[Heard 19*th July*. Judgment, 5*th September*, 1844.]

MRS. JANE CARRICK and OTHERS, *Appellants*.

DAVID BUCHANAN and OTHERS, *Respondents*.

Tailzie.—A deed of entail which contained prohibitions embracing acts by the institute by name, and a general irritancy of all acts contracted, granted, or done, in contravention of the prohibitions, without mention of the institute or heirs, followed by a declaration that all debts, deeds, and acts contracted or done in contravention should be ineffectual against "the other heirs of tailzie," was *held* effectual to void a deed, altering the order of succession, made by the institute.

Ibid.—Held that a gratuitous *mortis causa* deed, altering the order of succession prescribed by an entail, is void in a question *inter hæredes*, without regard to the question whether the entail was sufficiently fenced under the Act 1685.

THE terms of the deed of entail out of which this case arose, will be found in vol. i., page 368. When the cause returned to the Court of Session, under the remit there reported, that Court ordered cases upon the questions contained in the remit to be laid before the Judges for their opinions. That question was expressed in these terms:—" Whether, if the irritant clause in the " deed of entail should be held defective, as not being directed " against the institute, the said deed of entail is otherwise suffi- " cient to exclude or render void the disposition under reduction, " on the ground of its being, as alleged by the respondents, a " gratuitous deed."

After reading the cases for the parties, the following opinions were delivered by the Judges:—

" LORD JUSTICE CLERK.—The point involved in the question " stated for the opinion of Her Majesty's Judges in the above " remit from your Lordships is this,—Whether, if the irritant

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" clause in the entail referred to is not directed against the insti-
" tute, a deed of alteration of the order of succession—a gratuitous
" deed—is reducible in respect of a *prohibition* in the deed of
" entail against alteration of the order of succession?—whether,
" in short, a prohibitory clause is of itself sufficient to render void
" a deed altering the order of succession?

" Had this question occurred in the course of any cause in the
" Court of Session, I would not have been disposed to express, if
" other Judges did not concur in, the difficulties which I have
" always entertained on the point, and would have deferred to the
" weight of the opinions expressed by institutional writers, and
" incidentally but frequently by so many Judges of great name
" and authority.

" Called upon specially by the House of Lords to report our
" opinions on the point, I feel that I am bound to state my own
" view, however reluctantly expressed when in opposition to the
" authorities I have alluded to. I cannot assent, however, to
" the statement, that this is a point on which the opinions of
" lawyers have been uniformly settled. Judges of great authority
" in the case of Ascog gave a deliberate sanction to the opinion
" which I entertain, and that opinion is explained in one of
" the most elaborate judgments which Lord Eldon ever pro-
" nounced, which received the deliberate concurrence of Lord
" Lyndhurst.

" In the first place, I am of opinion, that the point has not
" been fixed by any decisions, so to preclude the determination of
" it according to sound principles.

" The case of Callander I cannot regard as authoritative. It
" seems to me, according to Fountainhall's report, to support
" views of the Act 1685 (*e. g.* as if an irritant clause alone was
" effectual against onerous creditors), which undoubtedly cannot
" be acknowledged. It proceeds on the application of the Act
" 1621, which, if a sound ground, would, in my opinion, apply
" against creditors as much as gratuitous disponees. And that

" view of the argument, founded on the Act 1621, was taken by
" Lord Eldon in the Ascog case, who said he did not see how
" one could stop short in the application of the Act 1621. The
" last point decided, viz., as to the impossibility of keeping up
" debts affecting an entailed estate, is contrary to many subse-
" quent judgments. The case is not satisfactory as reported by
" Fountainhall. But further, from Harcarse's report, it is not
" clear to me that there was really any prohibition at all, but only
" a destination, which is admitted not to be sufficient. It would
" rather appear from that report, that the destination had become
" the subject of onerous contract between the heir in possession,
" and his brother and nephew, which a gratuitous disponee
" might be bound to implement, and had been ratified by an
" onerous obligation not to alter the entail. Again, there was no
" proper deed altering the order of succession, but a bond for a
" fictitious debt. And, lastly, the reduction is stated by Har-
" carse to be rested specially on an *obligation*, which had been
" the subject of contracts. The argument for the pursuer, as
" given in *Harcarse*, (*Mor. Dict.* 15,480), seems to show that the
" case did not turn on or decide the point now in question.

" The case of Ure *v.* Crawford has no application. The deed
" there seems to have been solely a destination. But the in-
" stitute *granted a separate deed binding himself* not to grant
" any deed whereby the lands might be affected. A question
" was raised as to the meaning of that obligation. The judg-
" ment of reduction proceeds on the effect of that *obligation*
" granted by the party whose deed was challenged—not on the
" effect of a tailzie with a prohibitory clause. The points are
" manifestly different.

" The only other case referred to as a *decision*, is a branch of
" the Roxburghe cause. The defenders have given no detailed
" explanation of this branch of the case, and I may be in error
" regarding it. But after a careful examination of the report,
" and of all the pleadings in this Court and in the House of

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"Lords upon this branch of the cause, and of the opinions of the "Judges of the Court of Session, I cannot find that the point "was raised for decision, or could be decided. The points raised "were, whether the words of the prohibitory clause did include "alteration in the order of succession, and whether all the "branches of the destination were included within the protected "order of succession, if the prohibition did apply to alteration? "But the question never was raised, whether *a simple prohibition* "would be sufficient, and could not be raised, because it was not "disputed that *there were irritant and resolutive clauses* which "*included all the prohibitions, whatever these might be.* How, "then, in such a case, could the question be raised for decision "—whether a prohibition *without* irritant and resolutive clauses, "was sufficient to render void the deed of alteration of the suc-"cession? The Court found, by a subsequent judgment, January "16, 1808, that Duke William 'held the estates of the duke-"'dom of Roxburghe under the fetters of a strict entail.' When, "therefore, in the preceding action to reduce the new deed of "entail, the Court found that the entail 'contains an effectual "'prohibition against altering the order of succession,' and that "the persons called to the succession under the branch of the "destination, beginning with the eldest daughter of Henry Lord "Ker, 'are heirs of entail of the said entail,' they pronounced "this judgment with reference to a deed containing irritant and "resolutive clauses, and the prohibition to alter was brought "at once within the effect of the irritant and resolutive "clauses. This judgment, and the interlocutors upon the "import of the destination to the eldest daughter of Henry "Lord Ker and their heirs-male, went to the House of Lords. "The Lord Chancellor Eldon discussed at great length, on the "15th, 16th, and 19th June, 1809, the questions as to the "import and effect of the clauses of destination, but thinking the "Court had erred in pronouncing a finding as to the validity of "the entail, until it was ascertained whether any of the compe-

" titors made himself out to be an heir of entail, he delayed
" deciding the point on the meaning of the prohibitory clause,
" until the points of pedigree and succession were decided. The
" interlocutor of the 15th January, 1807, was not upon this point
" affirmed until June, 1811.

" In the report of this branch of the case in the Court of
" Session, the point embraced in the remit is not mentioned as
" having been decided or separately argued. It is true, that in
" the pleadings in the Court of Session, there is a great deal of
" general argument as to prohibitions; but in almost every sen-
" tence the terms employed are 'prohibitions and *limitations*'—
" 'prohibitions and *restrictions*,' which make the argument as
" much applicable to an entail with irritant and resolutive
" clauses, *which* the Roxburghe *entail was*, as to a different
" species of entail. When it went to the House of Lords, there
" is no reason in support of the judgment founded upon the point
" which is now said to have been decided. In giving an account
" of the opinions of the Court, respondent's Appeal Case, p. 13, it
" is not stated that the Court gave any opinion upon this ques-
" tion. The opinions themselves do not turn on this point.
" They turn on the question, are the *terms* of the prohibitory
" clause sufficient to cover alteration of the order of succession?

" The account of the argument on the prohibitory clause on
" page 15 of Sir J. Innes's case, shows that the discussion turned
" on the meaning of the clause in which the prohibition against
" alteration of the order of succession was stated to be found. In
" the argument upon the meaning of the prohibition, I find that
" there are quoted some authorities as to the effect of a prohibi-
" tion, without irritant and resolutive clauses. These, however,
" are very oddly introduced, because the same argument holds the
" entail to be complete, with irritant and resolutive clauses: and
" it was not disputed that the latter applied to one part of the
" prohibitory clause as much as to another, though there was an
" argument that neither the prohibition nor the protection

" applied to the detached part of the destination. When Lord
" Eldon noticed this point in 1809, he obviously understood that
" it was a question under an entail complete in all its clauses,
" provided it included alteration of the order of succession. Thus,
" in the opinion of the 16th June, 1809, in stating the points, he
" mentioned the one which he intended to postpone to be, 'that
" 'all the rights of the heirs of tailzie are guarded by clauses,
" 'irritant, resolutive, and prohibitory, sufficient to prevent an
" 'alteration of the order of succession.' I understand from my
" brother Lord Meadowbank, that, according to his belief, Lord
" Eldon, in moving the affirmance in 1811, did not give the
" grounds of his opinion; and in the collection of the papers
" belonging to the agent of General Ker, the late Mr. Hotchkis,
" there is a note by him made *at the time* stating that fact. The
" same fact is stated in a letter from the late Mr. James Camp-
" bell, solicitor in London, to Mr. Goldie, agent for Bellenden
" Kerr, which I subjoin in a note, as it is the only account I can
" find of Lord Eldon's opinion*.

" * Excerpt from Letter from Mr. James Campbell to Mr. Goldie,
" 8th June, 1811:

" '*Roxburghe Reduction, June* 1811.

" 'The Lord Chancellor has just now moved the House to affirm
" 'the interlocutor of the Court of Session in the reduction. He
" 'barely stated his own opinion upon the two material points, without
" 'going into any detail. Upon the prohibitory clause, he said that
" 'the words, "nor yet do any thing in hurt or prejudice of these pre-
" 'sents or this tailzie or succession," were a sufficient prohibition of
" 'altering the order of succession—a distinct prohibition for that pur-
" 'pose—not exegetical of the preceding prohibition. With regard to
" 'the fetters being to apply to the heirs of the devolving clause, and
" 'to benefit them, he said that it was of no consequence in what part
" 'of the deed the fetters or the heirs were placed; and that, upon the
" 'most anxious attention to every thing within the four corners of the

"In the Strathbrock case, 1838, there is unquestionably a
" finding in the interlocutor of the Lord Ordinary, which appears
" to be directly upon the point. But still that entail contained
" irritant and resolutive clauses; and the House of Lords, who
" affirmed that case, have nevertheless remitted the same point
" for the opinions of Her Majesty's Judges. If I understand
" correctly the opinion of the late Lord Chancellor in the Strath-
" brock case, he did not appear to think that the point now
" raised did then occur for decision, and waived giving any
" opinion upon it. He says expressly, that there are in the
" Strathbrock entail clauses irritant and resolutive applicable to
" alterations in the order of succession. It does not appear, then,
" that in the House of Lords the point was taken to be involved
" in the decision.

" I see that reference is made, by misapprehension, to a recent
" decision of the Second Division of the Court of Session, Lord
" Duffus's Trustees v. Dunbar, &c., 28th January, 1842. The
" ground of that decision is misunderstood, and the rubric in one
" expression goes too far. The entail which prohibited debt
" contained an express declaration that bonds and obligations
" should not be granted for debt; and in one of the actions, the
" heir in possession, or his trustees, concluded to have it found
" that he was *entitled* to grant bonds and obligations for debt,
" there being no bond actually granted. It was proposed
" in that case to dismiss that action, on the ground that
" the Court ought not to sustain an action to find that a
" party may do a thing, which he is prohibited from doing, or

" ' deed of 1648, and to nothing anywhere else, he had no doubt that
" ' the true construction was that the fetters should apply.'

" The terms of the above very distinct letter certainly do not war-
" rant the inference that Lord Eldon imagined that he was dealing with
" a simple prohibition in an entail which had no fetters."

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" to entertain an action to *relieve* him of the prohibition. If " he can effectually do the act, let him do it; but a party pro- " hibited is not entitled to *the aid* of a declarator against the pro- " hibition. There was another action at the instance of a " creditor, to have it found that he was entitled to adjudge. That " was the ground upon which I called the attention of the Court " to the distinction between the two actions, and I did not under- " stand that decision to go further than that an action could not " be sustained at the instance of an heir of entail to have a " decree in the abstract that he was entitled to do that which he " was directly prohibited from doing,—there being no deed or " transaction put in issue by him by the action. That I under- " stood to be the whole import of the decision. The case itself " occurred in a deed in which the irritant clause was quite " defective, limiting the protection of the estate to certain acts, " and to certain acts only, and in the question at the instance of " a creditor who was proceeding in a way not prohibited by the " irritant clause, we held that he was entitled to adjudge.

" Expressions in one of the opinions go further, but that was " upon a point only incidentally noticed. Having long enter- " tained great difficulty upon this point, I certainly did not intend " to express any such opinion as the pursuer supposes.

" If your Lordships shall not hold the point to be closed by " former decisions, then the question is one which must, in my " opinion, be decided by the terms of the Act 1685, c. 22. That " Act of Parliament, in consequence of the unsatisfactory state of " the law, was introduced in order to regulate the subject of " entails.

