[Heard 7th *April* — Judgment 18th *August*, 1843.]

WILLIAM MONTGOMERIE and Others, *Defenders*, } *Appellants.*

JAMES DUNLOP, Trustees and Executors of the deceased William Patterson, *Suspenders.* }

The RIGHT HONOURABLE ARCHIBALD MONTGOMERIE HAMILTON, Earl of Eglinton, } *Respondent.*

Tailzie. — Terms of deed *held* not to be a continuance of a previously existing investiture, but to form an original substantive entail.

Ibid. — *Held*, that possessing for forty years under a deed executed by an heir of an existing and valid tailzie, but in its terms being not a continuance of such existing investiture, but an original and substantive entail, would work off the fetters of the old entail; and *found*, that the heir possessing under such new entail, was entitled to sell the lands, in respect that it had not been recorded.

Ibid. — *Found*, that an heir of entail entitled to sell the lands, by reason of the entail not being recorded, is not bound to reinvest the price under the fetters of the entail.

Ibid. — Terms of resolutive clauses held not to be defective, by reason of defective enumeration of the acts to be resolved.

ON the 27th May, 1728, Hugh Montgomerie, under reservation of his own liferent, executed an entail of his lands of Lochliboside and Hartfield, the vicarage teinds of Skelmorlie Montgomerie, the ten pound land of Skelmorlie, and the lands of Ormsheugh, in favour of Sir Robert Montgomerie of Skelmurely, Baronet, " my nephew, in liferent, for his liferent use

" allenerly, and the heirs-male of his body; whilks failzeing, to " the eldest heir-female of the body of the said Sir Robert " Montgomerie, and the heirs-male of the body of the said " eldest heir-female; whilks failzeing, the next heir-female succes- " sive of the body of the said Sir Robert Montgomerie, and the " heirs-male of the body of the said next heir-female successive; " whilks failzeing, to Alexander Clark, son to the deceased Mr " James Clark, minister of the gospell at Glasgow, procreat be- " twixt him and Christine Montgomerie, his spouse, and my " sister, and the heirs-male of his body; whilks failzeing, to the " eldest heir-female of the body of the said Alexander Clark, " and the heirs-male of the body of the said eldest heir-female: " whilks failzeing, the next heir-female successive of the body " of the said Alexander Clark, and the heirs-male of the body " of the said next heir-female successive; whilks failzeing, to " any other heirs of tailzie, to be nominat and apointed by me, " by wryte under my hand, at any time in my life, in my *liege* " *poustie*; whilks also failzeing, to my own nearest lawful heirs " and assigneyes whatsomever, the eldest heir-female always " excluding all other heirs-portioners, and succeeding without " division in fee heritably:" This entail, which required the heirs to possess under it alone, and to use a certain sirname and arms, contained prohibitions against altering the order of succession, selling or contracting debt, which were fenced by irritant and resolutive clauses, and was duly recorded in February, 1735.

Sir Robert Montgomerie predeceased the entailer, without leaving any issue male, but leaving three daughters, of whom Lilias Montgomerie was the eldest.

The entailer died in 1735, and thereupon Lilias Montgomerie entered into possession of the entailed lands, and was infeft in them in August, 1735.

In 1757, Lilias Montgomerie procured an act of Parliament.

authorizing her to sell the lands of Lochliboside and Hartfield, This act proceeded on the recital, that the only heirs of entail then existing, were the children of Lilias Montgomerie, and her two sisters, then spinsters, Alexander Clark having died without issue; and that the lands of Lochliboside and Hartfield, were a a distance from the other entailed lands; and it directed that the price of these lands, when sold, should be invested in the purchase of lands contiguous to the other entailed lands, to be settled and provided " to and for the use, benefit, and behoof, of the said " Lilias Montgomerie, and the said other heirs of entail, accor- " ding to the different rights and interests, and in the same " order and course of succession, as the same premises are " secured to and for them and their benefit respectively, in " and by the said deed of entail, and subject to the restrictions " and limitations, clauses irritant and resolutive, therein con- " tained."

Under the powers of this act, the lands of Coilsfield, in the county of Ayr, were purchased from Alexander Montgomerie, the husband of Lilias Montgomerie. In November, 1757, Lilias Montgomerie and her husband joined in executing a deed, by which, professing to act in compliance with the act of Parliament, they disponed the newly acquired lands of Coilsfield, " to " and in favours of the said Lilias Montgomerie, my wife, who " is the eldest heir-female of the body of the said deceased Sir " Robert Montgomerie of Skelmorley, Baronet, and grand " niece of the said deceased Sir Hugh Montgomerie of Skel- " morley, Baronet, and to her heirs-male procreated, or to be " procreated, of her marriage with me, the said Alexander " Montgomerie; whom failing, to the heirs-male of the said " Lilias Montgomerie's body in any subsequent marriage; " whom failing, to the next heir-female successively of the " body of the said Sir Robert Montgomerie, and the heirs- " male of the body of the next heir-female successively; whom

" failing, to any other heirs of taillie, (if any be,) nominated and " appointed by the said deceased Sir Hugh Montgomerie, by " a writing under his hand, at any time of his life *in liege poustie ;* " whom also failing, to the said deceased Sir Hugh Montgo- " merie, his own nearest lawful heirs and assignees whatsoever, " the eldest heir-female always excluding all other heirs-por- " tioners, and succeeding without division."

The prohibitions and fetters of this entail were the same, *mutatis mutandis*, with those of the original entail of 1728, to which reference was made at the outset of the prohibitions, in these terms: " but always with and under the provisions, re- " strictions, limitations, clauses irritant and resolutive, hereafter " specified allenarly, and no otherwise, which are contained in " the foresaid deed of entail of the said lands of Lochliboside " and Hartfield, executed by the said deceased Sir Hugh Mont- " gomerie, and referred to in the act of Parliament before recited, " namely, with this provision always, as it is by the aforesaid " taillie, and by these presents, expressly provided and declared :" and a similar reference was also made in these terms, in the condition requiring the use of the family sirname.

This entail was duly recorded on the 4th of January, 1758, and in June, 1771, Mrs Lilias Montgomerie completed her titles, and was infeft under it.

In June, 1774, Mrs Lilias Montgomerie, with consent of her husband, and under the designation of " eldest daughter and *heir* " of tailzie of the deceased Sir Robert Montgomerie," executed a deed, whereby, on the narrative of its being made " for certain " good and weighty causes and considerations, and with and " under the reservations after written, conceived in favours of " me, the said Lilias Montgomerie, and my said husband; and " also with and under the express reservations, provisions, con- " ditions, declarations, restrictions, limitations, and clauses irri- " tant and resolutive, after specified, allenarly and no otherwise,

" which are hereby appointed to be inserted and contained in " the instruments of resignation, retours, charters, infeftments, " precepts, and sasines, and others to follow hereupon," she disponed in favour of " Hugh Montgomerie, Esq. my " eldest son, and heir of taillie, Captain in the 1st Regiment of " Foot, and the heirs-male of his body; whom failing, to the " other heirs-male of my body; whom failing, to the next heir- " female successive of the body of the said deceast Sir Robert " Montgomerie, my father, and the heirs-male of the body of the " said next heir-female successive; whom failing, to any other heirs " of taillie, (if any be,) nominated and appointed by the deceast " Sir Hugh Montgomerie of Skelmurelie, Baronet, by a write " under his hand, at any time in his life, *in liege poustie*; whom " also failing, to the said Sir Hugh Montgomerie's own nearest " lawful heirs and assignees whomsoever, the eldest heir-female " always excluding all other heirs-portioners, and succeeding " without division, in fee heritably," — the vicarage tiends of " Skelmurelie and Montgomerie, the ten pound land of old extent of Skelmorlie, the lands of Ormsheugh, " as also, all and whole these " parts and portions after mentioned of the lands and estate of " Coilsfield, which were sold and disponed by the said Alex- " ander Montgomerie, my husband, to me and my heirs of " taillie before mentioned, conform to disposition by him, with " consent therein mentioned, dated the 1st, 2d, and 4th, days " of November, 1757, and recorded in the register of taillies, " the 4th day of January, 1758, and that in lieu and place of " the lands of Lochliboside and Hartfield, part of the said " entailed estate of Skelmurelie, which were sold and disponed by " me, with consent of my said husband, in virtue of an act of " Parliament obtained by me for that purpose, in the 30th year " of his late Majesty's reign; namely," [Here followed a particular description of the lands,] " reserving always to me, the " said Mrs Lilias Montgomerie, my liferent of the whole lands

" and heritages hereupon disponed, during all the days of my " life; and reserving also to the said Alexander Montgomerie, " my husband, in case he shall happen to survive me, his life- " rent, during all the days of his life after my decease, of all " and whole the said lands of Ormsheugh, possessed by the " Earl of Eglinton, the forty-shilling land of Coilsfield, with the " manor-place, houses, yards, and pertinents thereof, in the " natural possession of the said Alexander Montgomerie, and " these parts of the lands of Carngillan possessed by John " Humphrey, which were disponed by me to my said husband, " in liferent, by way of locality, conform to disposition, dated " and his infeftment taken, or to be taken, there- " on: But declaring always, as it is hereby expressly provided " and declared, that the liferent so reserved to me, the said Mrs " Lilias Montgomerie, shall be, and is hereby expressly bur- " dened with any liferent locality hereafter to be granted by the " said Hugh Montgomerie, my eldest son, to and in favours of " Mrs Eleonora Hamilton, his present wife, of such parts of the " said lands and estate as he shall think proper, not exceeding " one-third part of the free rents thereof, so far as the same is " free and unaffected at the time, with the liferent locality " granted by me to the said Alexander Montgomerie, my hus- " band, and after deduction of teind and superior's duties, " ministers' stipends, schoolmasters' fees, cess, and other public " burdens, under which express declaration and burden the " liferent in favour of me, the said Mrs Lilias Montgomerie, is " hereby reserved, and no otherwise; so that in case it shall " happen that the said Hugh Montgomerie, my son, shall die " before me, in that event, the said Eleonora Hamilton shall " immediately have access to her said liferent locality, in the " same manner as if my liferent had not been hereby re- " served."

