[HEARD 19*th June*—JUDGMENT 3*rd July*, 1846.]

The RIGHT HONOURABLE WILLIAM DAVID, EARL OF MANSFIELD, and GEORGE DRUMMOND STEWART, ESQ. of Braco, in the county of Perth, *Appellants.*

SIR WILLIAM DRUMMOND STEWART, of Grandtully, Bart., *Respondent.*

Entail.—Where an Entailer, in exercise of a power reserved in the Entail to alter or revoke, executed a deed which revoked the Entail so far as to free his sons and the heirs of their bodies from its fetters, and contained a procuratory of Resignation for infeftment in favour of a series of heirs, the same as in the Entail, under a restriction that it should not be in the power of the sons or the heirs of their bodies gratuitously to alter the order of succession prescribed by the Entail, in case of its falling to remoter heirs, and under the conditions and provisions of the Entail which were not repeated, *found* that the deed constituted either a revocation or an alteration of the Entail so as of the two deeds to make one entail; and that, not having been put upon record, the lands were free from the fetters of an Entail, as in a question with a purchaser from one of the heirs in possession.

ON the 12th February, 1767, John Drummond executed a procuratory of resignation, and deed of entail of his lands of Logiealmond in favour of the following series of heirs: "to "myself in liferent and fee, and after my decease to the heirs-"male to be procreate betwixt me and Lady Katherine Drum-"mond, second lawful daughter of the deceased William, Earl of "Dunmore, and the heirs-male of their bodies; whom failing, "to the heirs-male to be procreat of my body of any sub-"sequent marriage, and the heirs-male of their bodies; whom "failing, to the heirs whatsoever of my eldest son, in their

" order of seniority, and without division; whom failing, to the " heirs whatsoever of my second or other sons of this or any " after marriage successively, and in their order of seniority, and " without division; whom failing, to Catherine Drummond, my " eldest daughter, and the heirs whatsoever of her body; whom " failing, to Elizabeth Drummond, my second daughter, and " the heirs whatsoever of her body; whom failing, to Frances " Drummond, my third daughter, and the heirs whatsoever of " her body; whom failing, to Mary Drummond, my fourth " daughter, and the heirs whatsomever of her body; whom " failing, to any other daughter or heir-female to be procreat of " my body of this or any after marriage, successively in their " order of seniority, and without division, and the heirs what- " soever of their bodies rexive; whom failing, to Mary Drum- " mond, my sister-german, and the heirs whatsoever of her " body;" and a variety of other substitutes not necessary to be noticed.

This entail was fenced by prohibitory, irritant, and resolutive clauses, but contained a power of revocation in these terms: " saving and reserving to me full power and liberty, at any " time in my life, and even on deathbed, not only to alter the " foresaid course and order of succession, and to revoke all or " any of the conditions, provisions, limitations, and irritancies " before written, innovate or destroy the present right and " settlement of my said lands and estate, either in whole or in " part at my pleasure; but also to sell, alienate, wadsett, and " dispone the lands and others above mentioned, or any part " thereof, and to contract debts thereupon, or even gratuitously " to dispose thereupon, as I shall think fit." The deed was duly recorded in the Register of Entails, and a crown charter of resignation was expede upon it, on which infeftment was taken and recorded.

On the 18th of May, 1773, John Drummond executed another procuratory of resignation of the same lands, which set out with

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the following recital: "I, John Drummond of Logiealmond, "heritable proprietor of the lands and barony of Logiealmond "and other lands, specially mentioned in a procuratory of "resignation and deed of entail of my said estate, subscribed "by me upon the 12th day of February, 1767, and whereon "charter under the Great Seal and infeftment hath followed in "my favours, and which deed of entail is recorded in the "register of entails, and in the books of Council and Session— "Considering that since making said entail of my estate, God "hath blest me with the prospect of male succession of my own "body, having now two sons William and Thomas Drummonds, "by my beloved wife Lady Katherine Murray, now Drum- "mond, second lawful daughter of the deceased William, Earl "of Dunmore, and as it may please God that I may have other "sons, I am resolved so far to alter the former deed of settle- "ment and entail of my estate as to leave the heirs-male of my "own body unlimited fiars thereof, except in so far as after- "mentioned, and therefore I, agreeable to the powers reserved "to me by the foresaid procuratory of resignation and deed of "entail, hereby revoke and make void the same, so far as it "may affect the heirs-male of my own body, and the heirs- "male of their bodies, otherwise than as after mentioned." Upon this recital, the granter bound himself to resign the lands by their general designations, "and as more fully specified and "contained in the said deed of entail," "in favours, and for "new infeftments of the same to be made and granted to "myself in liferent and fee-simple, and after my decease to the "said William Drummond, my eldest son, and the heirs-male "of his body; whom failing, to Thomas Drummond, my second "son, and the heirs-male of his body; whom failing, to any other "son of my body in my present or any after marriage, and the "heirs-male of their bodies successively; whom failing, to the "daughters or heirs-female of the body of the said William "Drummond, my eldest son; whom failing, to the daughters

