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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.

'having, in such review, regard, among other considerations, to 'the consideration, how damages are to be estimated which are 'claimed by an heir succeeding to an estate, on account of a lease 'or tack subsisting at the time of his succeeding to the estate having 'been made at an under-value in point of rent, and which lease or 'rent such heir cannot, according to law, reduce; and with res-'pect to which lease or tack it is uncertain, at the time of the com-'mencement of his suit, and at the time of pronouncing judgment 'therein, during what period of the endurance of the tack he may 'live, or his right to the estate may continue: and also to the con-'sideration, whether, if such tack shall endure during a period in 'which several heirs entitled to succeed shall succeed to the estate, 'it is competent to each of them so succeeding to institute and 'maintain, upon their respectively succeeding, a like action or suit 'for damages on the like account; and how the damages are to be 'estimated in the respective actions or suits which such heirs res-'pectively shall so institute: And it is farther ordered, that the 'Court to which this remit is made do require the opinion of the 'Judges of the other Division in the matters and questions of law 'in this case, in writing; which Judges of the other Division are 'so to give and communicate the same.'

"*Circumstances of the Case.*—Upon the 9th September 1769, Charles Duke of Queensberry executed an entail of the lands and barony of Tinwald in favour of himself and the heirs-male of his body, whom failing, to 'our well-beloved cousin William 'Earl of March, and others.'

"By this entail it is declared, that it shall not be in the power of the heirs to alter the succession; and, under various other restrictions and limitations as to selling, alienating, &c. 'and with and 'under this restriction, that it shall not be lawful to any of the 'said heirs to set tacks or rentals of the said lands, or any part 'thereof, for any longer space than nineteen years, and without 'any diminution of the rental, or for the setter's lifetime in case 'of any diminution of the rental; and that it shall not be lawful 'to any of the said heirs to take grassums for any tack or rental 'to be set by them, but to set the said lands and estate at such 'reasonable rents as can be got therefor, so that the succeeding 'heirs may not be hurt or prejudged by the heir in possession 'setting the lands at an under-value, or taking, by way of 'grassum, what falls annually to be paid out of the produce of 'the lands.' The irritant and resolutive clauses of the entail are expressed in the most complete and efficacious form:—'Likewise 'it is hereby provided and declared, that in case any of the heirs

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'hereby called to the succession of our said lands and estate shall 'incur any of the irritancies contained in this present tailzie, the 'heir next called to the succession shall be obliged to prosecute 'and follow forth a declarator of irritancy and contravention, and 'to procure him or herself infeft and seized in our said lands and 'estate, within the space of two years after the former heir has 'contravened the conditions or restrictions before or after writ-'ten, or any of them. And in case the said next heir shall ne-'glect to pursue the declarator of irritancy, and obtain himself 'infeft as aforesaid, the said heir so contravening, by neglecting 'to pursue such declarator, shall, for him or herself only, forfeit, 'amit, and lose their right to our said lands and estate, and the 'same shall fall to and devolve upon the heir next called to the 'said succession, who shall prosecute the foresaid declarator of 'irritancy; but all the heirs aforesaid succeeding upon any con-'travention, and heirs succeeding to them, shall be subject and 'liable to the same conditions, restrictions, and irritancies, through-'out the whole course of succession for ever.' The deed contains a commission in favour of any one or other of the heirs of entail for recording it in terms of the Act 1685:—'And we hereby 'grant full power, warrant, and commission to

'as our procurators, or to any one or 'other of the heirs of tailzie before specified, to cause present this 'our disposition of tailzie before the Lords of Council and Session 'judicially, and procure the same recorded in the Register of 'Tailzies, and to expede charters and infeftments thereon agreea-'bly thereto, in terms of the Act of Parliament anent tailzies; and 'that either in our lifetime or after our decease.'

"Charles Duke of Queensberry, the maker of the entail, died in 1778. William Duke of Queensberry (formerly Earl of March) made up titles in terms of the entail. He never recorded the entail in the Register of Tailzies. Upon his death in 1810 he was succeeded by the present Marquis of Queensberry. The Marquis recorded the entail in 1818. In 1791 William Duke of Queensberry granted a lease of Tinwald Mains to the late Provost Staig of Dumfries, for nineteen years, at a rent of L. 140 sterling. No grassum was taken, and there was no apparent diminution of the rental. In 1796 and 1799 the Duke renewed the lease at these respective periods, for the same period of nineteen years, at the former rent of L. 140. The lease expired in 1818. This lease, as well as the other leases granted of the farms of the estate of Tinwald, were not challenged during the life of the late William Duke of Queensberry: The Marquis soon after his death brought

an action against the executors, as his representatives, upon the ground that the Duke, in the management of the estate of Tinwald, had acted contrary to the injunctions of the entail, by granting leases below the fair and true value; and concluded for damages, or a free yearly annuity. After the usual course of procedure, detailed in the cases for the parties, the Court (Feb. 23. and Nov. 15. 1815), 'assoilzied the defenders from all the conclusions 'of the action.' The Marquis did not carry these judgments to appeal till 1819; and of this date (May 26. 1820) the House of Lords affirmed the above interlocutors, 'without prejudice to any 'action or actions to be hereafter brought on account of the said 'leases;' and a remit was made to the Court of Session to review the interlocutors on various points, and to receive additional condescendences. Thereafter the Marquis, in 1820, raised a new action relative to the lease of Tinwald Mains, setting forth generally, that, while the said William Duke of Queensberry was in possession of the estates to which he succeeded under 'the disposition and deed of tailzie aforesaid, he let the whole or most of 'the farms upon the estates, not at such reasonable rents as could 'have been obtained therefor, but, on the contrary, he, with an 'intent to defraud the succeeding heir, let them at rents far below 'such reasonable rents; and thus the said Marquis, pursuer, has 'been hurt and prejudged by the said Duke, while in possession, 'his setting the lands at an under-value;' and concluding for a specific sum of damages, in respect that the lease had by that time expired. This new action came before Lord Gillies, who directed the proper steps to be taken in terms of the Act of Sederunt; and thereafter the case came to be discussed before Lord Meadowbank, who ordered informations to the Court. July 16. 1830.

"Upon advising these papers, the Court, of this date, (December 15. 1825), pronounced this interlocutor:—'The Lords find the 'present action competent, repel the additional defences, and 'remit to the Lord Ordinary to proceed accordingly.' Leave was granted to the defenders to appeal against this interlocutor; and, on discussing the same, the judgment was pronounced on 22d May 1826, already narrated. The judgment having thereafter, upon petition in common form, been applied, (May 31. 1826), mutual Cases were ordered to be given in. That order having been complied with, and the same considered by the First Division of the Court, they, in furtherance of the remit from the House of Lords, put the following questions:—

1. Whether the summons is competent by the law of Scotland?
2. Supposing such action to be competent generally by the law

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and practice of Scotland, how are damages to be estimated which are claimed by an heir succeeding to an estate, on account of a lease or tack subsisting at the time of his succeeding to the estate having been made at an undervalue in point of rent, and which lease or tack such heir cannot, according to law, reduce; and with respect to which lease or tack it is uncertain, at the time of the commencement of his suit, and at the time of pronouncing judgment therein, during what period of the endurance of the tack he may live, or his right to the estate may continue?

3. If such tack shall endure for a period in which several heirs entitled to succeed shall succeed to the estate,—is it competent to each of them so succeeding to institute and maintain, upon their respectively succeeding, a like action or suit for damages on the like account; and how are the damages to be estimated in the respective actions or suits which such heirs respectively shall so institute?

4. Is an action upon an alleged contravention of the prohibitory or limiting clauses of an entail, when duly fenced with irritant and resolutive clauses, necessarily and de jure to be confined to the matters and conclusions directly warranted by these clauses? or may the substitute heirs of entail in any case also demand reparation and damages from the contravener or his heirs, so as to make up any loss which cannot be obtained by the immediate operation of such clauses?

5. Whether, in the circumstances of this case which have been referred to in the pleadings, and where the entail also contains the particular clauses founded on by the defenders, the pursuer is barred by any personal objection from demanding reparation, indemnification, or damages, from the representatives of the late heir?"

The following answers were returned:—

LORDS JUSTICE-CLERK, ALLOWAY, and NEWTON.—IN answering the queries put to us, we conceive it better to take them in an order different from that in which they stand; the first or general question, as to the competency of the action, depending chiefly upon the matter which makes the subject of Query 4th. We shall begin, therefore, with considering this latter Query.

Query 4.—We are of opinion, That where the prohibitions and injunctions contained in an entail are fenced with proper irritant and resolutive clauses, it is incompetent for the substitutes, in case of alleged contravention, to maintain an action of damages; and that they must confine themselves to the remedies which the entail gives them by means of these clauses. This opinion, we conceive, stands quite clear

of the decision of the Court in the case of Ascog. Where an entailer has prohibited certain acts, but has failed to secure his prohibitions in terms of the statute 1685, he must be held to have looked to the common law as the means of enforcing them; and this law, if it operate at all, can only do so by admitting an action of damages to repair the loss arising from the contravention. But the case is materially different where the entailer has availed himself of the statute, by fencing his prohibitions with irritant and resolutive clauses. He thereby adopts the sanctions of the Act, and points out precisely the remedies which are to be competent; and as these are the best, and indeed the only effectual ones, to allow the substitutes to neglect them, and resort to others of a quite different and less effective nature, would be to disregard his declared will, and, in many cases, to defeat his main object. In the present entail, which is strictly in terms of the statute, the maker has not only provided and declared that the consequences of a contravention shall be a forfeiture of the contravener, and the nullity of the deed inferring in it, while he specifies no other remedies whatever; but he has shewn his will that these particular sanctions shall be enforced, by making it imperative on the next substitute, under the pain of forfeiting his own right, to follow forth a declarator of irritancy within the space of two years from the date of the contravention. It seems impossible in such a case to suppose, that the entailer could have meant to allow the substitutes to leave the acts of contravention unreduced, and to claim damages for the loss arising from them. But the law on this point we understand to have been fixed by the judgment of this Court, and of the House of Lords, in the action of damages at the instance of the Duke of Buccleuch against the present defenders. Had the Tinwald entail, then, been recorded, we think it clear that no action such as the present could have been maintained; and it does not appear to us, that the circumstance of its not being so when the lease complained of was granted, can have the effect to make it competent. It is true that in the case of Dorrator an unrecorded entail was found effectual against the heir in possession. But this goes no farther than to hold, that, quoad heirs, recording is not necessary to give it effect, or, in other words, that it shall have the same efficacy against them as it would have had when recorded. But it does by no means follow, that the want of recording is to change the nature of the deed, so as to create, by implication, new remedies not given there. If there could have been no room for an action of damages under the recorded entail, we do not see how the very same deed can have different and more extensive effects, merely because it remains incomplete. It has been argued, indeed, that a claim of damages may arise from the very failure to record; that it was the duty of the late Duke of Queensberry to have completed the deed by recording; and that, as the noble pursuer has been deprived by this neglect of the means of reducing the lease, the defenders, as the Duke's representatives, are bound to make up the loss. But to give ground

