DAVID DICKSON and others, Appellants.—*Mr. Solicitor General (Campbell) and Mr. Patrick Robertson.* No 51.

CUNINGHAME and Lord MEDWYN, Respondents.—*Lord Advocate (Jeffrey) and Mr. Sandford.*

Entail—Sale—Sasine—Res Judicata—Title to pursue—Personal Objection—Homologation. — 1. Circumstances under which it was held (affirming the judgment of the Court of Session).—(1.) That an entail executed in implement of a decree arbitral did not prevent an heir substitute from selling part of the estate. —(2.) That a sale under a power in the entail, and by authority of the Court, in absence of minor and pupil heirs, was effectual.—(3.) That the refusal of a bill of suspension presented by a purchaser, relative to another sale, afforded a plea of res judicata.—(4.) That a sasine written on nine pages, but stated in the docquet to be on eight, was valid.

2. A posterior entail, inconsistent with the original one, was sustained; and an action was brought by the heirs substitute under the original entail, concluding for reduction of the sales of parts of the estate falling within it, for declarator of irritancy against the heir in possession under the second entail, in respect of his having concurred in those sales, and to have the next substitute found entitled to possess; but that substitute had the succession to the fee propelled to him under the second entail, and was infeft, and enrolled as a freeholder, and voted as such — Held,—(1.) That the original entail was annihilated. — (2.) That the action was not maintainable by that substitute, nor any others suing with him, notwithstanding the renunciation by him of the infeftment, and a decree of reduction, pendente lite, against the other heirs; — and, (3.) That these objections were pleadable by the defenders, although not heirs of entail.

Oct. 1, 1831.

1ST DIVISION. Lord Eldin.

WILLIAM DICKSON, proprietor of the estate of Kilbucho, had three sons, John, David, and Michael. In 1733 he executed a disposition of his estate in favour of John and the heirs male of his body, whom failing, the other heirs male of his own body. This destination was accompanied by a prohibition against altering the order of succession, but not by irritant or resolutive clauses. On the 17th of February 1762 he executed an unlimited disposition in favour of John, and died upon the 8th of March. John made up titles to part of the lands by Crown charter, proceeding on the disposition of 1733, to part under his father's marriage contract, and the rest (embracing the barony of Culter) he possessed on apparency. He himself acquired in fee simple five acres of land in that part of Edinburgh now called York Place. John had no issue, and his heir at law was his younger brother David, who had several

Oct. 1, 1831.

children, the eldest of whom was William, afterwards General William Dickson. On the 11th of June 1767 John disponed his whole estates to trustees for various purposes, but particularly to discharge his debts, pay an annuity of 100*l.* to David, and settle provisions of 1,000*l.* on each of David's younger children; and declaring, that if the trustees sold any part of the lands for these purposes, they should retain possession of the rents of the residue till they had a sufficient fund for purchasing other lands in place of them. He further appointed them not to dispose of any part of his paternal succession unless absolutely necessary, and, on the purposes of the trust being accomplished, to denude in favour of "the said William Dickson, or the eldest son of my "said brother Mr. David Dickson, who shall be alive at the "time, and the heirs male of his body; whom failing, to the "other sons of my said brother David according to their "seniority, and the heirs male of their bodies respectively; "whom failing, to the sons of my said brother Dr. Michael "Dickson, seriatim, according to their seniority, and the heirs "male of their bodies respectively," and that under such burdens, restrictions, and limitations as he should appoint by a writing under his hand. He died in December 1767, without having executed any such writing. His brother David, being thus excluded by the trust-deed, adopted legal measures for having it set aside; and in 1769 the estates were sequestrated by the Court of Session, on a petition by the trustees.* These proceedings were abandoned in consequence of an arrangement under which, while David ratified the trust-deed, a submission was entered into between him and his son General William to certain arbiters. Neither the trustees nor the substitute heirs were parties to this submission. The arbiters were authorized to appoint such parts of the estates to be sold as they might think necessary for payment of the debts, to settle the provisions to be payable to the younger children of David, and to determine "in what manner, to what series of heirs, and under what "burdens, limitations, conditions, prohibitory, irritant, and "resolutive clauses, the said lands and estate, or what part "thereof may remain unsold, shall be settled," and in general to do whatever might be necessary "for the interest of the said

---

* See Hyndford and others v. Dickson, Dec. 5. 1769 (14,347).

" parties, and a final and amicable settlement of their whole " family affairs." Under an interim order of the arbiters, David executed a disposition of the estates in favour of the trustees, who were thereupon infeft. He and General William then acquired right to the debts due by John, of which all the creditors, with one exception, executed discharges. For the security of these creditors they granted heritable bonds over the barony of Culter and the five acres in York Place, and at the same time disponed these lands to Mr. Boswell as trustee for the creditors, with power to him to sell them for payment of John's debts. They also granted a bond of relief to the trustees, to protect them against the claim of the creditor who had not discharged his debt. Oct. 1, 1831.

After these arrangements were concluded, the arbiters, on the 11th of August 1775, pronounced a decree arbitral, by which, " being desirous to preserve for the family such parts of the " estate as the situation of affairs will permit," they " decerned " and ordained the said Mr. David and William Dickson, for " their respective rights and interests, on or before the 1st of " October next, to execute a tailzie and strict settlement of the " lands and barony of Kilbucho in favour of the said Mr. David " Dickson in life-rent, and the said William Dickson and the " heirs male of his body in fee; whom failing, to the others " mentioned in a scroll of the said tailzie signed by us, of the " date hereof, as relative to this decree arbitral, and with and " under the whole conditions, provisions, clauses prohibitory, " irritant, and resolutive, contained in the said scroll;" but they declared that the life-rent of David should be burdened with an annuity of 250*l.* to his son General William, and that they should grant a joint bond to the younger children * for payment of certain provisions. On the same day the trustees denuded in favour of General William and the series of heirs mentioned in the trust-deed, and he was thereupon infeft. He then, upon the 27th of January 1776, executed the entail agreeably to the scroll referred to in the decree arbitral. It proceeded upon the narrative of John's trust-deed, the measures taken by David to set it aside, the arrangement and relative

---

* These younger children were, John, a member of the Faculty of Advocates, David, a clergyman, and two others.

Oct. 1, 1831.

submission, the discharges by John's creditors, and the decree arbitral; and then the dispositive clause was thus expressed:—"Wit ye me, therefore, in implement of the decree arbitral "and other writs above narrated, and for carrying the intention "of the said deceased John Dickson, my uncle, into further "execution, to have given, granted, and disponed, like as I, &c. "give, grant, and dispone to and in favour of the said David "Dickson my father in life-rent, during all the days of his life-"time, for his life-rent use allenarly, and to myself and the "heirs male of my body in fee; whom failing, to Mr. John "Dickson, advocate, my first brother-german, and second son "of the said David Dickson my father, and the heirs male of "his body; whom failing, to David Dickson, my next brother-"german, and third son of my said father, and the heirs male "of his body;" whom failing, to certain other heirs. This deed was fortified by all the clauses of a strict entail; but it was declared, that as the lands were liable for the debts of his grandfather William, his uncle John, and his father David, and of the General "himself, preceding the date hereof," (all of which were declared real burdens,) therefore it was provided, "that if the prices of the said lands, and of five acres of ground "in the New Town of Edinburgh, disponed by my said father "and me to the said Thomas Boswell, shall not be sufficient for "paying the whole debts and provisions aforesaid, then and in "that case it shall be lawful to and in the power of me the "said William Dickson, or the heir possessing the said estate "for the time, and likewise to any of the other substitutes "hereby called to the succession, to bring an action before the "Court of Session for selling by public roup such parts of the "said lands and barony of Kilbucho as can be sold with least "prejudice to the remainder, and shall be necessary for paying "such of the said debts and provisions as shall remain unpaid, "after due application of the prices of the other lands and "subjects above mentioned." There was also a clause that the heirs should possess in virtue of the entail, and on no other title. The entail was recorded on the 15th of February 1776, and in June a Crown charter was expede in terms of it, and sasine immediately taken and recorded.

Prior to this sasine an heritable bond was granted over the lands by General William to his brother John (the advocate),

and the other younger children for their provisions, on which they were infeft. Thereafter the lands of Culter and the five acres in York Place were sold for payment of the debts, but it was alleged that the proceeds were insufficient for that purpose. David died in April 1780, whereupon General William took possession in virtue of his infeftment under the entail; and in 1784 he, with concurrence of his brother John as his commissioner, brought an action before the Court of Session, founded on the above clause in the entail, against John for his own interest, and as administrator in law for a child then alive, and also against other heirs substitutes, several of whom were in pupilarity. After setting forth the terms of the entail, the insufficiency of the proceeds of Culter and the five acres to pay the debts, and the necessity of selling part of the entailed lands, the summons concluded that General William should be found empowered to do so; that a proof should be taken of the amount of the debts, and of the lands proper to be sold, and that they should be declared free from the fetters of the entail. No appearance was made for any of the defenders; but John Dickson acted as commissioner and counsel for his brother the General, having, as was alleged, as well as the other brothers, an interest to have the lands sold, so as to get payment of their provisions, on which there was a large arrear of interest. No tutors ad litem were appointed to the pupil children; and appearance having been attempted for two sons of Dr. Michael Dickson, who resided in England, an objection was made that they had not sisted a mandatory, and they did not subsequently appear. After some procedure, the Court, on the 11th of December 1784, found, that the debts condescended on had been contracted prior to the entail, that in virtue of the reservation it was competent to sell part of them, appointed the lands of Mitchelstone, &c. to be sold, and ordered that the sale should be reported, and the surplus price applied in the purchase of other lands, agreeably to the entail. At this time nothing was done under this authority; and General William, conceiving (agreeably to the then recent decision in the case of Agnew of Sheuchan) that the whole lands were liable for payment of his debts, and being greatly embarrassed, executed a disposition in July 1785 of the estate of Kilbucho in favour of John Loch, as trustee for his creditors. An action of declarator,

Oct. 1, 1831.

Oct. 1, 1831.

at the instance of him and Mr. Loch, was then brought against the heirs of entail and their respective children, concluding to have it found that the lands were attachable for the debts of the General then due, and that Loch was entitled, under his disposition, to sell them for payment of these debts. Appearance was made by his brother John, and some of the other nominatim heirs substitutes, but none for the minor children of these substitutes. During the dependence of this process, and before any judgment was pronounced, the lands of Mitchelstone, &c. which had been authorized to be sold, were exposed by public roup, and purchased on the 31st of January 1786 by the late William Cuninghame; and on the 5th of February thereafter another part of the estate called Parkgatestone, not comprehended in the conclusions of the first action, was purchased by private bargain also by Cuninghame. To ascertain the validity of the sale, he presented a bill of suspension of a threatened charge for the price of the lands last sold; and this having been reported, along with the action of declarator, at the instance of the General and his trustee, on informations to the Court, (one of the informations being for John Dickson and the heirs substitutes who had appeared,) their Lordships, on the 10th of March 1786, repelled the defences, and found and declared in terms of the libel, and remitted to the Lord Ordinary to refuse the bill of suspension presented by Cuninghame.*

---

* See Mor. 15,534. The following notes of the opinions of the Judges were laid before the Court of Session by the pursuers:—

Lord Swinton. — Clear that no person can bind up his estate against his own creditors.

Lord Justice Clerk.—No man can make a deed to hurt prior creditors, but there is a difficulty as to future contractions. This requires very serious consideration.

Lord Eskgrove.—I am much difficulted, laying aside the decision in the case of Sheuchan, and I do not see that it established law in every case. Clear the act 1685 applies not to the maker of an entail, but to heirs only; and if the fetters were laid only on the maker, it could not be registered in the record of tailzies, or thereby have more effect than it had aliunde. The question is, whether such a settlement as the present may not be good, independent of a statute? The rule of law is, that no man can hold an estate which is not affectable by his debts, and therefore by the act 1685 the right of the contravener must be resolved. Here there is a resolutive clause. There are two other modes in which a man may tie up his estate against creditors. He may dispone the fee, and only reserve a life-rent, or he may interdict himself. A voluntary interdiction will be effectual, even on false grounds, though a man be not so weak and facile as he calls himself. This Court must proceed on

In consequence of this judgment Cuninghame paid the price of the lands which he had purchased, and received a disposition from the General and his trustee Loch, and which John and two

Oct. 1, 1831.

---

good grounds, but both interdictions equally effectual. The arbiters in this certainly thought the deed they ordered would have some effect, and John Dickson seems to have intended an entail. I would incline to have a hearing in presence.

