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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-

'cuted by the said Sir William Bruce, bearing date the 16th day 'of February in the year 1683. July 16. 1830.

The estate was accordingly sold; and there being a reversion of about L.25,000, the estate of Tillycoultry was purchased at the price of L.24,000, and thereupon a disposition agreeably to the original entail was executed in 1783. By this deed it was provided, 'That it shall be nowise leisom or lawful to the said 'James Bruce, or any of the heirs of tailzie and provision above 'written, succeeding in the right of the foresaid lands and estate 'by virtue of the foresaid tailzie and substitution, and of these 'presents, or any of them, to sell, anailzie, dispone, dilapidate, 'or put away the foresaid lands and estate, nor any part nor 'portion thereof, nor to break, innovate, or infringe this pre-'sent tailzie, nor contract nor ontake debt, nor do no other fact 'nor deed, civil or criminal, whereby the said lands and estate may 'be anyways apprised, adjudged, evicted, or forfeited from them, 'or anyways affected in prejudice and defraud of the subsequent 'heirs of tailzie above-mentioned successive, according to the order 'and substitution above-written. Neither shall it be leisom nor 'lawful to the said James Bruce, or the other heirs of tailzie and 'provision foresaid, to suffer and permit the said lands and estate, 'or any part thereof, to be evicted, adjudged, apprised, or any 'otherwise evicted, for any debts or deeds contracted or done 'by them before their succession, or by any of their predeces-'sors whom they shall anyways represent, or wherein they shall 'be liable as representing them: All which deeds are not only 'hereby declared void and null ipso facto, by way of exception 'or reply, without declarator, or so far as the same may burden 'and affect the foresaid estate; but also it is hereby provided and 'declared, that the said James Bruce, and the other heirs of tail-'zie who shall contravene and incur the said clauses irritant, or 'any of them, either by not assuming the name and arms of Bruce 'of Kinross, or by the saids heirs-female, they being unmarried, 'and not marrying a gentleman of the said name, or shall assume, 'bear, and carry the said name and arms; or, being married, they 'and their heirs of the said marriage not bearing and carrying the 'said name and arms as aforesaid, or by their saids heirs their not 'accepting the benefit of this present tailzie within year and day 'after the decease of the immediate preceding heir to whom they 'may succeed in manner respective aforesaid; or who shall break 'or innovate the said tailzie, or contract debts, or commit any 'other fact or deed whereby the said lands and estate may be any-'ways evicted or affected in manner foresaid; or who shall suffer

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'and permit the said lands and estate, or any part thereof, to 'be evicted, adjudged, or apprised, or anyways affected, for any 'debts or deeds contracted or done by them before their suc- 'cession, or by any of their predecessors whom they shall repre- 'sent, and wherein they shall be made liable as anyways repre- 'senting them—That then, and in any of the saids cases, the per- 'son or persons so contravening as said is, shall forfeit, amit, and 'tyne their right of succession to the aforesaid lands and estate; 'and all infeftment and pretended right thereof in their persons, 'shall from thenceforth become extinct, void and null, ipso facto, 'by way of exception or reply, without declarator, as said is; and 'the same shall devolve, fall, and belong to the next and imme- 'diate heir of tailzie in being for the time, who is ordained to suc- 'ceed to the foresaid lands and estate by virtue of the tailzie and 'substitution foresaid; to whom it shall be lawful either to be 'served heir in special therein to those who died last infeft before 'the contravener, and thereupon to be retoured and infeft; or 'otherwise to pursue for declarator, adjudications, or other legal 'sentences, which may formally and legally establish the right of 'the said lands and estate in their persons, and remanent heirs of 'tailzie that are to succeed to them, in manner above provided.'

The deed then gave authority to provide for wives and children, and, after a variety of clauses, contained the following:—'With 'which reservations, burdens, conditions, provisions, restrictions, 'limitations, and qualifications, respectively particularly above 'written, the said present tailzie, assignation, and infeftment to 'follow thereon, is granted and accepted, and no otherwise; and 'all which conditions, provisions, restrictions, limitations, clauses 'irritant and resolutive before written, with the exceptions, reser- 'vations, and declarations before specified, are to be inserted in the 'instruments of resignation, charters and sasines to follow here- 'upon, and in all the subsequent procuratories and instruments of 'resignation, charters, special retoured services, instruments of 'sasine, and other transmissions and investitures of the said lands 'and estate.'