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for this argument it must be shown, that the Duke lay under such an obligation. Now, we can see nothing in the entail imposing it as a duty on the heir in possession to record the deed. There is an injunction on him, under the pain of an irritancy, to make up his titles to the estate in terms of the tailzie, and that he shall possess on no other title. But with these injunctions the late Duke strictly complied. There is also a procuratory, giving power to the heirs of entail generally to put the deed on record; but there is nowhere an injunction on any person to get this done. In such circumstances, we think the negligence lay entirely with the substitutes themselves. They had the sole interest; and it is to their vigilance in protecting their interest that the entailer seems to have wholly trusted.

Query 5.—After answering the 4th Query in the manner we have done, it seems very immaterial to consider whether the pursuer is or is not barred personali exceptione. The ground on which he is stated to be so is, 1st, That having failed to bring a declarator of irritancy against the late Duke within two years after the lease complained of was let, he has himself incurred an irritancy under the entail, and is not entitled to found upon it as authorizing the present action: That had a declarator of irritancy been brought in the Duke's lifetime, but after the two years had expired, he might have effectually objected, that the pursuer, having contravened the entail, was not entitled to declare a forfeiture under it, and that the defenders must have right to urge the same objection. Admitting that the Duke could have competently defended himself by pleading that the pursuer had also contravened, it strikes us, that it might have been necessary previously to shew that the pursuer knew of the contravention from the time of its taking place; a thing which has not been alleged, and which is not naturally to be presumed, considering that leases are private instruments, necessarily known only to the contracting parties. It seems very questionable if the pursuer could have forfeited his right by failing to complain of a contravention, of the existence of which he was utterly ignorant. A second ground on which the pursuer may be held barred from founding any claim of damages on the neglect to record the entail is, that he has taken benefit from this very neglect, in so far as he has been thereby enabled to relieve himself of personal debts to the extent of above L.100,000, which, having become capable of affecting the entailed estate, are to be paid off by a sale of part of it. To this, however, it may be answered, that as the question of personal objection becomes of consequence only on the supposition that an action of damages is otherwise competent, and as on this supposition the substitute heirs may claim damages from the Marquis to the extent of the value of the lands carried off, he is not relieved in effect of any part of his debt. It will only be transferred from one set of creditors to another. But the effect of this answer evidently depends on the substitutes making such a claim. If they do not, or cannot in the circumstances establish it, then it appears to us that the Marquis will derive

a very great personal advantage from the very circumstance that his predecessor did not record the entail; and that he is not entitled to found any claim of damages on the ground of such failure. The existence of personal bars is, however, of no consequence, if we are right in our views of the incompetency of the action. July 16. 1830.

Query 1.—We have answered this Query in what we have said on the subject of the fourth.

Query 2. & 3.—The subject of these Queries seems also immaterial; for if an action of damages cannot be maintained, it is unnecessary to inquire how these damages are to be estimated or divided among the different heirs who may happen to possess the estate during the currency of the objectionable lease. As the attention of the Court seems, however, to be called particularly to this subject in the remit by the House of Lords, it may be proper to state what occurs to us, supposing the action had been competent. It does not appear that, in the circumstances of the present claim, the least difficulty can be felt; because, as the lease complained of had expired before the summons was executed, there can be no doubt either as to the mode of estimating the damage, nor as to whom it is due. Neither do we think the difficulty considerable, where the heir in possession has not gone farther than to infringe the injunction to let at reasonable rents, having kept his leases within the period permitted by the entail. As the sole complaint, then, arises from the inadequacy of the stipulated rent, the damage will just be the difference betwixt this and what would have been a reasonable rent at the time of letting. Any variation in the value of land during the currency of the lease ought to have no effect; because the obligation being to take a reasonable rent when the contract was made, this is the time when the heir must exercise his judgment. A subsequent rise of value ought not to increase the damages, nor ought a fall of rents to diminish them; for, had a fair rent been stipulated at the commencement, the succeeding heir would at least have had the tenant's obligation to pay this during the lease, and his chance that the obligation would be fulfilled. As the annual damage, therefore, admits of immediate estimation, there seems no great difficulty in apportioning it among the successive heirs. The damage may be decerned for in its natural form of an annual payment during the subsistence of the lease, to be drawn by the person who shall have right to the rents for the time; or, if it be necessary to settle by a payment at once, by applying this in the purchase of an annuity for the period of the lease; or, where there is a deficiency of funds, by applying whatever can be recovered in procuring such annuity as it will bring. The heir in possession, no doubt, settles in this way for the succeeding heirs, as well as for his own interest; but this is no more than he is authorized to do in any litigation he may maintain regarding the estate. The difficulty may become much more formidable, if we suppose the heir to have contravened at the same time the prohibition as to endurance, by letting a lease for a period far beyond that permitted

July 16. 1830. by the entail; yet such a lease, from the deed being unrecorded, might have been effectual. The reasonable rent at the time of letting can be no criterion of the damage beyond the first nineteen years; for as any lease in terms of the entail would have come to an end by that time, the heir then in possession would have had it in his power to resume the lands, and to benefit by any intermediate rise in their value. Besides, it is quite impossible to say, supposing the future heirs disposed to have conformed to the provisions of the entail, what number of leases might have been let during the hypothetical time assumed, nor at what particular periods these might have come to an end. Such difficulties we cannot pretend to obviate; but as we do not hold the action to be competent, we are noways called upon to do so. This can only be required of those who maintain the opposite opinion.

LORD GLENLEE.—*Query* 1. For the reasons stated in my answer to the 4th Query, I rather incline to think, that action for the pursuer's claim does not lie against the general representatives of the late Duke of Queensberry; and that, therefore, the process falls to be dismissed. But I hesitate as to saying, that, in strict technical language, the summons is incompetent by the law of Scotland.

Query 2. & 3.—I agree with the opinion of my Lord Justice-Clerk.

Query 4.—In the case put in this Query, I think that the substitute heir is not, in all circumstances and universally, de jure confined to the remedies which are articulately and in express words provided by the tailzie. Thus, supposing the tailzie to be perfect, as stated in the introduction to the queries, but not recorded in the Register of Tailzies, and that the heir on whom the estate has devolved sells it, and that the purchaser's right is safe;—in such a case it is obvious, that a substitute heir could not be benefited in any possible way by merely irritating the contravener's right; and I do not see any thing which precludes him from insisting in an action for having the price reinvested in lands to be settled under the same destination, and under the same fetters as those provided by the original tailzie, and for having the money in the meantime, till an opportunity for reinvesting occurs, properly secured; and I think the action would also lie against the contravener's heirs. In the present case, however, taking it as stated in the introduction to the questions, the matter may perhaps stand otherwise; for the contravener, although by neglecting to do what the entail enjoined he may have occasioned loss to the pursuer, took no benefit to himself, and did not become lucratus by the transaction complained of. Thus, the claim made by the pursuer is highly penal, a parte rei; and no step having been taken during the contravener's life, it may be thought that the claim does not transmit against his general representatives; and this, on the same principle on which the universal passive title of vicious intromission cannot be made the ground of an action against the representatives of the intromitter, except to the extent of his actual intromissions, unless it has been raised and insisted in during his life. There are many

other cases in which the same doctrine has been applied; but I am aware there are also cases in which, at first sight at least, it might be thought that the action was of a penal nature, and yet it has been sustained against heirs, when pursued only to the extent of reparation. And although I am inclined to think, that, on examination, it would be found that those decisions may be justified without impeaching the applicability of the doctrine to other cases, yet the discussion would be long, and I must just content myself with saying, that, on the whole, I incline to think that the doctrine is applicable to such a case as the present, taken with all its circumstances. July 16. 1830.

Query 5.—I am not satisfied that the action is barred by the personal objections stated against the pursuer. They are quite of a different kind from that which occurred in the case of Barholm, where it was no doubt found that an heir of entail, who, it appeared from the libel, possessed the remainder of the estate by feudal titles made up under a new entail inconsistent with the original one, and which new entail bound him to possess by no other title, could not, in the character of heir under the original entail, pursue for reduction of other deeds alleged to have been granted in contravention of that original entail. This was plainly an objection to the title to pursue, arising from the personal conduct of the pursuer, which was available to the defenders without the necessity of any separate procedure for establishing that the pursuer himself had incurred an irritancy: but in the present case I see nothing of this sort; and it appears to me, that the pursuer's character as heir of entail, on which he founds, must be held to subsist, unless it should be set aside, if it can be set aside, by those who have right to insist in an action for that purpose.