Lord Braxfield.—If this were a new case, notwithstanding the urgency of circumstances, I would join your Lordships in wishing a hearing in presence; but the precise same point was determined in the case of Sheuchan. I was for the judgment then pronounced, and am still of the same opinion. Tailzies were no doubt made before 1685, and some of the largest estates in this country are held under these deeds; but the House of Lords have properly found (contrary to a judgment of this Court) that these entails are not effectual unless registered according to that act, and no tailzie can be valid but upon that statute. The arbiters here designed no doubt to bind up this young man, and they meant well; but they did not take the right way. They should have restricted his right to a life-rent, for so long as he holds the property his debts must affect it. The other case of an interdiction the law allows to protect those who are weak and facile; but if a man prove himself otherwise he may reduce that limitation of his right. Besides, a man's deeds, even under interdiction, are not set aside, unless lesion is proved. Another man may give me his estate under limitations, and I must take it sub modo as he pleases to give it; but if once the fee-simple is in my person, no deed, while that remains, can cut out my creditors. The act 1685 is the rule by which every entail is to be determined; but every line of that act is repugnant to the idea of a person holding property not affectable by his debts. Accordingly, no prohibition to contract debt, nor even an irritancy of debt, is sufficient; there must at the same time be an absolute resolution of the right of the debtor. It is now trite law, that without a resolutive clause no entail can be effectual against creditors. By the act 1685 the next heir serves to him who was last infeft, passing by the contravener, that he may not be liable for his debts. This can never apply to the maker himself, for if you pass by his right, the right of the heirs must cease of course. This is the idea of the common law, sanctioned by the act 1685. There is another idea—a man cannot bind himself to his own heir, so as to prevent him contracting debts, or granting other deeds; the heir, being eadem persona cum defuncto, necessarily becomes liable for his predecessor's deeds as his own. The same principle applies here as in testaments, voluntas est ambulatoria usq. ad mortem. With respect to the submission here, William Dickson need not have entered into it but as he pleased. As to John Dickson's intentions I can say nothing, as he did not execute them. The decree arbitral makes no difference.

Lord Justice Clerk.—After recollecting the case of Sheuchan, and the principles, as now stated, on which it proceeded, I am of the same opinion.

Lord Henderland.—For the judgment in Sheuchan's case, and of the same opinion now. A man's property can only be secured from creditors in the two ways which have been mentioned.

Lord Hales.—I would wish extract to be superseded, as this is a case of some difficulty and importance.

The parties desired extract not to be superseded; upon which the lords repelled the defences in the declarator, and refused the bill of suspension at Mr. Cuninghame's instance.

Oct. 1, 1831.

of the other heirs substitutes subscribed as consenters. On this deed Cuninghame was infeft, and obtained from these heirs substitutes a supplementary disposition, on which he was likewise infeft. The General having again got deeply involved in debt, an arrangement was entered into between him and his brother John, (who was the next heir substitute,) by which it was agreed that certain additional parts of the estate should be sold, and that the General should execute a new deed of entail of the residue in favour of John and a series of heirs. Accordingly, in February 1809, the General agreed to sell part of the estate called the Main's Mill and Mill lands of Kilbucho to Mr. John Hay Forbes, advocate, (now Lord Medwyn,) of which he and his trustee Loch executed a feu disposition on the 24th of May thereafter, and at the same time disponed the whole other lands of Kilbucho to Mr. Forbes in real warrandice. Upon the 28th of April of the same year the General executed an entail, proceeding on the narrative of that of 1776, that he had sold a considerable part of the estate, and had exposed himself to a declarator of irritancy at the instance of his brother John, but that John had agreed not to object to the sales, nor to raise such a declarator, on condition of executing the new entail; and therefore he disponed to himself in life-rent allenarly, and to his brother John in fee "and the heirs male of his body; whom "failing, to the heirs female of his body;" whom failing, the other heirs called by the entail 1776; with this difference, that the heirs female were by that deed postponed to the heirs male of all the nominatim heirs substitute, whereas by this new deed their heirs female were called immediately after their respective heirs male. From this deed there was excepted the feu-right of the lands which had been sold to Mr. Forbes.

Thereafter, in 1814, the General, along with Messrs. Hotchkis and Tytler, W. S. (who had succeeded Mr. Loch as trustees for his creditors), brought an action of reduction of the entail 1809, mainly on the ground that it had been obtained by his brother John by fraud and deception, which he explained to have consisted in representing that he was liable to a declarator of irritancy, whereas he alleged that he had the absolute disposal of any part of the estate, without being subjected to any such penalty. At the same time he executed a minute of sale of the estate to Tytler, who brought a suspension; and defences

having been lodged for John Dickson, and the cases having come before Lord Balgray, his Lordship, on the 6th of July 1813, pronounced this interlocutor:—"In respect that the pur- "suer and charger asserts and maintains that he was unlimited "fiar of the estate of Kilbucho, and had the right of disposing "thereof as he thought proper—1st, finds, that, so far as he is "concerned, he had power to execute the deed of entail dated "28th April 1809; 2d, finds that the said entail is a delivered "deed, and irrevocable; and that the pursuer has conveyed "away the right of fee, and has restricted his right to that of "life-rent allenarly; 3d, finds that no legal, just, or reason- "able ground is assigned by the pursuer or suspender for "setting aside the said bond; therefore in the process of "reduction assoilzies the defender, and in the suspension "suspends the letters simpliciter." To this interlocutor his Lordship adhered on the 16th of November 1813, "in respect, "1. That it does appear that the execution of the deed of "entail 1809 was, under all circumstances, a measure highly "proper, prudent, and expedient on the part of the pursuer. "2. That it is admitted by the pursuer that he voluntarily "executed said entail, and had power to do so; and that there "does not appear from the tenor of the deed itself, or any "collateral circumstance, any foundation for the allegation that "the pursuer was improperly or fraudulently induced to "execute said deed; and that the present proceedings seem to "arise rather from a change of mind on the part of the "pursuer, than the discovery of any facts attending the "execution of the entail 1809."

Oct. 1, 1831.

The case having afterwards come before Lord Alloway, his Lordship reported it to the Court; and Tytler having withdrawn his suspension, their Lordships, on the 2d and 28th of June 1814, "assoilzied the defender from the whole conclusions of the "action of reduction, and found and decerned in terms of "Lord Balgray's interlocutors of 6th July and 16th November "last;" and found expenses due.

On the 18th of May 1815 the General died; and on the 2d of June, his brother John, in virtue of the entail 1809, expede a Crown charter of resignation. By this time he had several children, and his eldest son David had been admitted a member of the Faculty of Advocates in 1815. In September

Oct. 1, 1831. of that year John conveyed the fee to David, and they were thereupon infeft for their respective rights of life-rent and fee. In virtue of this title David was enrolled as a freeholder of the county of Peebles, and as such he voted, at the elections of 1818 and 1820, in favour of the successful candidate.

In the meanwhile Hotchkis and Tytler, as trustees for the General's creditors, had entered an appeal against the judgment sustaining the entail of 1809; but the House of Lords affirmed it on the 19th of July 1820, with costs.

In 1822 David Dickson, along with his brother Alexander, and two of the next nominatim heirs substitute, brought an action of reduction and declarator against John, and also against John Cuninghame, advocate, son of William Cuninghame, and Lord Medwyn, founding on their rights as heirs substitutes under the entail 1776, and concluding for a declarator of irritancy and forfeiture against John, and decree of reduction of the sales to William Cuninghame and Lord Medwyn, as made in violation of the entail 1776. The grounds on which these conclusions rested were chiefly, that the entail 1776 was an onerous deed, so that it was incompetent for the General to sell any part of the estate, except for payment of the debts mentioned in it; that the proceedings in 1784 and 1786, under which the sales were made to William Cuninghame, were collusive, irregular, in absence and to the lesion of the parties having the true interest to oppose them; that those heirs for whom appearance was made were creditors of the General, and as such had an interest to have the lands sold; and that the sale to Lord Medwyn had been made without any sort of authority.

No appearance was made by John Dickson; and after the production had been satisfied, great avizandum made, and a remit to discuss the reasons of reduction, parties were heard before Lord Mackenzie, and memorials ordered, in which the whole case was argued. Cuninghame confined himself to the merits, and rested mainly on a plea of res judicata afforded by the judgments in the declarator and suspension in 1784 and 1786; but Lord Medwyn further maintained, that as David Dickson had made up titles under the entail 1809, which was in opposition to and a contravention of the entail 1776, he had not a title to insist in the present process, which contained a

Oct. 5, 1831.

conclusion, that on the sales being set aside, and decree of forfeiture pronounced against his father, it should be found that he had right, under the entail 1776, to the lands; that besides, by availing himself of the entail 1809, and exercising the rights of a freeholder, he had homologated both that deed and the sale to Lord Medwyn, which was expressly mentioned in it; and that as the conclusions in favour of the other pursuers were dependent upon the success of David, the action must be dismissed. Lord Eldin, on advising the memorials, (10th July 1824,) "repelled the reasons of reduction, assoilzied the "defenders from the conclusions of the libel," and found them entitled to expenses.

Against this judgment the pursuers presented a petition, but no petition was presented by the defenders. On advising the cause, the Court, considering that the principle of the case of Sheuchan, then recently decided in the House of Lords, was brought into discussion, and that it would be proper to have the opinions of the whole Judges, made a remit accordingly. In consequence of this remit the Judge of the second opinion returned the subjoined opinion.*

---

* *Lords Justice Clerk, Glenlee, Robertson, Pitmilly, Alloway, Cringletie, Meadowbank, Mackenzie,* and *Eldin,*—Having considered the summons and printed pleadings of the parties in this case, we are of opinion that the action cannot be maintained, in respect of the form and structure of the summons. That instrument, after concluding for reduction of the various decrees, interlocutors, judgments, charters, and writs therein set forth, concludes, that it shall be "found and declared by decree foresaid that the "pursuers and the other heirs of entail in the order set down in the said deed of "tailzie, have the only good and undoubted right and title to the hail foresaid "entailed lands and estate, and others which were sold as aforesaid," &c. "And "further, it should be found and declared by decree foresaid that the said John "Dickson, the heir of tailzie to whom the succession opened on the death of the said "William Dickson, has, by the various acts and deeds of contravention above set "forth, or one or other of them, incurred an irritancy in terms of the resolutive "clause in the said entail, and has for ever lost, forfeited, and amitted all right and "title to the said entailed lands and estate; and that his right, title, and interest "therein has been, since the death of the said General William Dickson, is now, and "shall be in all time coming, void and extinct; and that the said entailed lands and "estate did at the date foresaid fall, and have now fallen and devolved, to the said "David Dickson first above named, being the eldest son of the said John Dickson, "and the next substitute called to the succession by the said deed of entail, and the "other substitutes in their order; and that the said David Dickson and the other "pursuers as aforesaid have accordingly the sole right to possess and enjoy the said "lands and estate," &c. Such being the most important and primary conclusion of

Oct. 1, 1831. A minute was then lodged by David Dickson, stating that on 12th January 1824 he had executed a renunciation of the infeftment under the entail 1809; and he afterwards gave in another minute, stating, that although the sasine in his favour was

---

the action, in order to see that it cannot be maintained, it is only necessary to attend to the situation in which the leading pursuer David Dickson confessedly stands. It appears that, in consequence and in consideration of the last sales of the estate of Kilbucho, William Dickson executed a deed on the 24th April 1809, conveying the remainder of that estate to himself in life-rent, and Mr. John Dickson in fee; whom failing, to a series of heirs differing from those contained in the entail 1776; the validity of which deed was afterwards sustained in this Court in a question between General (William) Dickson and the trustees for his creditors, and his brother Mr. John Dickson, and the judgment was affirmed on appeal. It is also an admitted fact, that, after General Dickson's death, Mr. John Dickson made up a title under the deed 1809, and propelled the succession under it by conveying the fee thereof to his son, the pursuer David Dickson, who was infeft, has been enrolled as a freeholder, and is now actually in possession under that title.

In these circumstances it appears perfectly manifest that Mr. David Dickson, standing infeft in the fee of the remainder of the estate under titles importing a clear contravention of the entail 1776, which likewise expressly required the whole heirs of tailzie "to possess and enjoy the lands and estate hereby disponed in virtue of this "present tailzie, and infeftments to follow thereupon, and by no other right or title "whatsomever," cannot maintain a reduction founded on that very entail, and a declarator of contravention against his father. If his father has contravened, he himself stands in the same situation, and is equally barred from insisting in the conclusions of the present summons that the sales under reduction should be set aside, and the lands restored to him. But, independently altogether of this objection, as David Dickson is at this very moment enjoying the benefit of the deed 1809 executed by General Dickson, which, in consideration of the validity of all the prior sales, secured the remainder of the estate to his brother and his descendants by restricting his own interest to a life-rent, he is barred personali exceptione from insisting in the present action for setting aside the whole of these prior sales.

We consider it to be no satisfactory answer to the above objection, arising from the nature of the action, that other persons claiming as substitutes under the entail 1776 are associated with David Dickson as pursuers. We hold it to be clear, that if David Dickson, the leading pursuer, is not entitled to maintain that the estate has devolved upon him, no other person can insist in either the reductive or declaratory conclusions for his benefit; and as to the individual interests of the other substitutes of entail to insist in the conclusions of the action, to the effect of having it declared that the estate has devolved upon any of them, it is altogether incompetent under the present summons. As it appears, upon their own showing, that it was considered necessary to declare the forfeiture of Mr. John Dickson, it must be equally necessary for them to take the same step with regard to his son before the right of any other substitute can be declared; but that is certainly a proceeding altogether incompetent under the present summons. We are therefore of opinion that the action ought to be dismissed, and that it is unnecessary to give any opinion on the other points argued in the pleadings.

written upon nine pages, the notary's docquet set forth that it consisted of only eight, and therefore the sasine was null and void. He also raised a reduction of the sasine, in which he got decree in absence against the other heirs. On resuming consideration of the case, and it having been ascertained that there had been an irregularity as to the form of consulting the Judges, the Court appointed the parties to lodge cases on the subject of the title. This having been done*, a minute was thereafter given in by Cuninghame, stating that he waived all objections to the title, and requested their Lordships to determine the merits of the reduction. Oct. 1, 1831.

The parties were then ordered to lodge questions, with the view of consulting the other Judges; which was accordingly done, and remitted to their Lordships along with a separate class of questions proposed by the Court, which will be found embraced in the subjoined opinions of the Judges.†

---

* The nature of the pleas maintained by the parties will be seen from the queries put to the Judges, and their opinions.