This entail contained prohibitions, with relative, irritant, and

resolutive clauses, which were *mutatis mutandis*, the same as similar clauses in the two entails of 1728 and 1757, and were expressed in these terms, — " As also declaring, likeas it is " hereby expressly provided and declared, that the said Hugh " Montgomerie, my son, and his heirs and successors, shall " be obliged to bruik and possess the lands and estate before " disponed, and to establish the rights thereof in their persons, " by virtue of these presents, and to take the rights, and securities, " and infeftments of the same, with the burden of the reserva- " tions, and irritancies, and provisions herein contained, to and " in favour of the heirs of taillie before named, in the order " before specified: As also providing, likeas it is hereby ex- " pressly provided and declared, and appointed to be inserted in, " and provided and declared by, the instruments of resignation, " charters, infeftments, sasines, services, retours, precepts, and " others to follow hereupon, that the whole heirs of taillie before " mentioned, as well male as female, and the descendants of their " bodies, who shall succeed according to the foresaid destination, " shall be obliged to assume, use, and bear the sirname, arms, " and designation of Montgomerie of Skelmurlie, as their proper " arms, sirname, and designation in all time hereafter; and if " any of the said heirs of taillie before mentioned, or the descen- ' dants of their bodies, who shall happen at any time hereafter " to succeed to the said lands and others foresaid, shall do in the " contrary thereof, then, and in that case, the heirs of taillie before " mentioned, male or female, and the descendant of his or her " body, so contravening, shall *ipso facto* amitt, lose, and tyne their " right, title, and possession above specified, to the said lands " and others before mentioned, and the same shall in the case " foresaid, *ipso facto* fall, accresce, and pertain to the next heir " of taillie who would succeed if the contravener and the descen- " dants of his or her body were naturally dead: And it shall be " leisom to the next heir of taillie to establish the right thereof

" in his or her person, either by adjudication, delarator, or " serving heir to the person who died last vest and seised therein " preceding the contravener, and that without being liable to " the said contravener, his or her debts or deeds, or by any " other manner of way consisting with the laws of this kingdom: " and the persons so succeeding upon the contravention, and " the decendants of their bodies, shall be obliged to assume, " bear, and wear the sirname, arms, and designation, under the " like irritancy, to which the whole heirs of taillie before men- " tioned, and the descendants of their bodies, that shall happen " to succeed to the said lands and others foresaid, are to be " subject and liable through all the succession in time coming: " and also providing, likeas it is hereby specially provided and " declared, and appointed to be contained in, and especially " provided and declared by, the instruments of resignation, " charters, infeftments, sasines, services, precepts, retours, and " others to follow hereupon; that it shall not be leisom or lawful " to the said Hugh Montgomerie, my son, nor to the " heirs-male of his body, nor to any others, the members of " taillie before mentioned, to alter, innovate, or change the " foresaid taillie and order of succession before expressed, or to " do any other deed, directly or indirectly, in any sort, whereby " the same may be any way altered, innovated, or changed, or to " possess, by any other title than this present right; and also " that it shall not be leisom or lawful for the said Hugh Mont- " gomerie, nor to the heirs-male of his body, nor to any other " the members or heirs of taillie before mentioned, to sell, dis- " pone, wadset, or impignorate the said lands and others foresaid, " or any part or portion thereof, or to grant infeftments of " annual-rent out of the same, or any other right or security, " either irredeemably or under reversion, of the said lands and " others foresaid, or any part thereof, nor to contract any debts, " or grant bonds, nor to do any other deed of commission or

" omission, either civil or criminal, whereby the said lands and " others foresaid, or any part of the same, may be apprised, ad- " judged, evicted, or become caduciary, escheat, or confiscated; " Declaring always, that if the said Hugh Montgomerie, or the " heirs-male of his body, or any others, the members or heirs of " taillie before mentioned, shall do in the contrair hereof, then " and in that case, all and every one of such acts and deeds, " with all that shall happen to follow, or may follow thereupon, " shall be *ipso facto* void and null, and of no force, strength, or " effect, sicklike and in the same manner as if the said acts and " deeds had not been done, acted, committed, or granted; and " also declaring, that the persons so contravening, and the de- " scendants of his or her body, shall immediately, upon the said " contravention, amitt, lose, and tyne all right and title they " have, or can pretend to, in the said lands and others foresaid, " with the pertinents; and the same shall, in the case foresaid, " *ipso facto* fall, accresce, and pertain to the next heir and " member of taillie hereby appointed to succeed thereto, sick- " like and in the same manner as if the person so contravening, " and the descendants of his or her body, were naturally dead; " and it shall be leisom to the next member or heir of taillie to " establish the right of the lands and others foresaid, with the " pertinents, in his or her person, and that either by declarator, " or serving heir to the person who died last vest and seised in " the lands and others foresaid, immediately before the contra- " vener, or by adjudication, or any other manner of way con- " sisting with the laws or practice of the kingdom for the time, " without respect to the person contravening, or the descen- " dants of his or her body, and without respect to any innova- " vation, alteration, or change foresaid to be made by the person " so contravening, and without the burden of any debts con- " tracted by the said contravener, or of any acts or deeds of " commission or omission, or any other act or deed whatsoever,

" which, according to the law, may be interpreted to import any " contravention of the before written clause irritant; and the " person so succeeding upon the said contravention, is to " be subject and liable to the same irritancy to which the whole " members and heirs of taillie before specified, and the descen- " dants of their bodies, are to be subject and liable through the " whole course of succession, in all time coming: Excepting " always forth and from the said clause irritant, full power and " liberty to the said Hugh Montgomerie, and the heirs-male of " his body, and to the other subsequent members and heirs of " taillie before narrated, to grant liferent infeftments to their " ladies or husbands, in satisfaction to them of all terce and " courtesies, (from which the ladies and husbands of the said " heirs of taillie are hereby altogether excluded and debarred,) of " the said lands and others foresaid, not exceeding one-third " part thereof, so far as the samen is free unaffected for the time " with former liferents, and after deduction of teind and supe- " rior's duties, minister's stipends, schoolmasters' fees, cess, and " other public burdens."

The entail of 1774 was never put upon record, but Hugh Montgomerie, afterwards Earl of Eglinton, was duly infeft under it in June, 1774, and his sasine was recorded in August following.

In 1784, Earl Hugh obtained from the superior of the lands of Coilsfield, a charter. This charter confirmed the entail of 1757, as granted with the consent of the trustees appointed by the act of Parliament, for concurring in the sale of Lochliboside and Hartfield, " notwithstanding the entail thereof executed by " the deceased Sir Hugh Montgomerie of Skelmorlie," and for applying the purchase money, in the purchase of other lands to be settled " in the same order as the said lands were secured to " them by his deed of entail, and subject to the restrictions " and limitations, clauses irritant and resolutive, therein con-

" tained ;" and in reciting the restrictions which were given at length, each clause set out with these expressions, — " as it is by " the foresaid former tailzie, and by the disposition and deed of " tailzie above mentioned, granted by the said Alexander Mont- " gomerie, expressly provided and declared."

After confirming the entail of 1757, the charter also confirmed the deed of 1774, as granted under the restrictions " particu- " larly above specified allenarly, and no otherways ;" and after setting forth the various parts of the deed, it wound up, " as the " said disposition of tailzie containing obligation to infeft and " seise the said Hugh Montgomerie, and the other heirs of tailzie " before mentioned, in the order before set down, in the whole " lands," &c. with and under the reservations before written, and " under the reservations," &c. " therein and herein before speci- " fied, and no otherways."

Under these titles, Earl Hugh enjoyed possession of the lands until his death, which took place in December, 1819.

Upon the death of Earl Hugh, he was succeeded in the enjoyment of the entailed lands by his grandson, Archibald, Earl of Eglinton, the respondent in the appeal, who made up his titles as nearest heir-male of the body, and of tailzie and provision, to Earl Hugh, by special service, which was expede in March, 1836, and by charter of confirmation and precept of *clare constat*, dated and recorded in August, 1836.