LORD CRINGLETIE.—*Query* 1. Whether the summons is competent by the law of Scotland?—I understand that this question has no relation to the form of the summons, but applies to the point, Whether such an action as the present can be maintained against the defenders? Viewing it in that light, my answer demands explanation. The tailzie on which the action is laid, prohibits the letting of leases for longer than nineteen years; 2*d*, The diminution of the rental, except by a lease for the lifetime of the granter; and, 3*d*, The taking of grassums, declaring that the lands must be set 'at such reasonable 'rents as can be got therefor, so that the succeeding heirs may not be 'hurt or prejudiced by the heir in possession setting the lands at an 'undervalue.' The lease to Provost Staig in 1791 was for L.140 yearly during nineteen years, which is not alleged to have been in diminution of former rent, neither is it said that grassum was taken: The lease was renewed in 1796, and afterwards in 1799, for the same rent and same period of endurance. There can therefore be no ground of complaint under the provisions of the tailzie, unless that the lease was not granted for a reasonable rent. The entail contains irritant and resolutive clauses, applicable to its various prohibitions, and, among others, to that of leases let under a reasonable rent; but the

July 16. 1830. entail not having been recorded, whereby the lease in question could not be set aside, the noble pursuer rests his claim on the assumption that a contravention has been committed ; and, assuming that the late Duke having violated the prohibition not to let a lease under the reasonable rent that could be obtained at the time, pleads, that his Grace had violated his own obligation not to let such a lease. In other words, he assumes that a prohibition in an entail to do any act, constitutes an obligation not to do it ; and this seems to be the principal ground of the claim, supported by reference to various authorities, all quoted and referred to in the case of Ascog, then depending before your Lordships. As that question has been decided by your Lordships in favour of the prohibition being construed to be an obligation, I should consider myself bound to adopt that judgment as law ; but as it has been appealed from, whereby the House of Lords will have to take the point under their consideration, and the present case will probably have to return to that high tribunal, I hope that I shall not be considered as presuming too far, when I refer to the opinion which I gave to your Lordships on that case of Ascog, and of which you must be in the possession of a printed copy. I will only repeat, that, with due deference to that case, I cannot convert a prohibition or a restriction into an obligation. I know no case where any man has come under an obligation in which it cannot be enforced, or the performance of it secured, by the diligence of the law ; and it is on this principle, that a prohibition could be enforced, and observance of it secured by diligence, that M'Kenzie, Lord Stair, Bankton, Elchies, Erskine, and every authority quoted by the pursuer, laid down, that such prohibition constitutes an obligation upon the heir of tailzie in possession not to disregard it, and renders the violator subject to indemnify the succeeding heirs ; but it is a decided point, since the days of these authorities, and now uncontroverted, that no diligence is competent to enforce the observance of a prohibition, and thereby proves that it does not constitute any obligation. It is merely a prohibition, and nothing else ; and if it be not made effectual by the sanction afforded by the law, it is good for nothing, except to secure against gratuitous deeds in disregard of it, which it does effectually.

The law has given to every man the power of rendering his prohibitions effectual by means of irritant and resolutive clauses ; and if he do not choose, or if he neglect to use them, the presumption of law is, in my opinion, that he means only to tie up his heirs from giving away his land gratuitously, but leaves them at liberty to dispose of it for onerous causes, as I have fully explained in my opinion in the Ascog case, to which I refer. When the law has given one effectual mean of rendering a prohibition effectual, I do not think that additional ones should be given by constructive interpretations of words.

But in this particular action I am clearly of opinion, that the matter has been settled, both here and in the last resort, by the judgments in the cases between the present defenders and the Earl of Wemyss

and the Duke of Buccleuch. In these cases, the late Duke of Queensberry had let leases, which were all declared to be contraventions of the entail under which his Grace possessed, for they were all reduced and set aside as such. There the matter went on in a regular shape by the contravention being ascertained, after which came the actions of damages at the instance of the Earl and Duke against the present defenders; and these actions were all founded on the contravention of the prohibitory clause in the entail. The action for reducing the leases lasted for nine or ten years before it was decided; during all which the tenants possessed on payment of the rents stipulated in their respective leases; and ultimately it was decided, that bona fide possession protected them from paying more than these rents during the long period while the actions were in dependence. In this way the Earl and the Duke sustained a serious loss, which they called on the present defenders to indemnify; but it was determined that no such action was competent, notwithstanding the said obligation, under which it was alleged that the late Duke of Queensberry had come by possessing under the entail. No doubt there were irritant and resolutive clauses in it, and it was recorded, which would have enabled the Earl and the Duke of Buccleuch to have set aside these leases during the Duke of Queensberry's life, and forfeited his title to the estate; but although that was one remedy competent, it could not have taken away the other, arising out of the obligation implied from the prohibition to let such leases, if that had been understood to exist. But the contrary was decided—it was found, that the present defenders were not liable for damages; and therefore I hold this as a precedent, that a prohibitory clause does not constitute any obligation, and, at all events, that no claim of damages is competent, where there are irritant and resolutive clauses in a recorded entail to enforce the prohibition. It is true, that in these cases the leases were set aside; whereas in the present one, although the tailzie also contains irritant and resolutive clauses, the leases to Provost Staig could not be reduced, owing to the entail being unrecorded. But here, I ask, whose fault was it that the entail was not recorded? It expressly conferred power on all the heirs under it to apply to have it put on record; and I cannot conceive that the Marquis of Queensberry, by omitting a duty incumbent on his Lordship, can plead that he is thereby entitled to what otherwise he could have had no claim. Besides, I think that it is well observed by the defenders, that if the entail had been recorded, and the pursuer had attempted a reduction of the leases to Provost Staig, his Lordship would have had a still more difficult task to execute than the Duke of Buccleuch had; and during the time the affair would have been in litigation, the lease would have expired, and his Lordship would have got no damages, more than did the Duke of Buccleuch. And here again it would be not a little singular, if, by omitting to get the entail recorded, his Lordship shall be in a more favourable situation than if it had been complete and effectual.

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July 16. 1830. Another consideration to show the incompetency of such an action as this, is the difficulty which, in some cases, may exist in disposing of it. In the present case there would be no difficulty, because the lease is expired, and there is but the pursuer, as heir of tailzie, who is entitled to damages if they be due. But, in order to render such an action competent, the principles on which it proceeds must apply to all cases of the sort. The late Duke of Queensberry might have let a lease for ninety-nine years, in which case there would have been many heirs, and a long course of time embraced under one lease. One heir has no right to pursue for damages to his successor; and consequently, if there happen to be twenty heirs during the lease there may be twenty actions. One heir may be entitled to damages, and his successor not; because, by the change of times, the rent reserved in the lease challenged may be reasonable. Then times may vary, so that large rents may return. Even in the course of one man's life the amount of damages may vary. In order, therefore, to afford a fair rule for estimating damage, the action would require to be current, and the amount be settled every year. For damage is the amount of a man's loss, and consequently must vary with the times. The Court is not entitled to settle it on a course of time, as if a lease were granted, for that would be making a lease which never existed. Then comes the question, How are funds to be set apart and secured to pay an unsettled and contingent loss? nay, a loss which may be dormant during one heir's time, and rise up again in the life of his successor? It is certainly so difficult to direct a Jury how to ascertain this, as to amount to an impossibility, which goes to shew the incompetency of such actions.

Query 2. & 3.—I think it necessary to add together these two Queries, in order to answer them with correctness. They are in part answered by my observations on the preceding query. But in farther explanation I beg leave to remark, that if an action be competent to one heir, to insist in an action for damages or reparation on account of a lease having been let at a rent lower than could be considered reasonable, the same right must be competent to each succeeding heir. The heir in possession is entitled to give, during his own life, the farm at any rent, however low; and, in this predicament, I do not think that it would be sufficient for each heir to state that the rent was too low at the time the lease was let, because his claim is for damages only; and if he could not shew that the rent was too low at the time that he complained, he could suffer no damage whatever. Supposing it competent for him to set aside the lease altogether, he could get no more than the rent which the farm could afford at the time, whereby, comparing that with the rent reserved, the difference must be the measure of the damage: and to me it seems to follow of course, that an action of the nature referred to must be current, and require a new proof every year during the possession of the heir, if the lease should last so long. Take, for instance, this very case.—The noble

Marquis succeeded to the late Duke of Queensberry in 1810, the period of the highest rents given in Scotland. Had his Lordship brought this action, and his damage been ascertained by the rates of that year, to continue downwards to the year 1818, in which the lease expired, gross injustice would have been done, because, in a few years after, rents fell from 25 to 30 per cent; and, consequently, to do justice, (supposing the action to be competent), the Court must have taken evidence of a reasonable rent for every year by itself. If it be said, that the damage must be estimated on the principle that the Duke of Queensberry, or any heir of tailzie in his circumstances, ought to have let the farm at a reasonable rent at the time; and the rent which would have been reasonable at the time, ought to be held to be the rule for ascertaining the damage during the lease;—it appears to me that this cannot be the rule; because I do not think that any heir is bound to give leases at all—he may let from year to year if he pleases. 2*d*, The right competent to the succeeding heir is to get rid of the lease, if one had been let, and to let a new one; so that the only rent to which he is entitled is that which is reasonable when he succeeds, and gets quit of the subsisting lease. Even supposing that the noble Marquis has a right (which I think he has not) to insist that the late Duke of Queensberry was bound to let a lease for nineteen years at the rent that could be reasonably got at the time, it is quite clear that there could be no slump sum of damages awarded, because such sum would proceed on the principle of buying an annuity, to last as long as the lease, of a sum equal to the difference between that reasonable rent, and the rent actually reserved by the lease; and it is clear that no such sum could be awarded to the Marquis, because there could be no certainty that he would live during the whole period of the lease; and he has no sort of right to pursue any right competent to his successor. July 16. 1830.

Query 4.—I consider this to be answered by the observations made in considering Query 1st, viz. 'That the substitute heirs cannot demand reparation and damages from the contravener or his heirs, so 'as to make up any loss which cannot be obtained by the operation of 'the irritant and resolutive clauses.' But I beg leave to add, that, in this particular case, my observations on the general law are decidedly enforced by the clause of the entail quoted in the preface to the questions put by the Court, to be adverted to in answering the next question.

Query 5.—I am clearly of opinion, that the noble pursuer is barred personali exceptione from insisting in this action. His Lordship has personally incurred an irritancy, and forfeited right to the estate, under the express words of the clause just referred to, and fully quoted in the preface to the questions.