" I cannot think that the statute was intended to make a " complete and new code, so far as third parties were concerned, " and yet to leave the law upon a different and indeterminate " footing as to the question of settlement and power between " heirs. If not intended to regulate and settle the law as to the " rights and interests of the heirs of tailzie against the heir in

" possession, as well as against third parties, then the statute was
" not only wholly defective—but begun at the wrong end. I
" think the statute began systematically and according to prin-
" ciple—*first*, to establish the means, and the only means of pro-
" tecting the rights of heirs of entail against the deeds of the
" heir in possession *by restraints on that heir;* and then, *secondly*,
" as a *consequence* of such restraints, to give the means of reducing
" all deeds done to the prejudice of the substitutes, and in viola-
" tion of the restraints so imposed on the powers of the fiar. The
" question how far an entail, when made, is to strike against
" transactions entered into with third parties, relates to the *effect*
" ascribed to the deed, whatever may be the character of that
" deed. But the primary matter is to regulate the settlement of
" the estate, and the rights of the heirs of tailzie, by the restraints
" which it should be competent by tailzies to impose on the title
" to lands. The restraints to be imposed on the title was the
" first thing to settle, being the means of accomplishing the end
" in view. The opinions expressed by the institutional writers
" upon this point, appear to me to ascribe a singular view to the
" Legislature, and to hold that the statute looked merely to the
" *effect,* and omitted provision for that which was to produce the
" effect. I have always thought that the Act of 1685 is very
" skilfully and systematically drawn. I think it embraces the
" whole matter of the settlement of the estates by entail, and
" that it does so by beginning most anxiously to provide for
" and sanction entails, in the first instance with reference to
" heirs.

" The great object of an entail is to preserve the estate in the
" course of succession, and for the line of heirs whom the entailer
" prefers. Everything else relates to the *means* of accomplishing
" that *end.* The questions as to deeds obtained by purchasers or
" creditors, relate only to the *effects* of the deed which contains
" the entail. But there must first be a deed containing a desti-
" nation or tailzie, and rights constituted in the heirs of that

" tailzie by a certain description of deed. And power must first
" be given *effectually* to make and protect such destination, and
" to vest rights in the heirs of tailzie by restraints on the fiar,
" before provision can be made for reducing deeds by which the
" object of the entail is to be defeated. I think that the *first*
" thing done by the Act of 1685, was to sanction the right to
" make a tailzie, and to fix the mode in which that was to be
" done, and the form of deed 'whereby' it should not be lawful
" to do acts to the prejudice of the heirs of tailzie. I think the
" Act first provides for what shall be effectual to protect the heirs
" —and for the only method of protecting them—and *then* makes
" the tailzie, if so made, to strike against third parties, as a
" *means* of accomplishing that *end*. Hence, in my opinion, the
" statute begins by giving power to make a deed which *shall* be
" effectual against the party holding the estate—and having a
" statute thus general—complete in itself—introduced to settle a
" fixed system, I am of opinion, that no deed not in terms of the
" statute is effectual to bind the party in possession, or to prevent
" him doing any of the acts mentioned in the statute.

" The Act 1685, c. 22, does not profess to be in supplement
" of any existing and defined state of the law as to entails. It
" does not contain a declaration, or proceed upon a statement, of the
" law being complete, except in the cases where onerous rights are
" concerned. It does not admit that there previously existed the
" power effectually to tailzie estates so as to exclude alteration of
" the order of succession. In truth, that is always the great and
" leading object of every system of entails. On the contrary,
" the Act of Parliament begins systematically, and upon a plain
" method and principle, to *give right* to *tailzie* lands, and to
" *substitute heirs* in the tailzie. Now the proper meaning and
" import of the term tailzie is, beyond all doubt, to appoint a
" specific order of heirs, who may be different from the legal
" line of succession, and to cut off such of the latter as the party
" chooses.

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" The Act declares that 'it *shall be lawful*' (not, as Lord " Eldon said in the Ascog case,—it *is lawful*—but it *shall* be " lawful) 'to His Majesty's subjects to tailzie their lands and " 'estates, and to substitute heirs in their tailzies.' Whatever " was the state of the law previously, which I do not think is " very material in the question, I hold it to be clear that the " statute became *thenceforth* the only *legal origin of the right to* " *make a valid and effectual tailzie*—even laying aside all refe- " rence to the effect of entails with third parties.

" Then the Act of Parliament goes on to make it lawful to " do so, 'with such provisions and conditions as they shall think " 'fit, AND to affect the said tailzies with irritant and resolutive " 'clauses, *whereby*' (that is, as Lord Eldon also says, by the " said irritant and resolutive clauses) 'it shall *not be lawful* to " 'the heirs of tailzie to sell, &c., or to do any other act whereby' " (omitting the intervening acts) 'the succession may be frustrate " 'or interrupted,'—declaring all such deeds to be in themselves " null and void, and that the next heir may pursue contra- " vention.

" 1. In this enactment, it will be observed that the leading " thing authorised and declared to be legal, is to substitute heirs " in tailzies.

" 2. Then authority is given to affect these tailzies with " irritant and resolutive clauses. So far as we have yet gone, " the destination is the main thing which is here to be protected " by such irritant and resolutive clauses, that is, the rights of " the heirs against the party in possession.

" 3. It will be observed that the effect of rendering it un- " lawful for the *heirs of tailzie* to frustrate or interrupt the " succession, is ascribed by statute directly and exclusively to " the irritant and resolutive clauses thus authorised, just as " much as the exclusion of sales and contraction of debt which " are said to be *thereby* rendered not lawful. No distinction is " drawn between the former and the latter. It is from the

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" irritant and resolutive clauses—' *whereby*'—that it is not to be
" lawful for the heirs of tailzie to break the succession. The
" statute acknowledges no other origin of the power to prevent
" the party in possession from altering the order of succession.
" It declares that it *shall* be lawful to do this in a way, *whereby*
" the thing shall not be competent. Unless so done, I see no
" other origin for a reduction of the act if done. It is the only
" origin of the right to reduce sales and debts—that is admitted.
" I think it is equally the only origin of the right to reduce
" deeds of alteration. Further, the latter part of the clause,
" declaring all such deeds, &c., is equally applicable to the
" alteration of the order of succession as to the other. acts—
" whatever may be the reading of that clause, and whether the
" word ' declaring' is descriptive of what is to be contained in
" the irritant and resolutive clauses, or provides for what shall
" be their effect.

" The result that by any means heirs of tailzie shall not have
" power to break the order of succession, is thus by the statute
" ascribed directly to the force of the irritant and resolutive
" clauses authorised by the enactment. I cannot draw the dis-
" tinction between the act of alteration and of sales or debts.
" The statute says expressly that the lieges may *affect their*
" *tailzies by irritant and resolutive clauses*, *whereby* it *shall not be*
" *lawful* to sell, contract debt, *or* alter. I think as the two
" former are only rendered unlawful by the force of the enact-
" ment, and through the means of irritant and resolutive clauses,
" the same obtains as to alteration. The statute is not decla-
" ratory. It contains no reference to any existing law as to
" entails. It *confers* the power to make tailzies. Hence, I hold
" there can be no tailzie effectual for *any* purpose, except under
" and by force of the statute. It makes these tailzies effectual
" to restrain the party in possession from altering or selling
" (both are put on the same footing) by means of irritant and

" resolutive clauses. I cannot hold the heir to be restrained
" from *altering*, if there are not irritant and resolutive clauses.

" 4. I hold it to be inconsistent equally with the general
" view, as with a sound reading, of the statute to suppose that
" the Legislature admitted that, at common law, and without
" irritant and resolutive clauses, it was not lawful for the heirs
" of tailzie to break the succession, if they were simply pro-
" hibited. I think the statute meant for the first time to sanc-
" tion the power to render void an alteration in the order of
" succession appointed by tailzies, and provided for the only
" machinery by which that object could be secured, according
" to the view taken by Parliament. To suppose that any com-
" mon law was left upon one branch of this enactment unaltered
" and equally operative, while the Act was only to form a new
" code as to other things embraced in the enactment, is a con-
" clusion to which I could not come by any reading or general
" view of the statute. Such seems to me to be a result not
" warranted by any consistent view of the purposes of the Act,
" or by analogies in any similar cases. I find in a doubtful,
" unsettled, and disputed state of the law—when the form of
" accomplishing an entailer's object was, to say the least, not
" clearly settled, and when public policy plainly required that
" if entails were to be permitted there should be a clear system
" upon the subject,—that a statute is passed which *gives power*
" *to make* entails, and then in order to protect the same, says
" that *irritant and resolutive clauses* may be used, *whereby* it
" *shall not be lawful* to the heirs to sell, contract debt, or alter,
" &c. I cannot hold that, *without* these irritant and resolutive
" clauses, it shall not be lawful to heirs to alter, any more than
" to sell, or that the one was left to common law any more than
" the other.

" Again:—It is declared 'that *such tailzies shall only be*
" '*allowed* in which the foresaid irritant and resolutive clauses

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" 'are inserted' in all the steps of the title. This seems to me
" again to shew that no entail is to receive any effect at all
" which does not contain irritant and resolutive clauses.

" Again:—When the record is appointed, it is assumed that
" the tailzies therein entered shall contain *irritant and resolutive*
" *clauses*, and that the same shall be repeated in all the subse-
" quent titles of any succeeding heirs.

" And then 'being so insert, the same are declared to be
" 'real and effectual, *not only against the contraveners and their*
" '*heirs*, but also against creditors.' The pursuer reads this as
" if they are admitted to be effectual at any rate, and without
" all these requisites against the contravener. I think this is
" neither a sensible nor a warrantable reading. I think the
" statute, *after these requisites are complied* with, and on that
" condition, *declares* the tailzie to be effectual against the con-
" travener, as well as against creditors; and when these requi-
" sites are complied with, (among which are irritant and reso-
" lutive clauses,) but not till then, are they, in my opinion,
" effectual either against the contravener or against creditors.
" This clause, on which an opposite construction is so often put,
" appears to me to be the clearest of all the parts of the statute,
" and to be undoubtedly *enacting*, as much in regard to the
" contravener as to creditors. Supposing entails had never been
" attempted before, would not this clause have made them effec-
" tual against the contravener as well as against creditors? That
" cannot be doubted. Then surely it is not admissible to hold,
" that, if entails, *with* these requisites, are *declared* to be effectual
" against the contravener, the statute intended to acknowledge
" that entails in any form, and *without* any of these requisites,
" were equally effectual against the contravener.

" According to the statute, then, I think it is plain that, in
" order to be effectual against the heir in possession, the entail
" must contain irritant and resolutive clauses to be engrossed in
" the titles, whether to exclude the power to alter or to sell, and

"that there is no warrant for holding any prohibition to be valid "and effectual, so as to render void the deed of alteration, if "there is not an irritant and resolutive clause.

"The statute affords a test as to the soundness of the con-"struction contended for by the pursuer. It is said that a "tailzie with a prohibition simply, is effectual to render unlawful "an alteration in the order of succession,—that it is good *inter* "*hæredes*, and that the deed may be reduced which conveys the "estate to another party as much as if there had been an irritant "and resolutive clause. Suppose, then, the prohibition which "is said thus to make the entail complete as to alteration, has "been omitted in the course of the title, will that omission "import a forfeiture? Clearly not, under the next section of the "Act, which assumes that there must be an omission of irritant "and resolutive clauses to operate as a forfeiture. Then what "an absurd species of tailzie is supposed to be effectual to prevent "alteration. Why, the heir might simply carry through a new "title in his *own* favour without the prohibition—that would "imply no forfeiture, and then his title would be one in fee-"simple, and so he might alter.

"The statute properly provides for the protection of parties "who have *bona fide* contracted with a party infeft in fee-simple, "while the tailzie has been omitted from the title. But this "clause affords no warrant, as some have thought, for holding "that the only object of the statute was to provide for the case "of contracts with third parties.

"The pursuer seems to wish to represent the point embraced "in the remit as of the same character with another very extra-"vagant proposition maintained in the case of Cathcart, viz. "that if a party did not prohibit *all* the acts which he *may* "under the statute exclude, he could not by prohibitory, irritant, "and resolutive clauses, exclude some. The first words of the "statute, which give the lieges power to put in *any* conditions "they choose, and draw so plainly the distinction between the

" *conditions* and the *irritant and resolutive clauses*, render this
" notion wholly inadmissible.

" This remark leads me to another observation on the com-
" mencement of the statute, which I have purposely reserved,
" and which I explained at some length in a case recently
" decided in the Court of Session, Dingwall's Trustees *v.* Ding-
" wall. The Act says, that 'it shall be lawful to tailzie lands,
" 'and to substitute heirs in their tailzies, with such *provisions*
" '*and conditions as they shall think fit*, AND to affect the tailzies
" 'with irritant and resolutive clauses, whereby,' &c. Now, I
" apprehend it to be clear, that the '*provisions and conditions*'
" refer to the prohibitions,—that is to say, that you may insert
" in the tailzie whatever provisions and conditions you think fit,
" and separately, that you may render these effectual by *affecting*
" the *tailzies by irritant and resolutive clauses*, *whereby* it shall
" not be lawful for the heirs to do certain things. I think the
" distinction between the provisions and the irritant and reso-
" lutive clauses is most clearly and emphatically marked; and
" according to that distinction it is only by the irritant and
" resolutive clauses that the conditions are to be rendered effec-
" tual, and that it is not to be lawful for the heirs to alter or sell.

" In the above view I regard the whole of the entail law as
" depending exclusively upon statute, and I hold that the point
" stated for our opinion must be resolved in this case by the
" statute—which will be found sufficient for the determination
" of every general point which can well be raised. In many
" recent discussions I think the tendency has been to fall back
" more directly upon the terms of the statute, and the result has
" been to give much more certainty to the rules of decision.
" I refer particularly to the opinion of Lord Lyndhurst in the
" case of Munro *v.* Drummond, to his opinion, and that of Lord
" Eldon's in the case of Ascog, and the Marquis of Queensberry's
" claim of damages, and also to many of the opinions of Lord
" Brougham.

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" If one deviates from the statute, I do not know what safe " or consistent principle of judgment can be obtained.

" For instance, the ground for reducing deeds done in viola- " tion of a prohibition is sometimes rested upon the Act 1621: " But the principle of that statute would equally reach deeds in " favour of third parties, for, whether onerous or not, they are " done to the prejudice, (according to the view of the Statute " 1621), and in defraud of the rights of the heirs of entail as " creditors under the tailzie.

