The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed. Oct. 3, 1831

Napier's Authorities.—Campbell, March 3, 1802 (F. C.); M'Neill v. M'Neill, May 26, 1826 (4 S. & D., No. 386); 22 Dec. 1830, (4 W. & S. p. 455); Jolly v. M'Neill, May 28, 1829 (7 S. & D. p. 666).

Common Agent's Authorities.—Queensberry's Executors, 21 Dec. 1826 (5 S. & D. No. 112).

DUTHIE, MACDOUGALL, and BAINBRIGGE—MONCRIEFF, WEBSTER, and THOMSON,—Solicitors.

BARRON GRAHAME, Appellant.—*Sir C. Wetherell—A. M'Neil.* No. 58.

SARAH GRAHAME and others, Respondents.—*Dr. Lushington.*

Entail—Sale.—Sale of lands by public roup sustained (affirming the judgment of the Court of Session), which was alleged to have been made in contravention of a strict entail in an antenuptial contract, recorded in the books of Council and Session for preservation and infeftment, engrossing the fetters of the entail taken and recorded previous to the sale, but the entail not having been recorded in the Register of Entails till after the sale. *Appeal.*—Order on an agent to exhibit the authority for putting the name of a counsel to an appeal case which was disclaimed by the counsel, and observations on alleged practice of doing so without authority.

BARRON GRAHAME, as one of the heirs-substitutes under a strict entail of the lands of Balmakewan and others, contained in an antenuptial contract which had been entered into in 1748 between William Grahame of Morphie and Katherine Ogilvy, brought a reduction of the sale of a portion of these lands which Robert, eldest son of William, had made in 1786 in contravention of the entail. The pursuer was descended of William Grahame by a subsequent marriage with Wilhelmina Barclay of Almeriecloss. His action was directed against Sarah Grahame the only surviving child of the contravener, Robert Grahame, and against Shand and other parties, into whose hands the purchased lands had come. At the date of the action only two days were wanting to complete forty years from the date of the sale. Oct. 6, 1831.

1ST DIVISION. Ld. Fullerton.

The defenders stated that the purchase of the lands had been

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The pursuer answered, that the contravener had made up his title to the lands under the entail; and that his recorded infeftment at the date of the sale bore within it the whole fetters of the entail, so as thereby to certify the purchaser of the limited title of his author. He further stated that the deed of entail had been recorded for preservation in the books of Council and Session prior to the date of the sale.

The Lord Ordinary assoilzied from the reduction with expenses, and the Court unanimously, without requiring any argument from the respondents' counsel, "Found, that, as the "pursuer is a substitute heir of entail under the deed of entail "founded on, he is entitled to pursue this action; but, in respect "the said deed of entail was not recorded in the Register of "Entails till after the date of the sale libelled, refused this note, "and adhere to the interlocutor complained of."*

Grahame appealed.

When the case was called, and Dr. Lushington appeared for the respondents, the *Lord Chancellor* asked,—How does it happen, Dr. Lushington, that your signature is affixed to the case for the appellant, and that you now appear for the respondents?

Dr. Lushington.—I do not know, my Lord; I believe there must have been some mistake about the retainer.

Lord Chancellor.—I will read the standing orders of this House on this subject, of the date of the 19th of April 1698; the first is in these

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* S. D. B. p. 231.

terms:—"The House taking notice, that, upon appeals and writs of "error, there have been of late several scandalous and frivolous "printed cases delivered to Lords of this House; for preventing "whereof for the future, it is this day ordered that no person what-"ever do presume to deliver any printed case or cases to any Lord of "this House, unless such case or cases shall be signed by one or more "of the counsel who attended at the hearing of this cause in the "courts below, or shall be of counsel at the hearing in this House." And further, "Whereas, by the rules and orders of this House, for "preventing the bringing of frivolous appeals, all appeals are to be "signed by two counsel, it is this day ordered, that no person what-"soever do presume, as counsel, to sign any appeal to be brought "into this House for the future, unless such person hath been of coun-"sel in the same cause in the courts below, or shall attend as counsel "at the bar of this House when the said appeal shall come in to be "heard; and unless he shall certify that in his judgment there is rea-"sonable cause of appeal." Lord Eldon used to inquire who had signed the petition of appeal, and who were the counsel? and it appears necessary to do it again. These standing orders are for the security of the House, and they are a security against frivolous appeals. Dr. Lushington, did you sign your name to this case? Oct. 6, 1831.