This clause, more decidedly than any thing occurring in the other Queensberry causes, proves that no action for damages for contravention can exist. It points out the remedy:—It orders the next heir to

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set aside the contravention, and forfeit the contravener, within two years after. Had the present pursuer observed this, there could have been no room for this action. The lease to Provost Staig (if it be a contravention, which has not yet been regularly declared) would have been the ground of forfeiting the late Duke of the whole estate, or forced him to purge the irritancy by sweeping away the lease; in either of which cases there would have been no ground for this action. The Marquis has personally incurred an irritancy, and forfeited right to the estate, under the express words of the clause just referred to; and although the defenders have no right to declare that contravention to the effect of forfeiting the noble pursuer of his estate, it appears to me that they are obviously entitled, when his Lordship is founding on an alleged act of contravention of the same entail done by the late heir of the estate, in whose right they stand, to tell him that he has himself contravened it, and, having forfeited, has no right to pursue this action. Put the case, that the Duke of Queensberry were alive, and that the Marquis had been pursuing a declarator of irritancy against his Grace during the subsistence of the lease to Provost Staig, but more than two years after its date; it seems to me quite clear, that the late Duke would have told the Marquis, that, by omitting to challenge that lease within two years, he himself had contravened and incurred a forfeiture of his title to the estate, and was not entitled to pursue. For the same reason, the same answer must be competent to the Duke's executors, when they are called on by the Marquis to pay damages for that contravention. To me it seems unreasonable, that an heir shall disregard one clause of an entail, and complain of his predecessor for disregarding another clause of the same deed. It may be urged, that the heirs of tailzie could not know that a lease had been granted, and therefore could not pursue the contravention. But I am not moved by that; they must stand or fall with the entail. By that deed certain deeds are prohibited under an irritancy, among which the granting of leases in contravention of the entail is one; and the heirs are required to pursue every contravention within two years. The tailzie assumes their vigilance and acquaintance with every contravention; and if they don't discover it, theirs is the misfortune or the fault. The tailzie does not require them to pursue a contravention within two years after it shall come to their knowledge: it presumes their knowledge, and provides that the contravention shall be declared within two years.

In the case of Gordon of Carleton, the tailzie prohibited contraction of debt, and declared, that the contravener should forfeit for himself and the heirs of his body. Alexander Gordon, one of the heirs of tailzie, contracted debts, which were challenged by his son Alexander. But this Court (21st June 1749) found, 'That, by the conception of the entail, the person contravening forfeits for himself and 'his heirs; and therefore it is not competent to Alexander Gordon, 'the son of the alleged contravener, to object to the debt upon the

'estate of Carleton.' Hailes, vol. i. p. 48.; Kilkerran, *voce* Tailzie, p. 545. July 16. 1830.

The late Mr Little Gilmour insisted in an action for setting aside a lease which had been granted by his deceased father in contravention of the tailzie under which he had possessed;—and it was pleaded by the defender, that the tailzie forfeited the contravener, and the heirs of his body; so that, if the lease under challenge was a contravention, the pursuer cut the branch on which he stood: he, eo ipso facto, proved the contravention to extend its effects to himself, whereby he had no right to pursue; and the Court being of that opinion, dismissed the action. The self-same principle appears to me to rule this action. Under the tailzie libelled on, the Marquis had his remedy: he omitted to use it, and has, by operation of the same tailzie, incurred a contravention, and forfeited his own right to pursue.

The same principle that ruled the cases just quoted, guided the Lords of the Second Division, in the question between Mr M'Culloch of Barholm and various persons who had purchased parts of that estate, (17th May 1826). It was held, that Mr M'Culloch, having contravened the entail on which he founded, was not entitled to complain of contraventions by a preceding heir.

Lords Mackenzie and Medwyn.—We shall give precise and articulate answers to the questions put by the First Division of the Court before we conclude; but we feel it necessary to begin by expressing, in our own way, our opinion upon certain points.

1. In the *first* place, then, we are of opinion generally, that, in cases of strict entail in Scotland, damages may be awarded to the heir of entail, as representing the entailed estate or series of heirs of entail, for injuries done to that estate; and that these damages must be disposed of so as to repair as nearly as may be the injury to the entailed estate, or series of heirs. We shall suppose the case, that an estate is bought for a full price and entailed, and that, after the death of the entailer, the whole estate is evicted, from defect of right in the seller,—we ask, in such case, is there to be no claim of warrandice, or for damages, which is the same thing, on account of this loss? We can have no doubt that there must be a claim of damages against the seller. By whom then? We think clearly by the heir in possession, as representing the whole series of heirs of entail; or, in other words, for himself and his heirs of entail. His own right is clear. But farther, he is, by the form of the right, the proprietor; the others are his heirs, though no doubt under entail, but still his heirs. Why, then, should not he have right to sue the seller for damages on account of this eviction? We see no reason. We do not see how any remedy can be obtained otherwise: Nor do we see why any difficulty should be made in allowing this, more than in allowing the heir of entail in possession to maintain all the real rights of the entailed estate. He, it is clear, may pursue to vindicate the real right to the land under the entail, if an attempt is made without right to usurp it, or any part

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of it, or any right upon it. Why should he not equally sue for an equivalent in case it be evicted? The same thing must, we think, be said, in case any part of the entailed estate be evicted; or in case the extent of it be found less than was warranted by the seller to the entailer; or if any part of the estate be lost by defect in the conveyances, arising from culpable ignorance or neglect in the conveyancer employed. Again, the same thing must, we think, be said, in case a real debt of the seller's should emerge against the entailed estate,—or if a servitude should emerge contrary to his warrandice,—or a feu-duty. It is equally clear, we think, that there must be a legal claim of damages in the heir of entail in possession, in case the whole or part of the entailed estate should be destroyed by the injury of another person;—as, if the land should be washed away by the sea, or a river, or overflowed in consequence of injuriously breaking down, or failing to make, or keep up, a bulwark. In all these cases we think there can scarcely be room for doubt, that there must be a claim and action of damages, and that this must be competent to the heir in possession, as for himself and his heirs of entail. How, then, must the money received as damages be bestowed in these cases? Shall it go to the heir in possession in fee-simple? No. That would manifestly be unjust. It must be equitably employed for the interests of all concerned; *i. e.* land must be bought with it, and entailed; or it must, in some way, be settled so as to indemnify, as nearly as may be, all who suffer by the injury. In short, there must be an equitable disposal of it, at sight of the Court; just as there is of the surplus, when an entailed estate is judicially sold for entailer's debt, or debts of an heir, by which it happens to be affected—as was done, for instance, in the case of Smollet, where part of an entailed estate was judicially sold for debts of an heir of entail contracted while the entail was not recorded.

2. It appears to us, that the temporary nature of any loss caused by injury to an entailed estate can make no difference, except in the equitable mode of disposal of the damages recovered. Put the case, for instance, that on an entailed estate a mansion-house is set fire to, and destroyed injuriously,—or that a wood or fences are destroyed,—or that the agricultural state of the land is deteriorated, so as to require a certain time to restore it: Or suppose that a liferent, or temporary right of usufruct, or feu, affecting the whole, or part of an entailed estate, is evicted, from fault in the party who sold it to the entailer; or that a lease for 500 years, at a nominal rent, is evicted out of it in the same way, or for 100, or 50, or 20 years; or that an annuity is evicted out of it for 100, or 50, or 10 years; or a servitude of any kind for a limited time—it seems equally clear, that damages must be due, and that the heir in possession must have right of action for them. The only difference must be, that the damages, when recovered, would be employed in a different way, *i. e.* as closely as might be to compensate the parties who suffered, or were to suffer,

the temporary loss; as, for instance, in rebuilding a similar mansion-house, in restoring fences and a good state of the ground; or, if reparation in that way was impossible, by way of equipollent, as in settling on the heirs of entail existing during the time, a provision equal to the loss by the rent or annuity taken out of the estate.

3. We cannot see why it should make any difference, that the injurer of the entailed estate is himself one of the heirs of entail. Suppose, for instance, that an heir in possession maliciously breaks down a dyke, and lets the sea sweep away an entailed estate; or burns, or takes down and sells the materials of the mansion-house;—can there be any doubt that, after his death, the next heir of entail can sue his representatives for the damages? And the case seems just equally clear, when the wrong done by an heir consists in defeating the entail injuriously; as in omitting the irritant and resolutive clauses in making up titles, and so alienating the estate to an onerous third party,—or any real right out of the estate,—or conveying it with debt to such party; or in making such alienation or contraction of debt while the entail is still unrecorded,—or in making an onerous change of the succession in such circumstances. In all these cases there seems to be no room for doubt, that the parties suffering must have relief by action of damages; and that, whatever difficulties there may be in other respects, at least the heir holding, or entitled to hold, the entailed estate, may sue, as representing himself and the other heirs, *i. e.* his heirs of entail. Again, the same thing must hold in case the injury from the wrongous act of an heir of entail be of a temporary nature, as the constitution of a liferent or temporary feu, or servitude, or annuity, while the entailing clauses stand omitted in the making up the titles, or the entail stands unrecorded. In these cases it seems equally clear, that the heir in possession, or holding right to possession, of the entailed estate, must have right to sue for damages, as representing the series of heirs; and that the damages must be liable to an equitable disposal, to provide for the fair interest of all concerned as closely as may be. Put the case, then, that an estate worth L. 10,000 a-year is let on a lease for 1000 years, at a rent of L. 100, by an heir of entail who has omitted to insert the fetters in making up his titles, or while the entail is unrecorded, and that at his death he leaves this lease operative against the entailed estate,—we can see no reason why a claim and action for damages should be less competent, or otherwise operative in this case, than if a similar lease had been found in force against the estate by the fraud of a person who sold it to the entailer, and contrived to get the lease concealed from him; nor indeed any reason why the effect of such a lease should be different in this respect from that of a perpetual feu for the same rent. Diminish, then, the endurance, and increase the rent; let it be a lease for 100, or 50, or 19 years; let it be for a rent of L. 500 or L. 1000, the rent still being grossly inadequate, the principles of law applicable to the case remain the same. Let it then be a lease only of one farm, for a moderate time, but still the

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rent grossly inadequate, so that the lease is a manifest contravention of the entail; and valid only by the want of insertion of the fetters, or of recording, still the principles of law applicable to the case appear to remain unchanged. That, however, is just the present case, as it is alleged on the part of the Marquis of Queensberry. For what he alleges seems just this,—That the late Duke of Queensberry, being heir in possession of an estate strictly entailed, but the entail not being recorded, let a lease which, counting from the expiry of a former lease, was of the endurance of 8½ years, and that of a farm worth L.550, at a rent of only L.140; and for that, he, the heir of entail, having succeeded to the entailed estate before the commencement of this unfair lease, demands damages. He states further, that there need be no question here as to the employment of the money to be recovered as damages, because he, the pursuer, has already possessed the estate during the whole time of this injurious lease, and so he himself has suffered the whole injury. This last statement relieves the Court of the trouble of disposing of the damages, to secure the interest of all concerned; but surely it cannot have the effect of making the pursuer's right to these damages worse. On the contrary, if there were any difficulty in cases of this kind, arising from the heir in possession suing as representative of the whole series of heirs, and for the interests of them all, that circumstance seems to rid the case of that difficulty. But we really do not see any such difficulty, nor any difficulty at all, in cases of the kind, except those which Courts of law, when equity is included in law, as it is in this country, do and must overcome. After these remarks, we proceed to answer the questions put by the First Division of the Court.