" Again, if anything is rested upon the prohibition being *in* " *gremio* of the title, and so forming an effectual condition that " would apply equally to all prohibitions, and ought to be equally " effectual against third parties contracting with a person who " has a title so limited, the title and the Record of Seisins " give them notice of the limitations as much as the Record of " Tailzies; or the insertion of the entail, with a prohibition in " the Register of Tailzies, gives them as much notice of the " condition as when irritant and resolutive clauses also occur. " But if in the one case the Court is at liberty only to look to " the statute, on what ground is there to be a different rule " when the question is raised as to a deed altering the order of " succession? I see no solid distinction. The statute certainly " draws none.

" Again,—it is sometimes stated as the ground for reduction, " that the party obtaining the deed of alteration *represents* the " heir of entail, who has *violated* the prohibition, and who is " *bound* to fulfil the obligation under the deed, and to acknow- " ledge the conditions of his own title. But that view *begs the* " *whole question*, for it assumes that the statute has acknowledged " that, without irritant and resolutive clauses, a party is *bound* " by a prohibition alone, whereby an act done against it is not " lawful. I take the sound view under the statute to be, on the " contrary, this, viz., that the provision or condition (the prohi- " bition in short) is not to constitute a *complete obligation* on the

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" party, or to *restrain his power* under his title, unless the tailzie " containing the condition is *affected* by irritant and resolutive " clauses, whereby it is not to be *lawful* for him to do the " thing prohibited, whether in favour of one party or another. " Unless there are such clauses, there is no statutory or effectual " obligation.

" Besides, if that view of the case is taken, how could it be " possible to *refuse damages* for the breach of a prohibition, thus " taken to constitute a valid obligation, and to impose an effec- " tual prohibition, though the contracting party might be safe, " owing to the defect in the irritant and resolutive clause? The " view I am considering holds that the heir is bound by the " prohibition—that the prohibition constitutes a *valid obligation* " *on him*—that his act in contravention of it is a wrong—that " the party representing him cannot defend it—and that the " wrong must be repaired by annulling the deed. But is not " that principle still more strongly applicable to the claim of " damages, when the entail is even more perfect, but perhaps " not recorded; and it may be that the heir in possession is the " only one of full age in the destination, and the others have " been unable to defend themselves by putting the entail on " record? The party in that instance has committed an addi- " tional wrong by not recording the entail. He has violated the " prohibition—he has disappointed the heirs of most valuable " rights, and he has put into his own pocket an immense sum of " money by the sale of the estate, and yet he is neither bound to " reinvest nor liable in damages,—although the view I am re- " ferring to ought to lead to that result as much as to the " reduction of a deed altering the order of succession. Accord- " ingly, Lord Eldon held, in the case of Ascog, that all these " general arguments were met by the answer that the statute " drew no such distinction as that an entail was effectual against " the party in possession to any effect, if not made in the way " and form provided for by the statute. Referring to the whole

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" of his opinion, I beg particularly to call attention to pages
" 228-9 of the 4th vol. of Wilson and Shaw's *Appeals.*

" I solicit permission to remark, that the views which I have
" ventured very reluctantly to state, when differing from those
" whose opinions I so deeply respect, are rested very much upon
" the effect which I think the decision of your Lordships in the
" case of Ascog must have on the question stated to us for
" opinion. If that case can be explained and accounted for by
" *this* view alone, viz., that there was no direction to be found to
" entail the lands in which the price might be reinvested, and
" that there was only an entail of the lands actually sold, and
" that on this ground alone it was held that no action lay for the
" price against the contravener or his representative; if the case
" of Ascog can be so explained, undoubtedly one main difficulty
" in the pursuer's way will be removed. But I cannot so explain
" that important judgment. It appears to me that it proceeded
" upon very comprehensive and (with deference) sound views of
" the general object and effect of the Statute 1685, and not on
" any narrow technical view. I must look to it, not in reference
" to the opinions of those who did not concur in the result, but
" in reference to the opinions of those whose judgment prevailed.
" I see that Lord Eldon had fully before him the train of opi-
" nions, expressed in institutional writers as to the alleged effect
" of a destination, with a prohibition, to bind the heir and to
" impose obligation on him. He saw that that view was truly
" at the foundation of the judgment appealed from,—that if
" sound, the judgment was in substance right,—that if there was
" an effectual prohibition imposing a complete obligation, then
" the claim for damages or compensation *in some form* was exactly
" the same as in all other cases of clear obligation, and a breach
" thereof wrongously committed. Hence he examined that view
" with great anxiety, and with that reach of understanding
" which impresses the mind with such profound respect for the
" reflection and thought evinced in his opinions. The result he

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" arrived at is rested on general principles drawn from an atten-
" tive examination of the statute, and supported by an inquiry
" into the sufficiency of the views on which it had been thought
" that damages in the form claimed were due.

" I look upon the judgment in Ascog as the one which has
" most satisfactorily cleared up the true effect and operation of
" the Statute 1685, and consistently with the view I take of it,
" I am unable to answer the question stated to us favourably for
" the pursuer.

" But it is for your Lordships to declare what was the true
" ground of judgment in that case, and what shall be taken to
" be the full and only effect of it. It is, therefore, a great com-
" fort to myself that the opinion now stated is one merely
" submitted for the consideration of your Lordships, with whom
" judgment lies, and that I have not been compelled to enter on
" this question in any case in the Court of Session.

" I own that some misapprehension seems to me to have
" arisen from the use of the expression,—'Questions *inter hæ-*
" '*redes.*' All questions as to the violation of an entail are
" questions *inter hæredes;*—though the party defending the act
" may be an onerous disponee, yet he is contending that the heir
" whose act is in question was not effectually restrained from
" doing the thing challenged. The substitutes must show that
" the *heir* in possession was *effectually bound and restrained* by
" the tailzie from doing the act, before they can reduce it. The
" restraint on the heir in possession is always the foundation of
" every reduction. Hence every such question turns on the
" rights of the substitutes and on the restraints imposed on the
" heir in possession. When an onerous third party defends the
" act, the inquiry is still, was the contravener effectually re-
" strained in favour of the heirs of tailzie? All such ques-
" tions are truly questions *inter hæredes,* in the only sense of
" the term that is material. Now, in trying that question, I
" cannot find any ground for holding that, *under this statute,*

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" there is any difference as to *power* on the one hand, and pro-
" tection to the heirs of tailzie on the other, whether the point
" is tried with the contravener or his representative, or with a
" third party.

" In some of the discussions upon this subject, it is said that
" deeds altering the order of succession are reducible because
" *mortis causa.* But that is in truth the use of a term without
" attaching any distinct meaning to it, because the very same
" opinions in the institutional writers undoubtedly hold deeds of
" alteration to be unlawful and reducible, although taking effect
" immediately *inter vivos.* Hence the effect ascribed to a pro-
" hibition is really not rested upon the fact that the deed is
" *mortis causa.*

" But I own I am at a loss to understand how this point,
" viz., that the deed is *mortis causa*, bears upon the question,
" either under the statute or on principle.

" The view, founded on the statute, it cannot affect.

" On principle, it seems to have no relevancy. Every man
" may effectually alter the destination of his estate by a deed
" which he may retain in his own possession and in his own
" power, *if he is not validly restrained from doing so. If* he *is*
" restrained, he can neither do so during his life, nor by leaving
" at his death a deed of alteration. If he is not restrained, then
" the deed is still his act, *of the date it bears.* There is nothing
" unlawful in his retaining full possession and enjoyment of
" the estate under a title which does not exclude alteration,
" and in leaving a deed which so alters. This seems to be the
" natural course to follow in every case where the title does not
" exclude alteration. Then, when the disponee produces the
" deed, and claims to act under it, it must receive effect, *unless*
" the title by which the granter held the estate barred alterations.
" And if it did, then upon *that* ground effect must be denied to
" the deed, whether it is to be acted upon at one period or at
" another.

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" The question is very different from that which has occurred,
" —whether a *faculty* or *permission* must be exercised during a
" person's life to the extent of doing the thing permitted in his
" own lifetime, and not merely by a posthumous act against his
" successors? If, for instance, there is a *power* to sell for debt, it
" may be a question whether, if the heir in possession does not
" sell, he can leave a trust-deed to take effect upon his death,
" with power of sale, seeing that if the act is not done in his
" lifetime, it may be said that his power over the estate is termi-
" nated, and cannot be exercised after his death. This was a
" point in the Newton Don case; and there are other nice ques-
" tions of this class. But there is no question in the present
" case raised as to the exercise of a *faculty* or *permission* to do a
" certain thing. A deed of alteration is either effectually
" excluded, or it is not. If it is not, then the proprietor may
" alter, like any other proprietor, in any form he chooses, whether
" by a deed taking effect *inter vivos*, or by a deed left to take
" effect after his death. Again, while the fact that a deed is left
" to take effect after death, is of importance in another respect in
" some questions, as, for instance, whether a fee was passed
" under it or not, or whether the granter remained truly the
" proprietor, or in some questions of fraud, yet it is to be kept in
" view that a deed is perfectly good to effect an alteration of the
" order of succession, though not produced or acted upon till
" after the party's death. It is a deed effectual, because executed
" according to its date by a party alive and in possession under a
" title which does not exclude alteration. Well, then,—in con-
" sidering the effect of his title,—viz., whether it excludes altera-
" tion or not,—can it possibly be of any importance whether the
" deed is produced before or after the party's death, seeing that
" its validity depends entirely on the effect of the title in restrain-
" ing alteration or not. If not excluded, the deed must be
" effectual; and hence all that is said about *mortis causa* deeds
" is really of no avail.

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" It appears to me that the fact that the deed of alteration is
" *gratuitous*, is of as little relevancy in point of principle, even if
" the question did not turn exclusively on the statute. The
" validity of restraints under an entail does not depend upon the
" point—what benefit the heir in possession gets by the deed of
" contravention, or the extent of benefit obtained by the grantee.
" It is a question exclusively of *power*. Either the prohibition is
" in itself sufficient, or it is not. If sufficient, then, although a
" party were to purchase a *deed of alteration* at a very great cost,
" leaving the other in possession during his lifetime, I presume it
" cannot be doubted that, according to the pursuer's argument,
" the deed, if a proper deed of alteration, would be reducible
" without reference to the amount of benefit on either side, be-
" cause it was a deed of alteration, and not a proper sale. I am,
" therefore, at a loss to understand how the fact, that the deed is
" gratuitous, bears upon the question of power, or is of any value
" according to the view that is taken, viz., that the prohibition is
" effectual to prevent the heir in possession frustrating the order
" of succession, though it does not exclude a sale or contraction of
" debt. Upon that principle it ought equally to exclude a pro-
" curatory for new resignation in favour of a second son, for
" which the latter may have, at some time or other during his
" father's life, paid very large sums in order to *succeed* to the
" family estate. But still the transaction may have none of the
" proper characters of a sale,—could not have been defended upon
" that ground alone,—and the party may be liable *ad valorem* as
" a representative for debts.

" On the whole, in short, I cannot see upon what principle
" any remedy can be given in the case of the violation of a prohi-
" bition against altering the order of succession not enforced by
" irritant and resolutive clauses, which would not also support a
" remedy in other cases.

" This is plainly the result of the very elaborate opinion of
" Lord Eldon in the Ascog case, already referred to.

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" Considering the opinions of the institutional writers, it may
" be thought too late to fall back on the statute for the determi-
" nation of the point involved in the question put to the Judges.
" I acknowledge that when the terms of a statute have received
" a certain interpretation by judgments of the Court, it would be
" very hazardous to construe the statute without the light and
" guide of such decisions. But if this question is not distinctly
" and authoritatively settled by decisions, it humbly appears to
" me that there cannot be a safer course than to consider the
" point with reference to the statute alone.

" The Act 1685, c. 22, is drawn with consummate skill for
" the objects it had in view. Every question which has yet
" occurred in entail law has been solved by the force of the
" statute, when its terms have been duly considered. It appears
" to me to be intended to introduce, fix, and arrange a *system of*
" *entails*. It *gives power* to make an entail. It acknowledges
" no power to do so in any other form or manner—(the extension
" of its sanction to deeds executed prior to its date, if in terms
" of it, and recorded under it, is a different point). It begins
" with declaring how the heir in possession may be restrained in
" his powers as proprietor, by *clauses whereby* it shall *not be lawful*
" for him to do certain acts. In no other way is it said that
" these acts can be declared not to be lawful. This is the
" *foundation* of all that follows. Among the acts which it *shall*
" be lawful *so to prevent* him doing, is alteration of the order of
" succession. When the question then is put to me,—Is he
" prevented from altering, I feel that the statute constrains me to
" inquire,—is the restraint imposed *in the form* and with *the*
" *requisites of the statute ?*—in the way in which power is given
" to impose the restraint, in order to accomplish the end of pre-
" venting the act? If not, then under the statute I must
" answer that he has not been prevented from altering in the
" only way in which he could have been competently and
" effectually prevented

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" I have therefore to state my opinion to be, that if the irri-
" tant clause is not directed against the institute, the deed of
" entail is otherwise not sufficient to exclude or render void the
" disposition or deed of alteration of the order of succession under
" reduction.

" JOHN HOPE."

" November 29, 1842."

" LORD FULLERTON.—In answering the question proposed to
" us, it is of importance to keep in view the nature of the deed
" under reduction, and the object and effect of the reduction if
" successful.