This entail was duly recorded; and the appellant, in virtue of it, on the death of Mr James Bruce Carstairs in 1784, succeeded to the estate. Having become embarrassed, he granted, in 1796, a trust-deed for behoof of his creditors, under which part of it was sold to John Tait of Harvieston, Esq. To ascertain his power to make such a sale, the appellant raised an action of declarator against the other heirs of entail, (including the respondent), to have it found that he 'had undoubted right to make the said sale, and

'to execute the foresaid disposition; and that he was not prevented 'from so doing by the foresaid deed of entail, or by any of the 'titles upon which he possesses the foresaid lands; and that the 'said disposition executed by him, with consent foresaid, is an 'effectual disposition to all intents and purposes.'

At the same time a suspension was presented by the purchaser, and passed. At first the Court sustained the defences for the heirs of entail; but thereafter, 15th January 1799, pronounced this judgment:—'In respect the resolutive clause in the entail 'does not apply to a sale of the estate, alter the interlocutor re-'claimed against, find the disposition libelled on valid and effec-'tual to the purchaser, and find the letters orderly proceeded, and 'declare accordingly.' (See Morr. 15,539.) On appeal, this interlocutor was affirmed by the House of Lords.

In consequence of these judgments, the estate was sold in 1805 at the price of L. 35,000, and, after paying his debts, there being a reversion, the appellant purchased with it the estate of Balchrystie. He enjoyed the undisturbed possession of it in fee-simple till 1821, when, by the death of a brother, he succeeded (as was alleged) to a considerable fortune. Soon thereafter the respondent (one of the heirs-substitutes) brought an action of declarator before the Court of Session, concluding to have it found, 'that the said James Bruce, 'defender, is, by the foresaid deeds of entail, accountable to the 'substitutes in the foresaid entail in their order, for the price ob-'tained for the said lands and estate (Tillycoultry); and that he is 'bound and obliged, and should be decerned and ordained, by de-'cree of Our Lords of Council and Session, to lay out the same in 'the purchase of other lands, at the sight of such substitute heirs, 'and to take the rights thereof to the same series of heirs, and under 'the like provisions, restrictions, and clauses irritant and resolutive, 'or to lend out the same upon landed security, bearing interest, 'and destined to the same series of heirs, under the like provisions, 'restrictions, and clauses irritant and resolutive; and so often as 'the same is uplifted, to re-lend the same again in like manner, for 'the benefit of the defender himself, and of the several substitutes 'called by the said entail, according to their several rights and 'interests, all as provided and directed by the foresaid Act of Par-'liament; and that until such purchase or investment in landed 'property is made, the defender is bound, and should be de-'cerned and ordained, by decreet foresaid, to deposit in the Bank 'of Scotland the sum of L. 30,000 sterling, or such greater sum 'as has been received by him as the price of the said lands and 'others, upon a promissory-note taken payable to himself and

July 16. 1830. 'the substitute heirs of entail in life at the time and of age, no-'minatim, or the major part of them, and the survivors or survi-'vor of them, in trust, for the purposes of being vested in lands, 'or being lent out as aforesaid.'