1. We think the summons competent.

2. and 3. We think that, in the case referred to, the heir of entail would, as representing the whole series of heirs of entail, or in other words, for himself and his heirs of entail, be entitled at once to claim damages for the whole injury done, or to be done, to the entailed estate by the lease; without any regard at all to the probable duration of his own life, or of his right to the entailed estate: That, in such a case, it would in like manner be competent for any after heir of entail to demand damages for himself and the after heirs, though we think not for any heir who predeceased him, unless he claimed as the representative of that heir: That we do not conceive it would be competent for any heir of entail to demand a priori damages as for himself alone, while the endurance of his life, or right to the estate, was uncertain: And that if, in such a case, no action was brought during the currency of the lease, we can see no principle whatever on which the separate representatives (if they had separate representatives) of every one heir who had suffered from the lease could be denied action of damages for the loss accruing to him.

4. In case an entail be not recorded, we think that an heir of entail, upon contravention, may demand damages from the contravener

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or his heirs, although it has been found that, after an entail has been recorded, there could be no room for such action of damages. While an entail is not recorded, it has not the benefit of the statutory sanction: The entailing clauses are not real or operative against third parties. It is plain, therefore, that they must either work in the way of personal obligation against the heir in possession upon the unrecorded entail, or be of no effective validity at all. If the heir in possession sell the entailed estate, the entail cannot work by irritancy and resolution, as a recorded entail does; for the buyer is a third party, not affectable by the unrecorded clause irritant, and the estate is not left in the heir to be forfeited. It is therefore manifest, that an unrecorded entail cannot possibly work as a recorded entail does, and must operate by personal obligation on the heir in possession, or be of no effective validity at all. It has never however been found, that an unrecorded entail was of no effect. The contrary has uniformly been held as law. We do not think it necessary to go into argument on that point, which we do not believe is now held doubtful by any person. If, however, an unrecorded entail is not wholly ineffectual, but does operate by way of obligation on the heir in possession, it obviously must give rise to an action of damages for contravention, precisely on the same principles on which an entail, with a clause prohibitory against altering the order of succession, or alienating or burdening, but without clauses irritant and resolutive, or defective in either of these clauses, gives rise to such action. Indeed, the idea of obligation, without damages for violation of the obligation, seems to us little better than self-contradictory. In this way we think the case of Ascog fully applicable as an authority in the present case. It is said the entailer, in making an entail with clauses prohibitory, irritant, and resolutive, must have intended that these should operate only in the way of irritancy and forfeiture. We shall not examine whether there be any conclusive reason why this should be held in respect to the prohibitory clause, even in reference to the entail after it is recorded: But in reference to the entail before it is recorded, we think that this is very obviously erroneous. The entailer could not possibly mean the entail, before it was recorded, to operate only by irritancy and forfeiture; because he must have known that, until it was recorded, it could produce no irritancy or forfeiture in the case of contravention the most obvious and probable of all, viz. in the case of sale or other onerous alienation of the estate. With this standing manifest before us, we never can adopt such a construction as to presume, that the entailer intended to deny to the prohibitory clause its natural legal meaning and effect, from absolute reliance on the clauses irritant and resolutive, during a period when it was perfectly plain that these clauses were of no effective validity. We have no doubt that the entailer meant that the entail should, before being recorded, have such operation as law would give it; *i. e.* that it should operate by way of obligation upon the heir in possession, as other imperfect entails do.

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5. We think this question must be answered in the negative. The deed of entail grants 'full power, warrant and commission, to ' as our procurators, or to any one or other of the heirs 'of tailzie before specified, to cause present this our disposition of 'tailzie before the Lords of Council and Session judicially, and pro-'cure the same recorded in the Register of Tailzies, and to expede 'charters and infeftments thereon agreeably thereto, in terms of the 'Act of Parliament anent tailzies, and that either in our lifetime or 'after our decease.' The maker of the entail died in 1778, when he was succeeded by the late Duke William, who lived till 1810; and he was succeeded in this estate by the present Marquis. The entail was not recorded till 1818. It has been argued, that as the Marquis might have applied to have this tailzie recorded, he is barred from pursuing any action founded upon a contravention of it in consequence of its being an unrecorded entail. We are aware that it is the privilege of every heir-substitute to call upon the heir in possession to produce and record the entail, under which the one possesses, and the other may eventually succeed; and the commission in this case does not seem to us to carry this right higher, or to impose any obligation upon the substitute heirs, the neglect of which is to import a forfeiture of any of their rights. It gives authority to the heirs, but it imposes no obligation on them; and therefore we do not think that an heir-substitute neglecting this, is guilty of any wrong which can bar his action against the heir in possession, or representatives of that heir, for a contravention of the entail that is not reducible. Again, as to the duty of the heir in possession immediately to record the entail, we have to observe, that the Marquis was only an heir-substitute until 1810, when he succeeded; and therefore, supposing him to have presented this tailzie in 1810, on his succession, and recorded the same, this would not have prevented the injury of which he complains through the acts of Duke William. As we think, therefore, that the Marquis cannot be barred by his neglect to record while substitute, so we also hold it is impossible to refuse to sustain action at his instance, because he did not record the entail immediately on his succession. Indeed we must observe farther, that the lease objected to was granted in 1799. The objection therefore must be, that the pursuer did not call upon the late Duke to record the entail before that time. Now, we believe the pursuer was a minor at that time. Is it to be said, then, that his claim to redress for any contravention is cut off by a neglect to record the entail while he was a pupil or a minor? Yet it is only this neglect that can possibly be founded on. Besides, we do not see how the failure of the pursuer to record this entail can be pleaded by the representatives of the former heir, who was equally a wrong-doer, as a bar to his claim of damages against them. If the pursuer, by succeeding to an estate with the entail unrecorded, has charged it with his own debt, the future heirs will be entitléd to claim damages to this amount from him; and this claim at

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the instance of the subsequent heirs, seems a strange defence in the mouth of the representatives of the former heir, against a claim for a similar contravention; since, to deprive the pursuer of his right of action, would just so far lessen his power of repairing the injury done by him to the subsequent heirs. In truth we must repeat, that the commission does not seem to make the case stronger than if it had been left to the ordinary rule of law, which authorizes any heir, however remote, to call for production of an entail in order to its being recorded; so that if the clause affords a good personal exception against the claim in the present instance, we think it must equally operate in every case of a perfect entail which has not been recorded; and thus the only mode of completing an entail would be by the entailer recording it in his own lifetime. The clause of the entail in question, which requires that the next heir, after an irritancy has been incurred, shall pursue a declarator of irritancy and contravention, and procure himself to be infeft in the lands, and provides that, failing to do so, he shall, for himself only, lose his right to the estate, has also been referred to as affording a personal exception against the pursuer. We are of opinion, that it would be competent only for a subsequent heir to pursue a declarator of irritancy against the pursuer, founded on this clause, and that it is jus tertii to any other party, a stranger to the estate, to found on it. We think the intention of this clause was to compel the substitute heirs of entail, as far as could be done, to bring declarators of irritancy within a certain time, but not to take away their right of doing so after the time had elapsed. Besides, it appears inapplicable to the circumstances of this present case, where, from want of recording prior to the act of contravention, it was not possible to bring a proper declarator of irritancy, *i. e.* an irritancy of the deed in contravention, by which the entailed estate might be purged and restored to its integrity. And here, again, there might be question from the minority of the Marquis, which, we believe, existed at the time of the contravention. And, on the whole, we do not think these latter objections to the title of the pursuer, more recently insisted on, are solid.

LORDS PITMILLY and MEADOWBANK.—We concur in the foregoing opinion.

On advising these opinions this interlocutor was pronounced:—
'The Lords, considering that the Opinions returned by the Lords 'of the Second Division, and the permanent Lords Ordinary, do 'not exhaust all the questions remitted by this Court for their con-'sideration; and that, in the event of their answers to the ques-'tions not being agreeable to the opinions of the majority of the 'whole Judges, it might become necessary that their Lordships 'should give their answers to the other questions; of new remit 'the questions to their Lordships, and request that they may re-

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In consequence of this remit, these Opinions were given:—

LORDS PITMILLY, MEADOWBANK, MACKENZIE, and MEDWYN.—Although it appears to us that we have already answered all the questions put to us in this case, we again give it as our opinion,—

1. That the summons is competent.

2. That an inquiry being instituted as to the true annual value of the farm at the time of entering into the lease, the difference between such value and the rent stipulated is, the loss or damage annually sustained by the heir first succeeding to the granter of the lease; and if that heir does not outlive the lease, the same will, in like manner, be the annual loss of the heir or heirs who may possess till the issue of the lease.