Dr. Lushington.—No, my Lord.

Lord Chancellor.—Did any one take the liberty of signing it for you?

Dr. Lushington.—Not that I am aware of, my Lord; no one had any authority for doing so.

Lord Chancellor.—Mr. Poole (solicitor for the appellant), did you get Dr. Lushington's name signed to the appellant's case.

Mr. Poole.—No, my Lord.

Lord Chancellor.—Where was it drawn?

Mr. Poole.—The case was drawn, settled, and printed in Edinburgh, my Lord. I know nothing further about it.

Lord Chancellor.—Who did it?

Mr. Poole.—Mr. John James Fraser, my Lord.

Lord Chancellor.—I shall move the House to make an order, calling on Mr. Fraser to send to this House the original signature of Dr. Lushington to this case; for I know that the client will be charged five guineas for that signature of Dr. Lushington, and five shillings for the clerk. There is another thing for which the client pays—(his Lordship standing up and unrolling a very lengthy petition of appeal). —This is the petition of appeal in a case that lies in a word. Here (holding up a small piece of parchment) is the petition of appeal in the last case, a case which does not lie in a word. That is properly drawn; but the present petition of appeal embodies the whole record.

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That is not done without great expense to the parties. I have looked at this case, and a more frivolous appeal I never saw. The case is about the plainest and the clearest on the face of it, and on the shewing of the appellant, that ever I have read since I have been in practice in courts of law. I have no objection to hear whatever counsel do not think it unreasonable to argue; but if this unanimous judgment of the Court below be affirmed, I shall move the House to visit real and actual costs upon the party appealing; and I shall take into consideration, when I hear the return to the order of the House respecting Dr. Lushington's name being added to the case, upon whose pocket the payment of those costs should fall. Having said so much, I would recommend the parties to investigate the case a little farther, and if they think it desperate not to come here again. This Court must be protected, like all other courts. I therefore move your Lordships, that John James Fraser either do attend at your Lordships' bar personally, or do forthwith transmit to your Lordships' clerk the authority which he had for signing Dr. Lushington's name to this appeal.

Ordered accordingly.

LORD CHANCELLOR.—My Lords, this case is one in which there has been a breach of the privileges of this House committed—a very grave offence—in respect of a false signature laid on your Lordships' table. On the merits this case is the most groundless I ever saw brought before this House, and equally objectionable in point of form, the petition of appeal being drawn out with the most unwarranted prolixity, and not the least like an appeal petition, but like a very long appeal case, all on parchment, and all utterly useless, to the great expense of the parties, as I see by looking into the attorney's bill of costs. That being the case, I asked Dr. Lushington, whose name I saw to the appellant's case, I asked him whether he had not signed and certified it — your Lordships' rules requiring that. He said, he not only had not signed and certified the case for the appellant, but that he was retained as counsel on the opposite side. It then became important that we should be informed who had put Dr. Lushington's name to this case, without the colour of authority from him for doing so. I therefore moved your Lordships, that the agent for the appellant should be called to the bar; or, to spare him a journey of 400 miles and back, that he should give an account, explaining minutely the reasons of his conduct. My Lords, I have now obtained that explanation in great detail, and made with very great zeal and anxiety on the part of this gentleman, and some other gen-