" or heirs-female of the said Thomas Drummond, my second son;
" whom failing, to the daughters or heirs-female of any other son
" to be procreate of my body successively; whom failing, to the
" daughters or heirs-female already procreat, or to be procreat of
" my body successively, in their order of seniority; whom all
" failing, to the other heirs specially mentioned and contained
" in the said deed of entail in the order of succession therein
" set down: but with and under the restrictions, limitations,
" declarations, and clauses irritant after mentioned, viz., that
" these presents are granted by me with the burden of paying all
" my just and lawful debts contracted and to be contracted by
" me, and performance of all my own and my predeceasors'
" deeds and obligations, to whatsoever person or persons; and
" also, that my said sons, nor the heirs-male of their bodies,
" shall in no shape be subjected to, or limited by the foresaid
" deed of entail, and shall enjoy my said lands and estate in
" the same manner as if the said entail had not been made and
" granted by me; but with this limitation and restriction, that
" it shall not be in the power of the said William Drummond,
" my son, nor of any of my other sons, nor in the power of any
" of their heirs-male called to the succession in virtue thereof,
" gratuitously, by contract of marriage or otherways, to alter the
" substitution or order of succession contained in this present
" deed, or in the said deed of entail in case the succession fall
" to remoter heirs by the failure of the heirs male and female
" of my body and their descendants; and with this provision
" and declaration, that if the succession devolve upon daughters
" or heirs-female, the eldest shall succeed alone and without
" division, secluding her sisters from being heirs-portioners with
" her; and that the saids heirs-female, so soon as the succes-
" sion devolves upon females, shall be restricted and limited,
" and fall under the whole restrictions, limitations, clauses
" irritant and resolutive, contained in the foresaid deed of entail
" granted by me, so that the said deed of entail shall, upon the

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" succession of heirs-female to my said lands and estate, take " effect in its full force and extent, and in the same manner as " if this present deed had not been granted, it being my sole " intention that my sons, and the heirs-male of their bodies, " should not be further limited by the said entail than not " having it in their power gratuitously to alter the substitution " or order of succession, but that their daughters and heirs- " female, as well as the other substitutes herein and in the said " entail mentioned, should be subject to the said entail and " limited thereby; which several provisions and declarations " herein before mentioned I appoint to be specially insert and " engrossed in the whole charters and infeftments to follow " hereupon, which if any of my said sons or heirs-male of their " bodies fail to do, they shall be subjected to the whole pro- " hibitions, limitations, clauses irritant and resolutive, contained " in the said deed of entail, in the same manner as if these " presents had not been granted: Reserving nevertheless to " myself full power to alter these presents and the said former " entail, and to contract debts, sell, and dispose on the said " lands and estate in what manner I shall think fit."

This deed did not contain either the statutory prohibitions requisite to fence an entail, or any irritant or resolutive clauses; it was never recorded in the register of entails, and no infeftment was taken upon it by the granter.

On the 19th of August, 1776, the granter of these deeds executed a holograph writing in these terms: " Know all men, " by these presents, that I, John Drummond of Logiealmond, " for very honerous weighty causes and reasons, as also con- " sidering the uncertainty of human life, and the infante state " of my children, the situation of my affairs, and the load of " debt my estate is burthen'd with, wit ye me to have made " this deed in order to set aside and annull the tailzie I formerly " made on my whole lands, and tho' registrated in the register " of tailzies, I do by these presents annull, cancel, and revock

" the clauses of tailzie, and all other clauses contained in said " deed of settlement relative to that purpose, and I do here, as " having power, and having reserved the same to myself, to alter " and make void the said tailzie, which I do hereby, leaving " my son William Drummond, and his heirs, whom failing, my " son Thomas Drummond, and his heirs, free of tailzie."

The maker of these deeds died in the same year, 1776, and was succeeded by his son Sir William Drummond, who expede a general service as eldest lawful son and heir of provision of his father, under the deed of 1773, and upon the procuratory in that deed, obtained a charter in favor of himself and the heirs called by it, without any mention of the fetters in the entail of 1767. Upon this charter infeftment was duly expede.

On the 26th of August, 1817, Sir William Drummond by trust disposition which specially recited the entail of 1767, and the deed of 1773, conveyed the lands of Logiealmond to trustees with power among other things, " to feu out such parts " of the said lands and baronies as they shall think proper, upon " such terms and conditions as they shall judge most for my " interest." " And farther, with power to my said trustees, and " the survivors or survivor of them in my name and behalf, to " borrow such sum or sums of money as may be necessary for " enabling them to pay off any debt or debts contracted by me " or my predecessors that may be demanded from them, and " for answering all drafts that shall be made by me upon them, " or upon any cashier to be appointed by them, or that may be " necessary for carrying on the management of my affairs, and " improvement of my said lands and estate, and to grant bills, " bonds, or other securities, heritable or moveable, therefor, " with interest, and under the usual penalties; and to bind " and oblige me, my heirs, executors, and successors, in pay- " ment thereof; and particularly, with full power to my said " trustees, and the survivors or survivor of them, for me, and " in my name, to grant, subscribe, and deliver heritable bonds,