† *Lords Justice Clerk, Pitmilly, Alloway, Cringletie, Meadowbank, Mackenzie,* and *Newton,* returned this opinion:—On considering the whole of this case, we will advert to the questions by the Lords of the First Division, because in answering them we shall fully exhaust those put respectively by the parties.

Q. 1.—Whether the interlocutor of the Lord Ordinary is to be regarded as a final judgment, virtually sustaining the pursuers' title against either or both of the defenders, Mr. Cuninghame and Lord Medwyn?

A.—We are of opinion that the interlocutor of the Lord Ordinary cannot be considered as a final judgment virtually sustaining the pursuers' title. We do not consider the objection to the title as a dilatory defence, because a defence of that sort only delays the cause; it prevents it from proceeding in the shape in which it is brought till something shall be done, or till another summons better libelled shall be brought; but the objection to the title in this case, if good, appears to us to involve in itself a defence on the merits, as the pursuers can never sue to the same purpose in any other action. We imagine that the Lord Ordinary has been of the same opinion, and therefore assoilzied the defenders in general, whereby we cannot know whether his judgment was founded on the objection to the title alone, or on the merits; and therefore we think that both are open to discussion.

Q. 2.—Whether the infeftment in 1815 was valid, and whether the pursuer David Dickson thereby incurred an irritancy under the entail 1776?

A.—To us there appears to arise out of this question a view of the cause which has not occurred to the parties, but which is one involving in itself both title and merits inseparably; and it is this, that the entail 1776 has been recalled, and the investiture under it annulled by a new one being taken, which has been found to be valid both in this Court and by the House of Lords, and which stands unreduced at this hour. This requires some detail.

Oct. 1, 1831. When the case again came before the Court, the pursuers stated, that as a new plea had been suggested by the Judges,

---

General Dickson executed the entail 1776, which contained a power to sell lands, by authority of this Court, for payment of debts contracted prior to the entail, and accordingly lands were sold to Mr. Cuninghame at the price of 7,200*l.*; and although objections are stated to the formalities observed in that action for selling lands, we consider these to be trifling and unavailable. About that time the judgment was pronounced in the case of Agnew, whereby this Court found that a man cannot entail his estate on himself as institute, so as to restrain himself from contracting debt, payment of which may not be made effectual against his estate. General Dickson, regardless of his entail, had incurred considerable debts; and judging that what was law for Agnew was also law in his case, he appointed the late John Loch of Rachan, esq., factor and trustee for himself and his creditors, by a trust disposition dated the 8th of February 1785. Accordingly they raised an action for having it declared that they were at liberty to sell parts of the estate for payment of the debt contracted posterior to the tailzie 1776; and, before any decree was pronounced in that cause, they made a second sale to the predecessor of the defender Mr. Cuninghame of Lainshaw at the price of 1,100*l.* In addition to the declarator, that gentleman raised a process of suspension of a threatened charge for payment of the price, which two actions were conjoined; and this Court, proceeding on the principle that General Dickson could not entail his estate against his debts, pronounced decree in the declarator, and found the letters orderly proceeded in the suspension; and thus part of the lands in the tailzie 1776 was taken out of the investiture by a posterior one.

Relying on his powers, thus found by this Court to be competent to him, General Dickson contracted more debt, for payment of which the sale of the dominium utile of lands was made to Lord Medwyn; and by his infeftment these were also taken out of the tailzied investiture 1776, leaving the dominium directum still as part thereof, burdened with the feudal right in favour of Lord Medwyn; and General Dickson's brother, John Dickson, esq. advocate, being afraid that the whole family estate might be squandered away, entered into the transaction detailed in the pleadings, by which the General, on the 24th April 1809, executed a deed of entail, divesting himself of the fee of the remaining estate by disponing it to himself in life-rent for his life-rent use allenarly, and to the said John Dickson and the heirs male of his body in fee; whom failing, to the heirs female of his body; whom failing, in his next brother and the heirs male of his body; whom failing, to the heirs female of his body; and so on through the course of succession, preferring the heirs female of the several heirs in their order to the next.

General Dickson still persisted in his course of extravagance; and supposing that he was not restrained by the second entail 1809, more than he had been by that in 1776, he brought an action in his own name and that of the trustees for his creditors against his brother and the whole heirs under the tailzie 1809, who were also heirs under that of 1776, though in a different order, for setting aside the entail 1809. In that case Lord Balgray, as Ordinary (6th July 1813) pronounced an interlocutor, in which his Lordship, "in respect that the pursuer and charger asserts and maintains that he was unlimited fiar of the estate of Kilbucho, and had the right of disposing thereof as he thought proper,—1st, finds that so far as he (General Dickson) is concerned, he had power to execute the deed of entail dated 28th April 1809; 2d, finds that the said entail is a delivered deed, and irrevocable; and that

which had not been noticed by the parties, they were entitled to be further heard; and the Court accordingly ordered

Oct. 1, 1831.

" the pursuer has conveyed away the right of fee, and has restricted his right to that " of life-rent allenarly."

The General then pleaded that he had been fraudulently misled to execute the entail; but the Lord Ordinary repelled that plea, and adhered to his interlocutor (16th Nov. 1813).

The case then went before the First Division, when the Court (3d June 1814) assoilzied the defender, " and find and decern in terms of Lord Balgray's interlo- " cutors of the 6th July and 16th November last."

Here, then, there was an action brought for setting aside the entail 1809, in which the judgment of the Court was expressly that General Dickson had power to execute the deed of entail 1809; and the judgment was affirmed by the House of Lords, with costs, in 1819, at which time the defender David Dickson had been four years at the bar, and stood infeft in the fee of the estate under that entail; for General Dickson having died in 1815, after the judgment had been pronounced against him, his brother John, who had been previously infeft in the fee, propelled the succession to the estate to the pursuer David Dickson by conveying to him in fee the superiority of the lands in the tailzie 1809, comprehending the superiority of Lord Medwyn's lands, reserving his own life-rent; and on this both father and son were infeft for their several rights of life-rent and fee; and both were placed on the roll of freeholders for the county of Peebles, on which they stood for many years.

Thus there is a direct finding of this Court that General Dickson had power to execute the tailzie 1809, and that had been affirmed by the House of Lords in 1819. The tailzie 1776 contained a different order of succession from that in 1809; it contained a provision, too, that the heirs should possess under it, and it alone; yet it is finally decreed that the General was not bound to possess under it. It has been virtually recalled, and a new investiture made on a posterior deed found to be valid in the Court of the last resort, which could not have been executed if the tailzie 1776 had been in force. And although the entail 1809 did not contain or even make allusion to the lands sold to Mr. Cuninghame, the first sale was warranted by the tailzie 1776 itself; and the same powers which authorized the General to recall that tailzie must have enabled him to make the second sale to that gentleman, which was ratified by the Court. The other part was also taken out by the sale to Lord Medwyn; and the remainder, including the superiority of Lord Medwyn's lands, was put under a totally new investiture, which stands in force at this moment. The conclusion that we draw is this, that the tailzied investiture 1776 is annihilated; in particular, that the sale of the lands to Lord Medwyn is ratified by the right to the dominium utile of them being excepted in the tailzie 1809; that neither John Dickson the father, nor his son the pursuer, has incurred an irritancy under it; and that the latter and the other pursuers have no right to found on it, whereby the title on which they libel is a nonentity, and they must continue to abide by the tailzie 1809 in so far as concerns Lord Medwyn; and as to Mr. Cuninghame, his acquisitions are secured to him by judgments of this Court, against which there is no power of appeal. The pursuer David Dickson now says that his infeftment of the fee of the subjects in the tailzie 1809 has been reduced by a decree in absence by this Court. But this is of no avail, since, allowing every effect to that decree, the only consequence is, that his

Oct. 1, 1831. additional cases, " in respect the consulted Judges are of " opinion that the tailzied investiture 1776 is annihilated, and

---

father's infeftment on that deed remains in full force, whereby the investiture was completed, which altered that on the tailzie 1776.

2. Supposing that the foregoing is a mistaken view of the case, (of which we are not sensible,) and that the tailzie 1776 has not been virtually recalled, we are clear that the pursuer David Dickson, by accepting a right under the tailzie 1809, and infefting himself thereon, did incur an irritancy under that of 1776, in so far as he possessed on a different title from the latter entail, and one, too, altering the order of succession in it.

Q. 3.—Whether the irritancy, supposing it to have been incurred, has been purged?

A.—The pursuer David Dickson's infeftment of fee has been set aside by a decree in absence, which is only a recent measure, indicating that the whole pursuers understand each other, and allow temporary expedients to be tried to support their cause. We do not feel ourselves called on to say what effect this might have had if that step had preceded this action; but as this summons was raised, and the action decided in a contrary predicament of fact, we do not think that this ought to make any difference.

As to the renunciation of the right of fee, the least knowledge of feudal law must at once determine that it cannot take away a right of fee subsisting in the pursuer's person. Nothing short of a reconveyance, and that followed by sasine, on a charter of resignation or confirmation by the Crown, can divest the pursuer.

3. As to the sasine being null, owing to the notary's docquet mentioning that the instrument consisted of nine pages, we can pay no regard to such a plea. It is true that acts of parliament require the leaves, and an act of sederunt requires the pages, to be numbered 1st, 2d, 3d, &c., and that the notary's docquet shall mention the number of pages of which the sasine consists; but if the pages be numbered, and there be an innocent graphical or clerical error in the docquet, specifying the number of pages, which is demonstrated to be a mere clerical error both by the enumeration of the pages and the fact detailed in the docquet, none of the fore-mentioned acts, says the sasine, shall be null. Now each of the pages of the pursuer's sasine is numbered; and in his docquet the notary attests that there is an erasure in the seventeenth line of the eighth page, being the same on which the docquet is written, thereby proving that the word " octo " in that docquet is a clerical error for " septem." Indeed the Act of Sederunt, 17th January 1756, goes beyond the statute 1686, c. 17.

Q. 4.—Whether it is not jus tertii to the defenders to plead the irritancy, supposing it still to subsist; and whether they can plead it by way of exception?

A.—We are of opinion that the defender Lord Medwyn can plead the irritancy, and by way of exception. He stands in the right of General Dickson, whose absolute warrandice he possesses, and whose conveyance he holds in real warrandice to the very subject possessed by the pursuer in fee. Suppose that General Dickson had been alive, and the pursuer had raised against him a declarator of irritancy, founding on the tailzie 1776, it certainly would have been competent to the General to say to the pursuer, " How can you accuse me of a contravention of that entail, when you yourself " have set it at nought by possessing on a different deed, altering and virtually re-

" that the entail executed on the 18th of April 1809 has Oct. 1, 1831.
" been sustained by final judgment of this Court, and in the

" voking the investiture 1776?" We think this answer would have been sufficient to stop the action at the pursuer's instance; and if so, it must be equally competent to any one in right of the General. It would be incompetent to Lord Medwyn to pursue a declarator of irritancy against the pursuer, but it is competent to plead the irritancy by way of exception in bar of this action.

2. We think that the case of M'Culloch, May 17, 1826, decided by the Second Division, is precisely in point with this cause, and proves that the irritancy may be pleaded by exception.

Mr. Dickson, says that Mr. M'Culloch was the heir who had succeeded to the estate of Barholm; that he was the verus dominus, as the pursuer expresses himself; whereas the latter has not succeeded to the estate of Kilbucho, and is not the verus dominus. We consider this to be a mere evasion; he has taken the fee præceptione hæreditatis; he was infeft, and took possession, and was as much the verus dominus of the estate as he will ever be; only that it is burdened with a life-rent to his father, which in the course of nature must cease, leaving the pursuer's investiture precisely as it stands.

Q. 5.—Whether David Dickson is barred by homologation from insisting in this action?

A.—We think that he is, precisely as much as is his father, against whom he libels to have an irritancy declared. It is undeniably clear that the tailzie 1809 was executed by the consent of the pursuer's father, who got his brother thereby to divest himself of the fee of the remaining parts of Kilbucho, and who immediately ratified that deed by an investiture on it. After the General's death the pursuer's father conveyed the fee to his son, the pursuer, who was infeft therein, and enrolled as a freeholder of the county of Peebles. He is now pleased to renounce this fee, and to get a decree in absence reducing his infeftment. But will these ex post facto acts take away the ratification? Homologation is equal to a direct deed ratifying the act subject to challenge; and if the pursuer had by a deed ratified the tailzie 1809, surely his renunciation, and decree in absence reducing his infeftment, can have no effect. He has ratified a deed altering that tailzie on which he founds, and expressly recognizing Lord Medwyn's feu-right; and on that ratification Lord Medwyn is entitled to found, as much as the late General Dickson could have done.

Q. 6.—Whether the concurrence of the other pursuers is sufficient to obviate any objection against the title of David Dickson, upon the ground either of irritancy or homologation?

A.—We think that the concurrence of the other pursuers is not sufficient to obviate the objection to the pursuer's title. The conclusion of their action is, that the right of Lord Medwyn shall be reduced, and that the defender John Dickson shall be declared to have forfeited his right thereto, and that the same shall be decreed to belong to the pursuer David Dickson, who has forfeited, just as much as did his father. The case of M'Culloch, already referred to, is correctly in point; and, with deference, it appears to be inconsistent with justice to forfeit John, and award his estate to David, who has done the same deed that inferred forfeiture against John. Besides, we think that the very tailzie 1776, on which all the pursuers libel, was revoked by a deed which, by the House of Lords, has been decreed to have been within the power of General Dickson to execute, and the investiture 1776 was thereby annihilated.