tlemen to whom he appears to have applied, and who appear to have backed him upon the occasion; and I take the result of the statement to be this:—First, that Mr. Poole, the agent in London, is guilty of not even the shadow of disrespect towards this House, or a neglect of its rules and forms—that he has no part whatever in this matter. It appears further, from the certificates which have been sent up, that a practice has crept in among professional men at Edinburgh to sign the names of English counsel who never were at Edinburgh, and who probably may never be there, without any communication with them, and without ever notifying to them the liberty taken of signing their names to whatever is chosen to be put into an appeal case, and it appears that quite enough is thought to be done if afterwards retainers are sent in the cause. My Lords, I have been for more than a quarter of a century a professional man, and this is the first time I ever heard of such a practice. I should have thought myself very ill treated as a barrister, if I had been so used, by having my name signed to a paper without my having seen it; for though it is quite true that the men in leading practice do sometimes put their names to papers without reading them, they always do it in full confidence and reliance on the gentlemen whose names they see beside their own, because they judge that those gentlemen are not putting their names to any thing that will discredit them, or be disrespectful to your Lordships; but this, I am told, is the practice at Edinburgh. My Lords, I do not believe it is a general practice at Edinburgh; if it were, it ought not to continue for an instant. I cannot believe that the respectable men of business at Edinburgh, either the advocates or the writers, can continue to sanction a practice so extremely irregular, so full of evil—opening the door to such frauds on the counsel, on the Court, and on the parties. But, my Lords, I have seen the certificate of counsel to this practice, and I have read the certificate of two advocates, whom I know to be respectable and able, having heard them argue cases here, that they have themselves put the names of English counsel to cases, and directed them to be put, and that it was a sort of retainer, for that it was an indication to the solicitor that he was to go and retain those counsel. My Lords, it must henceforth be understood by all counsel as well as by solicitors, that a counsel ought not to interfere in attempting to retain another counsel in any way, directly or indirectly. If an English counsel were to interfere by giving a hint who should be employed with him, or who should be employed in a cause whereupon he had been consulted, he would be considered as acting unprofessionally. My Lords, I hold it to be a practice in its nature liable to every species of abuse, and therefore I rejoice that I speak in the presence of most respectable professional men, who will let it be understood, that no English barrister ever recommends another barrister

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Oct. 6, 1831. to be employed. I also say it is wrong in Scotland, and if it be the practice there, it ought to be put a stop to; and I have no doubt that the faculty of advocates, (a body I highly respect, in which I was bred, and to be a member of which I regard as one of the greatest honours of my life,) unless this practice is given up, will look into it, and express their displeasure. My Lords, in the last case in which a person was found to have put the name of a counsel to a paper without his authority, he was ordered to the bar, and was committed for the contempt. In the present case, I am satisfied with the explanation which has been given by the Scotch solicitor. I have looked narrowly into his bill of costs, and I find—which goes a great way in forming my opinion of the course I ought to recommend to your Lordships—there is complete and satisfactory evidence that he never charged the fee for putting Dr. Lushington's name in his account with his client; and upon that ground, and because the practice has prevailed to a certain extent at the Scotch bar, though I am quite confident it is not general, and I hope it will now cease altogether, I shall move your Lordships, that the order for the attendance of Mr. Fraser be discharged, and no further proceedings be had regarding him; and with respect to the appeal, that if it is intended to be persevered in, the counsel for the appellant may be called in and heard to-morrow morning.

Ordered accordingly.

Lord Chancellor.—My Lords, this case has been put on the only ground on which it was possible for it to stand. After the uniform current of authorities on this branch of the Scotch law (I think more uniform than on any other) it was impossible to rest it on any other ground. The case is shortly this:—A person entailed, for a valuable consideration, (the highest known in the law, namely, that of marriage,) an estate upon the issue of that marriage, with certain destinations, fencing his prohibitions with irritant and resolutive clauses. We will take it that the instrument itself is valid and complete in all its parts, but when Dr. Gillies purchased the estate in 1788, one thing was wanting to give that entail effect, in questions with singular successors, (as purchasers or incumbrancers are called in Scotland,) and that is, the recording of the entail. It was recorded in the register of sasines, and Dr. Gillies may be said to have received notice from seeing the title he took; so that he had not only notice de facto, from seeing these clauses in the progress of the title, but he had also notice de jure, from the record in the register of sasines; but it was not recorded in the register of tailzies. It is not pretended that there was any fraud or irregularity to which he was a party; but