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" bonds and dispositions in security, annualrent rights, and " infeftments, or other securities, for the said principal sums, " interest and penalty, over the aforesaid lands and barony of " Logiealmond and others, comprehending as aforesaid, or over " such parts and portions thereof as my said trustees shall think " proper; and which heritable bonds, bonds and dispositions " in security, rights of annualrent, or other securities shall con- " tain obligements to infeft, procuratories of resignation, clauses " binding me and my heirs in absolute warrandice, assignations " to mailles and duties, precept of sasine, and all other usual and " necessary clauses, all which shall be as valid and sufficient for " affecting and burdening the lands and others foresaid, and as " binding upon me, my heirs, executors, and successors, to all " intents, and purposes, as if the same were granted by myself, " and shall be ratified, approved, and homologated by me when " required." " Declaring always, that so soon as the debts due " by me and my predecessors, for which I am liable, shall be " paid, and the other purposes of the present trust accom- " plished, my said trustees, and the survivors or survivor of " them, shall be bound and obliged to denude themselves " thereof, and to dispone and reconvey the said lands," " in " favours of me and the heirs-male of my body; whom failing, " to the daughters or heirs-female of my body; whom fail- " ing, to the said Dame Catherine Drummond, now Stewart, " and the heirs whatsoever of her body; whom failing, to " Elizabeth Drummond, second daughter of the said deceased " John Drummond, and the heirs whatsoever of her body; " whom failing, to Frances Drummond, third daughter of the " said deceased John Drummond, and the heirs whatsoever of " her body; whom failing, to Mary Drummond, fourth daughter " of the said deceased John Drummond, and the heirs whatso- " ever of her body; whom failing, to Mary Drummond, sister- " german of the said deceased John Drummond, and the heirs " whatsoever of her body;" and of other heirs which from this

point corresponded with the limitations in the deed of 1773, the part which has been quoted omitting, as will have been observed, after Mary Drummond, the fourth daughter of John Drummond, and the heirs of her body, the insertion of other daughters of John Drummond (to whom a fifth daughter, Louisa Clementina Drummond, had been born), who were embraced both by the entail of 1767 and the deed of 1773. The reconveyance so unprovided for was to be "with and under "the burdens, conditions, and provisions, restrictions, limita- "tions, reservations, clauses irritant and resolutive after men- "tioned, viz., That the heirs before named succeeding to the "foresaid lands, baronies, and others, shall possess and enjoy "the same, by virtue of the said procuratory of resignation and "deed of entail and infeftment following thereupon, and by no "separate or other right and title whatsoever, and shall be "bound to cause, insert, and ingross the same *verbatim* through "the whole course of succession before set down, with the "whole conditions, provisions, restrictions, limitations, clauses "irritant and resolutive after mentioned, in all the instruments "of resignation, charters, and infeftments to follow thereon, and "in all subsequent conveyances, procuratories, charters, ser- "vices, precepts, and instruments, of sasine of the several lands, "baronies, and others foresaid." There then followed the statutory prohibitions against selling, contracting debt, or alter- ing the order of succession fenced by irritant and resolutive clauses. The trustees were infeft upon this conveyance and their infeftment was duly recorded.

On 29th March, 1827, Sir William Drummond died without issue, and his brother Thomas having pre-deceased him also without issue, and there not having been any other sons born to the entailer, Sir William was succeeded by his sister, Dame Catherine Stewart, one of the trustees in the deed of 1817, who expede a service as heir of entail and provision to Sir Wil- liam, under the entail of 1767 and the deed of 1773. In that

character, she granted leases of the lands, and acted otherwise as heiress of entail in possession, but she never took any further steps for completing her title.

In March, 1833, Dame Catherine Stewart died, and was succeeded by her son Sir John Archibald Drummond Stewart, who also was one of the trustees under the deed of 1817.

On the 25th of April, 1834, Sir John Archibald Drummond Stewart, being infeft under the precept in the trust-deed of 1817, and with no other title, executed another entail of the lands which after reciting the entail of 1767, and the deeds of 1773 and 1817, continued thus: "And considering farther, that the "said trust-deed was granted by the said Sir William Drum- "mond with the view of providing for payment of his debts "during his lifetime, and of securing his creditors in the pay- "ment of their debts, out of his said lands and estate, and not "with the view of fettering or restraining the heirs called after "him to the succession of the estate, in the free use, benefit, and "enjoyment of the same, and the right of making up titles thereto, "but subject always to the burden of the debts of the truster, so "long as the same might remain unpaid; and that the said Sir "William Drummond had no power to grant any trust-disposi- "tion, or other deed, which should affect the right of the next "heir to the immediate succession to, and enjoyment of the said "estates, subject always to the burden of the said Sir William "Drummond's debts and onerous obligations—Therefore I am "entitled, and it is now necessary and proper that I should make "up my titles to the said lands, barony, and others, by denuding "thereof as sole surviving trustee foresaid, in favour of myself "and the other heirs called by the said disposition and procura- "tory of resignation, as well as by the said trust-deed; but that "always under the burden of the said debts, and under the "conditions, provisions, and limitations contained in the said "trust-deed. Therefore wit ye me, the said Sir John Archibald "Drummond Stewart, to have given, granted, and disponed, as

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" I do hereby, with and under the burden of the debts that were " due by the said Sir William Drummond, and which are still " resting owing, and also under the burden of the debts that " were incurred by his trustees under the foresaid trust-disposi- " tion, all as particularly after specified, give, grant, and dispone, " &c." By this deed, the granter conveyed the lands to the series of heirs in the entail of 1767 and the deed of 1773, with the same exception as in the deed of 1817, viz.: the omission of Louisa Clementina Drummond, the fifth daughter of the original entailer, and the heirs of her body. This entail contained the statutory prohibitions, and was fenced by the usual fetters, but it was never put upon the record of entails.