Oct. 1, 1831.

" House of Lords, and so become the standing investiture of " the estate, whereby the pursuers are deprived of any title to

---

Q. 7.—Whether the remote substitutes are entitled, supposing the objection to the title of David Dickson to be sustained, to insist in all or any of the conclusions of the action?

A.—We think that this question is answered by what has been already observed on the preceding query.

ON THE MERITS OF THE ACTION.

Q. 1.—Whether the entail 1776 was an onerous deed? 2. Whether (supposing it onerous, or even gratuitous,) it was effectual to secure the estate against the subsequent acts and deeds of the late General Dickson? If so,

Q. 3.—Is Mr. Cuninghame's defence against the conclusions of the action in regard to the land comprehended in his father's purchase well founded—1. Upon the plea of res judicata; or, 2. Upon the merits of the proceedings in the action 1784?

A.—We unite all these queries, because we think they may be all answered at once. We think that the deed 1776 was beyond doubt onerous. None of the judges entertained doubts of its onerosity in 1784, when the question was agitated whether it was effectual or not; they only said that in point of law it was ineffectual, because General Dickson entailed the estate on himself, which, in their opinion, ought to have been done by the trustees, and not by the General. But, with regard to the lands sold off at the first sale to Mr. Cuninghame, that was done in conformity to a power in the tailzie to sell lands at the sight of this Court. An application was accordingly made to the Court, who granted to the pursuer power to sell certain lands specially described, and of which a rental was proved. The sale was accordingly made by the pursuer in terms of the power given him by the Court; and although it was his duty to report the sale to the Court, as he was ordered to do, his neglecting that duty could not affect the validity of the sale or the right of the purchaser. It is said that John Dickson, and other heirs of entail who had children, were called as administrators in law for their children; but they were interested to betray these children, on which account curators ad litem ought to have been appointed, which was not done, and therefore the proceedings quoad them are null. This is carrying matters very far indeed. We cannot discover any jarring interests which existed between the parents and their children—all were alike concerned in preserving the estate. If there were any minutiæ erroneous in the procedure, they fall under the rule of law that the objections arising on that ground were competent and omitted, and we are clearly of opinion that the res judicata protects Mr. Cuninghame's first purchase.

Q. 4.—Is Mr. Cuninghame's defence against the conclusion of the action, in regard to the lands comprehended in his father's second purchase, well founded on the ground of res judicata, or on any other ground?

A.—We are satisfied that it is protected by the res judicata, against which all the objections started by the defenders appear to us perfectly groundless. Whether the judgments were right or wrong it is of no importance now to inquire, for they are secured by lapse of time against the power of appeal.

Q. 5.—Is Lord Medwyn's defence against the conclusions of the action well founded on the ground of res judicata, or on any other ground?

A.—We do not see that Lord Medwyn can found on any res judicata, as there is no action mentioned in the proceedings to which he was a party, or in which the validity of his individual purchase was brought into question. But we have already

" bring this present challenge, and that the defenders should " be assoilzied; a plea in law arises, which hitherto has not

Oct. 1, 1831.

---

enlarged on an objection to the title of the pursuers, which intimately blends itself with the merits—we mean the plea that the tailzie 1776, on which the pursuers libel, was revoked and altered by the subsequent deed 1809; that the tailzied investiture 1776, in so far as it remained, was annihilated by a new one upon that tailzie 1809; that this was declared to be within the powers of General Dickson, as an unlimited fiar, to do, both by this Court and the House of Lords; that the last investiture is, therefore, the only title which the pursuers have to the estate; and since the General was an unlimited fiar, Lord Medwyn's purchase must be secure to his Lordship.

When we review the whole proceedings detailed in this action, and from them see that the defender John Dickson acted uniformly in conformity to the opinion and judgments of this Court—when we see that the tailzie 1776 was not considered to be binding on General Dickson, and that he was declared to have full power to execute the tailzie 1809, it is inconceivable to us that this Court can declare a forfeiture against him of his right to the estate; and his not opposing such a decree is evidence of a collusion between him, his children, and the other heirs by this action, to attempt to enrich themselves by an act of injustice to the defenders. Let the case of Agnew be admitted to have been well decided in the House of Lords, which we are bound to admit, still that judgment cannot be a precedent in this particular cause, which has precedents of its own. This Court and the House of Lords have both found that General Dickson had power to disregard the tailzie 1776, and execute that of 1809; and whether it is possible for the pursuers to reduce the entail 1809 or not, in spite of the precedents already mentioned, we do not think ourselves entitled to decide. It is sufficient that that entail is the subsisting investiture of the estate, homologated by the pursuers David Dickson and his father, to exclude the former and the other pursuers from founding on the tailzie 1776 in this question with Lord Medwyn; and we are of opinion that on the title, as blending itself with the merits, his Lordship ought to be assoilzied, with full expenses.

Mr. Cuninghame has renounced his objection to the pursuer's title; but it appears to us to be impossible for the Court to pay any regard to such renunciation, since Mr. Cuninghame's case must of course be decided partly on the principles which apply to that of Lord Medwyn. Mr. Cuninghame, no doubt, has the additional plea of res judicata, which, we think, is of itself alone sufficient to protect him on the merits; but he ought to be assoilzied from this action, not only on that ground, but on the whole, with full expenses.

Lord Newton subjoined this opinion:—I concur in the foregoing opinion in all that regards the objections to the title of the pursuers.

As Mr. Cuninghame has waived these objections, it becomes necessary in his case to give an opinion on the merits. Here I agree with the other judges, that the first purchase was made in conformity to the power of sale contained in the tailzie 1776, and that no irregularity has been pointed out which can affect its validity. The second sale, I also agree in thinking, is secure from challenge as a res judicata.

Being satisfied in Lord Medwyn's case that there is a valid objection to the pursuer's title, I think it unnecessary at present to enter on the consideration of the merits. Both defenders should be assoilzied, with expenses.

Lord Glenlee delivered this opinion:—The disposition of tailzie of 1809 by General Dickson in favour of his brother John, and the heirs therein mentioned, I understand

Oct. 1, 1831. " been stated by the parties, and upon which they are entitled " to be heard, if they shall be so advised."

---

to be inconsistent with and repugnant to the previous tailzie of 1776, and also that it bears an express obligation on John Dickson not to challenge the sales previously made by the general.

The validity of this last entail was sustained in this Court and in the House of Lords in a question between General Dickson and John. Whether it may be challenged at the instance of the pursuers of the present action, I need not consider, because in fact it has not yet been challenged by them. Neither it nor the subsequent charter 1815 is called for in the summons; and although indeed a forfeiture of John Dickson's right under the entail of 1776 is concluded for, yet there is no conclusion for having his right to possess under the deed 1809 also extinguished.

This being premised, it appears to me, in the first place, that as matters stood when the petition and answers came to be advised formerly, the pursuer David Dickson, by accepting and acting in the manner mentioned in the papers under the deed of his father John, propelling to him the succession under the new tailzie of 1809, had lost all title to pursue in the inconsistent character of heir under the tailzie 1776; and, in the next place, it appears to me, that although, his father being still alive, he cannot be said to have incurred the proper passive title of præceptio, yet even now he is debarred from challenging those sales which, by the deed 1809, his father, who has propelled the succession under it to him was expressly bound not to challenge. I think these exceptions also bar the other pursuers from insisting in the libel as laid, because it concludes that the lands of which the sales are challenged should be found to belong to David Dickson. There is no separate and independent conclusion in favour of the other pursuers themselves.

I think that it was competent for the defenders to found on the deed 1809, and on the pursuer's having accepted and used his father's deed propelling the succession as above mentioned, and that the pleas thence arising were available to them by exception; and I see nothing in the Ordinary's interlocutor which barred them from insisting on these pleas in their answers to the pursuer's petition.

As the cause stood, therefore, when the petition and answers came to be advised by the First Division, and a remit, in which I understand there was some informality, was made to the other judges, requiring their opinions, I think that, on the grounds I have stated, the process fell to be dismissed.

With respect to the steps which, in order to obviate the objections stated against him, have been taken by the pursuer David Dickson since the cause was formerly before the First Division, I think it needless to inquire, and indeed I have formed no opinion as to what effect they might have had if taken before the action was raised, or even tempestive before it had made any considerable progress, because I think they were taken at so advanced a period of the litigation, and under such circumstances, that no regard can be paid to them in the present process.

According to the opinion above expressed, I certainly do think it altogether unnecessary to say any thing on the other questions which are discussed in the papers. The remit, however, bears that regard is to be had to Mr. Cuninghame's minute, waiving on his part all objections to the title. Now Mr. Cuninghame has defences peculiar to himself, and distinct from others which apply to both defenders—namely, his plea on the proceedings in 1784, in as far as concerns the first purchase, and his plea of res judicata in as far as concerns the second purchase, and I am of opinion that those pleas are well founded. I think, in expressing this opinion, I

In reference to this new plea, the pursuers (who denied that there was any understanding between them and John Dickson) maintained— Oct. 1, 1831.

1. That as the object of the action by General Dickson in 1814 was to set aside the entail of 1809, on the ground that it had been obtained by fraud and deception in representing to him that he was bound by the deed 1776, and as the defenders in that action had been assoilzied, it was impossible to found upon the judgment to any other effect than as negativing the allegation of fraud; and therefore matters stood precisely as if no such action had been raised, and no such judgment pronounced; and,

2. That as the lands sold to the defenders were specially excepted, and consequently excluded from the effect of the entail 1809, they could not be affected by any judgment pronounced respecting the validity of that entail, but remained subject to the effect and influence of the entail 1776, which therefore, quoad them, was the subsisting investiture.

On the other part, it was contended by Lord Medwyn, that as it was undoubted that the entail 1809 was in direct violation of the deed 1776, and as it was impossible, if the party in possession under the latter of these deeds had not had power to execute that of 1809, the Court could have found that he had so; and as the Court expressly adhered to the judgment of Lord Balgray, finding that "so far as he (the General) is con-" cerned, he had the power to execute the deed of entail dated " 28th April 1809;" and as this judgment had been affirmed by the House of Lords, it necessarily followed that the entail 1776, on which this action rested, was annihilated, and consequently the title of the pursuers destroyed.

The case having been again remitted for the opinions of the other Judges, they returned the subjoined opinions.*

---

sufficiently obey the requisition in the remit in regard to Mr. Cuninghame, and that I am at liberty to abstain from saying any thing at present as to other questions, on some of which I have not in fact made up my mind.

* *Lords Justice Clerk, Glenlee, Pitmilly, Alloway, Cringletie, Meadowbank,* and *Mackenzie* transmitted this opinion: — We have considered the cases offered for these parties, with the former procedure and remit by the Lords of the First Division to us, with the speech of the Lord Chancellor and judgment of the House of Lords in the Barholm case.

Oct. 1, 1831. When the case came to be advised, the Judges, with the exception of Lord Craigie, concurred in the subjoined opinion,

---

In our former opinion we referred to the case just mentioned as a precedent in point, and we have additional reason to be confirmed in our ideas by the affirmance of the judgment therein by the House of Lords.

It is pleaded by Messrs. Dickson that the investiture under the tailzie 1776 was not recalled by that in 1809, in so far as respects the lands sold to Mr. Cuninghame and Lord Medwyn; but we consider this to be a mistake.

In the first place, one of the sales to Mr. Cuninghame was made in virtue of powers contained in the tailzie 1776 itself, and under the authority of this Court; and the second sale to that gentleman was, to a small extent, sanctioned by a judgment of the Court, long ago final, and beyond the reach of challenge even by appeal. There can therefore be no doubt that these sales have annihilated the investiture of 1776 to the length that they extend.

With regard to the sale to Lord Medwyn, the deed of entail by the late General Dickson proceeds on the narrative, that, notwithstanding of the tailzie 1776, he had sold a considerable "part of the said lands and estate (viz. Kilbucho), and thereby be-
"come liable to a declarator of contravention of irritancy at the instance of the said John
"Dickson, which he might now raise against me. But whereas the said John Dickson
"has, for my accommodation, agreed not to object to the sales already made of part of
"the foresaid lands for payment of certain debts contracted by me, nor to pursue any
"action of declarator of irritancy against me, upon condition of my granting the deed
"underwritten;" he therefore granted the entail 1809, which contained a different order of succession from what was in the deed 1776; and, secondly, it referred to the sale made to Lord Medwyn, as it contained an express reservation of the feu-right granted to his Lordship, and entailed the superiority only of these lands. On this entail Mr. John Dickson was infeft, and in 1815 he propelled the succession to his son David, the pursuer, by conveying to him, inter alia, the fee of the lands that had been sold to Lord Medwyn, with the exception of the feu-right in his Lordship's person; and having disponed to himself in life-rent, both father and son were enrolled in the roll of freeholders for the county of Peebles for their respective rights of life-rent and fee of these lands purchased by Lord Medwyn.

Thus we consider that the investiture of 1776 was recalled, and annihilated also, with respect to the lands sold to Lord Medwyn, as well as those disposed of to Mr. Cuninghame. The deed 1809 ratifies the sales, because it proceeds on the narrative of them, and makes the non-challenge of them the condition of granting the deed; and further, it ratifies the sale to Lord Medwyn, by acknowledging the feu-right in his person, and the pursuer ratified that deed by taking possession under it.