In 1838, the Earl of Eglinton sold the lands of Coilsfield to the appellants, Paterson's trustees, and in 1839, he likewise sold the lands of Skelmorlie to Hay. Paterson's trustees brought a suspension, as of a threatened charge, for the price of Coilsfield, upon the ground that the Earl had no power to sell.

The Earl thereupon brought an action against the substitute heirs of entail, setting forth the deed of entail of 1774, and the titles which had been made up under it by his grandfather and himself, and alleging, that that entail, as well as the two entails

of 1728 and 1757, were defective in the statutory requisition, and that the entail of 1774 had never been recorded; and concluding to have it found that he had a right " to sell, annailsie, and dis-
" pone, in whole or in part, the several lands and estates espe-
" cially above described, in any way he may think proper, for a
" price or other onerous consideration, and to grant and execute
" all dispositions, conveyances, deeds, and writings whatsoever,
" which may be requisite or necessary for effectually conveying
" the whole, or any part or parts of the said lands and others,
" which may be sold and alienated; and that upon selling or
" alienating the whole, or any part or parts of the said several
" lands and others, the pursuer has the sole and exclusive right to
" the price or prices, or other consideration, as his absolute
" property, and that he has full power to use and dispose of the
" same at pleasure, and that the pursuer does not lie under any
" obligation to invest, employ, or lay out the same, or any part
" thereof, in the purchase or on the security of any other land
" or estate, or otherwise for the benefit of the defenders, or any
" of them, and that they have no right or title to interfere with,
" or control the pursuer in the use or disposal of the said price
" or prices, or other consideration, in any manner of way; and
" also, that the defenders, or any of them, have no claim or
" demand of any description against the pursuer, or against his
" heirs and representatives, in the event of his death, for or in
" respect of the sales or alienations which may be made, or dis-
" positions or other writings which may be granted or executed
" by the pursuer, for or in respect of the pursuer using or dis-
" posing at his pleasure, of the said price or prices, or other
" considerations: and farther, it ought and should be found and
" declared, by decree aforesaid, that the pursuer has full and
" undoubted right and power gratuitously to alienate and dis-
" pose of the foresaid several lands and others, contained in the
" aforesaid deeds of entail, in any manner of way he may think

" proper, and to grant and execute all dispositions, convey-
" ances, deeds, and writings whatsoever, which may be requisite
" and necessary for effectually conveying the whole, or any
" part or parts of the said lands and others, to any person or
" persons whatsoever, and in any manner that he may think
" proper ; and that the defenders, or any of them, have no claim
" or demand of any description against the pursuer, or against
" his heirs and representatives in the event of his death, for or
" in respect of such alienation and disposal of the said lands and
" others, or dispositions or other writings which may be granted
" or executed by the pursuer."

The two actions of suspension and declarator were conjoined, and cases were ordered, which the Lord Ordinary reported to the Court. The Court (First Division) ordered new cases to be prepared, and laid before the whole Judges, for their opinions; and after obtaining the opinion of the Judges, fresh cases were ordered as to the right of the substitute-heirs to have a re-investment of the price, in case the lands might be sold.

Upon advising these papers, the consulted Judges returned an unanimous opinion, 1st, that there was no such change in the destination of the entail of 1774 from the destination in the entails of 1728 and 1757, as would make the former supersede the latter deeds; but that, whatever might have been the intention of the makers of the deed of 1774, the effect of what they had done was to create by it a new and independent title, and that as possession under it had been enjoyed beyond the years of prescription, it was to be considered the ruling title; and that as it had not been recorded in the register of entails, it could not be effectual against creditors or purchasers. 2d, That the irritant clause of the entail of 1774 did not profess to make any enumeration of the acts to be irritated, and was sufficiently broad in its terms to embrace acts of sale; and that, as the resolutive clause, in that part of it which resolved the right of the contra-

vener, was sufficiently expressed to effect that purpose, it was of no importance, that, in the other part, declaring the mode in which the next heir was to make up his title, and which enumerated the cases of anticipated contravention, that of sale was omitted. 3d, That though of opinion the appellant had the *power* to sell, he was not entitled to a declaration that he had a *right* so to do. 4th, That the prohibitory clause was of itself sufficient to prevent all gratuitous alienations in questions *inter hæredes*, although the entail had not been recorded; and, 5th, That the heirs of entail had no claim upon the appellant, to compel him to invest the price of his sale to Paterson's trustees, in the purchase of other lands to be entailed, or to prevent him from freely disposing of the price, the principle which must rule this being the same as was adopted in the cases of Stewart *v.* Fullerton, Bruce *v.* Bruce, and Queensberry *v.* Queensberry Executors. This opinion was delivered at such length, as not to admit of its being given here *ipsissimis verbis*, but the foregoing was the substance and effect of it.

In conformity with this opinion, the Court, on the 21st January, 1842, pronounced the following interlocutor: — "Find, that the "deed of entail of 1774 must be considered as an original sub- "stantive entail, and that not having been recorded in the regis- "ter of tailzies, it is not effectual against creditors or purchasers: "Find, that the sale concluded between the Earl of Eglinton "and the suspenders, Paterson's trustees, was valid and unchal- "lengeable: Therefore repel the reasons of suspension, and find "the letters orderly proceeded in the process of suspension at "their instance, and decern: and in the action of declarator, "Find, that the pursuer, the Earl of Eglinton, has full power to "sell the whole lands, in the said deed of entail, for onerous "prices or considerations, and to grant valid dispositions to the "several purchasers: and farther, find and declare, that upon "the sales taking effect, the pursuer is under no obligation to

" employ or lay out the prices or sums arising from the said sales, " or any part thereof, in the purchase of other lands, or other- " wise to invest the same for the benefit of the defenders, or the " other heirs of entail; and that the prices or considerations " which the pursuer may receive, will become his absolute and " exclusive property; and that he has full power to use and " dispose of the same at pleasure, free from all claims what- " soever, at the instance of the defenders, or the heirs of entail, " all in terms of the first declaratory conclusion of the summons " in the said action of declarator."

The appeal was against this interlocutor.

Mr Sandford and J. R. Hope, for the appellants. — I. The destinations in the deeds of 1728 and 1757 were identically the same, with this exception, that the latter deed omitted those branches which had become extinct by the supervening death of the parties. By the deed of 1728, after the heirs-male of the body of Sir Robert Montgomerie, the parties called are his " eldest heir-female," and the heirs-male of her body; and after them " the next heir-female successive" of the body of Sir Robert, and the heirs-male of the body of such next heir-female. When the entail of 1757 was made, the heirs-male of Sir Robert's body had already failed, and the succession was then vested under the deed of 1728, in Lilias Montgomerie, who was the eldest heir-female of his body. The deed of 1757, accordingly, takes up the destination of the deed of 1728, at the point at which it was capable of taking, and had already taken, effect, namely, the eldest heir-female of Sir Robert's body, and following the deed of 1728, continues the destination to the heirs-male of the body of Lilias Montgomerie, that is, of the eldest heir-female of Sir Robert's body, and immediately adopting the very

terms of the deed of 1728, whom failing, to the next heir-female of the body of the said deceased Sir Robert Montgomerie.

So the deed of 1774, adapting itself only to the changed state of circumstances, follows exactly the destination of the deed of 1728. At that time, Lilias Montgomerie had a son, that is to say, an heir-male of the body of the eldest heir-female of the body of Sir Robert having come into existence, and being desirous merely on occasion of his marriage, to propel the succession to him, she took up the destination of the deeds of 1728 and 1757 where they had already taken effect, that is, in herself, and conveyed to her eldest son, the heir-male of her body, and the heirs-male of his body, and to the other heirs-male of her body, and then resuming the very words of the deeds of 1728 and 1757, to the next heir-female successive of the body of the said deceased Sir Robert Montgomerie, and the heirs-male of the body of such heir-female.

Under the destination in the deed of 1728, no heir-female of the body of Lilias Montgomerie was called at all; the destination is not, on failure of heirs-male of the body of Sir Robert, to the *heirs-female* generally, but to the *eldest* heir-female, and the heirs-male of her body. On failure of the heirs-male of the body of the eldest heir-female, the succession goes to the next heir-female of the body of Sir Robert, and the heirs-male of her body. The heirs-female, or heirs whatsoever, then, of Lilias Montgomerie, that is, of the eldest heir-female of the body of Sir Robert, could never have had any right under this deed, before the heirs-male of the body of the next heir-female of Sir Robert. Her second son would have excluded the daughters of her eldest son, and if she had died leaving daughters, and no sons, the eldest daughter would have succeeded, not as heir-female, or heir whatsoever, but as being the next heir-female of the body of Sir Robert. The effect of the entail of 1728, then, is, that the

eldest heir-female, and the heirs-male of her body, were to take in exclusion of the next or any other heir-female of Sir Robert's body, and the entail of 1757 preserves the same course of destination.

It is no doubt true, that Alexander Clark, and his descendants, though included in the deed of 1728, are omitted in the deed of 1757; but the omission is stated, in the Act of Parliament, to have arisen from the fact of Clark having died without any descendants: if that were true, the omission cannot form any ground for drawing a distinction between the deed of 1728 and the subsequent deeds; and that it was not true, has neither been proved nor alleged.