Sir John Archibald died in the year 1838, without issue, and was succeeded by his brother Sir William Drummond Stewart, the respondent, who made up his titles by deeds embodying the clauses in the entail of 1834, and afterwards in 1842, entered upon a treaty with the appellant for a sale of the lands for 203,000*l.*, which sale was afterwards completed by regular minute.

The appellant, the Earl of Mansfield, apprehending that a good title to the lands could not be made to him by the respondent, presented a suspension as of a threatened charge for the price; and the respondent in consequence brought an action against the other appellant, George Stewart, and the substitutes, under the different deeds which have been mentioned, to have it declared that he had an absolute right to sell the lands and apply the price to his own use.

These two proceedings were conjoined, and thereafter the Court repelled the reasons of suspension, and decerned in terms of the conclusions of the summons of declarator. Appeals were taken against this interlocutor, by the Earl of Mansfield the purchaser, and by George Drummond Stewart, the brother of Sir William Drummond Stewart, the seller; and one of the substitutes of entail, who was an illegitimate son of the respondent, legitimated by the marriage of his parents subsequent to the

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taking of the appeal, was allowed to compear upon it for his interest. When the cause was called, it was stated from the bar, that although Lord Mansfield was appellant upon the record, he was a willing purchaser ready to complete his purchase, upon receiving a good title, and had no interest to quarrel the judgment of the Court below. The counsel for the heirs of entail were therefore called upon to support the appeal.

Mr. Stuart for George Drummond Stewart;—*Mr. H. Robertson* for the substitute compearing.

The entail of 1767 was complete in form, and duly perfected by registration and infeftment. Though the deed of 1773 exercised the reserved power of revocation in the deed of 1767, it did so only to the extent of freeing Sir William and his brother Thomas from the fetters. Upon their failure, it declared that the entail should have full operation against the other heirs called by it. If the sons had predeceased the entailer without issue, the deed of 1773 never would have had operation at all, and the entail, on the decease of the entailer, would immediately have taken effect. It is difficult to see then how the circumstance of the sons having survived the entailer can make any difference in the case. There is nothing against principle in a deed being so framed as to give a fee-simple investiture for a certain period, and after that to change it to a tailzied one; and taking the entail and the deed of 1773 together, no more than this was done by them. The effect, therefore, of the deed of 1773 was not to revoke or destroy the entail of 1767, but merely to suspend its operation during the existence of certain parties; when they failed, the entail resumed that operation, which had only been suspended, but had never been destroyed. —Turnbull *v.* Hay Newton, 14 *Sh.* 1031.

In ascertaining the rights of the parties entitled to take, the entail and the deed of 1773 may be taken together as one deed, but that will not make it necessary that both should have been

registered. The fetters were confined to the entail, and when that was put upon record, the statute both in its terms and its policy was satisfied; third parties had thereby intimation of all that they required to know. The deed of 1773 gave immunity from the fetters; that was its only operation; and viewed in that light it was not necessary that it should have been put upon the record, as it could not have served any purpose to make third parties aware of its existence. The entail of 1767 therefore may well stand by itself, though the deed of 1773 was not put upon record, more especially as the circumstances under which that deed could have operation, have ceased to exist by the death of the entailer's sons and their issue. If the effect of the deed of 1773 was only to suspend the operation, not to destroy the existence of the entail of 1767, it is of no importance that Sir William Drummond passed bye the entail, and made up his title, and possessed under the deed of 1773; such possession could not evacuate the entail, by the negative prescription, as the deed of 1773 exempted the heirs male from the fetters of entail; until failure of these heirs, of whom Sir William was one, the heirs to be bound by the fetters of entail, were not in a condition to enforce their operation. The deed of 1773, under which Sir William possessed, so far from conflicting with the entail, expressly recognised its existence. Both the title and the possession of Sir William, therefore, were not only, not in conflict, but were in perfect consistency with the rights of the heirs under the entail during the life of Sir William Drummond.

Although the deed of 1773 perhaps formed the basis of a new investiture, the reference *in gremio* to the entail of 1767, prevented it being an investiture independent of the entail, and preserved the entail as part of the investiture, so that there was no room for the application of the negative prescription. And still further, there was not forty years between 1778, the date of Sir W. Drummond's infeftment, and 1817, the date of the trust-deed, which embodied the conditions of the entail 1767.

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With regard to the holograph writing of 1776, it was not larger in its terms or effect than the deed of 1773; all that it did was to free the sons from the fetters of the entail, and to revoke the entail to that extent and no more; that it was so intended and so understood, is shown by the reference to and adoption of the entail in the deeds made subsequent to its date.