" In the *first* place, the deed is not one of alienation, even
" gratuitous. It is a disposition by Mr. Thomas Carrick, the
" institute, by which he sold, alienated and disponed the lands
" contained in the entail, 'from me, in favour of *myself and my*
" ' *heirs and assignees;*' and the statement of the defenders is, that
" they, ' after *having been served heirs*-portioners to him *cum bene-*
" ' *ficio inventarii*, have taken infeftment in virtue of the dispo-
" ' sition executed by their said brother.' Whatever difficulty
" there may have been, in some cases, in defining an alienation, it
" is a palpable misnomer to apply that term to a conveyance by a
" disponer in favour of himself. The deed in question is strictly
" and technically, a deed altering the order of succession. If
" published during the lifetime of the granter, it might have been
" the subject of reduction against him, and every ground of
" reduction good against him, must be equally good against the
" respondents, who do not take from him, but through him, and
" are liable, as his heirs, in the observance of his obligations.
" *Secondly*, The object of this action, and its effect, is not to
" enforce the obligation contained in the entail, indirectly,
" through the medium of a claim of damages and for investment
" of price. It is to enforce directly that obligation; to annul the
" deed granted in violation of it, and so to replace the lands under

" that title, from which, according to the pursuers' view, the
" granter of the deed had no power to withdraw it.

" The question then is, whether the absence of an irritant
" clause in the original entail, is sufficient to exclude the pur-
" suers from the remedy which they seek. The affirmative is
" maintained by the defenders; mainly on the ground, that the
" Act 1685 forms the absolute and exclusive test, for determining
" the powers of those possessing under entails, and the rights of
" expectant heirs—that, in short, no deeds granted or acts done,
" can be effectually challenged, unless the prohibitions relating to
" them be fortified by the irritant and resolutive clauses autho-
" rized by the statute. But this, again, will be found to involve,
" alternatively, one of two propositions, namely, either that the
" prohibitions violated by the deed under reduction, were in
" themselves bad at common law, and required the enactments of
" the statute to render them effectual; or that though originally
" good at common law, their effect at common law was extin-
" guished by the statute, and the powers of proprietors to impose
" them, were, from the date of the statute, rendered dependent on
" an exact compliance with its provisions.

" On considering these points, with all the attention which
" their importance demands, I have not been able to satisfy my-
" self, that either the one or other of these alternative propositions
" is well founded. On the contrary, it appears to me, that both
" of them are irreconcileable with authority, and at variance with
" a uniform series of decisions of this Court, some of them not
" merely analogous but identical, pronounced since the statute was
" passed.

" In regard to principle, it would be difficult to see the ille-
" gality of a proprietor who conveys his estate to a disponee and
" a series of heirs, providing that neither the disponee, nor any
" individual heir, shall defeat the rights of those to come after
" him, by *mortis causa* deeds or alienations. That being the
" condition upon which the disponee and each successive heir

" takes the estate, and the condition not being illegal in itself,
" there can be no conceivable reason, why the obligation not to
" violate it, should not be available and an apt subject of action.

" Again, as the condition confers a right on the subsequent
" heirs, to take the estate by succession, a right substantial in
" itself, though peculiar in its nature, a *jus quæsitum* thence
" arises, enabling those expectant heirs to challenge and annul
" any violations of that condition, not merely against the violators
" of the condition, but against such of his successors as are in law
" affected by his obligations. Accordingly, on looking at the
" authorities in regard to the law as it stood, prior to the passing
" of the statute, it cannot well admit of a doubt, that they all
" considered prohibitions directed against altering the order of
" succession, or even against alienations and contracting debt, as
" creating a *jus crediti* in the substitutes, enabling them to chal-
" lenge gratuitous deeds done in violation of those conditions.
" Indeed this matter seems to have been considered so clear and
" of so little importance, in comparison with that which chiefly
" engaged their attention, viz., the effect of such clauses against
" onerous transactions, that it is not very wonderful that their
" views upon it are very briefly, and perhaps somewhat loosely
" expressed. As an instance of this, may be remarked the
" reference by some of those authorities to the Act 1621, as the
" proper instrument for reducing gratuitous deeds done to the
" prejudice of such prohibitions. For, although this reference is
" quite conclusive of the opinion of those learned persons, that
" such prohibitions raised in the person of the substitutes an
" available right of credit in their due observance, it would
" rather appear that such a right of credit did not necessarily
" require the assistance of the Act 1621. In the case of personal
" debts having no connection with the heritable estate, the
" debtor, though under a moral obligation not to defraud his cre-
" ditor by making away with his estate, is unquestionably under
" no direct legal obligation in regard to the estate itself; and,

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" consequently, a positive statute might be necessary to enable
" personal creditors to reduce gratuitous alienations, on the pre-
" sumption, perhaps somewhat arbitrary, of fraud. But when
" the *jus crediti*, the obligation itself, had direct reference to the
" estate, namely, not to convey it away to the prejudice of the
" expectant heir, that right of credit, if good at all, required the
" intervention of no statute. It could neither be made better nor
" worse by the Act 1621, and must have enabled the expectant
" heir to enforce directly the observance of the negative obliga-
" tion, by reducing the deed done in violation of it.

" But though the Act 1621 might not be a *necessary* instru-
" ment for the reduction of such deeds, there seems no good
" ground for questioning, that they did fall within its provisions,
" and that consequently it might be legitimately so applied. The
" words of the Act of the Lords of Council and Session, confirmed
" by the statute, declare, that 'in all actions and causes depend-
" 'ing or to be intended by any true creditor for recovery of his
" 'just debt, or *satisfaction of his lawful action and right*,' 'they
" 'will decrete and decern all alienations,' &c., made to conjunct
" and confident persons, without just and necessary causes, and
" without a price being paid, to be null. Now, in the case con-
" templated, 'the recovery of the creditor's just debts, or *satis-*
" '*faction of his lawful action and right*,' implied a restoration
" of the lands to that tenure and line of descent in which he
" stood as an expectant heir; and consequently, if claims to that
" effect could be held to constitute rights of credit, or grounds of
" 'lawful action,' on the part of the expectant heirs, alienations
" falling under the description contained in the statute, to the
" prejudice of such rights, were deeds which the Court were, by
" the terms of the statute, bound to decern and decree to be
" null. Assuming then, that simple prohibitions did *inter*
" *hæredes* confer rights of credit, those learned authorities were
" fully justified in holding that gratuitous alienations in violation
" of them were reducible under the Statute 1621. And it is

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" also to be observed, that the right founded on the Act 1621, " never could be extended beyond gratuitous deeds, or applied to " the case of onerous transactions; for that statute is expressly " limited to alienations without just and necessary causes, and " without the payment of a just price.

" But the important consideration is, that every authority " holding such alienations to fall under the Act 1621, does by " necessary implication hold that such prohibitions in themselves " confer a right of credit,—a right of credit which, for the " reasons already assigned, I should be disposed to consider the " assistance of the Act 1621 not necessary to enforce.

" Looking, then, at the whole train of authorities on this " point as it stood before the Act 1685, there does not seem to " me to be a doubt, that they all considered prohibitions against " altering the order of succession, and even against alienation " and contracting debt, to be effectual against gratuitous deeds, " as raising a right of credit in the expectant heir, independently " of irritant and resolutive clauses. Stair, Mackenzie, Hope, " all appear to concur in this; and indeed I am not aware of any " one authority to the contrary. Accordingly, if the only object " of entailers had been the prevention of gratuitous deeds, I think " the fair presumption is, that the interference of the Legislature " never would have been required.

" But to those whose feelings and prejudices rendered the " descent of their landed estates unaltered and undilapidated " through a long line of heirs, a matter of importance, clauses " not operating beyond gratuitous conveyances could afford but " little security. Sales, debts, and the accompaniments of " apprizings and adjudications were likely to be much more " fatal to such views of posthumous regulation than gratuitous " alienations *inter vivos*, which are but of rare occurrence, " or even alterations of the order of succession by *mortis causa* " conveyances. Consequently it was against onerous trans- " actions that the ingenuity of lawyers and conveyancers was

" taxed to provide a safeguard, and certainly never was in-
" genuity more zealously, but more fruitlessly, exerted. In the
" case of merely gratuitous, and consequently unilateral deeds,
" the condition not to alter or alienate, forming at the lowest a
" personal obligation against the granter, was, particularly when
" inserted in his titles, an obligation equally available against his
" representatives and the gratuitous donees, who held in them-
" selves no independent right—no character entitling them to
" shake themselves loose from the obligations, even personal, in-
" cumbent on the donor. But in onerous transactions a very
" different element was let in, namely, the independent right of
" the onerous purchaser or creditor. There was then involved,
" not merely the obligation of the proprietor not to contract debt
" or alienate, but the right of a creditor or purchaser to adjudge
" and to take possession. And accordingly this distinction
" between the validity of onerous and gratuitous deeds is one
" which pervades the whole of this branch of our law. It is
" quite a mistake to state the difference between gratuitous and
" onerous as a difference merely between the motives or con-
" siderations affecting the mind of the granter, and therefore as
" one extrinsic to his powers. It does affect his powers, and
" that most materially, if by power is meant his capacity to do a
" thing unchallengeably and with certain effect. A party hold-
" ing property under merely personal obligations has not power
" to violate those obligations by gratuitous deeds, because the
" obligations, though personal, are transferred against the donees,
" while he has the power to execute onerous deeds, because such
" obligations, if personal, are not transmitted against the one-
" rous acquirer. It is equally correct in expression and sound
" law, then, to state, that such a party has no power to grant
" gratuitous deeds, and has the power to grant onerous deeds,
" because he one description of deeds can be reduced and the
" other cannot.

" The difficulty, then, was to devise means by which the

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" estate could be protected against onerous transactions, a diffi-
" culty which, however, was insurmountable, when we consider
" the two principles of law which were even then considered as
" perfectly established. In the *first* place, that each disponee or
" heir taking under an entail was the fiar in the full real right
" of property; and, *secondly*, that whatever were the personal
" obligations a fiar so vested might lie under, every third party
" was, by the law of the land, entitled to acquire unchallenge-
" ably, for onerous causes, the full right which was in the party
" with whom he dealt. No condition, then, which did not
" qualify or abridge the real right in the fiar could affect the
" right of the singular successor. Various ingenious contriv-
" ances, indeed, were resorted to for that purpose. Such was
" evidently the origin of irritant and resolutive clauses. Thus,
" Hope, after stating the difficulties attending the use of inhibi-
" tion, which was one of the measures resorted to, and the
" inefficiency of it, proceeds (tit. 16, sec. 5)—'But to *prevent*
" '*and remeid this* there is *a new form found out*, which *has*
" '*these two branches*, viz. either to make the party contractor of
" 'the debt to incur the loss and tinsel of his right in favour of
" 'the next in tailzie; or to declare all deeds done in prejudice
" 'of the tailzie by bond, contract, infeftment or comprising, to
" 'be null of the law.' He then enters into a discussion as to
" the effect of such clauses, and he arrives at the conclusion that
" they would be effectual. But the sounder opinions seem to
" have been the other way. The irritant clause, annulling debts
" and deeds, which the public law of the land recognized, seems
" to be clearly beyond the reach of any private provision; while
" the resolutive clause which, from its very nature and object,
" implies that the complete right had previously vested, could
" be viewed in itself as nothing but a personal condition, and
" consequently ineffectual against singular successors. According
" to *Stair*, b. i. tit. 14, sec. 5, 'if the buyer become once the
" 'proprietor, and the condition is adjected that he shall cease to

" ' be proprietor in such a case, *this is but personal; for property*
" ' *or dominion passes not by conditions or provisions, but by tra-*
" ' *dition and other ways prescribed in law.*' And accordingly,
" though in one case, that of Stormont, effect was given to a
" prohibition fortified only by a resolutive clause, in a question
" with onerous creditors; that decision appears to have been
" considered even at the time as but of dubious authority.

" The whole of these curious questions as to the effect of
" irritant and resolutive clauses were set at rest by the Act
" 1685, cap. 22, which defined the conditions, on the observance
" of which such clauses should receive effect against onerous trans-
" actions, and on the non-observance of which they should have
" no such effect. But while it may be admitted, and is indeed
" now fixed in practice, that this statute forms the rule by which
" all competition between the rights of heirs of entail and those
" of onerous third parties must be tried, I must be permitted to
" doubt whether there is any good ground for holding that that
" statute, in sanctioning the operation of irritant and resolutive
" clauses in matters previously questionable, extinguished or in
" any way affected those common law rights created in favour of
" the substitutes by prohibitions, which never seem to have
" required irritant and resolutive clauses to protect them. On
" the contrary, I think it clear, from those authorities who
" treated of the subject at the very time, that the statute was
" not understood to have that effect. Lord Stair, in treating of
" clauses resolutive, concludes (B. i. tit. 14, sec. 6)—' And now
" ' there is a special statute regulating tailzies *and clauses irri-*
" ' *tant:*' and in another passage, after mentioning the case of
" Stormont, he refers (B. ii. tit. 3, sec. 58) to the statute as
" sanctioning *clauses irritant* in taillies, for the observance of the
" conditions there laid down, ' which, if they omit, it shall infer
" ' a nullity of their right, but shall not prejudice creditors so
" ' contracting *bona fide, which weakens the former tailzies with*
" ' *clauses irritant.*' These expressions seem to me to imply,

"that the only common law right which was weakened was "that very questionable one of affecting the entail with clauses "irritant,—a right which, in order to be effectual against cre-"ditors and purchasers, required to be exercised in terms of the "statute. Mackenzie is still more explicit. After describing "the second class of entails containing merely prohibitions, which "he holds to be good against gratuitous deeds, he (B. iii. tit. 8) "proceeds to describe the third class. He says,—'If the maker "'design that the tailzied lands should not be alienable even "'for onerous causes, then he adjects to the *pactum de non alie-* "'*nando*, a *clause irritant and resolutive;*' and he concludes, "'because *such clauses* prejudge creditors and commerce very "'much, and seem to be inconsistent with the nature of pro-"'perty and dominion, therefore an Act of Parliament *was* "'*necessary for securing them.*' Here I think it is clearly ex-"pressed, and that too by a person of all others likely to be "acquainted with the true object and reading of the Act 1685, "that while prohibitory clauses are in themselves effectual "against gratuitous deeds, it was only the irritant and resolutive "clauses rendering them inalienable even for onerous causes, "which required the sanction of the statute. A similar opinion "is expressed by Erskine, by Bankton, and in so far as I know, "by every institutional writer who has treated of the subject.