Thereafter, the respondent gave in a minute, stating, That, after the purchase of Balchrystie, he had been informed by the appellant that he was to execute an entail of that estate, and that 'the pursuer, (respondent), and his mother, the late Mrs 'Bruce of Arnot, were satisfied with this, and supposed this 'entail had been executed. That, before commencing the pre-'sent action, the pursuer, although quite aware that the price 'paid for Balchrystie was only about one-third of the price 'received by the defender for Tillycoultry, did offer to hold 'it as sufficient implement of the obligation to reinvest, if the 'estate of Balchrystie was secured to the same series of heirs as the 'estate of Kinross had been, by a sufficient and valid entail, contain-'ing full power to the defender and his successors to make such pro-'visions for their heirs, and their children, as the original entail 'allowed. That the pursuer is still willing to adhere to this ar-'rangement, and therefore now offers to withdraw the present 'action, on condition that a valid and effectual entail of the lands 'and estate of Balchrystie is executed and completed, so as to 'secure that estate to the same series of heirs as the estates of 'Kinross and Tillycoultry were destined. But if this offer is not 'accepted, then the pursuer will insist, in terms of the libel, that 'the full price received for the estate of Tillycoultry shall be in-'vested in land or heritable security, in the manner prescribed by 'the Act of Parliament authorizing the sale of the said estate of 'Kinross.' This proposal was rejected, and the appellant resisted the conclusions of the action, 1st, upon the same general grounds as those maintained in the preceding case; and, 2d, on the plea of res judicata, which he rested on the judgment previously pronounced, finding that he had power to sell.

The Lord Ordinary reported the case, and thereafter judgment having been pronounced in that of Ascog, (which was held to regulate the decision in reference to the first of the defences), and the other being considered irrelevant, the Court 'found, that the 'defender is accountable for the price obtained for the estate of 'Tillycoultry, and remitted to the Lord Ordinary to proceed ac-'cordingly.' *

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* 5. Shaw and Dunlop, 822.

Mr Carstairs Bruce appealed. July 16. 1830.

The Solicitor-General (for the appellant) having commenced his opening,—

Lord Chancellor.—It was understood that this case was to be argued only on any special circumstances, not on the general ground; otherwise the House would not have appointed it to-day, the noble Lord (Eldon) who heard the case yesterday not being able to attend.

Solicitor-General.—It is not my intention to urge a single word upon the general question; but I have with me a learned Counsel, Mr Campbell, whose assistance I had not in the other case; and Mr Brougham, who led in that case, has with him my learned friend Dr Lushington, who was not in the other case. I apprehend, therefore, that each of these Counsel may feel it their duty to address to your Lordships such arguments as may suggest themselves to them upon the general question.

Campbell.—My Lords, I may not be able to address any thing to your Lordships worthy of consideration, but I certainly shall feel it my duty, for the interests not only of my client but of my country, to address to your Lordships those arguments which present themselves to my mind, to shew that the decision of the Court of Session is erroneous.

Lord Chancellor.—I shall take an opportunity of communicating to the noble and learned Lord what passes at the bar. I will take a note of the argument.

The Solicitor-General proceeded in his argument, and stated, that it was not his intention to repeat his former arguments.

Lord Chancellor.—I should think the most convenient course will be, that you should not enter into the general doctrine in this stage. If, in consequence of any thing which falls from the Counsel on the other side, it should become necessary, you may do it in your reply.

Brougham.—There is only this great inconvenience, my Lord, I might say hardship upon me, resulting from that, that my learned friend may reserve his argument for the reply, and after that, of course, I shall have no opportunity of observing upon it.

Lord Chancellor.—That which I threw out was upon the assumption, that the Solicitor-General had nothing new to offer, except what may arise out of the observations on the other side; that is the way I meant to put it.

Brougham.—There can be no objection to that certainly.

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Lord Chancellor.—Any thing new which arises out of your argument, of course it will be his right to urge in reply.

Solicitor-General.—I have no new light upon the subject: if my friends present a new view, I shall of course address myself to that.

The Solicitor-General proceeded.

Lord Chancellor.—The question will present itself thus:—You leave it upon the argument as it stands; Mr Campbell, who has not hitherto argued the question, may present some new arguments, which may render observation on your side necessary.

Solicitor-General.—I have every thing to expect from the learning and ability on both sides; both of us have very able assistants on this occasion. I have a right to expect there will be something new elicited. I shall therefore only address your Lordships upon the peculiarities of this case.

(In reference to the case of Young *v.* Young),—

Lord Chancellor.—Has any search been made on your side for that case?

Brougham.—We never expected any attempt would be made to impugn that case: We shall produce the most satisfactory evidence, by producing the decreet itself, not only the pleadings, but the summons, and the whole of the record, in the very words which were used; all is preserved, and can be produced to the satisfaction of your Lordships.