It is farther objected, that the deed of 1757 was applicable to the lands of Coilsfield alone; that was necessarily so, because these lands came from the husband of Lilias Montgomerie, in lieu of the lands comprehended under the deed of 1728, which had been sold; and as he had no right in, or power over, the lands remaining unsold, he could not have comprehended them in the deed of 1757 along with the newly purchased lands of Coilsfield. There was nothing in the fact of the deed of 1757, then, being applicable only to the lands of Coilsfield, either in fact or intention, to shew that the deed of 1757 was any thing more than a continuance of the deed of 1728, rendered necessary by the sale of part of the lands comprehended under the latter deed, and the purchase of new ones.

The two deeds of 1728 and 1757, then, must be viewed as parts of one and the same entail, and the original lands, and those newly purchased, as one estate, held by one title. If so, it was quite competent to any heir in possession under both deeds, to incorporate the two into one.

The deed of 1774 did no more than effect this. The only object of that deed was to create such incorporation, and to propel the fee and succession to the son of the granter and heir in

possession. The destination in this deed is the same as in the two deeds of 1728 and 1757, for the same reasons that the destination in the deed of 1757 is the same as that in the deed of 1728. The lands are the same as those contained in the two earlier deeds. The prohibitions and fetters are the same.

But it is said, that it was not competent to incorporate the two entails into one,—to make the fetters of the two deeds indiscriminately applicable to all the lands, and an act involving a forfeiture of the lands in the deed of 1728, equally involves a forfeiture of those in the deed 1757, *et e converso*. But, when this is said, the history of the title is overlooked. The deed of 1728 did not contain the lands of Skelmorlie and Ormsheugh alone, it contained likewise the lands of Lochliboside and Hartsfield, and its fetters applied to the whole indiscriminately. The lands of Coilsfield, being those contained in the deed of 1757, were purchased under the powers of the statute, which directed them to be purchased in the place of Lochliboside and Hartsfield, and directed that they should be settled in the same terms as these lands had been settled by the deed of 1728. Accordingly, the deed of 1757 makes express reference to the deed of 1728, and conveys the lands under the provisions and restrictions "which " are contained in the aforesaid deed of entail," being the entail of 1728.

When, therefore, Lilias Montgomerie executed the deed of 1774, she possessed the lands of Skelmorlie, Ormsheugh, and Coilsfield, though in form under two deeds, yet in substance and effect under one entail, applicable in its fetters to the whole; it was, therefore, perfectly competent for her to bring the whole lands under the fetters of one deed which should apply to all indiscriminately; and in doing so, it was not necessary to repeat the provisions in each of the deeds applicable to the lands containing them, because the rule *applicando singula singulis* would apply.

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That the intention of Lilias Montgomerie was to make such incorporation, and having made it, to propel the fee to her son, and not to make a new and independent title, is shewn by the description which she gives to herself, and her son, in the deed of 1774, bearing express reference to their characters as heirs under the prior deeds, and by the express reference in the dispositive clause of Coilsfield, to the deed of 1757, by its date and registration.

II. If, then, the deed of 1774 was a mere continuance of the previously existing titles—a mere renewal of the previous investiture, and did not form the basis of a new and independent title, the possession which has followed upon it cannot have any effect upon the rights of the parties. The deed of 1774 cannot, in such case, be the basis of a prescriptive title, as it refers *in gremio*, to the deed of 1757; and the two deeds, so far as regards the lands of Coilsfield, are not only not inconsistent or adverse, but are identically the same.

III. Farther, even if it were not competent to Lilias Montgomerie to incorporate the two entails in that of 1774, so as to make an act of forfeiture in regard to one parcel of the lands imply a forfeiture as to the other, and the two parcels are to be regarded as estates enjoyed under separate entails, there was nothing in the deed of 1774 to destroy the deeds of 1728 and 1757, and the deed of 1774 must then be read as having reference to each of the deeds respectively, so as to make the fetters in each of the deeds apply to the lands contained in it.

IV. At all events, the entail of 1774, though unrecorded, is effectual in all questions *inter hæredes*; and even if the respondent may sell, and the purchaser be entitled to insist on implement of the sale, the respondent will be bound to reinvest the price in lands to be entailed. In Stewart *v.* Fullerton, 4 *Wil. and Sh.* 205, the

heir was found not to be under any such obligation; but there the defect was in the entail itself, and the decision rested mainly on the inconvenience and absurdity of reinvesting under a defective deed, liable on the occasion of every successive investment, to be defeated by a new sale. But here the entail itself is complete; the defect is only in the non-registration, and if the heir is obliged to reinvest under the fetters of the entail, any of the substitute heirs can register and prevent the possibility of another sale. In Queensberry *v.* Queensberry Executors, it was held by the Court below, that an action by an heir of entail against the executor of his predecessor, for damages in respect of a lease in contravention of an entail which had not been recorded, could be maintained. That judgment was, no doubt, reversed by this House; but those members who delivered their opinions, gave them professedly in affirmance of those opinions delivered in the Court below, which, on careful examination of the whole, were considered to be most satisfactory, without any farther opinion being given by the noble Lords; and on examination of the opinions delivered by the minority in the Court below, which were so approved of, it will be found, that some were against the competency of the action, because the heirs should be confined to the remedies given by the entail, while others thought the action incompetent, because it was of a highly penal nature, and not transmissible against executors.

Here the claim of the substitute heirs, that the heir selling should reinvest, would be a remedy within the terms of the entail, not of a penal nature, and about the transmissibility of which no question could arise. There is, therefore, no authority, either in the Ascog or the Queensberry case, for saying, that such a claim is incompetent, or in other words, that an entail, while unrecorded, imposes no obligation upon the heir in possession, and possesses no validity *inter hæredes*, in contradiction of the judgments, Wilson *v.* Callender, *Mor.* 15369, and Hall *v.* Cassie, *Mor.* 15373.

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Mr Pemberton Leigh, and E. S. Gordon for respondent. — I. If a disposition of lands be made by an heir of entail, differing in its terms from the entail, and be followed by charter and seisin, the disposition will form the basis of a new investiture, Broomfield *v.* Paterson, *Mor.* 15618; Paterson *v.* Cuthbert, *Hume*, 869; and if possession be had under the new investiture beyond the years of prescription, it will become the governing investiture, Vere *v.* Hope, 12th February, 1828.

The deed of 1774 was framed with the intention of incorporating under one entail the different parcels of land which the granter had hitherto possessed under the two entails of 1728 and 1747. Contravention of the fetters of the deed of 1728 would not have inferred a forfeiture of the lands in the deed of 1757, *et e converso*. To accomplish this was the object of the deed of 1774. It might have been done, perhaps, so as at the same time to keep in force the two previous deeds; but it was not so accomplished. There is no reference in the deed of 1774, which would necessarily lead even to a knowledge of the existence of the previous deeds, and still less of any intention to keep alive their provisions. Its whole structure is as if the framer was for the first time making an entail of the whole lands. All the lands are embraced by it under one set of prohibitions and fetters, without mention of any others, as having previously existed, or being intended to be continued; and an irritancy as to any single portion of the lands, is made to infer a forfeiture of the whole; and not only so, but the heirs are, by an ordinary clause, taken bound to possess "under this deed alone," and prohibited from "possessing under any other title than this present right."

That the deed of 1774 was not intended merely to propel the fee to Hugh Montgomerie, to be possessed by him under the fetters of the previous deeds, is evident from this omission of all reference to these deeds, and to any such intention; whereas the ordinary form of a deed for that purpose, contains an

anxious recital of the previous existing deeds, and a distinct enunciation of intention to keep them alive; and if there be more than one deed, a repetition of the provisions of each, applicable and confined to the land contained in it. Not only so, but the terms of the deed of 1774 are uniform and applicable alike to all the lands, while the two deeds of 1728 and 1757 were disconform to each other, and each confined to the lands contained within itself, so as each to form a separate independent entail." The effect, therefore, of the deed of 1774, was to propel the fee, no doubt, from Lilias Montgomerie to Hugh Montgomerie, but not to be held by him under the same entails under which she herself had hitherto enjoyed them, but under a new and original investiture.

The destination in the deed of 1728 was different from that which was made by the deed of 1774. Under the first of these deeds, the heirs whatsoever of Sir Robert Montgomerie would, under the destination to the eldest heir-female, have been entitled to take on failure of the heirs-male of his body, *Ersk.* III. 8, 48, notwithstanding that the destination to the eldest heir-female was followed by the words "to the heirs-male of the eldest heir female," as these words were mere surplusage to accomplish what would have taken place without them, according to the ordinary rules of the law — the succession of males before females, Carruthers *v.* Majendie, 2 *Bligh*, 692, where, under a provision to the heirs-female of a marriage, and the heirs-male of their bodies, it was found, that on failure of the only son of the only daughter of the marriage, without issue of his body, a sister of the son was entitled to sue as an heir of provision under the settlement. Applying this case to the entail of 1728, the respondent would, under that deed, be entitled to take as an heir-female. That the destination is not to heirs-female generally, but to the "eldest" heir-female, makes no difference, *Craigie* and *Stew.* App. *Ca.* 238, where it was held, that a destination to the eldest

heir-female of the body, and the descendants of her body, did not entitle the *daughters*, successively with the heirs of their bodies, to take in exclusion of the proper heir-female under the general meaning of that term. If, then, the respondent were to die, leaving daughters only, without any sons, the succession would, under the deed of 1728, immediately open to them; but under the deed of 1774, by the destination being, on failure of the heirs-male of Hugh Montgomerie, to the heirs-male of the body of Lilias Montgomerie, if the respondent were to die, leaving daughters only, they would be excluded by the heirs-male if any, of the bodies of Hugh and Lilias Montgomerie.