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he bonâ fide purchases the estate, (the estate being sold against the prohibition of the entail,) a disposition is regularly taken, and an infeftment follows thereupon, which is regularly recorded. In 1792 the entail itself was recorded in the register of tailzies. Forty years all but two days elapsed after that sale so made, and then it is said, an invalidity had occurred, and that the right purchased or sought to be purchased cannot pass, though the sale was four years prior to the registration in the registry of tailzies. It is perfectly clear this would have been a case of most grievous hardship, if the Court of Session had found themselves compelled to set the sale aside, and take away the estate from a bonâ fide purchaser for valuable consideration, to give it back to the children of the person who had sold it to a purchaser also for valuable consideration. Two days more would have given the purchaser a title by prescription, for he had certainly a title to prescribe upon. Nevertheless the two days had not elapsed, and it was within the forty years, and two questions are accordingly raised; the first, whether or not, in this particular case, the recording the entail in the register of sasines is sufficient as against purchasers, namely, those representing or taking under Dr. Gillies?—the second, whether there is any thing in the peculiar nature of the consideration upon which this entail was executed, namely, marriage, to differ this from the common case, in which the estate would beyond all doubt have passed? Now, my Lords, I have the clearest opinion, that neither of these circumstances signify at all in the case, and that if your Lordships here were to reverse, or the Court of Session below had decided otherwise, the whole law of entail in Scotland would be upset. I need hardly remind your Lordships of the Stormonth case, or call back to your recollections what was the state of the law before the great entail act of 1685, which is the rule in this case, and which has often been made the subject of discussion at that bar. It may be a matter of curious antiquarian discussion, how far, prior to the passing of that statute, entails were valid against singular successors. It may be that one opinion of Lord Braxfield, who held that there were entails before the statute, is correct; it may be that another opinion of Lord Braxfield to the contrary is correct. It may be that Lord Meadowbank's opinion, which has been pronounced in the strongest possible language, in support of that doctrine of the non existence of entails prior to the statute, is sound. This, as it regards practical purposes, has become of little consequence, because all the decisions, without any exception, make it perfectly clear, that since the statute, whatever the law might have been before, an entail is only good which is made according to its provisions; and that the statute, in so far, may be said to be a restraining rather than an enabling act; for that unless persons comply with the statutory requisitions, their entail is not worth the paper it is

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written on. My Lords, when I speak of the Stormonth case, and its being a curious matter of discussion, rather than for any practical purpose, I do not overlook the view based on the prior, and, as it may be called, common law validity of such instruments, and the arguments which may thence be raised fruitfully, for the purpose of founding a principle important in a case similar to the present; for instance, having reference to the very valuable argument of Lord Eldon in the Sheuchan case, Sir Charles Wetherell contends that, independent of the statute, there has been a valid and a binding contract. A. contracts with B., that, in consideration of a marriage to be consummated between them, he will entail a certain estate on the heirs of the marriage; the marriage is contracted; the contract, therefore, is executed on the one side, must he not execute it on the other, and this, independently of the statute? If he does execute the contract by doing that which is contracted for in respect of the marriage, that becomes a valid entail; and if he sufficiently fences that entail with clauses, and records it in the register of sasines, that is sufficient; if he has, in consideration of marriage, executed a deed of tailzie, that ties up his hands for the future, whether with notice or not; and whatever the effect of notice in equity, at law the title is gone. Suppose you made a settlement of estates on the first and other sons of a marriage, and then I choose to sell those estates for a valuable consideration to a purchaser without notice, that purchaser may be put out of possession by an ejectment, in which your eldest son is lessor of the plaintiff, if he brings that ejectment within twenty years after your decease; of that there is not the least doubt, and even though the purchaser had no notice whatever, (I am putting the case of an estate in Lancashire, or in any country where registration does not prevail,) that purchaser has no title to the estate, whether he knew any thing about the settlement or not. If the case be as to an entail antecedent to the act of 1685, which of course puts registration out of the case, that is precisely the footing on which the Scotch heir of entail and Scotch purchaser would have stood. Then the argument must go this length, that without any sasine, without any registration, and even if the entail did not appear upon the title, and Dr. Gillies knew nothing about it, he would have had no title; because there had, behind his back, been executed a valid entail in consideration of a marriage. That is the argument. Now, all I have to say about that argument is, that would be perfectly sound law in England. It is equally clear that there is no such law in Scotland, and that such a private entail would not have been valid there. The Stormonth case is strong to show that before 1685 entails were supported, and at all events such was the usage for many years. The Stormouth case was in 1662, and the entail act in 1685. During