Lord Chancellor.—You say that that case was printed from a manuscript in the handwriting of the learned Judge's clerk. The probability is, that the greater part of the collection is in the handwriting of a clerk?

Solicitor-General.—That does not appear, my Lord: We have a letter, which has been put into my hands this morning, which states, that it is in the handwriting of a clerk, and not of Lord Monboddo: it does not set out whether the bulk of these notes were or were not in the handwriting of a clerk or of Lord Monboddo. If my learned friend produces a decree, that will of course be entitled to consideration.

Brougham.—Being in the handwriting of a clerk is perfectly immaterial; all the Scotch lawyers dictate to their clerks.

Lord Chancellor.—We shall see what it is when it is produced; it is not necessary to enter at present into what it may be.

Campbell (for the appellant)—In reference to the heir being bound by his service to the conditions of the deed of entail—

Lord Wynford.—Does he agree to any thing but legal conditions?

Campbell.—I apprehend not, my Lord; and that is the answer given by one of your Lordships. July 16. 1830.

(In reference to the case of Young *v.* Young),—

Lord Chancellor.—I understood you to say, that you had received information of that case: will you state what is the effect of it?

Campbell read the letter which had been received.

Lord Chancellor.—The printed papers were not found in the Advocates' Library?

Campbell.—No, my Lord, there are no papers to be found in that cause. It appears that his family possess his Lordship's papers in most of the cases he reported, but that they have not these.

Lord Chancellor.—With respect to its being in the handwriting of the clerk of Lord Monboddo, I think you should have gone on to tell us whether the other manuscripts are in the handwriting of the clerk or of Lord Monboddo, otherwise you do not distinguish this from others.

Brougham.—Your Lordship knows that in that country the learned Judges principally dictate; they write very little.

Lord Chancellor.—If a search is made for the proceedings, it is probable they may be found: the Faculty Library is not the place to find them, It is probable the case may be somewhat varied, but one cannot suppose that it is materially mistated, unless that is satisfactorily shewn.

Campbell.—It may have been what we call in this country an undefended cause. (He then proceeded in his argument.)

Lord Chancellor.—I do not understand what is your view precisely. You state that the interlocutor is bad, not being according to the terms of the summons; that it is necessary to exhaust all the prayer of the summons.

Campbell.—As far as it goes.

Lord Chancellor.—It is remitted to the Lord Ordinary to go on.

Campbell.—I say that the summons is bad.

Lord Chancellor.—It was remitted that the Court might go on and act on the residue of the prayer of the summons. You say that the judgment is wrong, but at present they have only declared the right.

Campbell.—As far as it goes, it is in the form of the summons.

Lord Chancellor.—Is there any objection in point of form?

Campbell.—I say the summons is bad, and that the interlocutor is bad. The summons is bad, because it must distinguish be-

July 16. 1830. tween reinvestment and damages in this case; and we do not know in what shape the claim is brought forward, for the prayer 'is that he may be accountable to the substitutes in the aforesaid 'tailzie for the price obtained for the said lands and estate.'

Lord Chancellor.—The interlocutors correspond with that exactly.

Campbell.—Yes, totidem verbis. But I say that the summons is bad in not distinguishing that; and that the interlocutor is bad in not distinguishing that; and that the interlocutor ought not to have stopped there, but that, when the case was brought to the Inner-House by the Lord Ordinary, they ought to have gone on, and to have delivered the decree as extensive as the summons.

Lord Chancellor.—Exhausting the whole prayer of the summons?

Campbell.—I say that they ought to have stated in what shape they held Mr Bruce to be liable. It must be a matter of vast importance, whether it was to be laid out in land or in money, or in what way.

Lord Chancellor.—I only wished to know how you put it.

Brougham (for the respondent) remarked on the argument of Mr Campbell, as having contended that there was no case in which there was not a right to interfere to prevent the mischief.

Lord Chancellor.—You can hardly put it so broadly as that:—he did in terms express himself to that effect certainly; but he hardly meant deliberately to contend for a proposition so broad as that.