3. That until an action for this damage has been raised, any heir in possession is entitled to bring a claim against the representatives of the contravener, for the loss or damage, from the commencement of his own possession, and during the currency of the lease; also, retrospectively, for the loss during the possession of a preceding heir, if he be the representative of that preceding heir; but after the damage has been ascertained at the instance of the heir in possession, it is not competent for any succeeding heir to institute a similar action.

4. That where an entail, though complete in its restricting clauses, has not been recorded, an action of reparation or damages in the case of a contravention may be competently instituted against the representatives of the contravener.

5. That the pursuer in this case is not barred by any personal objection from instituting such an action.

LORD BALGRAY.—In considering this case, the Court must have due regard to the questions and information required by the House of Lords, and to the opinions laid before us of the other Judges.

With respect to the questions which have been put, I am humbly of opinion,—

1. That the summons or action instituted is competent to be entertained by this Court, in the sense in which the word competent is understood by the law of Scotland;—that is to say, that the Court is bound by law to hear the demand of the pursuer, and is bound to call on the defenders to obviate the demand, if they can. No doubt, the pursuer may be barred from insisting in his demand, and in that sense the action may be said not to be competent; but that does not properly apply to the competency of the action.

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2. I also humbly think, that there can be no sort of difficulty in ascertaining the loss or damage sustained by an heir of entail in claiming under a contravention such as has been alleged. The true annual value of any farm at any given time can be easily ascertained, and the difference betwixt that value and the stipulated rent is the loss or damage to be repaired. *That* the heir in possession will draw, as long as he lives, during the subsistence of the lease; and if a new heir succeed, he will be entitled to draw the same rent, and so on successivé, till the right expires. As the value of the corn produce is annually ascertained by public authority in every county of Scotland, and the value of other produce also well ascertained, there is no practical difficulty in fixing the value of any farm; and in such a case as the present, there can be no difficulty in ascertaining the loss or damage to any heir of entail, whatever be the endurance of the lease.

3. According to the principles of the entail law in Scotland, when a jus crediti is created to every substitute heir of entail, however remote, he is entitled, upon contravention by an heir in possession, to bring an action to obtain redress; and this action is for the common benefit, and for the protection of the general right conferred by the entailer. Of course it necessarily follows from this, that if a succeeding heir finds it necessary to bring an action against the representatives of his predecessor for the reparation of any wrong that had been done, he is the dominus of the estate, and is, by the law of Scotland, considered as the representative of the whole body of heirs, and he is entitled to insist for reparation in his own and in their rights;—and consequently, what belongs to himself he will appropriate to his own use; and what may pertain to his successors, or rather to the estate itself, he is bound to preserve and protect for the use of the other substitutes. Such being the nature of the right of an heir of entail, and his duty in prosecuting all contraventions, and from all other substitutes being in the eye of law entitled to appear and to concur with him in such prosecutions, it is perfectly plain that the representatives of a contravener never can be subjected to successive demands of succeeding heirs to repair any damage or any loss which has been already determined with a predecessor. It is always to be recollected, that although heirs of entail do not represent one another, but merely represent the entailer, yet where an heir of entail acts in the proper discharge of his (duties) rights under an entail, he binds all the succeeding substitutes; and of course, in such a case as the present, if the damages have been ascertained at the instance of the heir in possession, it is not competent for any succeeding heir to institute a similar action.

4. I am also humbly of opinion, that as an obligation is always created by a prohibitory clause, and that although the Act 1685 entitles proprietors to protect these obligations by irritant and resolutive clauses; yet when these become insufficient from the circumstances of the case, action of reparation or damages in the case of contravention

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may be instituted against the representatives of the contravener. It is even apprehended that this would be competent against the contravener himself, even supposing that the irritant and resolutive clauses were enforced against him. For instance, suppose an heir of entail, contrary to the prohibition in any entail, should pull down the family mansion-house, and sell the whole materials, it is apprehended that he would not only forfeit the estate, but he would be bound to repair the positive loss which he had occasioned. The same thing would also occur in all cases of direct and deliberate waste; of which many instances could be pointed out. If this could be done against the contravener himself, much more must it be competent against his heirs and representatives, when there no longer exists any room for insisting upon the irritant and resolutive clauses. In fact, in the case of leases, of which there is no legal record, and where the substitutes have no right to interfere in the ordinary administration, it is impossible to discover, till the death of the heir in possession, what is the contravention that has been committed.

5. I am humbly of opinion, that there is nothing occurring in the present case on the part of the pursuer, which can bar him from insisting in his present action. If the pursuer has contravened any part of the injunctions of the entail, he in his turn will be amenable to the succeeding substitutes; but third parties are not entitled to vindicate their rights, or to compensate the wrong which their predecessor has committed, with the wrong committed by another.

What has now been stated relates merely to the general questions of law, in which the majority of the consulted Judges appear to concur. There still remains a material part of the facts of the case, as to which there seems to be required a great deal more explanation and investigation, before the Court can arrive at any determination. In the present case it is admitted on all hands, that there was no direct diminution of the rental. It is also admitted, that no grassum was taken. In short it is admitted, that nothing was put directly into the pocket of the late Duke. It is also to be remembered, that he was the dominus of the estate, and had, to a certain extent, the uncontrolled management of the property. It is also to be kept in view, that during the period that the late Duke possessed the estate, the most extraordinary variation occurred in the value of landed property in Scotland, and that even during the subsistence of the leases in question. It therefore becomes a question of very considerable difficulty to decide, what a prudent proprietor ought to do under such fluctuations. For these reasons it appears to me, that it would be proper for the Court to direct the parties to give in Cases directed to the facts which are respectively alleged by them, accompanied by condescendences of what they offer to establish by proof; as vague allegations with respect to the value of land ought not to be regarded in a matter of the kind, particularly as so much speculation has taken place in Scotland in this matter; and of course, what any tenant may have offered for land,

or even may have paid for a time, is no just criterion of its proper permanent value.

LORD CRAIGIE.—I am entirely of the same opinion. In a question between the heirs themselves, if one heir, when in possession, does an injury to the estate to the prejudice of the other heirs, he may be liable in damages upon that fact.

LORD GILLIES.—I felt a difficulty upon this case from the decision in the case of Ascog, in which I differed in opinion from the judgment that was pronounced. I considered, that where an entail was fortified by irritant and resolutive clauses, it must just work its own way; but your Lordships found, that although it was an imperfect entail, yet it was obligatory inter hæredes, and I think the same principle must apply here.

I concur in the opinion which has been given by Lord Mackenzie, and the other Judges who concur with his Lordship.

But upon the last point, viz. whether in this case the executors are liable, or what may be the extent of their liability—I think there is very great difficulty, and upon which I think we may still require to take the opinions of the other Judges.

Suppose the late Duke of Queensberry had derived an immediate and direct advantage from the transaction, then the executors might have been called upon, because the funds would have been thereby increased; but that is not the case here. The Duke of Queensberry got no advantage by the transaction, and I doubt much if the executors can be liable where they derive no benefit. Suppose all the opinions regarding the competency of the action were right, and that a claim for damages lay, there still remains the question, whether, in the circumstances of this case, the executors are liable for these damages? and upon that point I am not prepared to give any opinion at present.

LORD PRESIDENT.—I concur in the opinion expressed by your Lordships; but, with regard to the last point mentioned by Lord Gillies, it would be better either to order Cases, or to remit to the Lord Ordinary to hear parties further upon that point.

The Court then pronounced this judgment:—'Find, agreeably to the opinions of the majority of the whole Court, 1mo, 'That the present action is competent by the law of Scotland, 'and that the pursuers are thereby entitled to state their demand. 2do, That where an heir of entail grants a lease at 'an undervalue in point of rent, contrary to a prohibition in 'the entail, and which lease cannot be legally reduced, and 'when it is established that the prohibition is contravened, the 'damages are to be estimated and measured by the difference of 'rent, between what has been fixed by the lease and what the 'lands would have given if let in terms of the entail, secundum

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'arbitrium boni viri,—and the heir of entail in possession will be 'entitled to draw, during the subsistence of his right, that differ- 'ence of rent from the heir of the contravener. 3tio, That every 'substitute heir of entail has such a jus crediti under the deed, as 'makes it competent for him to institute and maintain any action for 'damages, where a prohibition has been contravened; and where 'such action is instituted, the same is to be considered for the bene- 'fit of all concerned; and that, if a difference of rent is fixed in a 'suit at the instance of an heir of entail in possession, who is do- 'minus of the estate, and representative of the other heirs, against 'the heirs of his predecessor, the same will regulate the right of 'the succeeding heirs who afterwards enter into possession, pend- 'ing the endurance of the lease—and they will be entitled to draw 'in their order, according to the nature and extent of their right 'to the same, such surplus rent as may be fixed in any such ac- 'tion; and that, after the damage has been so ascertained at the 'instance of a proper party, it is not competent for any succeed- 'ing heir to institute a similar action. 4to, That although an 'entail be complete in its restricting clauses, yet an action of 'reparation or damages in the case of contravention may be com- 'petently instituted against the representatives of the contravener, 'so as to make up any loss which cannot be obtained by the im- 'mediate operation of such restricting clauses. 5to, That the pre- 'sent pursuers are not barred by any personal objection from in- 'stituting the present action, and from demanding indemnification 'from the representatives of the late heir: And further, with re- 'ference to the question, whether such an action lies where the 'heir is not lucratus? the Lords remit to Lord Meadowbank, Or- 'dinary, to prepare the cause, and to report to the Court.'*

The Duke of Queensberry's executors appealed, and both parties again maintained the same pleas which had been formerly urged, (ante, vol. ii. 265.), and as to which the remit had been made.

Earl of Eldon.—My Lords, With respect to the Queensberry case, which we have just heard argued, it differs in this respect (I mean according to the argument at the bar) from the two cases of Stewart *v.* Fullarton, and Bruce *v.* Bruce, that there is no prohibition against letting of leases; and that suggestion from the bar appears to me to deserve a great deal of consideration, because unquestionably

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* 6. Shaw and Dunlop, 706.