2. We think that the deed 1809 is in contravention of the other in 1776, if the same could be said to be still in existence, for the former contains a different order of succession from that in the latter, and any alteration was prohibited under the sanction of irritancy and forfeiture of the contraveners. It also prohibited alienations of the whole or any part of the estate; it contained likewise a condition that the heirs should possess the estate under that tailzie alone, and by no other right—all under the sanction of forfeiture in case of contravention. But, as already mentioned, the tailzie 1809 ratified the sales made in contravention of that in 1776; and the pursuer and his father both repudiated the deed 1776 as their title of possession, and expressly made up their investitures under the tailzie 1809.

and thereupon the following interlocutor was pronounced:— Oct 1, 1831.
" The Lords having resumed consideration of the reclaiming
" petition for David Dickson, Esq. and others, answers thereto
" for John Cuninghame, Esq. and for the Honourable John
" Hay Forbes (Lord Medwyn) respectively, and advised the
" same, with the summons, defences, and the several mutual
" revised cases, and whole pleadings of the parties upon the
" merits; and having particularly considered the opinions of
" the other Judges consulted therein, in terms of the act of
" parliament, in which opinions there is suggested an objection
" to the title of the pursuers, founded on an annihilation of
" the entail 1776 by the judgment of the House of Lords
" sustaining the entail of 1809 as valid and effectual; and
" having heard the counsel for the parties in their own
" presence; and having also considered the deed of renunciation
" executed by the pursuer on the 12th of January 1824, and
" recorded in the register of renunciations on the 12th of
" March 1824; and having further considered the terms and
" conclusions of the summons, and other procedure, particularly
" the subsequent opinions of the other Judges consulted in the
" whole cause, in terms of the act of parliament; find that the
" defender John Cuninghame, Esq. is entitled to take the

Nothing, then, can be clearer than that if the pursuer David Dickson's father had contravened the tailzie 1776, the pursuer had, when the present action was instituted, equally done so. He then stood infeft on the entail 1809, and yet he founds on that in 1776, which expressly declares that he shall possess upon it, and it alone, under the penalty of forfeiture. He is therefore in the same situation in which Mr. M'Culloch stood in pursuing a reduction of deeds under an entail which he had repudiated, and must therefore have a similar judgment applied to him.

With regard to the other pursuers, they too are situated precisely as were a number of the pursuers in the case of Barholm. " They (as the Lord Chancellor observes
" in that suit) in fact adopt, as far as this cause is concerned, that which is done by
" Mr. M'Culloch. They adopt his disclaimer, and join in his prayer that the pro-
" perty may be adjudged to the pursuer;" and therefore his Lordship thought that this Court " were perfectly correct in considering that the situation in which these
" other pursuers stood did not differ from the situation in which Mr. John M'Culloch
" himself stood."

We are of opinion that this judgment is strictly applicable to the present cause. As Mr. Dickson himself has contravened and indeed repudiated the deed 1776 in so many ways, he cannot have any right to claim under it; and the other pursuers, by desiring that he shall forfeit his father, and take the estate, cannot bestow upon him any additional title.

Oct. 1, 1831.

" benefit of the objection which has been suggested as aforesaid " to the title of the pursuers, and sustain the said objection " accordingly: Find, on the merits, that the first purchase was " made in conformity to the power of sale contained in the " tailzie 1776, and that no irregularity has been pointed out " which can affect its validity, and that the second sale is " secured from challenge as a res judicata; and so far as " regards the other defender Lord Medwyn, that the entail " 1776 cannot be held as a valid and effectual limitation of the " right of the late General William Dickson, the author of the " pursuer, and repel the reasons of reduction which are founded " on a contravention of the said entail: Find, separatim, that " even if that entail could be held to be the subsisting investiture " of the estate of Kilbucho, the principal pursuer, David Dickson, " Esq., by making up a title, and possessing under the entail " 1809, which is inconsistent with the entail 1776, would be " barred from maintaining any action upon the latter deed, " and that the objection to his title to pursue is in no respect " removed by the renunciation executed by him, or any other " proceedings that have taken place pendente lite; and find " that the other pursuers are in like manner barred from " insisting in the conclusions of the present summons: There- " fore refuse the desire of the reclaiming petition, and adhere " to the Lord Ordinary's interlocutor reclaimed against; and " of new sustain the defences, repel the reasons of reduction, " assoilzie the defenders from the whole conclusions of the libel, " and decern; and find the pursuers liable to the defenders in " expenses."*

Dickson and others appealed.

Appellants.—1. *Annihilation of Entail of* 1776.—The action of reduction of the entail of 1809 was neither calculated nor intended to try the question as to the validity of the entail of 1776. The sole question was, whether the entail of 1809 had not been obtained by fraud; and although this allegation of fraud was negatived by the Court, and so the deed of 1809 held

---

* 7 Shaw and Dunlop, 503.

Oct. 1, 1831.

unobjectionable in that respect, the judgment could not have the effect to substitute the entail of 1809 for that of 1776. But supposing the judgment could be so construed, it cannot apply to lands not included in the entail of 1809. Those remained subject to the limitations created by the deed of 1776. But those in question were conveyed away prior to the execution of the deed of 1809, and consequently could not and were not embraced within it.

2. *Title to pursue.*—Independent of the preceding plea, it is said that the appellant David Dickson, by taking infeftment on the conveyance in 1815 in virtue of the entail 1809, has incurred a forfeiture under the deed of 1776 libelled — has homologated the entail of 1809; and that the claim of the other appellants being made to depend on and to flow from the sustaining of his title, they have no valid title to pursue.

But first, this plea is too late, because the judgment of the Lord Ordinary, being on the merits, necessarily assumed the validity of the title to pursue; and as the respondents acquiesced in that judgment, they cannot now object to the title. Second, the entail 1776 refers only to those heirs who have succeeded to the lands by virtue of it, whereas the appellant David Dickson has not done so, and indeed one of the pleas of the respondents is, that the entail of 1776 is altogether annihilated. Neither can it be maintained that he has succeeded præceptione. If, again, reference be made to the sasine of 1815, then the answer is, that it is ex facie null, has been renounced, and has been reduced. Besides, the respondents have no title to make the objection; and even if they had, the only effect should be to dismiss the action, but not to assoilzie from the reasons of reduction. In the case of M'Culloch the deed creating the irritancy was libelled on, and therefore the defender was entitled to plead on it, but here it is not so. Neither are there any relevant facts alleged to bar the title by homologation. This necessarily proceeds on the supposition that the appellant was not originally bound, but that by his acts and deeds he has bound himself. This is rested mainly on the sasine of 1815, and the subsequent acts as a freeholder. But that sasine is a nullity, and is renounced; and the voting as a freeholder can never be held to import an homologation of a sale which had no necessary connexion with the exercise of such a right. At all events, the

Oct. 1, 1831.

remoter substitutes who are claiming rights peculiar to themselves ought not to have decree of absolvitor pronounced against them in respect of acts done, not by them, but by David Dickson.

3. *Onerosity of the Entail.*—The majority of the consulted Judges were of opinion that the entail 1776 was onerous, and therefore they ought, according to the rule established in the Sheuchan case, to have given judgment in favour of the appellants. Proceeding, however, on the assumption that the decision in that case was not law, the Court below refused to give effect to the rule laid down by this House—a proceeding of the most dangerous tendency in all cases, and one resting on an erroneous conception of the principles which regulated the judgment in that case. The admission that the deed was onerous leads to the necessary result, that thereby a jus crediti was constituted in favour of those having right under the deed, and the sasine taken thereon converted that right into one of a real nature, which could not be defeated except by their express consent. In the present case the facts clearly establish the onerosity. Mutual claims had arisen between David and William Dickson, and formed the subjects of actions in Court. A decree of a Court would unquestionably have constituted in favour of the successful party an onerous right, enforceable by the diligence of the law. But in place of litigating in Court, the parties referred the subject matter of the disputes to the decision of arbiters, who issued a decree arbitral, in obedience to which the entail of 1776 was executed, recorded, and infeftment taken. It has been said, that neither the trustees nor the substitute heirs were parties to the submission; but that circumstance cannot affect the question of onerosity. Rights may be acquired not only directly but indirectly, and on this latter principle all the class of cases under the head jus quæsitum tertii is founded. In the Sheuchan case heirs not in existence were found entitled to avail themselves of the plea of the onerosity of a contract to which they could not possibly be parties.

4. *Res judicata.*—This plea is peculiar to Mr. Cuninghame, and rests on the assumption that whether the entail be onerous or not, his right is complete. But the proceedings were altogether incompetent, and irregular. In the first action the

judgments were not only in absence of the minor children, but they were not properly cited, and those who took it upon them to appear for their behoof had a manifest adverse interest. Besides, the sale was neither in term of the entail nor of the conclusions of the summons. Both of these referred to a sale by public auction; but in place of that the sale was made privately, and at a time when the process was asleep. The minor children thereby suffered lesion, the lands having been sold for debts not warranted, others having been undervalued, no credit given for rents arising during the process, no price paid for superiorities which constituted a valuable estate, warrant granted to sell to a greater extent than was necessary to pay the debts, lands sold accordingly, and the surplus not applied to the benefit of the heirs of entail. The second sale was equally objectionable, was altogether collusive, and Mr. Cuninghame was a party to the collusion. Oct. 1, 1831.

Respondents. — 1. *Annihilation of Entail* 1776.—It is impossible that two entails containing inconsistent destinations and provisions can subsist at one and the same time in relation to the same estate. But the entail of 1809 is in various respects directly at variance with that of 1776. By the judgment of the Court of Session in 1814, affirmed by this House in 1820, the validity of the entail of 1809 was sustained, and therefore that of 1776 was necessarily annihilated.

2. *Title to pursue.*—The appellants found their title to pursue the present action on the entail 1776; and as it is competent for a party whose rights are attacked to inquire into the validity of the title in virtue of which his assailant attacks him, so the respondents, although not heirs substitute, are entitled to show that the appellants have no right under the deed 1776. If they were seeking to set aside the appellant's title, the plea of jus tertii might be available, but such a plea cannot be stated against a defender to the effect of preventing him from investigating and objecting to the title of his opponent. Now it is admitted that the leading appellant, David Dickson, made up titles to the fee of the estate under the entail of 1809, and it cannot be disputed that the effect of doing so was to forfeit all right he had under the deed of 1776; indeed so sensible is he of this, that he has attempted, pendente lite, to remove the objection by

Oct. 1, 1831.

renouncing and setting aside his rights under the entail 1809. But this cannot avail him, for the objection to the title must be judged of as it existed at the time when made. Having therefore incurred a forfeiture of his rights under the entail 1776, neither his title nor that of the other appellants (whose rights are made to be dependent on his) can be sustained.

Farther, the appellant, David Dickson, is barred by homologation from objecting to any of the sales. They were made under the entail 1776, and he was in the full knowledge that the deed of 1809 had been sustained as valid, notwithstanding the previous entail. In this knowledge he took the fee of the remaining parts of the estate under the deed 1809, and in virtue of it engaged the rights and privileges of fiar and of superior of the lands in question.

3. *Onerosity of Entail.*—The entail 1776 was not onerous. A family dispute had taken place between David and General William. The lands were vested in the trustees of John, and their right was unchallengeable. David and the General then referred the question as to the arrangement of their family disputes to mutual friends; and they, under the form, but merely the form, of a decree arbitral, adjusted these disputes. Neither the trustees nor the heirs substitutes were parties, and consequently could not be bound by any thing done by the referees. Although, therefore, the referees took upon them to suggest (for they could give no effectual decree) that the deed of 1776 should be executed, yet this did not make it any more onerous than if it had been spontaneously executed by the maker.

Even if it were onerous, it could not prevent the estate from being sold or adjudged for the debts of the General. It is true that a decision to this effect was pronounced in the Sheuchan case; but it is a solitary decision, and is at variance with the established law of Scotland.

4. *Res judicata.*—The respondent, Mr. Cuninghame, made two purchases; the first was under a provision in the entail 1776 itself, and it was in every respect regularly carried through The appellants have, by confounding actions of ranking and sale (which are regulated by statute) with an action brought in virtue of a provision in the entail, raised up various objections in point of form. These, however, are quite irrelevant, and are unfounded both in fact and law. The minor heirs were called;

their fathers, as administrators in law for them, made appearance, and except by imputing to them a possibility of acting fraudulently, it cannot be alleged that they had any adverse interest. Oct. 1, 1831.

In regard to the second sale, the question as to its validity was tried in the declarator, and the relative suspension presented by Mr. Cuninghame. The Court found that he had no just defence against payment, and in consequence he was compelled to pay the price. This is plainly a complete res judicata.

The respondent, Lord Medwyn, is also entitled to the benefit of the same plea, because as the decision was pronounced in an action with the parties from whom he derived right, and as they would be entitled to found it as res judicata, so he must likewise be entitled to do so.