Mr. Rutherford for the Respondent.—The deeds of 1773 and 1834 are admitted to be neither of them upon the record of entails, as against a purchaser therefore both of these deeds may be put of consideration as operative entails. The only stay of the parties must be upon the entail of 1767, but that was expressly revoked by the deed of 1773. The effect of this deed was not only to revoke the entail, but to create a new and independent settlement of the lands; it was not a mere exercise of the reserved power of alteration in the deed of 1767, but was a new title in the form of a procuratory of resignation—the form proper for originating a new investiture. It moreover removed the fetters of 1767 from the sons of the granter, and while it continued them against his daughters, and the heirs of their bodies, did not impose upon them, when the succession should open to them, any obligation to make up their titles under the entail 1767, or to insert in their titles the fetters of that deed; all that is to be inserted is the fetters of the deed 1773 itself; the resignation is to be for new infeftment with and under the restrictions and limitations, "after mentioned," which are set out at length. Accordingly Sir Wm. Drummond, the eldest son of the entailer, when he took infeftment upon the deed 1773, inserted in it only the provisions of that deed, altogether omitting those of the deed 1767. Though adopting therefore a part of the old settlement, the deed of 1773 had in itself everything necessary to create a new investiture, the effect of which was to obliterate the old one. Eglintoun *v.* Montgomerie, 2 *Bell's App. Cases*, 149.

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If the infeftment upon the deed 1773, superseded that on the entail 1767, then the latter deed became ineffectual upon this separate ground, that its provisions thenceforth ceased to appear upon the investiture. In short, the deed of 1773 was the investiture under which the estate was held, and as it destroyed the deed of 1767, the only registered deed, entail was at an end, and the lands are unprotected, for the deed of 1773 was never put upon record.

But supposing the deed of 1773, neither to have absolutely revoked the entail of 1767, nor to have formed the basis of a new and ruling investiture, it at all events made an alteration upon the entail of 1767; and whatever in that view might be necessary in questions *inter familias*, it was indispensable, in order to affect purchasers, such as the appellant, that the deed of 1773 should have been upon the record. In this view it constituted at least part of the entail, and to make an entail effectual against creditors or purchasers, it is not enough that part only is upon the record—the whole of it must appear upon the record, otherwise, in the present instance for example, creditors of the sons of the entailer might, by the fetters of the entail 1767 appearing upon the record, have been prevented from affecting the estate of their debtor by diligence, while in truth, these fetters had been revoked by the deed of 1773.

A question was raised upon the argument of this appeal, whether the deed of 1834 was not a breach of the trust in the deed of 1817, and so liable to reduction. This argument is sufficiently noticed in what fell from the Peers to supersede the necessity for any detail of what, when it was ascertained that the deed of 1767 had been revoked, and when the true bearing of the facts of the case upon this argument were ascertained, which was done upon a rehearing of the cause by one counsel of a side, ceased to be of much value.

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LORD CHANCELLOR.—My Lords, it is stated by one of the learned Judges that the case, though one of considerable complexity, in consequence of the numerous deeds connected with it, would be found in the result to be very simple and to resolve itself into very narrow limits.

The question relates to the title of an estate in the county of Perth; Lord Mansfield contracted for the purchase of that estate, and after some little time he was advised that doubts might be entertained as to the sufficiency of the title, and in consequence the purchase-money being of a very large amount,—I think to the extent of upwards of 200,000*l.*,—he was advised to raise a suspension, upon which Sir William Drummond, the vendor, commenced an action of declarator against the subsequent heir of entail. These two proceedings were afterwards conjoined, and the question in this conjoint proceeding is, whether Sir William Drummond, the proprietor of the estate, could, under the circumstances, make a good title to Lord Mansfield.

The first point for consideration relates to the deed of entail dated in the year 1767. John Drummond was the owner of the estate in fee-simple. He executed that deed of entail, entailing the estate upon a series of heirs. That entail was fortified by all the usual and proper provisions, and it was recorded in the Register of Tailzies. It was, in every respect, a complete, valid, and sufficient entail.

The entailer, however, reserved to himself a power of varying or revoking the entail.

A few years afterwards, namely, in the year 1773, he executed a second deed, altering, in many material particulars, the entail of 1767. He freed his two sons, William and Thomas, who, I presume, had been born after 1767, from the fetters of the entail. He not only freed them but the heirs male of their bodies from the fetters of the entail. He, however, declared that they should not have the power of gratuitously charging the estate, in the event of the failure of heirs male of the bodies

of his sons, and the estate coming to remoter heirs. With respect to heirs female, if the estate were to descend to heirs female the succession was to follow precisely according to the provisions of the deed of 1767. Those provisions were adopted by reference to that deed. The usual conditions with respect to the entailing of estates were also adopted in the deed of 1773 by reference to the previous deed of 1767.

The deed, however, of 1773 was not recorded. It therefore could not, in itself, operate against a purchaser for value. Either that deed of 1773 must be considered as revoking entirely, and superseding the deed of 1767, or the two deeds, taken together, must be considered as constituting one entail.