This difference in the destinations between the deeds of 1728 and 1774, did not originate with the deed of 1774, but with the deed of 1757, of which the destination in the deed of 1774 is but a repetition. If the intention, then, of the deed of 1774 was only to incorporate in one entail, having one destination, lands which had hitherto been held under two deeds, having each a different destination, and if, as is said, the deed of 1757 was an independent entail of the lands of Coilsfield, whose destination was preserved in the deed of 1774, how was that possible, by a deed which contained only one destination, and that different from the destination of one of the deeds to be incorporated? Suppose, moreover, the respondent were, by a new deed, to make a destination of the lands of Skelmorlie, in conformity with that in the deed of 1728, would this not operate a contravention of the deed of 1774, and infer a forfeiture of the lands of Coilsfield?

But above all, it is undeniable, that in the deeds of 1757 and 1774, the family of the Clarks, who had been called by the deed of 1728, were wholly omitted. It is no doubt true, that where a branch of heirs, called previous to the heir in possession, has become extinct, the heir, in framing a destination in conformity with the previously existing destination, may omit this branch,

yet the matter is very different when the branch is called subsequently to the heir. He is not entitled to act upon his own opinion, or the surmise of others. The prohibition is not to alter the order of succession. The effects and consequences of contravening this prohibition must depend upon the fact of contravening, not upon the extent to which either party may, by evidence or otherwise, shew that the fact is prejudicial or innocent. It may, or may not, have been true, that the Clarks had become extinct; but it had never been ascertained in any way upon which a Court would be entitled to act. *Non constat*, but that many years hence a member of the Clark family, might turn up; and if he did, the recital in the statute would be no obstacle to his proving his relationship.

III. In every view, then, the deed of 1774 must be regarded as an original independent title, capable of being the basis of a new investiture, and of cutting down the previous investitures, if followed by possession of sufficient duration; and as the possession of the lands had been held under it for a period greatly exceeding the years of prescription, the necessary result must be, that the two deeds of 1728 and 1757 have become inoperative. If so, then the respondent possesses under an entail which has never been recorded, and which, therefore, cannot form any bar to his exercise of all the rights of a proprietor in fee-simple.

IV. But even if the deed of 1774 is to be regarded as merely propelling the fee, and therefore not requiring registration, it and both the other deeds are ineffectual, inasmuch as the resolutive clause in all of them, though it sets out with general terms, winds up by an enumeration of the acts to be resolved, omitting in the enumeration the acts of sale and alienation. Now, it has been repeatedly held, as in Bruce *v.* Bruce, *Mor.* 15539, and Rennie *v.* Horne, 3 *Sh.* and *M'L.* 142, that, however general the clause

may be in the outset, if, before closing, it adopt enumeration, every act prohibited must be enumerated, otherwise those that are omitted will not be affected.

V. If the respondent is not restrained by the deeds of entail from selling the lands, there is nothing in these deeds to infer any obligation upon him to reinvest the price. Though an entail with prohibitions against selling or altering the order of succession, but unfenced by proper clauses for that purpose, may entitle the heirs to set aside gratuitous deeds, and to preserve the estate as it came from the maker, there is nothing in such a deed, after the lands are conveyed to an onerous purchaser, past being brought back, which can entitle them to have the price invested in other lands never contemplated by the entailer. A simple prohibition to sell, does not impose any obligation upon the heir capable of being enforced by inhibition or otherwise, Bryson *Mor.* 15511, Ankerville, *Mor.* 7010. How then can it be considered as making an obligation, the breach of which is to entitle them to an equivalent, by new investment or damages? The rights of parties, and the measure of their relief, can be ascertained only by the entail itself. This is true, even of an entail properly fenced; for the effect of the irritant and resolutive clauses is not to entitle the heirs to any thing beyond or not within the entail, but merely to make void an act done in contravention of what is in the entail. If, then, the entail is ineffectual to prevent a sale, there is nothing in it imposing any obligation to invest the price of the sale, neither can it be said that the reepondent ought to have recorded the entail, and that he took the lands on the condition of doing so: there is no obligation or condition of the sort imposed upon him by the entail.

That the substitutes have no claim upon the heir in case of his selling, for reinvestment of the price, has been deliberately

determined in Stewart *v.* Fullerton, 4 *W.* and *Sh.* 196; Bruce *v.* Bruce, 4 *W.* and *Sh.* 240; Elibank, 1 *Sh.* and *M'L.* 1; Campbell, 1 *D.* and *B.* 81; and Thomson, 1 *D.* and *B.* 592; and that they have not either any claim for damages, has also been determined in Queensberry *v.* Queensberry Executors, 4 *W* and *S.* 254. In the last of these cases, the entail was not recorded; in the others the act complained of was sustained, because of defects in the entail itself, which had been recorded; but in all of them the principle upon which the relief asked was refused was the same — that according to the strict rule of interpretation applicable to entails, the relief asked must be authorized by the deed itself, otherwise it cannot be given.

LORD BROUGHAM. — This case, my Lords, consisted of an appeal from the judgment of the Court of Session in Scotland in three several actions. The Earl of Eglinton was heir of entail in possession of the two valuable estates of Coilsfield and Skelmorlie, both of which he held, or was supposed to hold, under the fetters of an entail. There had been an entail executed by his ancestors of those two estates in the year 1728, and a subsequent entail in the year 1757, of one estate, instead of another, by virtue, and under the provisions of a private act of Parliament, enabling Mrs Lillias Montgomerie, the heir then in possession, so to deal with the property. There was afterwards, in 1774, an entail executed by Mrs Lillias Montgomerie, at a time when she and Captain Montgomerie, as the heir-apparent under the investiture, were the heirs in possession and in reversion. And the question in the Court below arises chiefly on the force and effect of this last entail of 1774.

The Earl being advised that he was not under the fetters of an entail, so as to be prohibited from selling the property, brought it to sale, and it was purchased; but there being a doubt on the part of the purchaser, whether he could take a sufficient

title under the Earl's investiture, in respect of the fetters with which he was supposed to be bound, a suspenion of his charge to pay the purchase money was brought, and that suspension would itself have raised the question. But the Earl, according to a very convenient and most beneficial form of action known in Scotland, (the want of which we very much regret in this country, but which I am in the course of endeavouring to supply, by a bill now before your Lordships' House,) the Earl availing himself of the Scotch law in this respect, pursued two actions of declarator against the several purchasers of the estate, which raised these questions. He first desired to have it found and declared, (which was indeed the main stress of the bill of suspension, brought by the purchaser, of the Earl's charge to pay the price,) that he was free from the fetters of the entail; and secondly, to have it declared that he had power to sell the property without being called upon to reinvest the purchase money.

In these cases, which were conjoined, their Lordships in the Court below first of all took the opinion of the consulted Judges on the grave questions of law raised by the pleadings, and they came to a determination in the Earl's favour upon the first part of the declaratory action, namely, finding that he was not under the fetters of an entail, but they hesitated before they would give him a decree upon the second, and very important part — perhaps, I may say, substantially the most important part, namely, whether, if he was entitled to sell, he was not, as it were, a trustee for the future heirs of entail coming after him, and was not bound to reinvest the purchase money, so that they should not be damnified by his sale? Afterwards, their Lordships were of opinion, that they had not quite soundly dealt with the second of these questions, in refusing to take it up as they at first had done, but that they were bound to give him also the benefit of their opinion on this part of the declaratory action, namely, to declare his right to sell and appropriate the purchase money

without investing it. And accordingly they ordered additional cases, and those cases were, with the usual learning and ability, and with the great length of argument, that distinguishes Scotch professional men, discussed most fully. I have read them, as most of your Lordships have, and the Court afterwards added, what they had not done at first, their opinion, after taking the opinion of the consulted Judges. All were satisfied with that part of the summons, and gave their declaration upon that right, as well as upon the other.

Now these are the decrees of the Court below, which are brought before your Lordships by this appeal. They are very important to the Scotch law, as well as to the parties. Three questions having been raised in this case, have been brought before your Lordships by the appeal, and, having been fully argued, now await your decision.

First, was the deed of 1774 a new, and substantive, and independent entail? or was it only one related and ancillary to the former entail of 1728, varied under the powers of the estate bill in 1757, and having the mere operation of propelling the fee from the heir of entail in possession to the heir next called?

Secondly, was the entail of 1774, if substantive and independent, valid, as being fenced by the requisite clauses against sale? And one of the contentions was, that even if it were held to be a merely dependent and relative deed, and the entails of 1728 and 1757 still in force, the whole of the clauses being the same in all the three deeds of entail, still the Earl was free, because there was a defect in the resolutive clause.