Brougham then remarked on the case of De Boss *v.* Beresford, where the doctrine was laid down by the Chief-Justice, to the surprise of Westminster Hall, that the plaintiff might have gone into the Court of Chancery, and obtained an injunction to restrain the publication; a case reported by Mr Campbell.

Lord Chancellor.—Mr Campbell referred to that in his report, I recollect, as matter of great triumph given to the Chancery lawyers over the Common lawyers.

Lushington (for the respondent) cited Pothier on Obligations.

Lord Wynford.—Lord Mansfield made the same observation, that they were implied contracts, that in this country they were the subject of bills in equity. The difficulty in this case will be, not to prove that there are those equitable rights arising from conscience, but that there is that species of wrong on which the implication of any right can arise.

Lushington proceeded, and cited the proposition laid down in the Stormont case with respect to the personal obligation created by the irritant and resolutive clauses. July 16. 1830.

Lord Wynford.—Is that you have just read the language of one of the Judges?

Lushington.—No, my Lord, it is the statement of the party in his plea, which I consider most material, as showing the precise statement on which the question arose, and the way in which they thought fit to put it.

Lord Wynford.—If that had been the statement of the Court, it would have been decidedly against you, for it states it to be an obligation arising entirely from the irritant and resolutive clauses additionally invented, and containing but a personal obligation.

Lushington having remarked on the position laid down in the case of Gordon *v.* Cumming,—

Lord Chancellor.—I do not find that in Gordon and Cumming that part of the case was argued or considered at all. The question was with respect to the selling.

Solicitor-General.—Your Lordship will find, by referring to the opinions of Lord Alloway and Lord Eldin, that it is clear that that point was never argued in that case.

Lord Chancellor.—It does not appear to have been argued. I wish you would read that on which you rely as showing that question was raised.

Lushington.—'Although in questions with creditors and pur-'chasers, prohibitions or irritancies in entails do with great justice 'and reason meet with the strictest interpretation; yet in ques-'tions among heirs of entail themselves, the maxim of the common 'law must take place,—uti quisque legassit,' &c.

Lord Chancellor.—That appears to have been considered only as a consequence. The will of that testator, whether expressed or implied, must be supported. Now the Court found, 'that how-'ever safe an onerous purchaser might be, the pursuer, by a vo-'luntary sale of the lands, would contravene the tailzie, and be 'subjected to an action of reparation and damages at the instance 'of the substitute heirs of tailzie.'

Lushington.—It must have been a matter of deliberation and consideration with the Judges,—because otherwise they could not have given a decree which should have disposed of the whole question at stake,—whether he was at liberty to sell and to dispose of the price at his pleasure? They say, you may sell, but you cannot dispose of the price at your pleasure, because you would be subject to an action for reparation in damages.

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Lord Chancellor.—I will refer to the case, and see whether it goes further than I have supposed.

Lushington having referred to a note of the case of Young *v.* Young,—

Lord Wynford.—We were given to understand that some more accurate and full note of that case would be produced. If you have any such note, we should be glad to see it.

Lushington.—It has been sent for, but has not yet arrived. —Having proceeded to remark on the Westshiells case, and stated that the appellants in the present case rested their hope on being able to persuade the noble Earl (Eldon) that he had in the Westshiells case pledged himself that the decision of the Court of Session was decidedly wrong when he moved the House to remit it for further consideration,—

Lord Chancellor.—What one can collect is the impression of his opinion, but certainly no expression of a decided opinion can be collected. One sees certainly what was the impression of the noble Lord's mind at the time; but he is not to be considered as bound to any definite opinion.

Lushington then proceeded to remark on the authority of the text writers, and stated, that it having been supposed that entails were comparatively of modern date in Scotland, he should produce a deed of entail, with a prohibitory clause, in the year 1489, which he found in Dalrymple on Feudal Property, page 162.

Lord Chancellor.—Is there a resolutive clause too?

Lushington.—No, my Lord; I shall shew when they commenced.

Having remarked on the Stormont case,—

Lord Wynford.—In that case were there clauses irritant and resolutive?