Now it is quite clear that if the deed of 1773 superseded the deed of 1767, and constituted an entirely new entail, (which I myself personally consider to be the effect of that deed,) it would, as against a purchaser, be invalid, not having been recorded. If, on the other hand, it is to be considered that the two deeds together constituted one entail, (which is another view of the case,) then the entail is only partially recorded. As far as relates to the provisions adopted from the deed of 1767 it is recorded; as far as relates to the provisions altered by the deed of 1773, there is no record. Therefore this being merely a partial record of the deed, the entail does not appear to me to be valid within the Statute of 1685.

Now, under these circumstances, a title was made up by Sir William Drummond, who was the son of John Drummond, as the first heir under the deed of 1773, and he continued in possession for upwards of forty years. It is quite clear, therefore, that under that deed of 1773, under such circumstances, the heirs substitute could have no title whatever against a purchaser for value.

But the case does not rest here. There is another most important circumstance in the case. I have mentioned that under the deed of 1767 the entailer reserved to himself the

right to revoke or to vary the deed. Accordingly, in the year 1776, he did, by a holograph writing, absolutely annul and revoke the deed of 1767.

A question had arisen first of all with respect to the authenticity of that instrument. But that has been abandoned. A question was also raised in the Court below as to the effect of that instrument, supposing its authenticity established. That also has been abandoned, and, therefore, by the operation of that holograph writing of the year 1776, which is established by evidence beyond all doubt, the deed of 1767 was absolutely revoked, annulled, and made void. The consequence of which is, that the deed of 1773 was the only deed in existence, and that not being recorded, although the titles were made up under that deed, and Sir William Drummond held for a period of forty years under that deed, the heirs substitute under that deed never could have availed themselves of it, as against what, in Scotland, is called an onerous purchaser.

So far the case is perfectly clear and perfectly free from all doubt, as it appears to me. It is upon those grounds that the case was decided in the Court below.

Under these circumstances, in the year 1817, Sir William Drummond, being in possession of the estate in the manner I have mentioned, executed a trust-deed, by which, intending then to go abroad, he conveyed the estate to certain trustees to take the conduct and management of that estate, and in order that his debts might be paid by them out of it. There was a provision that after the debts were paid they should convey to a series of heirs mentioned in the trust-deed; the series of heirs corresponding, I believe, with one exception, with the previous limitations. However, that is immaterial. It does not bear upon the present question.

The trustees entered into possession, and held the estate subject to those trusts, and after the death of Sir William Drummond, the surviving trustees, agreeably to the provisions

of the trust-deed, conveyed the estate, (the debts being partially paid,) to the series of heirs mentioned in the deed of 1817. They conveyed to that series of heirs conformably to the trust. The first person in the series of heirs was the surviving trustee; he was infeft under the deed. He afterwards died, and the next heir in succession entered, he is the present Sir William Drummond, the vendor of the estate, having sold it to Lord Mansfield. The heirs substitute have no claim as against Lord Mansfield. The deed was never recorded. It can have no operation, therefore, against a purchaser; and it appears to me, under these circumstances, that it is perfectly clear that the title made by the vendor to Lord Mansfield is complete and perfect.

It is said that this was not a valid execution of the trust in some particulars. One of those particulars I shall state. There is no doubt that the estate was conveyed to the series of heirs mentioned in the trust-deed. The trust-deed requires that it should be held under the old deed of entail and the old procuratory. That is, the deed of entail and the procuratory of 1767. Now that deed of entail was annulled, revoked, and put an end to. It had no longer any existence; it could not be again revived. It was impossible, therefore, if that was the intention of Sir William Drummond, to carry it into complete and accurate effect. Therefore we are to assume that that was not his intention, and that the intention merely was, that in those particulars the title should be held under the new deed, but that the conditions should conform as nearly as practicable to the conditions and terms contained in the deed of 1767. It admits, I think, of no other construction.

But there is this observation. It was wholly immaterial, in that particular case, what were the terms and provisions of the deed. It was not recorded. Whatever provisions were contained in the deed, the result would have been precisely the same, as to the controversy between the heirs substitute and a purchaser under the tenant in-tail in possession.

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In addition to which, the heirs substitute have no title whatever, except under the deed of 1834, or under the deed of 1817. If the deed of 1834 was altogether invalid, they go back to the deed of 1817. That deed also is not recorded. They can have no title, therefore, as against a purchaser, either under the deed of 1817, or under the deed of 1834. It appears to me, therefore, that there is no validity in that objection.

Then it is further said, that the estate was not to be sold until the debts were paid, and that the charging the debts upon the estate was in fact injurious to the interests of the heirs substitute. That admits of precisely the same answer. But there is another answer, in point of fact, which was suggested at the bar by Mr. Rutherford, which is this, that under the deed of 1817 the trustees have the power of charging, if they think proper, the debts upon the estate. They therefore only executed that which they had a right to execute under the trust deed, in charging the remainder of the debts upon the estate. It is true they had the power to pay the debts, if they pleased, out of the money received; but they had also an alternative power of charging the debts upon the estate. It seems to me, therefore, that there is no ground for that objection.

