions of the Courts of that country, and as confirmed by the decisions of your Lordships' House, the heirs of entail cannot be prevented from selling the estate. From the nature of the estate, the heir has the power of sale, and a mere prohibition to do that which is authorized by the very nature of the estate, must be considered as altogether idle and inoperative.

But, my Lords, it has been argued, that, from the prohibition against selling, a condition must be implied. Now, what is the condition which it is said must in this case be implied? A condition that the money shall be reinvested in the purchase of another estate, to be settled, according to the English phrase, to the same uses. No person reading this instrument, and referring to its provisions, can suppose that such a condition ever entered into the contemplation of the party by whom it was framed or executed. Not only is this so, but, according to the rule of law which has been established with respect to instruments of this kind, nothing can be implied;—whatever condition or restriction is meant to be imposed, must be stated in express terms. We are not entitled, therefore, considering the nature of the instrument, to ingraft upon it the condition which has been suggested.

But, my Lords, in addition to this, many inconveniencies and absurdities have been pointed out by my noble and learned friend, upon

which it is unnecessary for me to make any detailed remarks. A new estate is to be purchased—that estate is to be settled in the same form—and, as soon as the conveyances are executed, the party has a right again to dispose of that estate; and that to go on without limit. But there is an alternative prayer in this summons, as has been also remarked by my noble and learned friend, viz. that if the defender does not reinvest the purchase-money in the manner proposed, that he should be declared liable to make compensation in damages. Upon this part of the case it may be sufficient to say, that the learned Judges below have given no opinion; but it may be asked, at whose suit is an action for damages to be instituted? Is it to be at the suit of all the substitutes who happen to be in existence at the time, or at the suit of the first substitute, or at the suit of each of the substitutes as they happen successively to come into existence? And if, after damages have been recovered, a prior heir of entail should appear, which may be the case, is the party who recovered the damages to be called upon to account for what he has received; and if so, in what manner, and to what extent? Your Lordships will recollect, that my noble and learned friend repeatedly put questions directed to some of these points to the Counsel at the bar, but to which he received no satisfactory answer. I do not, however, rest my opinion upon this view of the case; but these difficulties and entanglements fortify the judgment I have formed upon the grounds already stated, viz. that a simple prohibition, inconsistent with the nature of the estate, is altogether inoperative; and that from such a prohibition no condition (to say nothing of the assumed condition suggested in this case) can be implied.

My Lords, there are two cases which have been referred to, the case of Strathnaver, and the case of Pitlurg, to which I will just advert. I have considered the observations made upon these cases, as well by the learned Judges in the Court below, as by the Counsel at your Lordships' bar, and I am led to the conclusion, that they ought not to govern your Lordships' judgment in the case now under your consideration. I feel justified in this conclusion, not only by the observations and arguments to which I have adverted, but from this consideration, that when the case of Westsheills was argued at your Lordships' bar, it was referred back to the Court of Session by your Lordships, on the ground, that the question had not been concluded by any previous decision.

I am of opinion, then, and humbly take leave, with due deference to the Court below, to express that opinion, fortified with the concurrence of my noble and learned friends, that this judgment ought to be reversed.

The House of Lords accordingly ordered and adjudged, 'that 'the interlocutors complained of be reversed.'

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Appellant's Authorities.—3. Ersk. 8. 24.; 1. Ersk. 7. 22.; 8. Vesey, 87. Bryson, Jan. 29. 1760, (15,511. and 5. Brown's Supp. p. 941.) Lord Ankerville, Aug. 8. 1787, (7010.)

Respondents' Authorities.—Baillie, July 11. 1734, (15,501.) Gardner's Creditors, Jan. 27. 1744, (15,501.); Hope's Min. Pr. 16. § 9. &c.; 2. Mack. 490.; 2. Stair, 3. 59.; 3. Ersk. 8. 23. Willison, Feb. 26. 1724, (15,369.) Strathnaver, Feb. 2. 1728, (15,373.; and Craigie and St. p. 32.) Gordon, July 29. 1761, (15,513.) Sutherland, Feb. 26. 1801, (No. 8. App. Tailzie.) Lockhart *v.* Stewart, June 11. 1811, (F. C. remitted.) Earl of Breadalbane, June 12. 1812, (F. C.) Young, Dec. 7. 1705, (15,483.) Hay, Feb. 9. 1753, (15,603.) Earl of Wemyss, Feb. 28. 1815, (F. C.) Young, Nov. 13. 1761, (5. Brown's Supp. 884.) M'Nair, May 18. 1791, (Bell's Cases, 546.)

MONCREIFF, WEBSTER, and THOMSON—SPOTTISWOODE and ROBERTSON;—Solicitors.

No. 33.

JAMES CARSTAIRS BRUCE, Appellant.—*Solicitor-General (Sugden)—John Campbell.*

THOMAS BRUCE, Respondent.—*Brougham—Lushington.*

Entail.—Held, (reversing the judgment of the Court of Session), that an entail containing prohibitory and irritant clauses, but no resolutive clause against selling, does not create an obligation on the heir selling to reinvest the price in other lands.

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2D DIVISION.
Lord Mackenzie.

THIS case involved, besides another point, the same as that which occurred in the preceding one.

On the 16th of February 1683, Sir William Bruce of Kinross executed an entail of the lands and barony of Kinross in favour of himself and a series of substitutes. In virtue of this entail, which was duly recorded, James Bruce Carstairs (the father of the appellant) succeeded; and the estate being greatly burdened with debts, he obtained an Act of Parliament for selling it. By this Act it was inter alia enacted, 'That in case a balance shall 'remain of the price of the said estate and barony, or of such part 'or portion thereof as shall be sold under the authority of this 'Act, after defraying the expenses of passing this Act, and of all 'reasonable expenses which may be incurred in carrying this Act 'into execution, and after payment of all debts, which shall be ascertained in manner hereupon directed, the Judges of the Court 'of Session are hereby empowered and required to direct and 'order that the said balance shall be laid out and employed in the 'purchase of other lands, which shall be limited and settled to the 'same persons and uses, and under the like prohibitory, irritant, 'and resolutive clauses, as the said estate and barony of Kinross 'now stands limited and settled by the foresaid deed of entail exe-