"And I think this is the fair reading of the statute itself, "which seems to contain nothing extinguishing any common "law right, or rendering dependent upon the observance of its "provisions any right whatever, which did not require irritant "and resolutive clauses to protect it. The leading enactment is, "'that it shall be lawful for His Majesty's subjects *to tailzie* "'*their lands*,' &c. and 'that *such tailzies only shall be allowed* in "'which the foresaid irritant and resolutive clauses shall be "'insert in the titles, and the original tailzie entered on the "'record,' &c. The inference from this, that no tailzies *should* "*be allowed*, *i. e.*, should have any effect whatever, except those

" which contained irritant and resolutive clauses, published in
" terms of the statute, refutes itself by going too far. If it were
" correct to the extent of excluding all prohibitions without
" irritant and resolutive clauses, it must be just as effectual in
" invalidating simple destinations without either the one set of
" clauses or the other.

" But the inference appears to me to rest entirely upon a
" most arbitrary construction of the statute. Its enactments
" must be read together. The leading enactment declares what
" it shall be lawful for the entailers to do, viz., to tailzie their
" lands, and to substitute heirs, with such provisions as they
" shall think fit, '*and to affect the said tailzies with irritant and*
" '*resolutive clauses, whereby*' it shall not be lawful to sell,
" annailzie, or contract debt, or alter the succession,—being the
" enumeration of the acts to be struck at by these irritant and
" resolutive clauses. The fair construction certainly is, that it
" shall be *lawful to tailzie*, with the additional security of irritant
" and resolutive clauses directed against the acts enumerated.
" And the mention of the alteration of the succession in that
" enumeration is by no means superfluous; because, though the
" simple act of altering the succession might not require an
" irritant and resolutive clause to prevent it *inter hæredes*, yet if
" the party holding under that alteration alienated for an onerous
" cause, an irritant and resolutive clause might be necessary to
" annul that link of the title against the onerous purchaser.

" The next head of the statute declares the terms upon which
" these powers shall be exercised, namely, *such tailzies*, *i. e.*, the
" tailzies previously described, fortified by irritant and resolutive
" clauses, shall only be allowed, in which the aforesaid irritant
" and resolutive clauses, are insert in the titles; and the original
" tailzie, with all its substitutions and irritant and resolutive
" clauses, shall be produced before the Lords of Session, &c.

" There is then the provision for the repetition of all the
" provisions and irritant clauses in all the subsequent con-

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" veyances of the lands. Lastly comes the important declaration:
" 'And being so insert,' (*i.* . the provisions and irritant clauses),
" 'His Majesty, &c., declares the samen to be real and effectual,
" 'not only against the contraveners and their heirs, but also
" 'against their creditors, comprisers, adjudgers, and other sin-
" 'gular successors whatsoever.' Now, is there any thing in
" these various enactments, which, upon a sound construction,
" renders any provisions, good at common law previously to the
" statute without irritant and resolutive clauses, dependent on
" the addition of irritant and resolutive clauses, and the exact
" observance of the statute in regard to such irritant and reso-
" lutive clauses? I think not. The expressions rather seem to
" me to warrant an inference the very reverse. If there were
" provisions legally operative *inter hæredes* before the statute,
" without irritant and resolutive clauses, but which were not
" operative against third parties without irritant and resolutive
" clauses, while the effect of those irritant and resolutive clauses
" themselves was doubtful, the form of expression was quite
" natural, in enacting that the provisions and irritant clauses,
" when published in a particular way, should be effectual, not
" only against the contravener and his heirs, as the provisions
" had been before, independently of the statute, but also against
" their creditors, comprisers, and singular successors.

" It appears to me that this is the natural reading of the
" statute; and what is of much more importance than any
" opinion of mine, it is the reading of the statute, which has
" received the uniform sanction of the Court since the passing of
" the statute itself. In every case that has occurred, in which
" there was room for the distinction, the distinction has been
" taken, and given effect to, between onerous transactions requir-
" ing the sanction of the statute to invalidate them, and gratui-
" tous deeds, in regard to which, in questions *inter hæredes*, the
" sanction of the statute, and the observance of its provisions
" were held to be unnecessary.

" In the case of Callender, *Mor.* 15,476, occurring imme-
" diately after the passing of the statute, it was 'found that a
" ' prohibitory clause was a sufficient ground for the next heir to
" ' reduce, upon the Act 1621, any gratuitous deeds, *though it*
" ' *wanted a clause irritant*,' and I have already submitted my
" reasons for holding that the application of the Act 1621 neces-
" sarily implies that a prohibitory clause, without irritant and
" resolutive clauses, was sufficient to create a *jus crediti* in favour
" of the expectant heir. Neither can I see how the authority of
" this decision, or any others resting on the Act 1621, can be
" questioned; as countenancing the operation of a bare prohi-
" bitory clause against creditors or singular successors. That
" statute never could have any such effect. It is *in terminis*
" limited to alienations made without just and necessary causes,
" and without a just price really paid.

" The same principle was sustained in the case of Ure against
" Earl of Crawford, 17th July, 1756, *Mor.* 4,315, in which the
" only peculiarity was, that the condition, not to sell, contract
" debt, or do any other deed by which the lands might be
" affected, does not seem to have entered the title at all, but was
" contained in a separate obligation. This specialty was evi-
" dently rather unfavourable than otherwise, to the heirs found-
" ing on the condition, and yet it was held sufficient to support
" the reduction of a gratuitous conveyance,—that reduction, as
" would appear from the report, being rested, not on the Act
" 1621, but simply on the contravention of the prohibitory
" clause. A similar judgment was pronounced in the case of
" Craik against Craik, *Mor.* 4,313, in which the question seems
" to have turned entirely on the onerosity or non-onerosity of
" the deed challenged.

" For it must be observed that the decisions in which effect
" was refused to a bare prohibitory clause, are no less instructive
" on this point, than those in which its effect was sustained.
" In almost every one of those cases, it was conceded in argu-

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" ment by the party supporting the deed of contravention, and
" assumed by the Court, that a prohibitory clause was good
" against gratuitous deeds; so that the only subject of debate
" truly was, whether the deed under challenge should be held to
" be onerous or gratuitous. Thus, in the case of Bruce of Red-
" heugh, *Mor.* 15,493, in which the point at issue was the effect
" of an entail defective in some of its clauses, the argument
" on the part of those denying effect to the prohibitions, was
" entirely founded on the distinction between onerous and gra-
" tuitous. 'These prohibitory clauses may have indeed the
" 'strength of an inhibition *to reduce any voluntary gratuitous*
" '*deeds, as was found in the year* 1687 *betwixt the Earl of Cal-*
" '*lender and Lord John Hamilton,* now Earl of Ruglen; but
" 'without an irritant clause annulling the fee, *they can never*
" '*prejudge lawful creditors.*' And according to the same report,
" 'The Lords found that the tailzie in this case did not effec-
" 'tually bind him up from contracting debts, and therefore
" 'found his daughter, as served to him, liable for his debts, and
" 'that this tailzie was not in the terms of those now settled by
" 'the Act of Parliament 1685, and *that the clause imported no*
" '*more but the discharging, altering, and changing the order of*
" '*succession and all gratuitous deeds, and could go no farther.*'
" The same doctrine was recognized in the case of the creditors
" of Primrose against heirs of entail, referred to in the case for
" the pursuer. Indeed, the general nature of the matter in dis-
" pute in such cases is accurately described in the report, by
" Lord Monboddo, of the case of Logan against Drummond,
" July 14, 1752, *Brown Supp.* 798, vol. v., in which the deed in
" dispute was ultimately sustained; he says,—'The Lords were
" '*all of opinion,* 1*mo*, *that the clause prohibiting the alteration of*
" '*the succession excluded all gratuitous alienations of the subjects;*
" '2*do*, that it did not exclude alienation for onerous causes; so
" 'that the *only question was* whether or not the marriage and
" 'marriage-settlement upon the lady and her heirs *was such an*

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" ' *onerous consideration as would defeat the substitution, fortified*
" ' *by the prohibitory clauses above recited.*'

"Further, the effect of conditions merely personal, in questions
" *inter hæredes*, independently of the Act 1685, is necessarily in-
" volved in the decisions giving effect to an entail unrecorded.
" According to the fixed principle in our law, the right having
" once vested in an heir in possession, a resolutive clause, an-
" nulling his right in a certain event, is nothing but a personal
" condition. If, then, it could be held, that from the date of the
" Statute 1685, no personal condition was effectual, even *inter*
" *hæredes*, except by the force of the statute; it must follow, that
" no heir holding under an unrecorded entail, could incur a for-
" feiture of his right by contravention. Accordingly, that was
" the very argument maintained in the case of Willison against
" Callander of Dorator, *Mor.* 15,369-70. But ' the Lords found
" ' that the resolutive clause was effectual.' And this leads me
" to observe, that there are many provisions and conditions
" which have hitherto stood unquestioned, in regard to the rights
" and obligations of heirs, and which can be derived from no
" other source than the common law, independently of the
" statute. The statute sanctions irritant and resolutive clauses,
" whereby it shall not be lawful to sell, annailzie, contract debts,
" or to alter the order of succession, declaring such deeds to be
" in themselves null and void, &c. That is quite intelligible, in
" so far as it applies to the rights of third parties, which rights
" necessarily imply, the intervention of some positive act to
" create them. But what becomes of all those provisions and
" conditions, of which the subject is not a prohibition against
" doing, but a positive injunction to do, certain acts. It is clear,
" that although these last admit of a resolutive clause on failure,
" they admit of no irritant clause. Such injunctions, indeed, do
" not seem to fall within the description of cases, to which, by
" the terms of the statute, it is competent to attach either irritant
" or resolutive clauses. For instance, to take the most ordinary

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" of all clauses, the obligation to assume the name and arms,
" clearly admitting of no irritant clause, I do not well see where
" there is any authority in the statute, for attaching a resolutive
" clause to such a condition, or how either the provision or a
" resolutive clause can operate at all, except on the ground that
" the rights and obligations thence arising, exist merely *inter*
" *hæredes*, and consequently do not require the support of the
" statute. The same may be said of clauses of devolution, bind-
" ing the heir to surrender the estate in particular events, as, on
" succeeding to a title, or various others easily supposeable; so
" that I do not think that this new doctrine of the statute,
" forming the single test of valid personal obligations, even *inter*
" *hæredes*, can be maintained, without overturning many of the
" hitherto generally received principles in this branch of our
" law.

" Although sensible of the undue length to which these
" remarks extend, I feel it necessary to notice two other de-
" scriptions of cases, 1*st*, because the principles laid down in them
" have the authority of our latest practice: and, 2*ndly*, because
" they appear to me to be cases directly in point.

" The first consists of those touching the effect of entails un-
" supported by the statute, in regard to the provisions of widows.
" In one of the older cases, Anderson *v.* Wishart, *Mor.* 13,576,
" a clause excluding courtesy and terce, the entail being not
" recorded, was not held effectual against the widow. And
" certainly much might be said in favour of that decision, on the
" ground of the right of terce being onerously acquired. But a
" different rule is now laid down by a series of decisions, of
" which it is impossible to question the authority. In the case
" of Gibson *v.* Reid, *Mor.* 15,869, the question was, whether a
" clause excluding the terce, but without an irritant clause,
" could take effect against the widow? The Court found that it
" did, upon the ground that, 'like the *jus mariti*, it may be
" ' excluded by the terms of the grant, which are strictly *obliga-*

" '*tory on the widows and children of the substitutes without irritant*
" '*and resolutive clauses.*' That was again confirmed in the case
" of M'Gill *v.* Law, June 13, 1798, in which, as in the old case
" of Anderson, the question was raised on an unrecorded entail.
" The point was held to be ruled in the case last alluded to, that
" of Gibson—'The Court considered that case to be decisive of
" 'the present. In the former case, it was observed, the entail,
" 'though recorded, was ineffectual against creditors, from want-
" 'ing an irritant clause; *but irritant and resolutive clauses, and*
" '*consequently registration, are unnecessary to make entails*
" '*effectual intra familiam of the substitutes.*' *Lastly,* In the
" case of the Duchess of Roxburgh *v.* the Duke, January 11,
" 1820, the Court held a provision of 4000*l.*, in addition to her
" jointure contained in a postnuptial contract, to be ineffectual
" against the next heir of entail, the entail not having been
" recorded; on the ground, as appears from the report, '*of want*
" '*of power* in the Duke to grant the provision under the per-
" 'mission of the entail, as being excessive in addition to the
" 'locality, *and as gratuitous, being contained in a postnuptial*
" '*contract of marriage.*' Nothing can bring out more clearly
" the distinction, even in a question of power, between onerous
" and gratuitous deeds. If it had been a bond for borrowed
" money, or if the provision, though in a postnuptial contract,
" had been within the limits of a fair allowance, and had been
" thus constructively onerous, it must be held to have been
" effectual against the next heir, as within the powers of his pre-
" decessor, holding by an unrecorded entail. But, once held
" gratuitous, it was of no effect. In short, it is a decision
" exactly in point on the present question, namely, that a pro-
" vision not good, according to the requisites of the Act 1685, is
" still entitled to effect against gratuitous deeds, in a question
" with the next heir.