Then the only question that remains is this, about which I did entertain for a moment some doubt, can this title ever afterwards be challenged, after a decision of the Court below, confirmed in this House? Can it hereafter be challenged by the heir substitute? Mr. Rutherford satisfied me by his argument, and by his authorities, that it can never afterwards be challenged, if the estate is properly represented in Court. That is all that is required. The judgment is against those persons who represent the estate, and all persons coming after them will, therefore, be bound by this decision. Under these circumstances, I think there is no sufficient ground for this appeal, and that the judgment of the Court below ought to be affirmed.

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LORD BROUGHAM.—My Lords, I am entirely of opinion with my noble and learned friend, who has so distinctly and so accurately stated the case, upon the two several grounds which formed the subject of consideration in the Court below, and upon both of which it has been argued and considered by your Lordships, that it becomes unnecessary for me to detain you at any length.

With respect to the first branch of the case, I think there cannot be, nor has there ever been in my mind, any doubt, any more than there appears to have been in the Court below. But Lord Jeffrey, towards the close of his very ingenious and very able opinion, (as all that comes from him is distinguished by very great ability,) threw out the question whether or not the deed of 1834 had not been such as to amount to a breach of the trusts under which the trustees acted, namely, the deed of 1817. And it is most material, with a view to that, to consider that it was by the deed of 1817 that that very trust was constituted, and that they were bound, if at all, by that deed, and not to go beyond it, either to the deed of 1767, or to the deed of 1773, which, in fact, overruled that deed.

The result of the argument has been completely to satisfy my mind that there is really nothing in the objection. It is quite certain that Lord Jeffrey's mind leaned towards it; for if you look at his opinion, it is clear that he goes further than saying that there is a possibility, for he rather inclines to think that the objection, if taken in time, must have been successful. But, however, be that as it may, that point was not very much considered before his lordship. It seems to have emerged, as it were, in the course of his own consideration of the case, and I doubt whether it was much argued before him. But, be that as it may, we now have the benefit of its having been fully argued before us, and most fully considered by us; and I have come to the result, which my noble and learned friend has stated

that he has arrived at, that there is nothing in the objection, and that we cannot say either that there was any breach of trust committed by that dealing with the estate in 1834, or that there is any possibility of this title subsequently being questioned by the heirs substitute.

First, as to the breach of trust, it is material to consider what deed it was that gave the trustees their power, and against which, if at all, they committed that breach. It was the deed of 1817.

Now, besides the objections urged and sufficiently disposed of by my noble and learned friend in his argument, there is another, namely, that the destination in the deed of 1834 was not precisely the same as in the deed of 1767; but that Louisa Drummond was omitted, who had been called in the deed of 1767. It is quite true that she was called in the destination clause of that deed of 1767. But, besides the observation made by my noble and learned friend as to the force and effect of the deed of 1773, she is not called in the deed of 1817. She is omitted in the deed of 1817. She is just as much omitted in that deed of 1817, which is the governing deed with respect to that question of breach of trust, (for it is the deed which created the trust and constituted the trustees,) as she is in the deed in question of 1834, by omitting her, in which it is said that a breach of trust has been committed.

Then, my Lords, it is to be considered that in that deed (as to the other point, my noble and learned friend has dealt with that,) there are not directions, but powers. There is an option given to the trustees. They might have so dealt with the rents and profits as to have cleared the estate of incumbrances; but they also had the option; they exercised that power, and under that power no breach of trust can be said to have resulted.

Now, my Lords, with respect to the power of the heirs substitute to quarrel this judgment, and to challenge it, and hereafter to upset this title, I am clearly of opinion with my noble and

learned friend. I am satisfied by Mr. Rutherford's authorities, not perhaps by his arguments, but by his authorities, that there is no such power, and that the estate is protected, and the purchaser protected, and effectually and for ever protected, by this decision. It is needless to refer to the cases. There is Dixon *v.* Cunningham, in 5th *Wilson & Shaw*. There is Maule *v.* Maule, 9 *Sh.* 876, a case of very great anxiety, which underwent the very fullest consideration, both by argument at the bar, and then by *Lord Eldon*, and subsequently by myself, who ultimately decided it. Then there is the case of Rutherford *v.* Nisbets, trustees, in 11th *Shaw*, 123; and lastly, a case which, perhaps, bore more upon the present than any other, Macpherson *v.* Dunlop.

My Lords, these authorities perfectly satisfied me, as they have satisfied my noble and learned friend, that the contention on the part of the vendor here in favour of the title cannot be upset by heirs substitute subsequently coming into Court. The estate, as my noble and learned friend observes, is sufficiently represented; and that is all that in this most important and beneficial form of proceeding, a declaratory action, is absolutely essential. Nobody can doubt that here the estate is thoroughly represented, and that whether it is represented by A or B, if it is represented by persons standing in precisely the same shoes, enjoying the same rights, and having the same liabilities, and who are concluded by omitting to state their defences, according to the authority of Dixon *v.* Cunningham, all others, though not called in the action, are precluded.