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the evidence of non-imputation of intention has been carried to the utmost length. Thus, in a case which has been cited, the institute in an entail was named, I know not how many times over, under the expression of 'institute and other heirs of entail,' from which it would have been implied, unquestionably, in the construction of any deed but a deed of Scotch entail, that the entailer understood the institute to be one of those heirs of entail, and which, if he had been so understood to be by implication, all the fetters would have been just as completely taken to be imposed upon him as upon the heirs of entail. But though he had been spoken of in conjunction with other heirs of entail, by those repeated expressions in the instrument of entail, 'the institute and other heirs of entail,' yet this House refused to consider that the institute was, by implication, to be taken as an heir of entail within the intent and meaning of the author of that deed. It is therefore absolutely necessary that we should decide, with respect to the Queensberry estate, whether there is, or is not, strictly speaking, and without the aid of any implication, a prohibition, or a clause in the nature of a prohibitory clause, to prevent the heirs of entail making such leases as were made in this case. My Lords, I pass over at present, because I do not well understand the grounds of decision in the Court below, how it happened that it was thought grassums were not objectionable—I mean, not objectionable with a view to the question, whether, with respect to them, there was not a diminution of rental? because, to be sure, if a man lets an estate worth L.1000 a-year for L.500 a-year, and takes a grassum of the value of L.500 a-year for a certain series of years, it must be said that that tends to diminish the rental by the taking of the grassum; or, in other words, that the tenant purchased, by the grassum, so many years' enjoyment of the land as the grassum, in consideration of which the rent was reduced, amounts to.

My Lords, with respect to this case I shall say no more at present, than that it may be my duty to explain pretty largely hereafter, (having been concerned in making that remit, to which reference has been made, to the Court of Session), the embarrassment this House was under with respect to this case. I hope I shall do it satisfactorily, after looking back to what was said upon the subject. There are very many cases, and it is exceedingly difficult to reconcile the recent decision that the House came to in respect to the Duke of Buccleuch's case;—the difficulty, perhaps, arises in one's mind the more, because one cannot help feeling that there is a moral right which one would wish to carry into a legal right; but, in making that attempt, we must not go further than the law will enable us to do. My Lords, I should hope that, in the course of a very short time, we shall be prepared to decide these cases; and would request, that in the meantime the gentlemen who may be in possession of the notes of speeches made in this House, will have the goodness to furnish them, as far as they can, to the person

July 16. 1830. who is now addressing the House. I should feel that to be a very considerable obligation conferred upon myself.*

Earl of Eldon.—My Lords, This case, in different shapes, has been before your Lordships several years. The summons recites a deed of entail, (a copy of which I now hold in my hand), which was executed by Charles Duke of Queensberry and Dover, who, after making several limitations, and describing a great variety of property which was to be included in this entail, annexed the following conditions, one of which is, that the heirs succeeding by virtue of this tailzie shall be bound and obliged to pay the entailer's debts, so far as they shall not be recoverable from his unentailed or personal estate. Then follows this clause: 'And with and under this 'restriction and limitation, that the whole heirs aforesaid are and 'shall be limited and restrained from selling, alienating, impignorating, 'or disponing the said lands and estate, or any part thereof, either 'irredeemably or under reversion, and from burdening the same in 'whole or in part with debts or sums of money, infeftments of annual-'rent, or any other servitude or burden whatever, (excepting only 'as herein after-mentioned), and from doing or committing any act, 'civil or criminal, and granting any deed, directly or indirectly, 'whereby the said lands and estate, or any part thereof, may be 'affected, apprized or adjudged, forfeited, become escheated or 'confiscated, or any other manner of way evicted from the said heirs 'of tailzie, or this present tailzie prejudged, hurt, or changed.' There is then the following restriction, on which the question arises, as to the power of granting leases: 'With and under this restriction, that it 'should not be lawful to any of the said heirs to set tacks or rentals 'of the said lands, or any part thereof, for any longer space than 'nineteen years, and without any diminution of the rental, or for the 'setter's lifetime in case of any diminution of the rental; and that it 'shall not be lawful to any of the heirs to take grassums for any tack 'or rental to be set by them,' (grassums, your Lordships know, are slump sums of money for renewals at a smaller rent), 'but to set the 'lands and estate at such reasonable rents as can be got therefor, so 'that the succeeding heirs may not be hurt or prejudiced by the heir 'in possession selling the lands at an undervalue, or taking, by way 'of grassum, what falls annually to be paid out of the produce of the 'lands.' Then there are irritant and resolutive clauses. And there is this peculiar clause: 'That in case any of the heirs hereby called 'to the succession of our said lands and estate, shall incur any of the 'irritancies contained in this present tailzie, the heir next called to 'the succession shall be obliged to prosecute and follow forth a 'declarator of irritancy and contravention, and to procure him or

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* The further consideration of the case was then postponed to this day.

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'herself infeft and seized in our said lands and estate within the space 'of two years after the former heir has contravened the conditions or 'restrictions before or after written, or any of them; and in case the 'next heir shall neglect to pursue the declarator of irritancy, and 'obtain himself infeft as aforesaid, the said heir so contravening, by 'neglecting to pursue such declarator, shall, for him or herself only, 'forfeit, amit, and lose the right to our said lands and estate, and 'the same shall fall to and devolve upon the heir next called to the 'succession, who shall prosecute the foresaid declarator of irritancy; 'but all the heirs aforesaid succeeding upon any contravention, and 'heirs succeeding to them, shall be subject and liable to the same 'conditions, restrictions, and irritancies, throughout the whole course 'of succession, for ever.' Your Lordships will observe, that these are very particular clauses; for there are not only irritant and resolutive clauses, but your Lordships will find that it is incumbent upon the heirs next in succession to follow forth a declarator of irritancy and contravention within two years after the former was contravened, under the conditions and restrictions before and after written, otherwise he shall lose his right to the estates, and the same shall devolve to the next heir. This declarator of irritancy and contravention is to be prosecuted by the heir in possession; and if he does not do that within two years, he is himself to be considered as a contravener; and those who come after him may deprive him in the same manner for his contravention, as it was intended by the author of this deed that he should be able to deal with the heir before named who had so contravened. Your Lordships are aware, that, according to the law of England, (which appears to me to be much better in this respect than the law of Scotland), if a person becomes, by limitation, the absolute owner of an estate, if you attempt to restrain him from making leases, you make an attempt which is repugnant to the very nature of the estate given to him, and that will have no effect at all. It is clearly otherwise in the law of Scotland; for though you make the person the absolute fiar of the estate, you have a right, by those irritant and resolutive clauses, to reduce him to the situation of a very limited owner of that estate, although, by the first clause in the instrument, he was to become the fiar of the lands. It is the case in England, too, that whenever a lease which is made is not according to the terms of the settlement, and which is to the prejudice of the tenant for life, the next taker has nothing to do but to prove that that lease is not made according to the terms of the settlement, and thereby he sets aside the lease; and he has in that case a power to go back for gone-by rental a particular period—six years, I think it is. This is not so in the law of Scotland. The allegation made in the summons was, that the person in possession had let a lease that he was not at liberty to let; that it was let for an undervalue, and (so to express myself) not let for such a reasonable rent as at the time of making the lease he might have obtained for his own benefit, and the

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'it was not incumbent on him to obtain the highest rent which might 'have been got on a competition, and that still less was he bound, 'under the pain of damages, to obtain the utmost which any specu-'lator might choose to think was the worth of the farm at the time.' My Lords, in observing on the heads of defence, I would state, that it is my humble opinion that he was bound to obtain such a rent as would be a reasonable rent for it at the time; and then the question is, What is the rent which might reasonably be obtained at the time? To be sure that ought to be considered with all due allowance. A Court ought not to set aside a lease on account of the party not having got the utmost farthing, but it should be all which can be reasonably obtained by ordinary diligence, so as to give to the persons entitled to the estate the benefit of that estate. My Lords, the additional defences stated, that the action was incompetent upon the following grounds:—'The deed of entail under which the noble 'pursuer has succeeded to the Tinwald estate, contains certain irritant 'and resolutive clauses, declaring, that any heir who shall contravene 'the conditions of the tailzie should forfeit his right to the estate, 'and that the acts and deeds done in contravention should be void 'and null. But these are the only penalties which the deed of entail 'has annexed to any act of contravention; and it does not contain 'any condition or declaration whatever, importing that the repre-'sentatives of any heir who should possess the estate should be liable 'in damages to a succeeding heir, on account of any alleged act of 'contravention. It would, therefore, be plainly inconsistent with the 'known rules of interpretation applicable to rights of this nature, to 'allow the pursuers, in the present case, to demand reparation from 'the defenders on account of an alleged act of contravention on the 'part of their author, while the only deed under which the pursuers 'have right to the estate gives no countenance whatever to any such 'demand. If, in consequence of the entail not having been recorded, 'the pursuers cannot avail themselves of the only mode of redress 'which would have been competent to them against the alleged act 'of contravention, they have themselves to blame for not having insisted 'upon the entail being recorded during the lifetime of the late Duke of 'Queensberry.' After the summons and these answers had been put in, there was an interlocutor ordering condescendence and answers. It is not necessary for me to state to your Lordships the nature of this long condescendence, and these very long answers. It will be in your Lordships' recollection, that, when this case was argued at the bar, there were several observations made on the case of the pursuer—what ought to be expected of him, regard being had to the advantages which he had received from certain deeds and transactions with respect to this estate; but it is sufficient to say, that we have nothing to do, I apprehend, with the question, whether the pursuer's conduct has been commendable or otherwise? My Lords, after the Counsel had been heard on the condescendence and answers, mutual informa-

July 16. 1830. tions were prepared to the First Division of the Court, on advising which they pronounced the following interlocutor:—'Upon report 'of Lord President, in absence of Lord Meadowbank, Ordinary, 'and having advised the mutual informations and other papers given 'in by both parties in this cause, the Lords find the present action 'competent; repel the additional defences, and remit to the Lord 'Ordinary to proceed accordingly.'