Lord Chancellor.—My Lords, this case of Dickson v. Cuninghame is one of the greatest importance and anxiety which I have ever been called upon to advise your Lordships upon since I have had the honour of holding my present situation. It is not that I have formed an opinion upon the subject with any great hesitation, or that I have found my way towards that opinion beset with any considerable difficulties; but it is because the opinion I have formed, so far as it goes to sanction the judgment of the Court below, may at first sight, without due explanation, and without proper consideration of the particular grounds whereupon it stands, appear to shake in some degree one of the most important decisions that ever was pronounced in this Court of appellate jurisdiction in any case of Scotch law. The case to which I allude is commonly known by the name of the Sheuchan case, a case decided with the greatest deliberation; and I must say, I should indeed have taken a very long time before I could make up my mind to do any thing that could throw discredit upon that important decision. I should indeed have found the path by which I arrived at any such conclusion beset by almost insuperable difficulties, and I should have been very far indeed from stating to your Lordships that I felt entire confidence in the conclusion I had reached. It therefore becomes necessary at present, and it is indeed the only task which now devolves upon me, to satisfy your Lordships, as I have satisfied myself, that the Court below might well decide this case as they have done, and that I may well advise your Lordships to affirm their decision without in the slightest degree affecting the law as determined in the case of Sheuchan. It will be unnecessary for me, I

Oct. 1, 1831.

apprehend, to preface the opinion I am about to deliver to your Lordships by any minute statement of the facts and circumstances of this case, because agreeing with the judgment below, I shall not argue the case at large, but shall confine myself to indicating wherein the two cases differ, in order that the affirmance of this decision may not for a moment be supposed to shake that. I perhaps shall not be happy enough to agree in all respects with the arguments of the learned Judges in the Court below; but at all events I come to the same conclusion with them, and by that conclusion the result of my judgment leaves the Sheuchan case rather supported than disaffirmed.

The question here is, as in the Sheuchan case, generally speaking, how far the person in possession and the owner of an estate in Scotland can so deal with it as to tie up himself, and to defeat the claims of subsequent creditors, by any deed in the nature of an entail? It is to the different forms in which that general question may be put, and the different circumstances in which it may arise, alone, that I am now to call your Lordships' attention; because the other objections with respect to the title to pursue, the res judicata, and so on, I do not touch upon. This being the important ground, and this being the ground on which I cannot altogether agree with some of the Judges in the Court below, it becomes necessary for me, in protection of the decision of this House, to state my opinion at somewhat greater length than I am used to do when moving to affirm. My Lords, if I were to judge from what I see in print, I should certainly have been disposed to say, that the learned Judges in the Court of Session still adhered to the opinion which they maintained when the Sheuchan case came before this House. I should say, when I find so many of the learned Judges of the Second Division using the expressions which are reported, that they yielded a reluctant assent to that judgment. When I look to these observations upon the great and important question in the case, namely, whether the deed is onerous or gratuitous, when I find those learned Judges all with one voice saying that it is clearly onerous, and when I find that, notwithstanding it being an onerous deed, they hold that it is incompetent to exclude the diligence of subsequent creditors, it seems to me a little difficult to take both of those propositions — both of those results together, and to allow them both to stand, and the judgment, which was the fruit of both, to stand, while the Sheuchan case remains unimpeached; because, that is as much as to say, that, be the entail ever so onerous, be it ever so little a gratuitous disposition, an onerous deed duly recorded, according to the provision of the Act of 1685, has no power to tie up, against contracting debts de futuro, the institute or person to whom the fee is conveyed by the force of the provisions of the deed; and that, my Lords, is a proposition

which I cannot go so far as to maintain, if I hold, as I am determined to hold till an act of parliament forbids me, to the Sheuchan case. Now, my Lords, that the Judges of the Court in Scotland have in considering this question hankered after the establishment of the doctrine they had laid down previous to the Sheuchan case being decided, I cannot entertain a doubt, for the reason I have now given; but this opinion of mine is very strongly confirmed by the treatment which I find was given by those very learned persons in the Court below to the decision pronounced by your Lordships, at least to a remit by your Lordships, in that very Sheuchan case, after a very plain indication of the opinion of this House had been flung out by a noble and learned Lord, a member of this House. It certainly did so happen, that, when that went to the Court below, the Judges remained pretty nearly of the same opinion which they had held before, which I do not blame, nor do I commend; but I state it as a fact. My Lord Justice-Clerk says, "It is quite "clear that, on attending to the terms of the entail, or rather of the "contract of marriage, and deed of entail therein contained, between "Mr. Vans and Mr. Agnew in 1757, that deed cannot be counte-"nanced for one moment, so as to deprive the creditors of their "right of proceeding against the estate of Barnbarroch. On looking "at the terms of the deed, though it is a mutual entail, and though "there is, in regard to Mr. Vans, the introduction of the word sale "in that part of the deed, it is clear there is no foundation for the "argument that the estate had been purchased by Mr. Agnew, or "that it is to be held as an acquisition by him; for even, with regard "to the word 'sell,' Mr. Vans 'sells,' &c. to himself and the heirs "called to the succession. I can pay no attention to such an argu-"ment in reference to the creditors. By no contrivance whatever, "even if it were deliberately intended to contrive a mutual contract "for that purpose, could this gentleman's estate be withdrawn from "the claims of his lawful creditors. This is a proposition requiring "no argument, as it is supported by the whole law of Scotland. "Looking at the state of his affairs, there were large debts owing by "him at the time. Though the operation of recording the deed of "entail was immediately carried through, yet, down to 1775, there "was no alteration in the titles of Mr. Vans, but he just continued as "the fiar of the estate. Then came the proceedings in this Court "in 1784, and the question was, whether the entail could be set aside? "The Court found that it could not be set aside; but that is qualified "with the finding, that the estate continued affectable by all the "debts due by him, and of course with the interest. The only question "that remained was the amount of the debts. These debts were made "out in a satisfactory manner, and at last an act of parliament was

Oct. 1, 1831.

Oct. 1, 1831.

" obtained, which comes more properly to be considered in the other " case. But as to the main question here—as to the powers of this " party to withdraw his estate from his creditors by the deed of entail— " I have no doubt." Then he proceeds to argue to that effect. Then, in concluding, his Lordship says, " I am for pronouncing a judgment " now in ipsissimis terminis of the former judgment, especially when " we recollect how the case was conducted; it was at least as " well argued and determined as it can be now by the greatest " abilities that ever sat on this bench." Then we have my Lord Robertson's opinion—a very learned opinion—the opinion of a great lawyer, the opinion of a most able judge, and of whom I shall have occasion to speak more in a subsequent part of my observations. Upon the whole he repels the defences, but it is upon the ground that the irritant and resolutive clauses are not sufficient to tie up the parties' hands. That is perfectly a different ground from the one on which the rest of the Court decided; it is a perfectly different ground from that which the ultimate decision of this House negatived, and it may stand with the decision of this House; for the proposition, the contrary of which was pronounced by this House, was, that by no irritant and resolutive clauses, however artificially framed—however strictly, according to the act of entail in Scotland, and the practice of conveyancers there—that by no such means could a person take to himself the fee by an onerous deed, so as to exclude a subsequent creditor. If the irritant and resolutive clauses were not sufficient, quod voluit non fecit, the deficiency was not in the power, but in the act; he had the power to defeat his subsequent creditors, but the means he had taken to defeat his creditors failed him. Lord Glenlee comes back to the Lord Justice-Clerk's view of the case:—" For my own " share, it is inconceivable to me how any one can doubt the pro- " priety of the judgment formerly advanced;" and then he says, " No such thing was necessary for enabling him to tie up himself. " There is a great extravagance in this idea. If that was the only " argument omitted formerly, I am not surprised that it was omitted, " for I dare say such an argument never occurred to mortal man " before." Now, I have the greatest respect for this very learned Judge, but that is not consistent with the fact. The argument may be right or may be wrong if it did occur; but I can show your Lordships that there are very great lawyers to whom it did occur, and among them one of the greatest writers in Scotland, whose opinions I have read, and whose doctrine is precisely that which Lord Glenlee says never occurred to mortal man before. We then have the opinion of Lord Craigie:—" I am entirely of the same opinion. I " think, not only that the irritancy was not properly against Mr. Vans, " but that he had always the fee of this estate," which, it must be ob-

served, does not much touch the question. "It is far different from "the case of an institute, who takes it qualified from the proprietor. "Mr. Vans had the right of property, and it was never taken from "him." But that is just the question, namely, whether it was taken from him by conveyance to himself and his wife for a valuable consideration? Oct. 1, 1831.

When, therefore, I find so great a disposition on the part of the learned Judges to cling by the first decision in 1784 against the intimation contained in the judgment of the Court of Appeal on the first branch of this case, that fortifies me in the opinion I have expressed, that the judgment of the Court below in this case was all but intended as an impeachment of the authority of the judgment of this House in the Sheuchan case. I have tried all I can to avoid arriving at this conclusion. I have strained every point, so far as I could, consistently with a due regard to the truth of the case, and I have done so on account of my great respect for the Court below, to see whether I could discover that the learned Judges pronounced this decision, having a due regard to the authority of the Sheuchan case; but although, in express words, they do not set it aside, I cannot discover that it was possible for them to rest the present judgment upon the grounds whereupon they have rested it, and to have felt all along that they were not impeaching the decision of that case; and sure I am, my Lords, that if I simply, according to the former practice, moved an affirmance, without any reference to the Sheuchan case, that case would probably next year in the Court below be deprived of the authority to which it is clearly entitled from the great learning, and the extraordinary sagacity brought to bear upon it, as it was on almost every case, for many years during the time that Lord Eldon and Lord Redesdale assisted your Lordships in this House. My Lords, this brings me to say one word more resepecting the Sheuchan case upon its own merits. I find it stated in the able argument in the respondent's case — "The respondent is sensible of the difficulty "which he has to contend with in maintaining this last plea in consequence of the judgment of this most honourable House in the "well-known case of Sheuchan; and while he regards with the most "unfeigned respect a judgment pronounced in the highest court of "judicature, he at the same time with the utmost deference trusts, "that if it can be shown to be at variance with those principles "of law which had been long considered settled in Scotland, your "Lordships will not regret that an opportunity has occurred for its "reconsideration;" the effect of which is this, that though the deed is onerous (and they cannot maintain that it is gratuitous), yet admitting that it is onerous, they have a right to a judgment here, affirming the judgment below. Now, I perfectly agree with the

Oct. 1, 1831.

learned counsel when he says that; and I feel no doubt that he is sensible of the difficulty he has to contend with in maintaining this last plea in consequence of the former judgment of this House, and he does not evade the point; nay, he reminds us of what Erskine says, that a judgment of this House is not an act of parliament—that your Lordships, in deciding appeals, act in the character of judges, and not of lawgivers; that the House of Lords, in the same manner as a court of law, deals but with the particular case in hand, and that it cannot introduce any rules binding upon itself in another case. My Lords, I take that proposition to be admissible only with a qualification. The decision of this House is not of such binding force, any more than that of the Court below, as to preclude the House, in a case of precisely the same kind between different parties, taking a different view of the law, or of the inference, in point of fact, to which particular circumstances may lead. I suppose a case to arise between A. and B., and that case to be decided, and then a case to arise between C. and D. of precisely the same nature; there is no doubt that the result of the consideration of the facts in the second case, the conclusion of fact might be different, and that, on the question of fact, the Court might come to another result. Take a case as to the rights between two persons, A. and B., standing in the relation of principal and agent, and that then a case arises between C. and D.: that the selfsame facts are presented, or only varying in some very minute particulars; there is no doubt that the Court which had decided, as between A. and B., that agency was not established, might, as between C. and D., come to a different conclusion, affirming the agency which they had denied before upon the same facts; and, secondly, they might come to a different result, in point of law, with respect to the obligations attaching upon agency. That is perfectly true, no doubt; but nevertheless it is not correct to lay down as a general rule that a decision of this House on a matter presented to it in its appellate character is not binding upon it. The House is not bound by it as by a law, but it is its endeavour, as it is its duty, to decide consistently with former decisions, as it is the endeavour and the duty of every court to adhere to the same principles which it has before laid down—to favour rather than to exclude that which has been established, and always to preserve an uniformity of decision. If an error has been committed—if a slip has been made—if a plain oversight has happened—if in any way a mistake, either in conclusion of fact or inference of law, has been made, God forbid that this Court, any more than any other, should not be open to the reconsideration of the case, and, if manifest error has been committed, to the setting it right. But it is equally true that until it shall be shown to be clearer than day-light that error has been committed in a decision

which has been made, especially where time has elapsed, under the impression that a certain rule of law prevailed, and where a certain legal principle has been sanctioned by the decision of a court of competent authority, and parties have acted upon the faith of that being right, and property has been invested, and rights have been dealt with, on the presumption of that being law, it is clear that it would be wrong to undo all which had been done during the interval, for the purpose of reverting to a technical nicety and accuracy of decision. It might be a great deal more mischievous to regain the position which had been lost than to proceed on the rule laid down, though erroneously; and upon this principle it was distinctly said by Lord Mansfield, in a well-known case in the Court of King's Bench, that if conveyancers had for a great many years understood that which was drawn into question to be the law, it would be better that it should remain, even although somewhat in error, if it was considered to be a settled rule of law, and not be shaken for the purpose of making it better than it had been. So much, my Lords, with respect to the authority of the decision, barely as a decision; but I have said, if there should appear to be a manifest error, the setting that right could not be attended with any great evil. Under such circumstances it is fit the case should be reconsidered, and the former decision, which had been of binding force, rectified; but, my Lords, having well known the Sheuchan case formerly—having assisted in arguing cases which were affected by it—having assisted in advising on cases in which the authority of that case came in question, and having since given it more consideration—having thoroughly investigated the particulars of it, and the grounds of decision in which the Court here differed from the Court below—I am clearly of opinion that it is not more to be respected out of a consideration for the very learned persons who advised your Lordships at the time than it is to be respected for the reasons in the judgment—the irrefragable reasons of Scotch law, distinctly Scotch law—the purely technical reasons, as well as the general reasons and principles on which my learned predecessors rested it. My Lords, I have read most carefully the judgment pronounced by my Lord Eldon in that case, in which, after a most anxious discussion of the facts, he refers to the venerable authority of the great Scotch lawyers who had assisted in framing the Agnew and Vans settlement, the mutual entails by them settled, and the opinions of those learned persons, which happily are preserved. Now, my Lords, the opinion of a counsel, even if he afterwards ascends the bench, I admit not to be a competent mode of obtaining the law of the country. It perhaps may be a little less objectionable, when we are dealing with the law of a foreign country, to have recourse to such matters; but Lord Eldon, having fortified himself with those opinions,

Oct. 1, 1831.