My Lords, I cannot close my observations in this case without once more expressing my great envy, as an English lawyer, of the Scotch jurisprudence, and of those who enjoy under it the security and the various facilities and conveniences which they have from that most beneficial and most admirably-contrived form of proceeding, called a declaratory action. Here you must wait till a party chooses to bring you into Court;

here you must wait till possibly your evidence is gone; here you have no means whatever, in ninety-nine cases out of a hundred, of obtaining the great benefit of this proceeding. In Scotland you have that benefit; and a more remarkable instance of its beneficial tendency does not exist in my recollection than the present litigation. How would Lord Mansfield have been situated in the case we now have, and how would the vendor of the estate have been situated if they must have waited till perhaps after two or three generations there was a new heir in possession, an heir substitute, and the question was raised? It is most comfortable, it is most gratifying to that noble person, as well as to the other contending parties, that they have had access to the decision of the Court below, and of your Lordships in the last resort, the highest judicial authority, and that he now takes a title which is just as good as if he had an Act of Parliament deciding in his favour, and as secure in the expenditure of his money, and the other parties as secure in taking it.

LORD CAMPBELL.—My Lords, I shall have occasion to add but a very few words to what has been stated by my two noble and learned friends who have preceded me. It gives me great satisfaction to think that, without remitting this case to the Court of Session, we can now come to a satisfactory and final decision.

It seems to me quite clear, my Lords, that the interlocutor appealed from ought to be affirmed. With reference to the main question, which was argued below, I never entertained any doubt. It seems to me quite clear that the deed of 1773 was a new entail; and if that deed had been registered in the Register of Tailzies, it would have regulated the descent of the estate, and would have been a valid and strict entail, binding on all parties. That deed of 1773 materially altered the deed of

1767, and it was felt so strongly at the bar, when we asked the learned counsel where they would draw the line as to withdrawing one substitute, and then another, and at last leaving only some person who was called after the failure of ten or fifty other lines, that really Mr. Stuart found himself almost driven entirely to abandon that. It is quite clear that this deed of 1773 altered materially the former entail, and that it would have been a valid entail, if registered; but, not being registered, it is not binding upon the parties.

Then I own that, for a time, I was very much startled by the objection upon the breach of trust, for it was very broadly asserted at that time—I confess that I had not made myself master of all the details of the deeds—it was very broadly asserted by the counsel, that the deed of 1834, under which the title is now made, was a clear breach of trust, and that Lord Mansfield, having notice of it, all that was done under it might be set aside.

But, upon inquiry, what does it turn out to be? Why, in the first place, you cannot say that the deed of 1834 is void; you can only say that if there were persons who were prejudiced by it, they would have been in as good a situation as if that deed had not been executed. But, upon inquiry, it turns out that there is no one prejudiced by it—neither heirs substitute nor creditors. Therefore, with great submission to what Lord Jeffrey has said, that if there had been an action brought in due time to set aside that deed, there would have been no sufficient ground for sustaining it—it is quite clear that that objection cannot be sustained. This estate is represented by the heir of tailzie in possession. By the law of Scotland the fee is in him. It has been usual in those cases, in such actions of declarator, to call all the heirs substitute; it appears quite clear that, by the law of Scotland, the heir of tailzie in possession does represent the estate; and if there be a suit carried on

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bonâ fide, to which he is a party, all the heirs substitute are bound by the decision in that suit. Well, then, if this deed was reducible, it lay on the parties who were called in this suit to have brought an action of reduction assimilated to this suit; they have brought no such action, and the decision of the Court of Session in this suit, affirmed by your Lordships' House, must be binding and conclusive upon all parties.

It was suggested at the bar, that an infant had come into *esse*—at least, not come into *esse*, but that he had got a fresh *status* pending the litigation, because, being born before the marriage, his parents had married since, and thereby, undoubtedly, he is rendered legitimate. But that only gives him an opportunity of appearing at your Lordships' bar, and challenging any of the prior proceedings, and arguing the question whether the decision of the Court below is right or wrong. It does not give him an opportunity of beginning *de novo*, and of being in the same situation as if the suit were recommenced, and he were called as a party.

Therefore, my Lords, I have no doubt whatever in my mind upon any part of this important case, and I agree with my noble and learned friend in saying, that I think that Lord Mansfield's title will be good as against all the world. I do not say that he is to be envied; but there is no one that would not rejoice very much under the same title to be Laird of Logie-almond.

[*Lord Brougham.*—I suppose you are all agreed about the costs?]

[*Mr. Mc Neil.*—In the Court below they did not think it was a case for costs, and I am not instructed to move for them at your Lordships' bar.]

[*Lord Brougham.*—It is a sort of amicable proceeding—amicable in one respect, but there has been no collusion or fraud; for it has been as thoroughly argued as if it were most hostile.]

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[*Lord Chancellor.*—The impression upon my mind was that there should be no costs. I suppose you do not ask for costs?]

[*Mr. Mc Neil.*—No, my Lord.]

It is ordered and adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutor therein complained of, be, and the same is hereby affirmed.

SPOTTISWOODE and ROBERTSON—G. and T. W. WEBSTER—DEANS, DUNLOP, and HOPE—Agents.