Thirdly, was the heir now in possession, the respondent, authorized to make sale of the property, without reinvesting the purchase money, and settling it to the uses of the entail?

These questions exhaust the subject in every way in which it can be considered. For if the first be determined in the negative, and the deed of 1774 only propels the fee, then the old

entail subsists; but if in the affirmative, then, not being recorded, and more than forty years' possession having been had under it, the entail is gone. Next, either of these determinations lets in the *second* question: for if the fencing clauses common to both the old and new entails are insufficient, the fetters are gone in any view; and if sufficient, the old entail would be valid to prevent sale, though the new entail not being recorded, and the period of prescription having expired, the prohibition would fail. But then, under this view, the invalidity of the fencing clauses would at once dispose of the *third* question in the respondent's favour, as to the re-investing the purchase money. Again, and lastly, if that *third* question be decided against the obligation to reinvest upon other grounds than the insufficiency of the fencing clauses, the respondent prevails, though these clauses may be effectual; whereas, should they be deemed effectual, and the obligation to reinvest be held sufficient, the appellant, though defeated on the other grounds, would substantially prevail.

The Court below, after a full examination of the whole question, and considering an elaborate, most able, and most learned opinion of the consulted Judges, came to the determination, that the entail of 1774 was substantive and independent, and being unrecorded, could not affect creditors or purchasers: that the resolutive clause, to which the objection had been taken, was sufficient to fence the prohibition levelled against selling: but that still, upon the authority of the Ascog, Tillycoultrie, and Tinwald cases, there was no obligation to reinvest the price obtained for the lands entailed. This decision was unanimous; for although Lord Cunninghame at first strongly inclined in the respondent's favour upon the second point, chiefly moved by the authority of the Ballilish case, and inclined against him, though not so strongly, upon the first point, rather considering the deed of 1774 as ancillary and dependent, and as propelling the fee, he was fully satisfied on farther consideration, and yielded to the

force of the argument so powerfully maintained by the consulted Judges.

I have never had any material doubt upon the *first* point. Upon the *second* I was for some time inclined to agree with the Lord Ordinary; but a farther consideration has made me, with him, come to the opinion of the consulted Judges. Upon the *third* point, I also, upon the whole, agree with them, and I am therefore prepared to recommend, that your Lordships should affirm the decree now under consideration.

I. In considering the *first* question, it is clearly not sufficien to be satisfied of the intentions or views entertained by the party, the maker of the deed. Mrs Lilias Montgomerie might have, nay, she very probably had, for the governing motive of her proceeding, the desire to advance Captain Montgomerie, by propelling the fee to him, retaining the liferent to herself. But she did not express that this was her design, and her only design, in that deed which she executed in 1774; and though she had expressed it, yet if she, in point of fact, went farther, and made new, and inconsistent, and independent provisions, her expressed object would not avail to stamp upon the deed a dependent character. It is to be observed, that she never refers once to the entail of 1728, the foundation and root of the whole proceeding, prior to 1774, and she only refers to the deed of 1757 for the sake of description as to the land of Coilsfield. It is true, she mentions herself as heiress of tailzie, but she does not state under what entail; and she might have described herself as such, in an instrument which was really, and in point of fact, designed to innovate the former settlement.

Now, I am of opinion, that the deed of 1774 was a new and different entail. The mere omision of all reference to the entail of 1728, it is hardly possible to get over. I do not believe tha any entail has ever been held to be ancillary, and merely pro-

pulsive of the fee, in which this entire silence as to the former entail was preserved.

The Lord Ordinary refers to the case of Turnbull *v.* Hay and Newton, in 1836, (reported in 14 Shaw,) where the Court held a deed to be propulsive merely, in which there was some variation of language in repeating the fencing clauses. But I do not well see how they could hold the second deed to be an independent, and new, and inconsistent entail, when it expressly disponed under the limitations of the first entail, referring to it by its date, and required the heir to possess by that former entail. Had the present case referred to the entail of 1728, and especially had it provided that the heir of the new entail should possess under the limitations of the old, referring to it in terms, the question now before us would have stood upon a very different footing. But independently of that consideration, the two estates are, as it were, united and comprehended within the scope of the same clauses prohibitory, irritant, and resolutive, in the entail of 1774, they never having been comprehended before under the same clauses in any one deed; so that forfeiture by contravention, under the deed of 1774, as to one, would have inferred a forfeiture of the whole — a sort of cross forfeiture. It must farther be observed, that the new deed requires the heirs and successors to possess under the limitations of the new deed, and none other. The words are, to " be obliged to brook and " possess the lands and estate before disponed, and to establish " the rights thereof, in their persons, by virtue of these presents;" and they are expressly prohibited " to possess by any other " title than this present right," which prohibition is generally fenced by a resolution and forfeiture of the contravened right.

It is to be observed, respecting such deeds as an heir of entail in possession makes merely to propel the fee, that they must very closely follow the tenor of the original and radical entail; because, unless they be so conceived as to be wholly identical

with it, there is some difficulty in understanding how a forfeiture is to be avoided, supposing the original deed to be sufficiently fenced; nay, more, there seems some anomaly even then. For example, if Mrs Lilias Montgomerie possessed under the deed of 1774, which she must have done if she propelled the fee to the next heir *alioque successurus*, and converted her own fee, under the old entail, into a mere liferent, giving her son, before his time, a power to jointure his wife, one does not very well see how she could escape a forfeiture under the careful prohibition contained in the deeds of 1728 and 1757, against brooking, that is, enjoying or possessing, under any title except that of those deeds themselves. However, this difficulty must long since have been got over in the Scotch law, because the validity of propelling deeds has long been fully recognized.

There seems, however, notwithstanding this remark, no ground for holding that any very strict construction should be applied to such conveyances, or that a leaning should be shewn towards considering them as propulsive. The presumption may no doubt be alleged as rather in favour of an heir of entail doing nothing contrary to the rights vested in him, or which would incur a forfeiture. But yet the general leaning is ever against fetters, and for freedom of possession, and we are quite sure, no great mischief can ever result to the entail itself, from such dealing with the property, because the new deed, if an independent and substantive one, must be perfectly ineffectual until the term of prescription has run. Nay, if it alters or innovates upon the old investiture, the risk forfeiture of is incurred, until that prescription has removed all danger.

I am, for these reasons, very clearly of opinion, that the Court below has come to the sound and correct conclusion upon the fundamental question in the case, and that the deed of 1774 constituted a new and independent entail. If so, possession was had upon it; and as it was never recorded, that possession for

more than the years of prescription upon an unrecorded tailzie, worked off the fetters imposed by the recorded tailzies of 1728 and 1757, so that no fetters remained with the heir in possession.

II. I come now to the *second* question, touching the validity of the fencing clauses in the governing deed, the subsisting entail of 1774.

Now, it is not correct to say, as the respondents contend, that the resolutive part of the resolutive clause omits selling in its enumeration. The resolution is levelled generally against the "persons *so contravening*," who are "declared, upon the *said* "contravention," that is to say, of the prohibitions generally, "to lose all right and title," and the same shall go to the next heir of entail, as if the contravener and his heirs were naturally dead.

Now it is not denied, that this resolution, following a complete irritancy, and by reference, like the irritancy to a complete prohibition, would have been quite sufficient, had the clause there stopped. The defect, therefore, is not in the resolutive part of the clause, but in that unnecessary part which is added, setting forth, that the next heir not contravening may obtain the estate. This additional provision states, that such "next heir is to ob-"tain the estate without respect to any innovation, alteration, or "change foresaid, made by the contravener, and without the "burden of any debts contracted by him, or of any acts or "deeds by him done or omitted, or any acts or deeds, whatsoever, "which may by law be deemed a contravention." It is evident, that this amounts to no qualification or restriction of the preceding generality. It does not even apply to that generality necessarily, and the general resolution is sufficient without it.

But it is said, that the irritant clause is qualified by the enumeration, and that in the case of Ballilish, Horne *v.* Rennie,

decided below in 1837, and reversed here in 1838, (3 Shaw and M'Lean,) a general irritancy was held by your Lordships to be insufficient, by reason of a subsequent special enumeration, in which sale was left out, although "failure in any part of the "premises" was added. I at first was much influenced by this reference; but I find, upon a nearer examination, that the cases are altogether different. In the Ballilish case, as in the first Tillycoultrie Case, there was a particular enumeration of the acts which should defeat the contravener's right, and sale was omitted. We held, differing from the Court below, that the entailer had not relied upon, or confined himself to, the general words, but had undertaken to designate by particulars what should constitute an irritancy and a resolution.

In the case now at the bar, he confines himself, in the irritant clause, to generals. "If the heirs shall do in the *contrair* hereof, "then, and in that case, all and every one of such acts and "deeds shall be *ipso facto* void and null, and sicklike as if the "said acts and deeds had not been *done*, acted, committed, or "*granted*." No one can say that a sale is not an *act done*, or a deed of sale a *deed granted*. But after following this, which is the whole of the irritant clause, with a similar general resolutive clause, the entailer adds a provision respecting the next heir holding the estate on the forfeiture free from all acts and deeds of the contravener. This part of the clause, or rather this matter adjected to it, has never yet in any case been held to form an integral part, either of the irritant clause, or of the resolutive clause, so as to limit the construction of those clauses, and to defeat them by reason of the omission. I therefore think, that this entail would have been effectual, and the prohibitions well fenced, had the deed of 1774 only been recorded; but not having been recorded, the heir in possession is not bound by it, whatever may have been the cause of the omission, whether neglect or design. It was an omission, which might at any time before the period of

prescription had run, have been supplied at the instance of any substitute, near or remote.