" The other description of cases, having an important bearing
" upon the present point, includes those touching the powers of

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" an heir in possession under an imperfect entail, either to extend
" the line of succession or to complete the entail, in terms of the
" Act 1685, by the addition of irritant and resolutive clauses.
" The incompetency of this is now fixed by a long series of
" decisions. The only intelligible ground upon which this can
" rest, is the disability of a party, barred from altering the order
" of succession or disponing, to execute any conveyance good
" against the subsequent heirs, so as to oblige them to take the
" estate under that deed, instead of the original entail under
" which he himself holds. It may be said, indeed, that if the
" prohibition creating this disability, was fortified by an irritant
" and resolutive clause, the existence of a perfect obligation not
" to violate it involved no inconsistency with the plea of the
" defenders. But it so happens, that in the two latest decisions
" upon this very point, that of Meldrum *v.* Maitland, 29th June,
" 1827, and the Earl of Fife *v.* Duff, 7th March, 1828, the only
" prohibition contained in the imperfect entail had no irritant
" clause attached to it.

" In the first case, Meldrum and Maitland, in addition to
" that of taking the name and arms, &c., there was the provision
" that it should not be lawful to 'alter the destination above
" 'written by contract of marriage, or by any other deed
" 'gratuitously to disappoint the order of succession,' and this
" was followed by a resolutive but no irritant clause. A party
" holding under this entail executed a new deed in favour of the
" same series of heirs, containing additional fetters against selling
" or contracting debt; and, at the same time, she, by another
" deed, conveyed part of the lands, and also one-fourth of the
" free rent of the whole estates, to trustees, for payment of pro-
" visions to her younger children. Both deeds were brought
" under reduction by the heir-apparent under the original entail;
" and both deeds were reduced, the argument on the part of the
" pursuers, as condensed in the report, 5 *S.* & *D.*, p. 859, being,
" 'that an heir in possession under an imperfect entail, *whatever*

" ' *may be his powers in reference to third parties, is bound by*
" ' *the conditions of the grant in all questions with the other heirs*
" ' —that, as he takes and enjoys under *the conditions of the*
" ' *deed*, he is bound to respect those conditions,' &c. It is clear,
" that if a prohibitory clause, without an irritant clause, had
" been of no avail against gratuitous deeds, such a judgment
" never could have been pronounced. On the assumed view,
" that no provision, unless secured in terms of the Act 1685,
" could avail even *inter hæredes*, the deeds in that question must
" have been as little subject to challenge as if they had been
" granted by a party holding under a simple destination.

" The other case, that of Lord Fife against Duff, 6 *S.* & *D.*,
" p. 698, was of the same kind. There was a prohibition
" against altering the tailzie or order of succession, with a resolu-
" tive, but no irritant clause. A party holding under this deed
" executed a new and strict entail, with prohibitory, irritant, and
" resolutive clauses; and, in doing so, made a very slight altera-
" tion in the order of succession. The heir entitled to succeed
" under the former entail, brought an action for setting aside the
" last entail, the summons being laid, not on the Act of 1621,
" but simply on the prohibition contained in the principal entail,
" and on the disability thence arising to alter the terms of the
" entail or the order of succession. Now, there the prohibition
" was not fortified by any irritant clause; and upon looking at
" the written pleadings, I perceive, that the circumstance was
" brought distinctly under the notice of the Court; and yet it
" never seems to have been doubted, that whatever might be the
" merits of the defence on other grounds, a prohibition required,
" in a question *inter hæredes*, no irritant clause to render it bind-
" ing; and, accordingly, the Court decerned in terms of the
" libel. It seems impossible to evade the application of these
" cases to the present question. Both of them are instances of
" the competency of reduction at the instance of an heir, founded
" on a prohibition without an irritant clause. And, in so far as

" the last case turned upon the express alteration of the order of
" succession, it is a case absolutely identical with the present.

" On these grounds, it does humbly appear to me, that the
" question put to us must be held to be determined in the affirma-
" tive, not only by the concurring authority of all our institutional
" writers, but by an uninterrupted series of decisions.

" It only remains to be considered, whether those authorities
" have been shaken by some of the later cases referred to on the
" part of the defender. In considering these cases, I am disposed
" to throw out of view entirely those of Sharpe against Sharpe,
" decided in the House of Lords, 18th April, 1835, and that of
" Speid, decided in the Court on 21st February, 1837. In the
" first case, the only question was the sufficiency of the irritant
" clause against acts of contravention. The House of Lords
" held, reversing the judgment of the Court, that there was no
" good irritant clause; and in the words of the judgment, as
" appearing in the report, it is declared, that the deed of entail is
" not sufficient to prevent the appellant from selling, disponing,
" or contracting debt, '*or from gratuitously alienating or dis-*
" '*posing of the same*,' being the acts that are described in the
" summons. It would appear, however, from the report, that
" this last point, as to gratuitous deeds, was neither raised in the
" arguments nor considered in the opinion of the learned Lord
" who moved the reversal; and it also appears from a note in a
" later case, that of Strathbrock, Robertson's *Reports*, 16th
" August, 1839, that these expressions in the judgment had been
" inserted from inadvertency. This I must hold to be confirmed
" by the very remit in the present case; as, if that judgment had
" been understood to express the judicial opinion of the Court of
" Appeal, I do not see how the present question ever could have
" been submitted to us.

" The case of Speid against Speid, is one of the same kind.
" The summons, founding on the defect in the irritant clause,
" included no doubt the alleged power of the pursuer to execute

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"gratuitous as well as onerous deeds, and the Court decerned in "terms of the libel, and thus, in form at least, supported the "one power as well as the other. But the whole argument "related to the sufficiency of the irritant clause. The Court "found that the prohibitions are not guarded in terms of the "statute, so as to constitute a valid and effectual entail, and "*declared in terms of the libel*,—their attention not having been "directed, either in the argument or in the opinions of the "Court, to any distinction between onerous and gratuitous deeds. "In these circumstances, I do not consider either of those cases "to be substantially judgments on the point in dispute.

"The whole difficulty arises from the cases of Ascog and "Bruce, decided in the House of Lords, on 16th of July, 1830. "And it is unquestionable, that the rejection of the argument of "the respondents in those cases is, to a certain extent, unfavour- "able to the present pursuer. Because, from the very nature of "those arguments, the judgment *in favour of* them would have "formed an authority *a fortiori* in favour of the present pursuer. "But it does not follow that the judgment in those cases, "though to that extent unfavourable, was necessarily an autho- "rity against him on the point now raised. On the contrary, it "rather appears to me that those judgments did not necessarily "affect the present question. This opinion is, of course, ex- "pressed with the most perfect deference to the Court of Appeal, "who are of course the best judges of the true principles of the "decisions which were pronounced by them. I can only say, "that considering the point at issue in the case of Ascog and "Bruce, and the grounds of the judgments as appearing in the "report, I should not feel myself authorized to hold that those "judgments did decide, or were intended to decide the question "that has been put to us. That they did not do so directly is "clear; whether they did so by any necessary implication, is a "fit subject of inquiry.

"In the case of Ascog, the entail was defective, both in the

" irritant and resolutive clauses, against selling; in that of Bruce,
" in the resolutive clause. There could be no doubt, then, of the
" *power* of the heir in possession to sell; and, accordingly, in the
" question with the purchasers, the sales in both cases were ulti-
" mately sustained. In both cases the expectant heirs raised
" declarators founding on the prohibitory clause, and concluding
" that the party who had sold should, in the event of the sale
" being sustained, be bound to reinvest the price in new pur-
" chases, to be settled in terms of the original entails. It is
" evident that the condition of the argument on both sides there
" was, the power of the heir in possession to sell, and the conse-
" quent inefficiency of the alleged obligation to secure its own
" appropriate performance. And this drove the parties demand-
" ing the reinvestment to the necessity of maintaining the very
" nice distinction between the rights of heirs and the rights of
" onerous purchasers in regard to the identical subject of obliga-
" tion. It was maintained, that though the obligation was
" invalid to the effect of preventing a sale, it was still valid to
" the effect of enabling the expectant heirs to compensate them-
" selves, by insisting on the reinvestment of the price, the substi-
" tute for the lands sold in the hands of the seller. The Court
" of Session gave effect to this distinction, and while they held
" the sales to be good to the purchasers, they held the sellers in
" both cases bound to reinvest; and those judgments were
" reversed by the House of Lords.

" Now it is clear enough, that if the judgments of the Court
" of Session had been affirmed, there would have been an end to
" the present question; because those judgments directly sus-
" tained the obligatory effect of the prohibitory clause *inter*
" *hæredes*, independently of the irritant and resolutive clauses.
" But the converse of the proposition is not necessarily true.
" We must look to what effect and under what circumstances
" the bare prohibitory clause was there pleaded, in order to see
" how far those judgments bear upon the present case. Because

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" it does not necessarily follow, from the inefficacy of the mere
" prohibitory clause to support the special ground of action in that
" case, that it may not be effectual to sustain a ground of action
" entirely different. Now, it appears to me, that it was pleaded
" in those cases, to an effect and under circumstances essentially
" different from those which hold in the present. It was there
" pleaded, as a ground of claiming compensation, as it were, for
" the breach of an obligation, which obligation the heirs of entail
" confessedly could not compel the alleged contravener to per-
" form, by annulling the sale. And the main argument on the
" part of the appellants in that case was, that the proper test of
" the existence of an obligation was the competency of preventing
" its violation: that a prohibition against selling, without irri-
" tant and resolutive clauses, which, by the admitted terms of
" the argument on both sides was of no avail, and not binding in
" regard to its only object, a prevention of sale, must be treated
" as constituting no obligation at all. That argument was suc-
" cessful, and thus the point was clearly fixed by the judgment of
" the House of Lords, that a prohibition *against onerous trans-*
" *actions*, if not secured in terms of the statute, constitutes no
" obligation even *inter hæredes*, to the effect of compelling the
" contravener to indemnify the expectant heirs.

" That principle was enough for the decision of the case before
" the House of Lords. It was not necessary to go beyond it; and
" it does not appear to me, from the report of the opinion of the
" noble and learned person who moved the judgment, that it was
" intended to go beyond it. Thus the Lord Chancellor, Eldon,
" 4 *W.* & *S.*, 222, gives the import of the claim of the respon-
" dents in the following terms:—' The deeds of entail apply no
" ' irritant or resolutive clause against selling. *The deed, therefore,*
" ' *admits of an effectual sale;* but the author of the deed, without
" ' expressing that such shall be the effect of a sale, is *understood*
" ' *to mean that of which he has not said one word, viz., that if the*
" ' *heir does sell he shall buy another estate with the price, and so sell*

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" '*and buy as often as he pleases to sell and buy*.' Again, (p. 223,)
" —'It is for your Lordships to judge whether clearly settled
" 'law *exposes the heir selling to such liabilities, and nevertheless*
" '*leaves him entitled to such liberty*, and that you are bound to
" 'imply that the author of the entail meant to impose an ex-
" 'press condition by the deed, and instead of enforcing the
" 'observance of it as he enforced the other provisions, by irritant
" 'and resolutive clauses, that he relied upon some supposed
" 'clearly settled law to *do what he might have directed by this*
" '*deed, but as to which he is perfectly silent, namely, from time to*
" '*time, upon every selling, to require the heir to buy again and*
" '*entail to the same uses*,' *&c.* A great many other passages
" might be quoted to the same effect. No doubt there are passages
" which refer to the statute, and the irritant and resolutive clauses
" there authorized, as the test of the existence of the obligation
" even *inter hæredes*. Thus, after quoting the statute, the report
" proceeds, 4 *W.* & *S.*, 229 :—'The language of this statute seems
" 'therefore to import, that the Legislature was not only ordaining
" 'a law for the benefit of creditors and other singular successors,
" 'but also a law which was to operate between and for the
" 'benefit of heirs.' But then it must be recollected that these
" expressions are to be construed, with reference to the only
" point which was before the Court of Appeal, viz., the possibility
" of the existence of an obligation *inter hæredes*, which obliga-
" tion required, from its nature, and the terms of the statute,
" irritant and resolutive clauses, in order to render it an obliga-
" tion at all; according to the test which seems to have been
" assumed as the true one, namely, the possibility of preventing
" the actual completion of the prohibited act.

" The judgment, then, as might be expected from the nature
" of the case, went no farther than this, that a prohibition which
" did not extinguish the heir's *power* to sell, constituted no obli-
" gation, even *inter hæredes*, so as to enable the expectant heir
" to claim any reparation or substitute for the loss of the estate

" sold. Indeed, I think the speech of the learned Lord is very
" guarded upon this matter. Whatever doubts and difficulties
" he admits to exist on some of the points argued, he confines
" himself strictly to the point at issue, and the whole opinion
" seems to me to be qualified by the observation made at the
" outset, p. 211. ' When I recollect what passed in the case of
" ' Stormont, and what passed in other cases actually adjudicated
" ' as to entails previous to the Act 1685,' &c., ' it does appear to
" ' me extremely difficult indeed to say that they did not form
" ' part of the common law of Scotland, *which at this moment*
" ' *ought to be regarded as having effect on the right of persons*
" ' *claiming under entails* INTER HÆREDES.' While it seems to
" have been expressly admitted, then, that entails might have
" effect *inter hæredes*, without the assistance of the statute; the
" object of the speech is to shew that they could not have, even
" *inter hæredes*, the particular effect concluded for by the expec-
" tant heirs in that particular action.