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those twenty-three years many entails had been framed, which were understood, on the authority of that case, to be valid against singular successors. But the act has been held to make all those entails invalid, unless they were registered. The words of the statute are most precise. It first says, that any of the King's liege subjects may tailzie their estates, and affect them with clauses, and so forth. Then what follows is declaratory,—" it is always declared." I shall assume, which is putting the case as favourably for the appellant's arguments as I can, that it is a mere declaratory act up to a certain point, and that whatever is allowed to be done is by way of declaration, and not enactment; because this will assume that before the act an entail would have been valid according to the Stormonth case. Then, what follows—and there is no doubt this is enacting and not declaratory—what follows is purely the creature of the statute, for there was no such thing in existence either in law or in fact, prior to the date of this act:—" It is always declared, that such tailzies shall only be al-
" lowed, in which the foresaid irritant and resolutive clauses are insert
" in the procuratories of resignation, charters, precepts, and instru-
" ments of sasine, and the original tailzies once produced before the
" Lords of Session judicially, who are hereby ordained to interpose
" their authority thereto,"—a process totally unknown before, and which is the creature of this statute; " and that a record be made in
" a particular register-book to be kept for that effect, wherein shall be
" recorded the names of the maker of the tailzie, and of the heirs of
" tailzie," and so forth, " to remain in the said register ad perpetuam
" rei memoriam." Here, therefore, is a peculiar register created; here is the invention of a peculiar process, namely, production before the Lords of Session of the original tailzie; and here is a positive requisition of the statute, that in order to make the aforesaid tailzies by the statute valid, there must be the condition precedent, of producing them before the Court of Session, and recording them there. Now, of that there can be no doubt; but if there were any doubt, what follows will take it away. It might be said, that as to that requisite, it was directory, and was not a condition precedent; still it must be observed, that producing the entail before the Court of Session has not been done in this case. But it is not merely directory, it is a condition precedent; what follows removes all doubt as to the registration in the register of tailzies, now for the first time constituted; for this rides over the whole antecedent,—" and being so insert"—that is, in the register—" his Majesty, with advice and consent foresaid, declares the
" same to be real and effectual, not only against the contraveners and
" their heirs, but also against their creditors, comprisers, adjudgers,
" and other singular successors whatsoever, whether by legal or conven-
" tional titles." I need not go farther to show that, whatever may