III. We have now only to consider the *third* question, respecting the appellants' claim to have the purchase money invested, and the estate settled to the uses of the entail.

I consider that this point is authoritatively determined by the former cases. The Court of Session, in the Ascog and second Tillycoultrie cases, held, that the heir of entail in possession, being entitled to sell from a defect in the fencing clauses, could nevertheless be compelled to invest the price for the behoof of the succeeding heirs in the settlement. I well remember the difficulty which we, who were of counsel with the respondent, had in our attempts to support that judgment, and the numberless questions with which we were met, and all but overpowered from your Lordships, especially Lord Eldon's usual subtlety and astuteness, as to the manner in which this remedy was to be applied in favour of the succeeding heirs of tailzie. To these difficulties I need not now refer. The case was alleged by our adversaries to be of the first impression, and feeling that we could hardly hope to prevail without some authority, we produced a case drawn from the shades of manuscript repository, Young *v.* Young, which, however, weighed not at all with your Lordships, first, because it had never been published, and was little if at all known to the profession, next, because there was no distinct account before the House, or which could be obtained of the pleadings, or even of the particular facts in the cause; and finally, and very materially, because there was considerable doubt cast upon the authenticity of the note itself of the case, said to be by Lord Monboddo, but not clearly shewn to be so. The faculty repositories were searched. We delayed the argument for the purpose. The greatest pains were taken. Almost all the sessional papers relating to other cases were found there, forming

a very valuable record, but none whatever relating to this; so that it was truly a very sleeveless errand on which we sent the searchers. It was, I must say, a very blind sort of case; altogether it obtained no great attention; it was allowed no kind of weight or authority by the House; and, I must fairly add, it deserved none.

The decree below was reversed in both the Ascog and the Tillycoultrie cases, and the heir of entail who had sold, was held not bound to invest the purchase-money. The plain broad ground of this decision, beside the numberless difficulties of working out the remedy, there sought for the respondent, here claimed by the appellant, was, that the entailer's very purpose being to effect an entail under the act of 1685, when he was found to have failed in accomplishing this, his sole object, the Court could not interpose to give a remedy not provided by the deed, and could not constitute in favour of the heirs a tailzie of lands not affected by the deed.

Now, it is certainly true, that we have, in England, been used to consider, when any breach of trust has been committed, by a sale contrary to the rights of a cestuique trust, that the party making such a sale shall be held as much a trustee, in respect of the price he gets, as he was of the land before the sale. The rule is, that money is land in this case, just as where a person improperly invests money in land, the land is held to be money, — it is considered to follow the same uses, and to be under the same fetters, and that the same equities are reserved to the party over the money in the one case, where the land has been converted into money, and over the land in the other, where the money has been converted into land, or where one estate is exchanged for another, in which case, the second estate stands in the same position as the first. But that all goes upon the supposition of there being a trust.

But I have to remark, in favour of the decision which your

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Lordships came to in the Ascog and Tillycoultrie cases, in defence of the principle on which they were decided, that there is the greatest possible difference between the position of an heir of entail, in Scotland, and a person who stands here in the position of a trustee for others. An heir of entail, in Scotland, is never considered a trustee for the subsequent heirs of entail. He is considered as a fiar in all respects whatever, except in so far as he is tied up, bound down, and fettered; and I have often had occasion, both at the bar in your Lordships' presence, and since I have come upon the bench, to explain the great difference, I may rather say the contrast, between the Scotch law and the English law in that respect. If I here make a tenant for life, by a settlement, he is tied up, *eo ipso*, and he can do nothing that shall endure beyond his own life estate, unless in so far as I add powers to his estate. But in Scotland it is the very reverse. The heir of entail is the fiar — he is free. Here the tenant for life is fettered, except so far as he is freed by powers. In Scotland, the heir of entail is free, except so far as he is fettered by the provisions of the entail — he is the fiar — he is in possession of the fee-simple of the estate in every particular, except in so far as he is tied up by the entail. This is the governing principle, and it is upon this governing principle that all the decisions have gone. Sometimes, perhaps, I may rather say once, they have a little deviated from the principle. I believe that Lord Redesdale prevailed upon Lord Eldon, in the Roxburgh case, to decide rather according to the views of the English law of entail than according to the principles of the Scotch law of entail. Yet the broad principle continues the same, and that is the governing rule which distinguishes the two laws.

Now, those principles upon which the Court proceeded in the Ascog and Tillycoultrie cases, clearly apply also to the present case, although the defect of the entail here is not, as in the Ascog and Tillycoultrie cases, the inept fencing clauses, but only the

omission to record the entail. I am unable to perceive any reason arising out of this diversity, for negativing the application to the case at the bar, on the doctrine in which your Lordships proceeded in reversing the decrees of the Court below in those former instances. You must admit, that you have no right to interfere for the protection of the heirs of an entail left unrecorded, and so ineffectual against purchasers and creditors, any more than you can interfere where the entailer has made an ineffectual deed, and recorded it. Still more must you admit, that you have no right to constitute an entail of lands not comprized in the entailer's deed, where the deed validly entailed other lands, but became inoperative for want of registration. So far upon the principle.

But we are not left without the light to be derived from express and direct authority. On the same day on which the Ascog and Tillycoultrie cases were decided here, there was also decided the Tinwald or Queensberry case, and upon the very same grounds. That was not a claim to have the price invested, but it was an action of damages by the heirs of entail against the personal representatives of the Duke of Queensberry, the last heir of entail, who, while in possession, had granted leases contrary to the prohibitions. There was, as here, no defect in the fencing clauses, but the entail had, as here, not been recorded. Consequently the Duke was held to be left free, as here the Earl is held to be left free, because the deed of 1774 has not been recorded. The entail was effectual and good there, and the entail is effectual and good here; the fencing clauses were sufficient there, and the fencing clauses are sufficient here; the entail was unrecorded there, the entail is unrecorded here; that was the only defect there, that is the only defect here; there the entailers in possession were held at liberty to lease, here the entailers in possession are held at liberty to sell; so far the cases are the same. But as there was no question of sale in that

case, there was no question of investing the price, as there is here; and because the entail had been violated, though unrecorded, the heir in succession claimed to have the right to damages, just as the heir in succession here, if he is defeated of his right by sale, claims an investment of the price; so that there is not the slightest difference between the two cases except this, that there, damages were sued for, and here, a specific performance is sued for. Here they are required to reinvest the price, so that you do not want the damages, there they could not do that, — they had done remediless damage, which they were called upon to make good. The Duke, therefore, was held entitled to grant the leases; but it was contended that he was bound, and that his representatives were bound, to indemnify the heirs succeeding, for having taken advantage of the omission to record a valid entail prohibiting the leases.

The reversal followed in that as in the two former cases, and on the very same grounds on which those had been decided. If any doubt could remain as to this being the reason of the judgment, it would be removed by the clear and full note of Mr Chalmers, the highly respectable and very accurate solicitor for the appellant, in whose favour the decision of your Lordships was given. It is to be found in the appendix, page 32, of 4th *Wilson* and *Shaw*. I must add, having argued this case for the appellant, that we put severally the contention on the same grounds as in the Ascog and Tillycoultrie cases, and that no reliance was placed by the Court, nor even by the respondent at the bar, on the diversity of the action being for damages, or on the defect being in the recording of the entail instead of the fencing clauses.

I therefore have no doubt whatever, that the present case has, on this point, as well as the two former, been well decided by the Court below.

In moving your Lordships to affirm in both the declarator-

and the suspension, I also consider that the costs of the appeal should fall on the appellant. It must be considered, that the Court below were unanimous; for even while Lord Cunninghame inclined to think the deed of 1774 merely propulsive, he considered it wholly defective in the fencing clauses, and therefore was against the appellant *in toto*. If he considered the fencing clauses deficient, there was an end of the case, because they were common to the deeds of 1728 and 1757; and that disposed of the substantial part of the case, namely, the right to have the money reinvested.

I have no hesitation at all, therefore, in moving your Lordships to affirm this judgment with costs, and I have only to apologize to your Lordships for having gone so fully into the law; but the case was very elaborately argued. There seemed to prevail an opinion that there had been a miscarriage below, and therefore I felt it my bounden duty to enter fully into the argument which has left upon my mind no doubt whatever that the case has been rightly decided.