Lushington.—No, my Lords, there were no irritant clauses.

Lord Wynford.—The great point decided was, whether the estate was subject to the debts.

Lushington.—Certainly; but the Stormont case is important in these respects, that there were no irritant clauses, and there was no inhibition.

Lord Chancellor.—The prohibition was guarded only by the resolutive clause.

Lushington.—Yes it was; that is mentioned in all the papers.

Having read an extract from Lord Bankton as to Heir-looms,—

Lord Wynford.—With respect to heir-looms, there is no right or power to sell: a man in that situation, if he does sell, is a

wrong-doer, and his doing so implies a contract to refund all he has got. July 16. 1830.

Lushington.—That is precisely this case.

Lord Wynford.—The question is, whether this person is a wrong-doer, or whether he has not a perfect right to do that which he has done?

Lushington.—The action for reparation here arises ex contractu, out of the obligation on the donee to obey the condition imposed upon him by the donor.—He then proceeded with his argument.

Lord Wynford.—Suppose an estate in fee to be given to a man with directions that he shall not levy a fine, he is supposed to take it under that condition; but no lawyer would argue that he might not, notwithstanding that direction, levy a fine, and destroy the remainder. Now, if he did levy a fine, would any action lie against him or his representatives to recover the proceeds?

Lushington.—Most undoubtedly not, my Lord; that is English law—but the Scotch law unquestionably proceeds on a totally different principle; and to ascertain what is the Scotch law, we must look to the feudal system and the civil law. The Scotch law, as I have shewn, imposed a personal obligation on the party to perform every condition on which the donation is made to him, unless the performing that condition is contrary to law, which is the only circumstance which can discharge him from performing it. Having remarked on the prohibitory clause,—

Lord Chancellor.—The prohibition is distinct and clear as a prohibition.

Lushington proceeded, and argued on the effect of inhibition.

Lord Chancellor.—If inhibition operates only as notice, your argument is correct.

Lushington.—Quacunque via data it is perfectly useless. If the entail be good, the sale is bad; if the entail is bad, the inhibition is waste paper:—He then stated that he was about to address himself to the question of time, it being contended that the parties were precluded.

Lord Chancellor.—The objection as to time has not been much pressed. I will not prevent your arguing it if you desire it, but I do not know but that may lead to a reply. You say he may exercise the right of selling, provided he does it fairly for the benefit of accommodating himself: What then becomes of the action of damages?

Lushington.—He is subject to an action of damages. We do not claim damages in this case.

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Lord Chancellor.—The summons is not for damages?

Lushington.—No, my Lord.

Lord Chancellor.—How would your argument apply to the former case? How can an action for damages lie, if he has a right to do it for his own accommodation?

Lushington.—I should say, there may be cases in which an action for damages would lie, in respect not of the sale of the estate simply, but the abstracting the price. So long as the money is made secure, there is no action for damages, but only when the money is made away with.

Lord Chancellor.—When must he lay it out? What time has he then for the purpose?

Lushington.—I apprehend that would depend on the equitable discretion of the Court of Session; that they would see that there was a fulfilment of the obligation on the party, and that justice was done to the substitutes in the entail.

Lord Chancellor.—You say, that if within a reasonable time the money is laid out in the purchase of other lands settled in the same manner, no action for damages can lie?

Lushington.—Just so; there would then be no injury to the substitute in the entail.

Lord Wynford.—Who is to decide whether the lands are equal, and whether it has all the same advantages?

Lushington.—I apprehend the Court of Session would decide that in the same manner as they would decide now. The price of this estate was so and so; they would direct a proper estate to be purchased with the price.

Lord Chancellor.—In the Courts of Scotland is there any person to whom that question could be referred, and who has jurisdiction to decide whether it was a proper investment, as far as related to the circumstances and situation of the substituted estate? or must the party do it at his own risk, subject to having it afterwards reviewed by the Court of Session?

Lushington.—I apprehend that the custom is, in the Court of Session, to refer it to certain valuators, and on the report made by them, to decide whether it is a fulfilment of that which is required.

Lord Chancellor.—Must that be done before the new purchase is made?