Oct. 1, 1831.

did not rest only upon them. I should have felt, perhaps, some reluctance to open the door to that mode of ascertaining the law, but after it has been opened by Lord Eldon I cannot avoid taking advantage of the information that has come in through it; and I find the decided opinions of Sir Ilay Campbell, possibly Lord Braxfield, though that does not appear quite so clear,—certainly Mr. Maclaurin, afterwards Lord Dreghorn, and Mr. Crosbie, one of the most able and learned Scotch lawyers, a man of the highest authority in those matters; and not only one opinion of Mr. Maclaurin and Mr. Crosbie, but a second opinion, upon reconsideration; and, first of all, they do show that Lord Eldon did not introduce a great innovation into the Scotch law in differing from the judges who decided in 1784, and afterwards in 1824 adhered to that opinion. Thus I certainly must at once deny the proposition, that he differed from all the Scotch lawyers, and proceeded without any Scotch authority. There has been no judgment on real property ever pronounced by this House which appears to me less open to the imputation of having been either a rash and ill-advised judgment, or a judgment on Scotch law, proceeding on English principles. Such an imputation I remember to have heard cast on the decision of this House in the Queensberry case, which I, on behalf of my client, when at the bar, resisted, but which decision, notwithstanding that imputation, has been maintained, and is now the prevailing opinion of good Scotch lawyers. But the present case is liable to no such imputation. It might there be said, that considering the total difference of principles upon which a Scotch and an English estate were held by an institute under a Scotch entail and a tenant for life under an English settlement,—considering that those fundamental principles of the Scotch and English law are not only different, but almost wholly opposed,—our English lawyers had in the Queensberry case introduced somewhat of the English principle; but the judgment in the Sheuchan case stands as entirely free from any possibility of such suspicions as if there were no such country as England, and no such system of jurisprudence as the English,—as entirely as if the judge who recommended its adoption had been still in Scotland and had never crossed the Tweed. Sir Ilay Campbell, a great authority in that law, afterwards President for so many years of the Court of Session, seems to entertain no doubt whatever on that transaction. He first says he apprehends it "to be clear that it was an onerous transaction, which neither "party could afterwards defeat, except by mutual consent. By the "clauses of limitation recited in the memorial I apprehend that the "memorialist's father, that is John, was tied up from contracting "debts to affect either the estate of Sheuchan, or his own original "estate of Barnbarroch, as the clauses expressly relate to him, as

" well as to the heirs after, and are prohibitive, irritant, and resolu- Oct. 1, 1831.
" tive;" differing certainly from Lord Robertson, who, upon that ground, appears to have joined with the other Judges in the decision. " Such debts, therefore, as he has contracted posterior to the exe- " cuting and recording of the settlement will not affect the estate, " though, as to prior debts, if there be any, I think they will affect " the lands of Barnbarroch; but I presume all these were paid off " by the 3,000*l.* which was then advanced to him by his father-in- " law." Messrs. Maclaurin and Crosbie go into the matter at somewhat greater length, and they go a little further. Your Lordships perceive that Sir Ilay Campbell's opinion rests upon the onerousness of the entail; he only says that the entail, being onerous, cannot be defeated, except by mutual consent. I shall presently remind your Lordships in what respect those circumstances do not at all coincide with the present case; but he was of opinion, that such being the nature of the transaction, the party could validly tie himself up. But Messrs. Maclaurin and Crosbie say, " Whether the entail was onerous " or gratuitous does not appear to us to be material, for there was " nothing to hinder Vans to convert the fee-simple that was in him " into a tailzied fee, and that was done by the entail in question." In their subsequent opinion they certainly do not go quite so far as that; they rather rely upon the onerousness, and they also make many remarks upon the great inconvenience and the great injustice that must result from so large a proposition as their first opinion might seem to sanction. Now, my Lords, as it is fit I should fairly state to your Lordships the opinion I hold upon the present occasion, the greater or less degree of importance of which I must leave to your Lordships' consideration, I can see no warrant in the Scotch law authorities, either the text-writers to whom Lord Eldon refers or the decisions—(I am talking now of course of cases prior to the Sheuchan case, for I am dealing with the grounds of the decision in that case) —I see no warrant from any of those cases—no authority, nor any principle arising out of the matter itself, to authorize such a proposition as this, that the owner of a Scotch estate, possessing it in fee-simple, can do any act of this kind, whereby he can, without consideration, gratuitously, voluntarily, and without any party being in existence who is otherwise than as a volunteer with respect to him, tie it up so as for the future to hold in himself the apparent ownership of that estate, while he excludes from any recourse against that estate the creditors with whom he, subsequently to that act, and as if dealing with the property, shall contract debts. I can see no warrant in the Scotch law to entitle me to hold with those learned persons, that if the deed was done gratuitously, which is the proposition they at first laid down, without any onerous consideration at all, and all

Oct. 1, 1831.

parties claiming under him being volunteers, he can thus defeat subsequent creditors. It is perfectly true (I admit to those learned persons whose opinion I am taking the liberty, with great humility, to sift,) that there are in the Scotch law two records provided by the act of 1685, the one of which was introduced by the act, and the other existed before; and by registering the title, and availing himself of the old record and the new record provided by that act, he could validly divest himself of the property altogether; so it may be said he may divest himself in a qualified mode, and continue to hold that power which he reserves to himself, though not by way of life-rent. I do not conceive that it signifies whether it is by life-rent or in fee; but if he may hold it in fee, and yet be tied up from contracting debt, so that those with whom he contracts debts shall have no recourse against that estate, it may be said, caveat emptor; it was the lender's own fault that he did not go to the register; he might have seen in the register of tailzies that this property was tied up, that this man was not safe to lend money to, and that the estate was not his to borrow upon. But, my Lords, there is in the system of all countries, there is in our law, this,—that though a gratuitous sale may be binding as against volunteers, yet it cannot stand for a moment against onerous creditors. And so of a bond being personal. Nevertheless a man had as just a right to bind his personal assets as his estate; that is the only difference in the two cases. It may be said, that the deed being registered, it is their own fault; but no court of justice can sanction such a principle; for though the register exists into which, past all doubt, a man may look, and though it is stated in the second opinion of Maclaurin (and it is a singular fact) that bankers are in use to have in their possession, and to hang up for a constant and easy reference, lists of all tailzied estates, in order to see under what prohibitions and restrictions persons hold their property, and to take care not to lend their money where they may incur risk, yet what are poor tradesmen to do who see a man in the possession of property; they cannot be expected to go to the Register Office every time they receive an order to furnish any article for the household; every little dealing of that kind cannot be suspended till they send to Edinburgh to the Record Office to see whether it is safe or not; and yet people always look to the landed estate, as ultimately to come in with the personal estate for their security. It is pretty well known whether a man is heir of entail or not; but a man would be able, if the law was such as Maclaurin and Crosbie conceive, to commit very great frauds. It is quite sufficient for me to say there is no authority for that; it is quite sufficient for me to say this is not now meant to be laid down as law; and as regards the Sheuchan case, that not only it gives no authority whatever to this proposition, but the greatest

pains are taken throughout the decision to rest it upon the circumstances of the case. I do not mean to say that it is a case going on specialties; it goes on the broad ground of the transaction in question being most onerous. It is not necessary to go into Lord Eldon's observations upon the subject, in which again and again he most explicitly says, "that whoever it be that drew the deed, there was no "doubt it must be taken to be onerous;" then he states in the most anxious manner, guarding his decision repeatedly, "I have a very "strong conviction that, independently of that statute of 1685, such a "deed as this, (recollect, my Lords, I do not say a gratuitous deed, but "such a deed as this,) proceeding on an onerous consideration and "valuable consideration, not a mere mutual entail, but proceeding like-"wise on money considerations, is competent to bind him;" and so he goes on throughout. But, my Lords, instead of referring to that, I will refer to the very distinct, and I think very satisfactory, statement of the case by Lord Robertson in one of the most able and lawyer-like judgments I have seen in any of the courts. He sums it up thus: "In these circumstances, I consider that the entail is strictly "onerous; first, because it is a mutual entail, and each entail "entered into in consideration of the other." Now the mutuality of the entail would not make it onerous; but I agree with Lord Eldon in the passage I cited, when he says, that this is different from a mere mutual entail — not made onerous, nor depending upon the mutuality of the entail, but on other grounds. Lord Robertson puts that first: "secondly, because from the preamble which I have read, and other "provisions, it is of the nature of a contract of marriage;" and so says my Lord Justice-Clerk in distinct terms, that it is in the nature of a contract of marriage; and so certainly it was, the parties being John Vans and his father-in-law, Miss Agnew's father, with whom he, John Vans, had contracted a clandestine marriage. Though the marriage had been contracted, it is nevertheless in the nature of a marriage contract by the Scotch law, which distinctly recognizes the validity of post-nuptial contracts, and it is not the less entitled to be considered as coming within that description than the contract well known in our law—namely, a contract before marriage, proceeding on a consideration in the highest degree onerous, namely, the consideration of marriage,—the only difference being, that with us it is not executed, but executory. The provisions of the Scotch law distinctly recognize the high nature of the consideration of marriage, even when it is a consideration executed — when it is a post-nuptial deed, and this arising out of circumstances — cases of clandestine marriage being much more common in Scotland, and it being a highly important and exigent duty in such cases to provide for the interests both of the woman and the issue of the marriage; "and, thirdly, it is onerous, because it is granted

Oct. 1, 1831.

Oct. 1, 1831.

" in consideration of 3,000*l.* paid by Mr. Agnew;" that is, paid to Mr. Vans. My Lords, that is a most material part of the case. There is not only a mutual entail — not only a post-nuptial contract of marriage, which it distinctly is — but there is also a sum of 3,000*l.* — a substantial money consideration — 3,000*l.* sterling paid by the one of the entailers to the other; the consideration not being merely that of its being a mutual entail, and in consideration of marriage, but there being, in addition, the adequate consideration of 3,000*l.*; and I may say (as Sir Ilay Campbell appears to have suspected when he gave his opinion) 3,000*l.*, in all probability, applied to extinguish the debts affecting the property before that time; but that did not make it less a valuable consideration, for what can be more important than for the man to get rid of the burden of debts hanging over his estate? Lord Eldon uses a remarkable expression — he makes an observation very well worthy of attention — that, independently of the act of 1685, such a deed proceeding on an onerous consideration, and valuable consideration, would bind the party. I cannot conceive why it should not. Without the help of the act of 1685 he could not regularly, and by valid clauses, bind as against singular successors, as the Scotch law has been held to be; but that a man can, for a valuable consideration, tie up his property, so that it shall not be affected by his creditors, appears to me a perfectly evident proposition; it is a proposition applying not only to Scotch transactions, but to English, that a man may tie up his property, provided he does it for money; for what is a conveyance but tying it up for money?—what is a mortgage but tying up the estate for money? In most parts of England there is no registration. In the counties of Middlesex and York there is a register very similar to that of Scotch estates, and in other counties there may be registers established also, by the passing of the Registry Bill, now under the consideration of the legislature. What would be the difference between tying an estate up in the way now under discussion and tying it up by mortgage, whereby you at once exclude all subsequent mortgagees, when it is registered where a register exists, or without any registration in other counties, and you make all other creditors come in as puisne creditors? Now, the consideration of marriage suggests a further observation. How clearly does this appear to be a marriage contract, when you consider another peculiarity in the case, which does not apply at all to the present. There Vans, one of the entailers, entailed upon Agnew, the son-in-law, and his wife. It was not merely upon Agnew himself, and then upon a series of heirs, but upon Agnew and his wife, and the longer liver. Now I do not mean to say that the limitation of the estate to himself for life, whom failing to a series of heirs, makes any difference, because I do not think the giving

Oct. 1, 1831.

to him and his wife in conjunct fee, and to the longer liver, can be taken otherwise than as a gift to them conjunctly as fiars, and to the survivor as sole fiar. You cannot make a distinction in consequence of that. If it were possible to consider the Sheuchan case as that of a life-renter, this would be a ground on which the judgment of the Court might rest, admitting the onerousness of the transaction on the one hand, but denying on the other the power of the party to take a fee and to tie it up during his own enjoyment; but I cannot consider the Sheuchan case to be one of life-rent. It is clear that the two parties were joint fiars, with a sole fee to the survivor, and the husband took upon the decease of his wife. The Sheuchan case was considered to be distinctly decided on the ground of its being an entail for an onerous consideration, and the facts I have adverted to show that the estate is one in which, against all subsequent creditors, he takes a fee — in which a series of heirs of destination afterwards take fees in succession — tailzied fees, according to the Scotch law of entail. My Lords, I have felt it to be necessary for me to comment at some length upon the Sheuchan case before I came to the present, because otherwise the consistency of the two decisions could not be so well seen; and before leaving these more general topics I would mention a circumstance connected with them. Some doubt appears to be raised, respecting the English law upon the subject, and this matter has been once or twice broached upon the present question. It does not at all enter into my consideration. It is not inaccurate, however, to state that attempts were made at one time in England by parties to create perpetuities by covenants, whereby they endeavoured to tie up their own hands and the hands of their successors against alienation. Those were entirely put an end to by several solemn decisions of the Judges in Westminster Hall. It was attempted in various ways—first in Corbet's case, in Coke's 1st Report, 84; and there it was provided in the deed, that if any of the parties interested under it should do any act concerning alienation by which an estate tail should be barred or the succession in tail be determined, the estate of the person so doing should cease, and the estate enure to the next succeeding tenant, as if the life of the tenant forfeiting were entirely ended, which is very like an irritant and resolutive clause. It does not say, if he shall alienate, but if he shall try to alienate; it makes the act void, any attempt to do it ineffectual, creating that which we should call in the Scotch law an irritant clause; and then it forfeits the right of the heir making such an attempt, which is like a Scotch resolutive clause. All this was very much considered by the Courts, and it was held not to be competent but upon the ground that it was inconsistent with the nature of an estate tail; for an estate tail is first given, and shall not be defeated but by the death of the tenant in tail without issue. If you say B.