My Lords, there was an appeal to this House against this interlocutor, upon which the judgment of this House was pronounced so long ago as May 1826. Your Lordships, however, will permit me to observe this short ground, that the House was very much disturbed, at the period, by the doctrines in the Ascog case, and various other cases and questions, whether, where there were obligations, irritant and resolutive clauses, these were to be enforced by inhibition; or whether the remedies given by the deed of entail itself, were not remedies which ought to be pursued in the case of an alleged breach of the conditions, &c. that were imposed by the deed of entail? And, under the circumstances of difficulty which the House was under with respect to regulations of this nature, the judgment of the House was,—(Here his Lordship read the judgment quoted p. 254.)

My Lords, unquestionably it was the feeling of this House, and that feeling has been rightly understood, that when the cause was remitted back to the Court of Session in Scotland, they were to review the interlocutor. It was meant, not merely that the Court of Session should consider the difficulties in respect to damages, but they were to review the interlocutor itself, having regard, among all the other considerations, (and the remit calling upon them, in the review, to attend to this consideration), how the damages were to be estimated. And I think I do not misrecollect what passed, when I state, that the Counsel at the bar were questioned at several periods with respect to those damages, and were requested to inform us how, according to their notions and speculations, the damages might be assessed; or to inform us, if they could inform us, by any decision, how such damages had been assessed; but they were not able to give any satisfactory answer to those questions, notwithstanding those questions were propounded to them by the House.

My Lords, the case having gone back again, it has produced great difference of opinion among the learned Judges. I observe, that those who have concurred in the opinion that this action cannot be sustained, state great difficulties with respect to the assessing the damages in certain cases, particularly one learned Judge, I think my Lord Cringletie, in his judgment;—and, on the other hand, there were four Judges who held the obligation to be competent, and who do not feel this difficulty about estimating the damages, because the last heir lived beyond the duration of the lease. That circumstance does not seem quite to remove the difficulty; because, if the heir was to have damages assessed at the period when his right was infringed upon, it does not follow that because he actually outlived the lease, that he has lost

his right. The heirs succeeding one another from time to time, it appears to be the opinion of the Judges of the Court of Session, that the damages should be equal to the buying an annuity—the amount of which would be the difference between the annual amount of that reasonable rent which might have been obtained at the time the lease was made, and the lower rent which had been obtained when the lease was made—and that that annuity should be paid, from time to time, to the heirs succeeding to the estates. Now, my Lords, it does occur to me, I confess, that there are a great many difficulties altogether unremoved by this mode of stating the matter. It is not necessary to go through them; but I think, when one comes to consider what questions might arise, there are a great variety of cases which this mode of solving difficulties, in the particular cases alluded to, would not enable us to get over with that judicial certainty which we ought to have. The points I am now alluding to are discussed in the different opinions given by the Judges: It is not necessary to go through the propositions which those respective Judges state;—there are many of them very largely discussed in the arguments at the bar in the Ascog case. It appears that the Ascog case had engaged the attention of the Court of Session a great many years, and had engaged the attention of this House for a great many years. It was most elaborately argued at the bar, and it was not only most elaborately argued at the bar of this House, but most elaborately argued in the Cases laid on your Lordships' table, and in the judgments of the respective Judges of the Court of Session; and your Lordships were finally of opinion, and I repeat my own humble opinion, that the deed in the case of Ascog was the rule by which the Court ought to proceed, and that it never could have sustained such a proposition as this, that a man having made such a deed as that in the case of Ascog, by which it was found that he meant to allow a sale to be made of the estate,—which we must take him to have intended, because he has not so prohibited the sale by the irritant and resolutive clauses as to prevent its being made;—yet that he meant, on the other hand, that there should not be such contravention, though it was not met by the provisions in that deed, but that, with respect to that deed, though he did not prohibit the sale to be made, and, in fact, the party might sell —yet that there should be satisfaction in this way, that the money should be laid out in the purchase of another estate, to be settled to the same uses, which, the moment it was settled to the same uses, might be again sold.*

My Lords, on referring to the different judgments which have been given by this House, and by the Court of Session, it is impossible that they can all stand; and the question is, which of

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* The speeches of the Judges of the Court of Session in the Ascog case, have been (in order to make the reports of these three cases complete) inserted in the Appendix, No. I.

July 16. 1830. those judgments appear to your Lordships to be the best founded? And, in determining that question, we must refer to the principles on which they have proceeded, having reference, at the same time, to the particular provisions on which the questions have been raised;—and, under those considerations, we must endeavour to come to the correct result. My Lords, in this case, it is very true that the pursuer might not know that such a lease as this had been granted; but, on the other hand, if the party claiming under the entail has been defrauded, he is entitled to his remedy. The question is—Whether he has so been defrauded? My Lords, I regret that there should be so great a difference of opinion between the learned Judges in the Court of Session. In such a state of things, I must agree with some of them, and disagree with some of them; and all I can do is to examine most carefully which of them appear to me to give the most satisfactory reasons for their opinions; and my conclusion, upon the whole, after a great deal of consideration of the subject, has led me to submit to your Lordships my opinion, that this judgment ought to be reversed.

Lord Chancellor.—My Lords, It is unnecessary, after the very able manner in which this case has been stated by my noble and learned friend, that I should follow him through his statement. I have also studied with great attention the judgments of the learned Judges in the Court below—I have attended minutely to the arguments which have been urged at your Lordships' bar—I have read with great attention the arguments in the pleadings; and it is sufficient for me to state, that I entirely concur in the opinion which my noble and learned friend has expressed; and I therefore second the motion of my noble and learned friend, that this judgment be reversed.

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

Appellant's Authorities.—Earl of Wemyss and March *v.* Duke of Queensberry's Executors, Jan. 14. 1823, (2. S. & D. 107.); March 10. 1824, (2. Shaw's Ap. Ca. 70.) Duke of Buccleuch, Nov. 13. 1822, (2. S. & D. 6.); Feb. 1. 1826, (4. S. & D. 412.) Bryson, Jan. 22. 1760, (15,511.) Lord Ankerville, Aug. 8. 1787, (7010.) Lockhart, June 11. 1811; Hope's Min. Prac. p. 403.; Stair, 2. 3. 59. Binney, Jan. 28. 1668, (4304.); Stair, 4. 13. Clauses Irritant; Ibid. 2. 1. 23.; 1. 9. 30. Bankton, 1. 3. 152. 158. Hamilton *v.* M'Dowall, March 3. 1815, (F. C.)

Respondents' Authorities.—Kames' Law Tracts, p. 144.; Dalrymple on Feudal Property, p. 139.; Hope's Min. Prac. 16. 9. 13.; Mackenzie, ii. 490.; Stair, 2. 3. 59.; Ersk. 3. 8. 23. Bryson, Jan. 22. 1760, (15,511.); Hope's Min. Prac. 16. 11.; Mackenzie's Institutes, 3. 8. 11.; Ibid. on Tailzies, ii. 489. Gibson, Nov. 24. 1795, (15,869.) M'Nair, May 18. 1791; Bell's Cases, 546.;

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* In the Appendix, No. II. will be found a note by the late Mr Chalmer, (communicated to the reporters shortly before his death), of the principles fixed by the recent decisions on entail questions.

Elchies on Stair, p. 110.; Ersk. 3. 8. 23.; Bankton, 2. 3. 130.; 3. 8. 27. Willison, Feb. 26. 1724, Dec. 18. 1724, (15,369.) Hall, Feb. 1726, (15,373.) Gordon, Nov. 21. 1753, (10,258.) Chisholm, Feb. 27. 1800, (No. 6. App. Tailzie); Stair, 1. 3. 3.; Ersk. 3. 3. 86. Strathnaver, Feb. 2. 1728, (15,373.); Feb. 25. 1730, (Craigie and S. 32.) Young, Nov. 13. 1761; (5. Brown's Sup. p. 884.) Gordon, July 29. 1761, (15,513.) Sutherland, Feb. 6. 1801, (No. 8. App. Tailzie). Lockhart, June 11. 1811; Elchies on Stair, p. 114.; Bankton, 2. 3. 152. Spittal, Aug. 3. 1781; Bankton, 2. 3. 152–158. M'Gill, June 13. 1798, (15,451.); Ersk. 3. 1. 13.; Stair, 1. 9. 3.

July 16. 1830.

J. CHALMER—A. MACRAE,—Solicitors.

CATHERINE MONRO or ROSE, and HUSBAND, Appellants.
Dean of Fac. (Jeffrey)—Lushington.

No. 35.

GEORGE ROSS, Respondent.—*Brougham—Keay—Dundas.*

Parent and Child—Foreign.—Where a Scotchman by birth, who was heir of entail in possession, and proprietor of estates in Scotland, but in early life settled in England, making occasional visits to Scotland, had, by an illicit connexion with an Englishwoman, a son born to him in England, and afterwards came to Scotland with the child and mother, where, after a residence of fifteen days, he married her; and they remained in Scotland about two months, visited his estates, and returned to England with the child, where they remained until his death;—Found, (reversing the judgment of the Court of Session), that the child was not entitled to the benefit of legitimation by the subsequent marriage of his parents.

July 16. 1830.

2D DIVISION.

THE late Alexander Ross was by birth a Scotchman, and went in early life to London, where he settled in business as an army-agent. He succeeded in the year 1786 to the entailed estate of Cromarty in Scotland; and he also inherited a paternal estate called Overskibo, and was enrolled as a freeholder in two of the counties of Scotland. After he went to England, his residence was either in London or its neighbourhood. He married a lady in England, but she died in April 1809, without being survived by a son. He then formed an illicit connexion in London with an Englishwoman, Elizabeth Woodman, (who assumed the name of Mrs Saunders, being the Scotch for his own name, Alexander), by whom he had a son, (the respondent), born in London in February 1811. Mr Ross was in the custom of making occasional visits to Scotland for various purposes, such as voting as a freeholder at elections, letting the leases on his estate, amusement, or seeing his friends. In May 1815 he took lodgings at Newhaven, near Edinburgh, and arrived there on the 25th, with