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have been the law before this statute, we are now governed by a statute which enacts, that whatever may have been originally the validity of the entail against singular successors from the time of the Stormonth case downwards, henceforth it should be good against them, only if the statutory requisite was strictly complied with. Now, my Lords, if any doubt could have arisen here, it was only this, how far entails made before the statute was passed should be shaped according to the terms of the enactment which I have just read, and cast, as it were, into the mould of the statute. It might be said that the statute makes provision as far as regards entails to be made hereafter, (the words being all in the future tense,) but what shall be done with the entails which had been made after the Stormonth case, and before the statute, on which money might have been advanced, and marriages contracted? That was a very maintainable argument, and it is only to get rid of it that you have recourse to the decisions in the Scotch courts. The statute appears to me sufficient without the decisions. Nothing can speak clearer than it does, and the record of an act of parliament is better than any decision. But, my Lords, when we look to the books to see whether they throw any light on this point, we find in all those cases, from that of Philip v. the Earl of Rothes, in December 1758, which was the first that affixed this construction to the act,—we find it adjudged, that though an entail be made prior to the statute, and in that case the entail was between the Stormonth case and the statute, namely in 1684, yet, that subsequently to the statute it must be dealt with as a statutory entail, and that there is no difference whatever in this respect between an entail made before the statute and one made since. The cases have adopted also another principle; they have said, that no recording in the register of sasines will do; for the statute assuming as a matter of course the recording in the register of sasines, requires expressly that every thing should be recorded in the register of tailzies. It is no doubt also requisite that you record your sasine; unless you do so you have no right, and a purchaser or creditor may come in totally independent of the entail. But, in order to make the fetters of the entail binding, so as to constitute a nullity against singular successors, who may have advanced money on the faith of this property, it is necessary also, by the words of the act, that it should be registered in the register of tailzies, and that the process should be first gone through of producing the original tailzie at that time, and before the Lords of Session, for the purpose of their recording. Accordingly, your Lordships will find that in all the cases this registration has been held necessary. In the case of Baird v. the Earl of Rosebery in 1765, infeftment had been taken and entered in the register of sasines. Being thus recorded in the public registry of sasines, and open to all the lieges, say they in the argument, therefore you had notice. But the

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Court says that will not do, for it was not recorded agreeably to the statute, unless it was registered in the register of tailzies. In the cases of Lord Kinnaird v. Hunter, and Irvine of Drum against the Earl of Aberdeen, and Smollet v. the Creditors of Smollet, there had been a recording in the register of sasines four years before; but as it could not be shown that until four years after that time the entail had been recorded in the proper register of tailzies, it was held not to be good. When indeed the statute had required a recording in the register of tailzies, and that this should be a sine quâ non to its validity against purchasers, that was enough, without any reasons or any decisions. But the reason plainly is, that when people want to know if the estate is entailed, and if it is safe to advance money by way of loan or purchase, they go not to the register of sasines, but to the register of tailzies. Accordingly the statute, instead of being a protection to all mankind, would be a trap to ensnare all mankind, if, while it required a record of the entail in the register of tailzies, the Court had said, you need not record it in the register of tailzies, it is sufficient if you do it in the register of sasines. Dr. Gillies might say, I have advanced money for the purchase of this estate, for I looked into the register of tailzies, and there it was not. But, says the argument for the appellants, why did you not look into the register of sasines? It is sufficient for Dr. Gillies to reply, the statute pointed me to the register of tailzies; let the register of sasines speak what it may, I am not bound to hear one word; here is the statute, and if it is not recorded in the register of tailzies, I need look to no other. Now, my Lords, with respect to the marriage consideration, I can only say that the statute is silent on any such exception—the text writers are silent—all the cases are silent. I have referred to them; and as reports do not make particular mention of the consideration of the entail, I sent for the original cases, and I find on examination that they are not apparently cases where the consideration was marriage; but the very silence of the reporters in all those cases (in most of which they do not say what the consideration was) is a decisive proof of the sense of the profession that it is quite immaterial what the consideration was. In many of these cases it is assumed that there may be some consideration. Look at the Sheuchan case: Lord Eldon there said, this is an onerous transaction for a valuable consideration, not a mere mutual entail, but proceeding likewise on money consideration; and if the tailzie is registered, that is to say, in the register of tailzies, it shall affect singular successors. Indeed Sir Charles Wetherell candidly admitted that it was rather for the tenor of the remarks, and the learning of the argument of the noble and learned Lord, than the bearing of it the decision, that he cited it. My Lords, I have examined the case to see what difference it makes to the argument; whether