Oct. 1, 1831.

shall take, as if A. was dead, that is saying nothing, for A. being dead does not defeat his estate; it is only if he dies without issue of his body that the estate tail determines. If any gentleman wishes to study the subject further, there are various cases in which this has been decided, with respect to estates tail, as often as attempts have been made, from the time of Edward the Fourth downwards to create perpetual successions. In the famous case of Taltarum, in the Year-book in 12 Edward IV., it was held, that such a provision could not prevent a tenant in tail suffering a recovery; and in Sonday's cases, in 9 Coke's Reports, the same proposition is laid down; in Mildmay's case, in 6 Coke's Reports, and in many others; but if any one wishes to see the whole of this learning, which is well worthy of the student's attention as it is of the historian's, he will find the whole collected together in the celebrated argument of Mr. Knowler in the case of Taylor on demise of Attkyns v. Horde, in the first volume of Burrow's Reports, one of the most able and learned arguments that was ever made at any bar, and which, I think, stands unrivalled in any report in the English law.

Having stepped aside to dispose of this, I shall now make a few observations upon the peculiarities of this case, and upon the grounds on which it is determined, and in respect of which it is distinguishable from the Sheuchan case. The learned Judges, consolidate several questions in one, in the answers to the ninth, tenth, and eleventh questions,—"Whether the entail of 1776 was an onerous deed? "Whether (supposing it onerous or even gratuitous) it was effectual "to secure the estate against the subsequent acts and deeds of the "late General Dickson? and if so, is Mr. Cuninghame's defence "against the conclusions of the action, in regard to the land com-"prehended in his father's purchase, well founded; first, upon "the plea of res judicata, or, secondly, upon the merits of the pro-"ceedings in the action in 1784?" The learned Judges—the Lord Justice-Clerk, Lord Pitmilly, Lord Cringletie, Lord Meadowbank, and Lord Mackenzie—Lord Glenlee not particularly adverting to this—say:—"We unite all these queries, because we think they "may be answered at once; we think that the deed of 1776 was be-"yond all doubt onerous. None of the judges entertained doubts of "its onerosity in 1784, when the question was agitated, whether it "was effectual or not. They only say it was ineffectual, because "General Dickson entailed the estate on himself, which, in their "opinions, ought to have been done by the trustees, and not by the "General." My Lords, I cannot quite separate the effectual nature of the entail from the question of onerosity; but it seems the ground of objection was taken in the Court below, that it should have been executed by the trustees and not by himself. Now, I certainly am

Oct. 1, 1831.

not at all able, from any consideration I can give to this case, to arrive at the conclusion that this was an onerous deed; and having dwelt upon the particulars of the Sheuchan case, and which shows so manifestly onerousness, I come to the arguing, whether there is, in the following circumstances, any thing that can be called parallel to the facts of that case. In 1767 John Dickson, the uncle of the General, being brother of David the General's father, executed a trust deed for, among others, the manifest purpose of excluding his brother David from the management of the estate; and after the payment of certain annuities, the trustees were to grant in favour of William Dickson, that is the General, and a certain class of heirs. In 1775 the trustees conveyed the estate in favour of the General, and a certain series of heirs described by the next deed; and that was the same series of heirs to whom, afterwards, the general deed of 1776 limited the estate. Now, in 1771, disputes having arisen in the family, at the head of which David Dickson then was, from the pre-decease of his brother John, they appear to have come to terms, and the General and David his father executed a deed of submission to arbitration. It appears that the arbitrators dealt with the subject, and made their award or decreet-arbitral; and by it they commanded the General to execute the deed of entail in question, and in consequence of that decreet-arbitral it is said he executed the entail. My Lords, I pass over various objections that are raised to the validity of the submission and the decreet-arbitral. It appears to me that any thing done only in virtue of that award cannot be said to be an onerous transaction, but gratuitous; however, I pass that by, because there is an objection to the whole which appears to me fatal—neither any children, nor any wife, nor any trustees for the wife, nor any relation of the wife, nor any party whatever except William the son and David the father, were parties to the submission; there was no party except David who could not compel himself to execute this deed, there was no person to bring an action for the nonperformance of the award, or a suit to compel its performance. When David and William were making a family arrangement for the purpose of not doing it themselves, but having indifferent men to decide between them, and to restore peace to the family, they called in those arbiters; and on their advice William executed this deed; for I do not see what power the arbiters had to compel this; I do not see any submitting parties who could compel this except David himself; and supposing David had a right, and there were now in the field the representatives of David, I now ask, whether it can be said to be any thing further than a mere gratuitous deed. What right had they—what possible right had David against William, or against William's representatives, except what William chose to give him? William is

Oct. 1, 1831.

the subject of the first deed of John, and it is to get at William his uncle that the father orders the trustees to denude themselves; that is, to divest themselves by a conveyance to William. David is out of the question; he has no right given in the deed executed other than and except the right which William chooses to give him. But the deed of submission to execute this family arrangement, and restore domestic peace, states, as the motive, some new title on which David could insist; for that is a material consideration. If you look at the whole of these deeds of 1767 and 1775, the deed of John, by which the trustees obtained the estate, and the deed by which those trustees denuded in favour of William, they are not charged with any prohibitory, irritant, or resolutive clauses; they are simple destinations by the law of Scotland. If there had been a valid entail executed by the son, or even if the trustees had validly executed an entail, though that entail might have been reduced, the matter might have been viewed in another aspect; but there is no entail created by the deed which gave the trustees their title, the deed of 1767; it is simply a destination or direction that they shall denude in favour of William and a certain series of heirs; a perfectly valid disposition to William, a perfectly sufficient exclusion of David the heir of law, a perfectly legitimate and complete title to William to take the estate when the purposes of the trust should have been fulfilled, but no title to the series of unborn heirs; for that could be created only by an introduction of clauses prohibitory, irritant, and resolutive, and no such clauses affect this title; therefore the submission, my Lords, could be of no binding value. If we are to pass over the great difficulty of the trustees being no parties, if we are to pass over the great difficulty of there being no substitutes in the field, if we are to pass over the great difficulty of the decreet-arbitral being on matters not submitted by any competent parties, and the complainant being sued by no competent parties, it still resolves itself into a deed of a perfectly different description from an onerous deed; namely, a voluntary submission to arbitration — a submission by a volunteer; and therefore the question comes back to this: If you say that the entail in question was not gratuitous, but onerous, what made it onerous? If it is said the decreet-arbitral, what made the decreet-arbitral necessary or gave it force? If you say the submission, what made the submission necessary or obligatory? Therefore, when I look into these matters, which are referred to as proving onerousness, if I find they are not onerous but gratuitous transactions in their nature, or, at all events, if not simply and absolutely gratuitous, that there is not the slightest resemblance between their nature, their force, and their incidents in law, and the operation in law of the circumstances in the Sheuchan case, I have a right to found myself upon the

authority of the decision in the Sheuchan case, and upon the reason which sanctioned that decision, namely, that if a party, vested with an estate, chooses to make for valuable considerations a settlement of it upon himself, or upon himself and his wife in fee, and to the survivor, and to any series of heirs not in a simple destination, but one fenced by the proper irritant and resolutive clauses; and if he chooses to tie up himself as well as those heirs from contracting debts with creditors posterior to the deed, at all events posterior to its registration in the record of tailzies, such creditors are excluded from all power to affect the estate by their diligence any more than they could affect an estate sold away for a price. But then I must also hold, that the principle of that decision, and the ground upon which it rests, does not extend to a case like the present; that it extends to no gratuitous case; at all events, it is enough for me to say, and to show your Lordships, that this is not a case in its circumstances at all resembling the Sheuchan case.

I perceive that there was an attempt made in the Sheuchan case to exclude the diligence of the prior creditors, and it is perfectly clear that that was the intention of the parties; for if you look at the date of the deed you will find that they were all excluded, just as much as the subsequent creditors; "that neither the said John Vans "and Margaret Agnew, nor any of the other heirs and members of "entail aforesaid" (John and Margaret were however not heirs of entail but institutes)—"who shall take or succeed to the said lands "and estates by virtue of these presents, shall suffer or allow any "special adjudications to pass against the said lands and estates, or "any part thereof, for payment of the debts of the said John Vans "contracted before the date hereof, or for payment of the real and "legal burden payable furth of the said estates, or for payment of "any other debt to which the lands and estates may by law be sub-"jected in any time hereafter." Now it is perfectly clear that this was only a personal obligation against the parties; that it could not be suffered to have the power of barring the prior debts, but that these were recoverable in spite of it; nor does the authority of the learned President, Sir Ilay Campbell, at all sanction the notion of their being barred. My Lords, I have stated, the great respect I feel for the noble and learned Lords who decided the Agnew case, and who stated the reasons on which their decision was supported; and I shall not be charged with the least insensibility to the value of that authority, or the value of those reasons, when I say, that if there is any one part of that case on which I entertain a doubt, it is on the question whether the Agnew entail and the Vans entail were properly fenced, as against the institute, by irritant and resolutive clauses. There may be some doubt—possibly they were not properly fenced; and Lord Eldon's judgment having, as very often happens, been

Oct. 1, 1831.

directed much more to the main body of the opposite arguments, possibly his Lordship did not sufficiently attend to the only ground upon which, in my humble judgment, there could be any question. He has not decided that point, and in the decision in the Court below the Judges do not appear to have dealt with it. I take the decision, however, to have been right, even upon that on which alone I feel any doubt. As to the main point of law, and that called the principle of the Sheuchan case, I entertain no more doubt, as far as my opinion goes, than upon the subject of any of the most unquestionable principles of Scotch law. I therefore once more say, that though I cannot agree with the learned Judges in the rationes decidendi of the present case, and in the doubts which those reasons cast upon that of Sheuchan, yet I concur in the conclusion to which they have arrived; and it is a great satisfaction to me to know that Lord Eldon, who attended in the course of the argument and heard a great part of it, having come down because he understood that the Sheuchan case was to be questioned in the course of this, went from hence with the conviction that the two decisions could well stand together. That is the impression left upon my mind by the conversation I had with the noble and learned Lord. I now move your Lordships that the interlocutors be affirmed.

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

Appellants' Authorities. — (1.) *Title.*—D. of Roxburghe, 5th March 1734 (Craigie and Stewart's Ap. Ca. p. 126); Campbell, 5th Feb. 1760 (7783); Creditors of Cromarty, 25th Feb. 1762 (15,417); Turner, 17th Nov. 1807 (No. 16, Ap. Tailzie); Kinfauns, 16th June 1554 (7796); E. of Mar, 7798; King, 7799; Cranstoun, 7801; Bellenden, 7816; Gordon, 14th Nov. 1749 (Kilk. p. 445); Irving, 2d April 1770 (H. of L. not rep.) (2.) *Merits.* — Sheuchan case, 31st July 1822 (1 Shaw's Ap. Ca. p. 320, and authorities there); Hope's Min. Pr. p. 143, 146, 147; 2 Mackenzie on Tailzies, 489; Robertson's Ap. Ca. 207; Kerr, 9th June 1795 (Bell's Ca. No. 1956); V. of Garnock, 28th Nov. 1795 (Craigie and Stewart's Ap. Ca. p. 167); Gordon, 29th July 1791 (15,513.) (3.) *Res Judicata.*—2 Bell, 273 (5 ed.); 2 Ersk. 12, 63; M. of Titchfield, 22d May 1798 (No. 4. Ap. Tailzie); 1 Ersk. 6, 34; 1, 7, 13; Grant, 15th Nov. 1682 (12,175); Bannatyne, 14th Dec. 1814 (F. C.); Agnew, 30th July 1822 (1 Shaw's Ap. Ca. p. 333); 4 Ersk. 3, 3; Kames' El. p. 173.

Defenders' Authorities. — (1.) *Title.* — Gordon, 14th Nov. 1749 (Kilk. p. 445); Gilmour, 6th March 1801 (No. 9. App. Tailzie); Mackenzie, 17th May 1826, (ante, Vol. IV. No. 377, and 3 Wilson and Shaw's Ap. Ca. p. 352); 3 Ersk. 3, 47, 49. (2.) *Merits.*—1 Ersk. 1, 47; Sandford, p. 124. (3.) *Res judicata.*—4 Stair, 40, 16; 4 Ersk. 3, 3; 1 Ersk. 6, 54; 1 Ersk. 7, 13.

RICHARDSON and CONNELL—SPOTTISWOODE and ROBERTSON, —Solicitors.