" Indeed, this is the very description of that judgment given
" by Lord Chancellor Brougham, in a later case, that of Cath-
" cart v. Cathcart, July 18, 1836. After stating, ' that the whole
" ' current of decisions negative the proposition, that an entail, *if*
" ' *void against creditors and other singular successors is necessarily*
" ' *invalid as among the heirs of entail,* and *intra familiam,* and
" ' on behalf of one substitute against the other,' he proceeds,
" ' *the grounds on which the Ascog case was ultimately determined,*
" ' *does not break in upon that which I have taken the liberty of*
" ' *stating*, that the course and current of authorities is destruc-
" ' tive of the proposition, *that if an entail is bad as against*
" ' *singular successors, it is bad intra familiam,*' *&c.*

" All that was then decided in the Ascog case, was the in-
" competency of the expectant heir demanding reinvestment of
" the price, on a sale which it was admitted the prohibitory
" clause was not sufficient to prevent. The grounds of that
" judgment appear to me exclusively applicable to the case then

" before the Court; being truly rested on the incongruity of
" holding an obligation to exist, which, according to the condition
" of the argument, was unavailing, and which the entailer did or
" ought to have known to be unavailing for its proper purpose;
" the incompetency of rearing up by implication, an obligation to
" reinvest the price, which the entailer never did or could con-
" template, and had not expressed; the great and inextricable
" practical difficulty to which such a construction would lead,
" and, above all, the absence of any authority in practice for such
" a construction.

" But it must be evident that not one of those *rationes deci-*
" *dendi* applies to the present case. In the *first* place, so far
" from its being admitted as forming the condition of the argu-
" ment, that a prohibition of gratuitous deeds is ineffectual with-
" out the assistance of the Act 1685, the very question here
" raised is, whether such a prohibition be effectual or not?
" *Secondly*, This entirely removes the second ground of decision
" in the case of Ascog, that the relief there sought *inter hæredes*,
" viz., the reinvestment of the price, was one not contemplated
" in the entail, and rested merely on implication. Here the
" object and effect of the prohibition is not the indirect enforce-
" ment of the obligation through a claim of damages, or for rein-
" vestment, but its direct enforcement, the appropriate fulfilment
" of the obligation by annulling the deed challenged, and thus
" restoring the lands to that tenure under which the contravener
" was bound to leave them. *Lastly*, so far from there being
" any want of authority, we have a mass of authority, both
" from institutional writers and the records of our practice,
" which it would be difficult to produce in any other branch of
" our law.

" It humbly appears to me, then, that the decisions in the
" case of Ascog and Bruce are neither directly nor by implica-
" tion conclusive of this question. The question, Whether or
" not a prohibition without an irritant clause is sufficient to

" warrant the reduction of a *gratuitous deed*, must be decided on " its own merits, according to the authorities applicable to the " case; and does not appear to me to be affected by decisions, in " which the very essence of the case and foundation of the judg- " ment was, the admitted insufficiency of a prohibition without " irritant and resolutive clauses to warrant the reduction of " onerous transactions: and the consequent incompetency of the " special remedy sought by the expectant heirs, in those particu- " lar actions.

" I have only to observe, in concluding, that holding the " above reasoning to apply in general to gratuitous deeds, I have " the less difficulty in the present case, on considering the parti- " cular nature of the deed in question. It is not an alienation " at all. It is a deed in favour of the granter himself and his " heirs and assignees. If a title had been made up upon it by " the granter in his lifetime, it might have been reduced, as a " violation of the conditions on which he previously held the " estate. He clearly could have pleaded no independent right " whatever as a disponee, disencumbered from the obligations " under which he lay as a disponer; and it is equally clear that " those obligations, if good against him, are equally good against " the defenders, who take through him by service. Unless, " therefore, it could be held that a prohibitory clause was of no " avail whatever, and left the disponer in the situation of one " holding by simple destination, a proposition which seems to be " quite inconsistent with all our authorities, the deed under " reduction must be held reducible.

" Upon all these grounds, I humbly submit as my opinion, " that, even on the supposition made in the question, of the " defect of the irritant clause, the question ought to be answered " in the affirmative: and 'that the entail is otherwise sufficient " 'to exclude or render void the deed under reduction.'

" J. Fullerton."

" I concur in this opinion.

" H. Cockburn."

" Lord Jeffrey.—I concur entirely in the opinion of Lord " Fullerton, and should not have thought it necessary to make " any addition to it, were it not to bring under the view of the " Court a very important, though unreported case, in which I was " of counsel along with Lord Moncrieff, in 1816; and in which, " though most anxiously and elaborately discussed in all its pos- " sible bearings, the principle now contended for by the pursuer " was assumed as indisputable, and ultimately given effect to by " an unanimous judgment; and this, it is proper to observe, " after the case of Sir James Stewart had been remitted from " the House of Lords, in March, 1815, for an opinion of the " whole Court on the question, whether an heir who had effec- " tually sold lands under an imperfect entail, might yet be " compelled to reinvest the price, in virtue of distinct *Prohi-* " *bitions* against selling—and when all the doubts and difficul- " ties, afterwards brought forward, and acted upon in the latter " case of Ascog, had been fully brought under the view of the " profession.

" The case referred to was that of Grant against Dunbar; " and the circumstances were shortly these. The lands of Eden, " in Aberdeenshire, were entailed in 1713; by a deed containing " distinct prohibitions against selling or altering the order of " succession—*but no irritant clause.* It was therefore clearly in " the power of the heir in possession to sell; and accordingly " Mr. Gordon Duff executed an apparent sale of the property, to " a trustee for his nephew, Major Dunbar, in 1809; and in the " year following Mrs. Grant, as the next substitute, raised an " action against him, concluding first for reduction of the trans- " action, on the ground of alleged erasures and informalities in " the conveyance; but second, and substantially, for damages, " and reinvestment of the price, in case the sale should be found

"effectual. In the course of the proceeding, however, docu-
"ments were recovered which seemed to make it clear that no
"real sale had been intended, or effected; and that the whole
"transaction was a mere device and contrivance to alter the order
"of succession, and to defeat the rights of the heirs-substitute, by
"the heir in possession, a childless individual of eighty-three
"years of age, conveying the estate to his nephew Major Dunbar
"in fee simple, under colour of a sale, but really gratuitously,
"or only under the burden of certain legacies, amounting but to
"a small part of its real avail. That such was in truth the
"wish and object of the heir in possession, was amply instructed
"by the correspondence and consultations produced: but the overt
"acts by which it was said to be proved that this was the true
"nature of the transaction actually concluded, and on the suffi-
"ciency of which to support that conclusion the whole discussion
"turned, were—1*st*, The alleged inadequacy even of the nominal
"price; being 13,000*l.* for a property said to be worth upwards
"of 20,000*l.*; and, 2*d*, The remarkable fact, that by the arrange-
"ments adopted, no more than 1000*l.* of this price was ever paid
"or meant to be paid to the seller himself; the whole balance of
"12,000*l.* being lodged in the hands of a trustee, under direc-
"tions to pay the whole of it over to certain legatees of the
"seller, among whom was Major Dunbar himself for a sum of
"2500*l.*, and his three sisters to the amount of nearly 4000*l.*
"more; the only considerable legacy granted to any one out of
"the nominal purchaser's family, being one of 4000*l.* to the next
"substitute, the pursuer of the reduction herself, and evidently
"intended as a bribe to purchase her acquiescence in the ar-
"rangement.

"When these facts were discovered, the pursuer substantially
"abandoned her original action for reinvestment of the price,
"and instituted a new process of reduction, on the ground of the
"pretended sale being truly a gratuitous alienation or alteration
"of the order of succession, against which the prohibitions of the

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"entail were *per se* undoubtedly effectual, and required no aid "from irritant or resolutive clauses; and it was in *this* action "that the unanimous judgment of the Court, already referred to, "reducing and decerning in terms of the libel, was ultimately "pronounced in November, 1816.

"Now, I observe that the point of law submitted for our "consideration in the present case, as to the sufficiency of mere "prohibitions to annul gratuitous contraventions, was not at all "discussed in the first reclaiming petition for Major Dunbar "against the Lord Ordinary's judgment, though it obviously "was at the bottom of the whole case for the pursuer, and will "not be readily supposed to have escaped attention, when I "mention that this petition extends to no less than fifty-four "pages; and is conjunctly signed by the names of Andrew "Skene, George Cranstoun, and John Clerk. The whole argu- "ment, however, is on *the sufficiency of the evidence* produced, to "show that there was no real sale, but a mere collusive trans- "action of the kind alleged by the pursuer; and in the *second* "reclaiming petition, given in after the Court had unanimously "recognized the relevancy of that ground of reduction, the point "is still more distinctly brought out. The petitioner there says "(p. 23), 'that he does not dispute that, if the pursuer's repre- "'sentations of the import of the transaction under reduction "'were supported by evidence, there would be a ground for "'setting it aside. He has never disputed that if, under pre- "'tence of a sale, and by a fictitious transaction, to which he "'(the defender) was a party, Mr. Gordon Duff had in point of "'fact *merely made an alteration of the order of succession*, such "'a transaction could never be supported, as an onerous purchase "'of the property. But what he maintains is, that there is no "'evidence whatever *of his participation* in the intention which "'Mr. Gordon Duff had undoubtedly formed, to dispose of the "'lands contrary to the provisions of the entail,' &c.

"Now, considering that this was the decision, and this the

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" line of discussion adopted, in a case most eagerly contested, in
" November, 1816, and when the remit of the Westshiel case
" from the Lords was under consideration of the Court, and
" indeed amply discussed in the papers to which I have been
" referring, I cannot but consider it as the most conclusive proof
" of the views then entertained on the Bench and at the Bar,
" on the question now again submitted to our consideration, and
" as making a very important addition to that long series of
" precedents to which Lord Fullerton has already so distinctly
" referred.

" I scarcely think that anything need be added, in the way
" of commentary or farther illustration, to that clear view of the
" object and true meaning of the Act 1685, which Lord Fullerton
" has given. And yet I am tempted to observe, that it has all
" along appeared to me that it can require nothing more than a
" patient and attentive perusal of the several clauses and pro-
" visions of that Act, in their natural sequence and mutual
" bearing on each other, to arrive at the same conclusion; and
" that it is only by either attaching an *absolute* or separate mean-
" ing to *relative* expressions, or unduly limiting the reference of
" one clause to another, that any difficulty can ever have been
" occasioned. Nor indeed am I aware that, till very lately, any
" such difficulty has been experienced.

" In construing a short and concise document like this
" ancient statute, I take it to be a cardinal rule, or at least a
" most useful precept, to read the whole of it consecutively and
" together, before seeking to attach a precise meaning to any
" particular passage; and if this be done, especially with the
" slightest recollection of what I now assume to have been the
" antecedent state of the law, I really cannot bring myself to
" think that it could occur to any one to doubt that its whole
" and sole meaning was to provide, that tailzies should be there-
" after effectual against creditors and purchasers, provided they
" were fortified by irritant and resolutive clauses,—these clauses

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" engrossed in all the titles to the property, and the instrument
" containing them recorded in a particular register; but that, if
" any of these requisites were omitted, they should be entitled to
" no such privilege. This I humbly conceive to be a fair para-
" phrase, or, at least, abstract of all that was done or intended
" by this statute; and that no other meaning can be put upon
" it, except by stopping short in the reading of some of its *con-*
" *tinuous* clauses, or mistaking the plain reference of some of
" those that follow.

" In reading the introductory or leading clause, for example,
" which provides, 'that it shall be lawful to His Majesty's
" 'subjects to tailzie their lands,' &c., those who maintain the
" construction to which I object, appear to me to stop at the
" words I have now cited, as if they could be detached from
" those which immediately follow, and then to construe out of
" them a declaration, that for hereafter the whole power of tail-
" zeing should be held to depend solely upon this statutory
" permission. And afterwards, when they come to the clause
" which declares, 'that such tailzies shall only be allowed in
" 'which the foresaid irritant and resolutive clauses are insert
" 'in the titles,' &c., they construe this, not as referring only to
" tailzies intended to operate against creditors and purchasers,
" but to all and every tailzie which might afterwards be made;
" and, in fact, so as to import the absolute nullity of every
" settlement upon successive heirs of provision, which was not
" guarded by irritant and resolutive clauses.

" Now, it appears to me that both those startling and extra-
" vagant conclusions might be avoided,—1*st*, By merely reading
" on or through the whole of the first clause, to its natural con-
" clusion, and taking it as one simple and continuous provision;
" when it would be found to import merely, that, in all time
" coming, it should be lawful for His Majesty's subjects to *tailzie*
" *their lands with irritant and resolutive clauses*, which should
" secure them against creditors and purchasers; and, 2*d*, By

" giving their plain, natural, and grammatical meaning to the
" words of the subsequent clause, which are, *not* (as they seem
" sometimes to have been read), that *only such tailzies* should be
" allowed (or have effect) as had irritant and resolutive clauses
" engrossed in the titles; but, *as the words actually stand*, that
" '*Such* tailzies shall only be allowed when they have those
" 'clauses insert in the titles;' meaning, I do not say, merely
" probably, but *necessarily* that *such tailzies as had been just*
" *before mentioned*, viz., *tailzies with clauses irritant and resolu-*
" *tive*, should only be admitted to effect, where these clauses were
" duly insert in the register, and repeated in all subsequent titles.
" The words, when their whole antecedents, and their own plain
" collocation, are attended to, truly *admit*, I think, of no other
" construction; and I can scarcely imagine a greater strain and
" perversion of very clear expressions, than that by which this
" provision of the statute is sought to be transformed into an
" enactment, that no tailzie shall subsist to any effect what-
" ever, unless it contain irritant and resolutive clauses, duly
" engrossed in the titles, and insert in the register. Look again
" at the words, and the place they occupy in the statute, and see
" whether they can possibly bear such an interpretation. They
" come immediately after the full description of the new sort of
" tailzies authorized and required by the Act,—that is, tailzies
" affected by irritant and resolutive clauses, by virtue of which
" it should not be lawful to the heirs to sell or contract debt,
" their contraventions should be made null, and their right to the
" property forfeited; and then, 'it is declared that *such* tailzies'
" (that is, such tailzies as above described) 'shall only be allowed,
" 'in which the said irritant and resolutive clauses are insert in
" 'the titles,' &c., that is, these new statutory tailzies shall only
" be allowed to have these new and extraordinary effects where
" the said clauses are so insert or repeated,—a provision obviously
" and certainly *inapplicable* to any tailzies in which *there were no*
" *such clauses*, and consequently admitting of no such repetition;

" while the antecedent word *such*, evidently limits the applica-
" tion to the tailzies immediately before mentioned.