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marriage is the consideration, or any thing else. The whole law of registration proceeds upon the supposition, that a consideration may be executed on both sides; that is to say, that a man may give his money, and yet lose it, may purchase an estate, or may lend money on an estate, and may yet be found to have thrown away the money, and the person who after him purchases, or after him lends, may get the estate. The whole law of registration proceeds upon that assumption. The case Sir Charles Wetherell put, and which he said they could not deny on the other side, was, that if, during the interval between the time of executing the entail and the period when it was necessary, by the formalities, to have it registered, the party making the entail had sold the estate, he would have defeated the heirs of entail under the onerous consideration of the marriage. There is no doubt about that. The other party must admit it is the consequence of the argument, but it is no reductio ad absurdum of their doctrine; for the law of registration says, that the validity of the title is to be taken from the date, not of the constitution of the title, but of the registration of the instrument in the register of tailzies. It is just so if you lend money on heritable bond, and another person afterwards lends his money and registers his bond before yours; if there is a fault at all, it is not in the argument, but in the system of registration. My Lords, upon these grounds I entertain no doubt on either of the two points, that is to say, either as to the registration requisite being a registration in the register of tailzies, or as to the specialty of marriage said to exist in the case, and which does not in the least shake the decision of the Court below. My Lords, if I had entertained any doubt, I would have called for the assistance of the learned counsel for the respondent, who were ready to argue the case; but I felt none. Only consider what the consequence would be if we were to import an exception into an act of parliament where none such exists; to import a new limitation into the doctrine of the cases, where no such limitation exists. With what view are entails made? Almost always upon marriage; ninety-nine entails out of a hundred are in the contemplation of marriage. See what would be the consequence if they were to be exempted from the requisitions of the statute. They would be valid to defeat the rights of singular successors, although no singular successor has any means of discovering whether the entail exists or not. The register of entails is the place where the act bids him look. But the appellant would have us say, You need not go there, for it needs not be registered there; it is a good and valid instrument, because it is made on consideration of marriage.

My Lords, I conceive this case ought never to have come here. For the ingenious argument at the bar I observe that Sir Charles Wetherell is the person to whom the parties are indebted. I have looked

in vain into the papers in the Court below for it. He has put the case here on the only ground on which it was possible to put it, but I cannot trace a vestige of it there. The pleas in law do not raise that question; they proceed upon an argument, which, if it prevailed, would destroy the whole law of entail; but they do not say that this is a peculiar case; they do not say, when the cases are quoted on the other side, these are no cases of marriage settlement. This is not the argument relied on in the Court below nor in the appeal case; and as it is only from the respect I bear to the quarter from which this argument proceeds that I have stated the view I take of the case, I shall therefore certainly deem it my duty to recommend to your Lordships to visit the party appealing with costs. These he well deserves to pay, because it turns out that he is not brought here by bad advice, but chose to think that he saw a way of proceeding for reversing the judgment; and it appears from Mr. Fraser's statement that he gave instructions for this appeal. My Lords, I wish to give the real costs. I shall therefore follow the example of my learned predecessor, and suspend the mention of the sum of costs until Mr. Courteney shall have had an opportunity of ascertaining what they amount to. Oct. 6, 1831.

The House of Lords ordered and adjudged, That the interlocutors complained of, be affirmed, with costs, as reported by the clerk.

GEO. W. POOLE—A. M. MACRAE,—Solicitors.

Sir JAMES MONTGOMERIE and others, Executors of William Duke of Queensberry, Appellants. No. 59.

MACKILL MAXWELL, Respondent.

Lease — Title to Pursue — Warrandice.—A tack was granted to a tenant, "his heirs, assignees, and sub-tenants," with warrandice to him and "his foresaid;" the tenant granted a sub-tack with a clause of warrandice, but did not assign the warrandice in the tack; and the tack was reduced as ultra vires of the granter, and the sub-tenant thereupon removed: Held (reversing the judgment of the Court of Session), that the sub-tenant had no title to sue a direct action of damages founded on the warrandice in the tack against the landlord.

IN the month of February 1807 William Duke of Queensberry let by his commissioner, Mr. Crawfurd Tait, W. S., to "William Lorimer and his heirs, assignees, and sub-tenants," Oct. 12, 1831.

2D DIVISION.
Ld. Cringletie.