Lord Cottenham. — My Lords, I concur in the view taken by my noble and learned friend of the several points raised in this case. Upon the two first, indeed, I think the authorities are so clear, that it is not necessary to add any thing to what has been observed by my noble and learned friend. And with respect to the third, I think, after the course which was adopted by this House in the Queensberry case, it is now too late to raise the question, whether the heir in succession has any right to call for reinvestment. At the same time, I cannot but observe, that it appears to me that there is a very material distinction between the cases where the entail fails for want of proper fencing clauses, and where it fails merely for want of being recorded. Because, where there is a defect in the fencing clauses, there is a defect in the entail — there is a defect of that which is necessary to fetter the party: But where there is a defect in the recording, and the

owner therefore has a right to make a good title to a purchaser, it does not follow that there should not be a right in the heir to have the property produced by the sale considered as affected by the entail. An obvious distinction might arise between those two cases, which, however, does not seem to have operated on the minds of the noble and learned Lords who decided the Queensberry case. They considered the principle which had before obtained to be conclusive of the right of the heir to take the purchase money; and that having been so decided in that case, I think it is much too late to ask this House to reconsider the grounds upon which they decided; that point was decided in the Queensberry case.

The language attributed to Lord Eldon, not in the Queensberry case, but in the cases which were decided on the same day, does not appear to me at all satisfactory. If that noble and learned lord ever used those expressions, he seems to have proceeded upon the ground of the supposed inutility of affixing a trust upon the purchase money, which may be immediately defeated. You order a reinvestment of the purchase money in land, which is immediately to be defeated by the simple power of selling that land. That is neither more nor less than what frequently occurs in settlements of English property, where there is a power of sale attaching upon the settled estate, which power of sale also may be made to extend to the estate purchased in lieu of the settled estate. No difficulty whatever occurs in carrying this trust into effect; there is the power from time to time to sell. But where the property exists in the character of money, it is affected by a liability to the rights of those who are intended, by the author of the settlement to enjoy the property. When it appears in the character of land, it stands in the position provided by the settlement; and when it is in money, it is affected by similar trusts operating upon the property in that shape. That is a consideration, however, which, if it occurred to the

minds of those who decided that case, was not considered of sufficient weight to distinguish that case from those which had preceded it. I quite concur in the opinion of my noble and learned friend, that it is now too late to consider that any distinction can effectually be taken on that ground, and I concur in the motion which my noble and learned friend has made.

Lord Campbell. — My Lords, I will trouble your Lordships with a very few observations, as this case has been already so fully discussed. I think it right to say, that I entirely concur in the view taken of this case by my two noble and learned friends who have preceded me.

Two great questions arise, first, whether the Earl of Eglinton, the respondent, had a right to sell this estate, which he did sell? and, secondly, if he had a right to sell the estate, whether he was bound to reinvest the purchase money?

Now I am of opinion, that he had a right to sell the estate, because it had been held, ever since the year 1774, under an unrecorded entail. I am of opinion, that that entail of 1774 must be considered as a separate, independent, and substantive entail, and not a mere propelling of the fee. I certainly would not go so far as to say, that that deed, merely because it does not refer to the prior entail, for that reason cannot be considered as a propelling of the fee. If it does not change the destination, and if it does not change the conditions upon which this estate is held, I think it might well be a propelling of the fee, although there be no reference to the prior entail; but if the destination is altered, or if the conditions upon which the estate is to be held under the original entail are varied, then it is a new entail.

It was contended here very strenuously, that the destination was altered. But I think, when that was fully investigated, it appeared quite clear, that in the event which had happened, not the slightest alteration took place in the destination of the estate. But when you come to consider the conditions upon which the

estate was held, I think a most material alteration takes place. It is only necessary to observe, that this estate, along with another estate, was made what the Scotch lawyers call *unum quid*, and that all the conditions were made to apply to both.

Lord Brougham. — Cross forfeitures.

Lord Campbell. — Cross forfeitures. The case of Graham *v.* Bontine was referred to the Gartmore case; but there, *reddendo singula singulis*, it was quite clear, that the two entails, although they were contained on the same piece of parchment, were kept entirely separate and distinct, and for that reason it was there held, that the deeds were to be considered separate and distinct entails. But here they are made one for all purposes, and the conditions upon which the land was held are materially varied.

Now, there has been possession under this deed of 1774 for more than forty years, there has been an investituture under it; and, therefore, under these circumstances, I am of opinion, that the deed of entail which was registered in 1728, is to be considered as suspended, and that the rights of the parties now are in the same situation as if that deed had never existed.

Then this deed of 1774 not having been recorded, there can be no doubt, that the heir of entail holding under it had a good right to sell. It is unnecessary to repeat what has been said as to the sufficiency of the fetters of the deed of 1728. I confess that I have not strictly attended to these points, because, although those fetters had been ever so well framed, that deed is now superseded, and the power of sale arose after there had been possession for a sufficient length of time under the deed of 1774.

My Lords, I have no doubt upon the second point, and that renders it wholly unnecessary for me for my own satisfaction to examine strictly into the sufficiency of the deed of 1728; for I have no doubt whatever, that the Earl of Eglinton, being entitled to sell the estate, was not bound to reinvest the money. As far as the sale of an estate where the entail is defective is

concerned, it is allowed, that the Ascog case and the Tillycoultrie case are entirely conclusive, and have settled the law upon the subject. But a distinction was made at the bar between those two cases and the present, because, in these two cases, there being defects in the fetters, if the price of the land had been laid out in the purchase of another estate, it might have been sold and resold *toties quoties*. Now, there is no doubt, that Lord Eldon pointed out that inconvenience, as one reason for his decision in the Ascog and Tillycoultrie cases, but I apprehend that, in this case, there are other reasons which apply just as strongly to a case where the entail is not registered, as where the fetters of the entail are defective.

Your Lordships will observe, that this is an attempt to make a perpetuity, because the land may be sold, and the purchase-money be reinvested. If the estate is to be sold, and the purchase money is to be reinvested, that would be a perpetuity. But I apprehend, my Lords, that, by the law of Scotland, you cannot have a perpetuity, unless you comply with the requisites of the statute of 1685, which requires that there shall be proper irritant and resolutive clauses, and that the entail shall be recorded. Then, I think, that that would have beeen a sufficient reason for the principle laid down in the Ascog and Tillycoultrie cases, that the requisites of the statute of 1685 had not been complied with, and that therefore, in the absence of that compliance with that statute, a perpetuity shall not be permitted. Your Lordships will likewise consider, that the object of the entailer, according to the Scotch law, when he makes a strict entail, is with a view to a particular estate, from the love of that estate, to preserve it in the family as long as grass grows and water runs, and he probably would be indifferent to any estate which might be substituted for it.

My Lords, all these arguments apply with equal strength where the defect is in the entail not being registered; because

the Act of 1685 requires the entail to be registered, and until it is registered, the heir of entail is the absolute fiar of the estate. I entirely concur in the distinction which my noble and learned friend, who moved the judgment in this case, so forcibly pointed out between the English and the Scotch law, with regard to this subject of entails. By the English law, the tenant for life has no power except what is expressly conferred upon him, beyond his own life; whereas the heir of entail in Scotland is armed with every power except that which is expressly taken from him.

It was urged at the bar, that the money here was impressed with a trust, and that therefore, on that ground, it should be re-invested. But, my Lords, I think that the analogy between the Scotch and the English law upon that subject, does not in the slightest degree hold, and that, whether the defect arises from the non-registration of the entail, or from any defect in the fetters, the heir of entail is the absolute proprietor, and he having disposed of it, the money is absolutely his own.

With regard to the defect of the entail, for want of resolutive clauses, I have no doubtthat, *inter se*, it is good, and operates as a destination, and it is only against singular successors that the entail is bad for want of fetters. Therefore, the heir-substitute might just as well come and require that the produce of the sale of the estate that has been sold, where the fetters are defective, should be reinvested for him, as he may come and require that that should be done, where there is a good entail, but that entail has not been duly registered.

However, my Lords, it seems unnecessary to discuss this upon principle any farther, because it has been expressly decided by your Lordships' House in the Queensberry case. In that case, there was a valid entail, the fetters were perfect, there were leases granted which were in contravention of the entail, and which would have been invalid if the entail had been registered. Now what were the proceedings there? There was an action

brought by the heir-substitute against the representative of the contravener, and the question arose, whether, there having been a clear contravention of the entail by the granting of those leases, there was a remedy? The Court held that there was no remedy, because the heir-substitute had not taken care to have the entail recorded, and that not having been recorded, therefore the heir-substitute had no right to take advantage of it. That was the express decision, that there could be no action for damages. Does not this prove that you cannot have a remedy for the reinvestment of the money? It proceeded there upon the ground, there was no trust, that there had been no wrong done. Then, if there was no trust, and no wrong done, you cannot have the specific remedy prayed for here, by a reinvestment of the purchase money.

For these reasons, my Lords, I entirely concur in the view taken of this case by my noble and learned friends, and I think that the judgment of the Court below ought to be affirmed.

Lord Brougham. — The fact is, that the Act of 1685, regarding singular successors and purchasers, makes it still more important to have the entail recorded than to have fencing clauses, for it is the record that you are to look to. I observe, that the Court below dwelt very much upon there being no distinct refeference to the former deed, for they have marked that in Italics, as a very material point, but I am not prepared to say that precisely.

SPOTTISWOODE and ROBERTSON,—RICHARDSON and CONNELL,
DEANS and DUNLOP, Agents.