Lushington.—I conceive so, my Lord. I understand it is done in sales for the redemption of the land-tax, where the property is to be laid out again; that the Court of Session appoint valuators to see that the money is laid out agreeably to the entail.

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Lord Chancellor.—There is no mode of securing the money in the meantime, I suppose? How is that to be done?

Lushington.—The Court order it to be paid into the bank.

Lord Chancellor.—There it is secured until it is laid out in an estate approved of by the Court?

Lushington.—Yes; and they take a receipt in the name of their own officer.

Lord Wynford.—You say the Court do that in sales under an Act of Parliament: Is not there an express direction, not only that it shall be laid out, but that it shall be paid in, and so on? Are not you applying the provisions of this Act to a case in which there is no such provision?

Lord Chancellor.—How is it done in the case of teinds?

Lushington.—It is done exactly in the same way.

Lord Chancellor.—In the case of teinds, is the course pointed out?

Lushington.—No, I think not; the Act states that the purchase may be made under certain circumstances.

The Solicitor-General commenced his reply, and proceeded to remark on the observations imputed to Lord Eldon in the case of Westshiells.

Lord Chancellor.—I do not think the noble Lord pledged himself to any thing in that case. I am quite satisfied, not only that the noble Lord did not mean to express any definite opinion upon the subject, but that he had not formed any at that time; that it was quite open.

The Solicitor-General proceeded, and remarked on the argument of Mr Brougham as to the adopting the condition.

Lord Chancellor.—All I understood by that was, that he was an actor, and expressly by his own act adopted the condition.

Solicitor-General.—Yes, as every man does adopt a condition who acts upon it. Having remarked on the argument as to a vexatious course of selling,—

Lord Chancellor.—Doctor Lushington did not follow that up by stating what would be the consequence of a vexatious course of selling.

Solicitor-General.—No: I should like to see a declarator framed to prevent a vexatious sale.

Lord Chancellor.—I do not think he stated that you might prevent a vexatious sale.

Solicitor-General.—Yes: Lord Balgray hints at the same thing.

Lord Chancellor.—How is it to be done?

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Solicitor-General.—A man says, I will sell an estate; he has the power of selling; you cannot prohibit it. Can he be prevented, if he says he is going to do it to vex me?*

Earl of Eldon.—In this case of Bruce *v.* Bruce, I am not aware that there is any such distinction between it and that of Stewart *v.* Fullarton, as should lead me to give your Lordships any trouble upon this one. I think the judgment of the Court of Session ought to be reversed.

Lord Chancellor.—Your Lordships having expressed your opinion in the other case in the manner in which you have, it follows as a matter of course that this judgment should be reversed.

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

Moncreiff, Webster, and Thomson—Richardson and Connell,—Solicitors.

No. 34. Executors of William, Duke of Queensberry, Appellants.
Brougham—Murray.

Charles, Marquis of Queensberry, Respondent.
Lushington—Sandford.

Entail—Reparation.—Held, (reversing the judgment of the Court of Session), that an action of damages by an heir of entail in possession was not competent against the executors of the preceding heir, who possessed under an unrecorded entail containing prohibitive, irritant, and resolutive clauses; and who was alleged to have violated the prohibition as to the letting of the lands; and the penalty of the entail was the heir's forfeiture, and nullity of the act, and not pecuniary damages.

1st Division.

‡ July 16. 1830. Lords Gillies and Meadowbank.

After the judgment of the House of Lords, reported ante, vol. ii. p. 265. (which see), the First Division of the Court of Session, in obedience to the remit, proposed the following Case and Questions to the other Judges.

"In this case, the House of Lords, of this date, (May 22. 1826), pronounced the following judgment:—'Ordered, by the Lords 'Spiritual and Temporal in Parliament assembled, that the said 'cause be remitted back to the First Division of the Court of 'Session in Scotland, to review the interlocutor complained of;

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* The case was then adjourned, and judgment pronounced at the same time as in the preceding case.

† For authorities, see the preceding case.

‡ This case was decided on the 22d, but being connected with the two preceding cases it is reported here.