" The mere words of the Act therefore are sufficient, in my
" view of the matter, to make this out. But there are various
" considerations which should exclude the opposite construction,
" —even if the words were liable to any degree of ambiguity.

" In the *first* place, the statute is confessedly a remedial or
" *enabling* statute,—and every presumption therefore is against a
" construction which would make it the instrument of *imposing*
" *new disabilities*,—and *creating* evils of the very same kind
" with those which it was passed to remedy. Its object was *to*
" *enlarge* the powers of landed proprietors,—and the evil it was
" intended to remedy was, their previous inability to secure the
" descent of their lands to their heirs of provision, in spite of the
" claims of purchasers and creditors. And yet the effect of the
" construction in question would plainly be, to *deprive* them of
" the power to make a simple tailzied destination effectual
" against heirs at law, while it remained unaltered, or to enforce
" mere *prohibitions* by reduction of gratuitous deeds, without the
" hard necessity of also forfeiting the granters. That these were
" *new limitations* of the powers of landed proprietors, as they
" existed before the statute, cannot well be disputed; and I do
" not think their importance, or the consequent extreme impro-
" bability of its being intended to impose them, have yet been
" sufficiently considered.

" Lord Fullerton has merely hinted, that if all tailzies were
" to be absolutely null, except those which had the statutory
" requisites, a simple destination to heirs not *alioquin successuri*,
" would be ineffectual to exclude heirs at law. But the propo-
" sition, which I take ot be incontrovertible in fact, is worth
" a little more consideration, as it seems to me sufficient of
" itself to exclude the construction against which I am con-
" tending.

" All destinations to heirs of provision, who are not also heirs

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" of line, are *tailzies* by the law of Scotland ; and it is from their
" containing such a destination, and from nothing else, that they
" ever obtain this character, even when fortified by prohibitions
" and clauses irritant and resolutive ; and destinations of this
" kind, especially to heirs male, and to such heirs from various
" *stirpes* selected by the entailer, are among the most ancient
" and common of our settlements. The power of making these,
" too, though liable to be defeated by the act of any heir actually
" in possession, has always been highly valued ; and as, up to
" this hour, they have been uniformly held to be effectual till so
" altered ; and as it must often happen that the heir in possession
" is disposed to respect the investiture under which he has him-
" self taken, it could not but appear a most harsh and arbitrary
" measure to take away the power of making such settlements,—
" and to subject the destination and appointment of the original
" owner to be defeated, not by the party actually in the fee of the
" property, to whom that owner had left such a power, but by
" his *heirs at law*, or heirs portioners, whom it was the object of
" the entailer to exclude. Yet if *all* tailzies are to be null, unless
" they contain regular prohibitory, irritant, and resolutive clauses,
" I do not see how it is possible to avoid this conclusion,—or how,
" in short, an heir of provision could ever take in preference to
" an heir of line ; or the latter be prevented from reducing his
" titles, and asserting his own, whenever he was only excluded
" by a tailzied destination not so guarded; while it is obvious
" that many proprietors who were willing enough to take the
" chance of their successive heirs of provision allowing their des-
" tinations to stand, might yet think it hard to have them
" defeated, not by them, but their unknown heirs at law; and
" to be reduced to the alternative of either submitting to this, or
" absolutely tying up the hands, *and forfeiting the rights* of the
" favoured individuals to whom they had no objection that such
" a power should be entrusted. But if this would be the inevi-
" table consequence of disallowing all tailzies but those fortified

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" by irritant and resolutive clauses, and if no one has hitherto
" attempted to give *this effect* to such disallowance, I must con-
" clude that the construction which necessarily infers that it
" ought to have this effect, must be radically and wholly
" erroneous.

" But the case in fact is substantially the same as to tailzies
" guarded only by prohibitions. Many proprietors may choose
" in so far to ensure the descent of their lands to their own
" elected heirs, in their order, who might yet be willing to leave
" them the power of onerously burdening or alienating them in
" case of necessity; and who might especially scruple *unneces-*
" *sarily* to subject these favoured parties to the total forfeiture
" of their rights, in consequence of a mere *conatus* at a gratuitous
" and perhaps but partial alienation, which admitted of the
" milder and equally efficacious remedy of a simple reduction.
" Yet to this alternative, according to the construction now in
" question, all our proprietors were reduced by the Act 1685;
" though passed for the avowed purpose of *enlarging their arbi-*
" *trary powers* over their property, and subjecting commerce,
" and onerous creditors, to great restraints and disadvantages, in
" order that these powers might be so secured and extended. I
" think every rule of construction, and every principle of law is
" against such a conclusion.

" I will only add, that I have never been able to understand
" for *what objects or purposes*, either of general policy or par-
" ticular convenience, it has been imagined that such a strange
" restraint could have been contemplated by the framers of the
" Act 1685. The powers previously enjoyed by landed proprie-
" tors, of naming heirs of provision, who would continue to suc-
" ceed till excluded by the new settlement of a fiar in possession,
" or of guarding their succession by prohibitions, under which
" all gratuitous alterations might be reduced, were powers nearly
" akin to those which were secured, or for the first time given by
" the Act,—while they were liable to no part of the incon-

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" venience or *odium* which confessedly attached to the exercise
" of these higher powers. Why, then, should the former have
" been abrogated, or merged in the latter? And for what in-
" terests, or of what class of persons, can it be supposed that
" such a change could have been intended? It would require
" very plain words to make me believe in such an intention;
" and I confess I can find none which give it the slightest coun-
" tenance.

" No illustration, I think, can well be stronger than the case
" actually before us. But I shall conclude by stating one which
" now occurs to me, and which may perhaps put the extrava-
" gance of construing restrictions out of grants of enlarged
" powers, in a more familiar, if not a more striking light. Sup-
" pose that the provision of the Act of 10th Geo. III., c. 81,
" which empowers entailed proprietors to grant *improving* leases
" for a term of thirty-one years, had been expressed in the style and
" phraseology of the Act 1685, and had run thus,—'That it shall
" 'be lawful to entailed proprietors in Scotland, to grant leases
" 'of their entailed lands, and to insert therein covenants bind-
" 'ing the tenants to make certain permanent improvements;
" 'and that, upon such covenants being so insert, the said leases
" 'should be good and effectual to the takers thereof and their
" 'heirs, not only for the periods permitted by the several entails
" 'of the granters, but also for such longer periods as might be
" 'therein expressed, not exceeding the term of thirty-one years
" 'from the date of entry; but declaring always, that such leases
" 'shall only be allowed where the said covenants are distinctly
" 'engrossed in the body thereof, before signing or entering to
" 'possession thereon.'

" I think this a fair parallel to the provisions of the Act of
" 1685; and I shall merely ask, whether it would enter into the
" mind of any lawyer (or other person) to contend that, by such
" an enactment the former powers of entailed proprietors to
" grant leases *for the terms allowed by their entails*, would be

" taken away? and all *leases whatever annulled*, which did not " contain the improving covenants, without which the prolonged " terms could not have been supported?

" F. JEFFREY."

" I concur in the opinions of Lord Fullerton and Lord " Jeffrey.

" A. WOOD."

" We concur in the opinion of Lord Fullerton. The only " part of that opinion on which we could have entertained any " doubt was that which regards the extent to which the pre- " cedent of the decision of the case of Ascog in the House of " Lords reached. For we are willing to yield to that decision " as far as it goes, while, in so far as it does not bind us, we have " not changed the opinions we expressed in that case, and concur " with the views of the law of Scotland stated by Lord Fuller- " ton. We are now, however, disposed to think that, whatever " may have been the views entertained by the minority of this " Court in that case, there are no sufficient grounds for holding " that the decision of the House of Lords extended, in the case " of Ascog, further than has been expressed by Lord Fullerton.

" D. BOYLE.
" J. H. MACKENZIE.
" A. MACONOCHIE.
" J. H. FORBES."

" I entirely concur in the opinions of Lord Fullerton and " Lord Jeffrey; and, as those opinions are very full, and very " satisfactory to my mind, I do not think it necessary to enter " into the general argumen .

" I have had occasion to express a similar opinion upon this " which I had always understood to be settled law, in various " cases which have been recently before the Court,—that, where

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" there is a sufficient prohibitory clause against breaking the
" tailzie, or altering the order of succession, and against aliena-
" tions, that is effectual for setting aside all *gratuitous* deeds of
" the nature so prohibited, without the aid of any irritant clause.
" —Lockhart *v.* Lockhart, May 20, 1841; Earl of Eglinton *v.*
" Montgomery, January 22, 1842; and Murray *v.* Murray,
" January 28, 1842. And though the point might not be neces-
" sary to the decision of the material questions which were
" raised in those cases, I did not understand that there was any
" difference of opinion on that particular point. In the first of
" them, I mentioned, that in arguing the leading question in the
" Roxburghe cause, which related to the efficacy of a gratuitous
" deed of alteration, Mr. Blair, then Dean of Faculty, and after-
" wards Lord President, expressly assumed that the prohibitory
" clause alone was sufficient, and that he had no occasion to go
" upon the irritant clause at all; and that Mr. John Clark, then
" Solicitor-General, on the other side, distinctly assented to the
" proposition. I spoke then from very particular recollection.
" But I have since found my notes of that argument; and in the
" speech of Mr. Blair, I see these precise words set down,—'*In*
" '*question with person taking under gratuitous deed, prohibitory*
" '*clause enough.*' Mr. Clark replied, and granted the point as
" incontestable, and neither was there any attempt to dispute it
" in the reclaiming petition, or in any later discussion of that
" very important cause.

" I was well acquainted with the later case mentioned by
" Lord Jeffrey, Grant *v.* Dunbar, finally decided 15th November,
" 1816, and can fully confirm Lord Jeffrey's account of it.
" There was no *irritant clause* in the entail; and at first the
" party, believing that a real sale had taken place, was proceed-
" ing on a summons, concluding simply for having the price
" reinvested, although the case of Stewart *v.* Lockhart, on that
" point, had by this time been remitted by the House of Lords.
" But, in the course of the proceedings, the reality of the case

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" was disclosed by the recovery of documents which were held
" to make it clear that there was no sale, and that the transac-
" tion was merely *collusive* and *simulate* for effecting a *gratuitous*
" *settlement* of the estate. A new summons of reduction was in
" consequence raised; and the deeds and whole transaction were
" totally reduced on that ground. In that case, it was assumed
" in the argument for the pursuer, that the prohibitory clauses
" against altering the order of succession 'are undoubtedly effec-
" 'tual to prevent all *gratuitous deeds* to the prejudice of the
" 'heirs of entail.' And in the long reclaiming petition against
" the first judgment of the Court, signed, as that was, by three of
" the highest names at the Bar, there was no attempt to contro-
" vert the proposition. The case was argued and decided as
" depending entirely on the question of fact, whether there was
" a real sale, or a simulate transaction for altering the succes-
" sion; on the clear basis that, if it were of the latter descrip-
" tion, the prohibitory clause was sufficient to sustain the reduc-
" tion. It is not reported,—only, I presume, because the *law*
" was held to be so clear, that the case resolved simply into a
" question of *fact*.

" In addition to the other authorities referred to by Lord Ful-
" lerton, I observe that, in the notes on *Stair*, attributed to Lord
" Elchies, the author, p. 110, in speaking of the effect of 'an
" 'express obligement *not to alter* nor to contract debts, and how
" 'far the maker or any of the heirs of tailzie can make any
" 'deed to evacuate the succession,' lays it down *substantively*,—
" 'And, in the *first* place, it's *agreed*, and *very justly*, by the
" 'author (Stair), that it *cannot be altered by any gratuitous*
" '*deed*, and that such a deed would be reducible on the Act
" '1621.' This he holds decidedly as a *settled* point; though
" he goes on to speculate on the very *different* question, what
" shall be the effect of such an obligation in the case of *sales*
" being made, or other *onerous* deeds granted, where it is not
" fortified by irritant and resolutive clauses, in consequence of

" which the deeds are effectual in all questions with singular
" successors. It is evident, that it did not appear to him that
" there was any connection between these two questions.

" I am very clearly of opinion, that the judgments pro-
" nounced by the House of Lords in the cases of Ascog and
" Bruce, ought not to have any effect to lead to the conclusion
" here maintained on the part of the gratuitous donee. The
" principles on which those cases were decided, by the great
" lawyer who then presided in the House of Lords, have not, in
" my humble judgment, any tendency to impeach the general
" rule of the law of Scotland as to the effect of a clear prohibi-
" tory clause to prevent *gratuitous* deeds. But the distinction is
" so clearly explained by Lord Fullerton and Lord Jeffrey, and
" was indeed so emphatically taken by Lord Brougham in the
" case of Cathcart, that I think it quite unnecessary for me to
" enlarge upon it. To state it shortly, it just comes to this: In
" the one case, the entail has failed altogether in its purpose;
" the deed of sale or eviction *has taken effect;* the *only estate*
" *entailed is gone*, and cannot be recovered; and the entailer has
" given *no remedy.* In the other, the estate remains entire in the
" hands of a *gratuitous* donee, representing universally the heir
" of entail bound by the prohibition; and the simple question is,
" whether such a *gratuitous* donee can be allowed to take it
" from the heirs of entail, by virtue of a deed which is in viola-
" tion of the *conditions* of his author's title.

" JAMES W. MONCREIFF."

" LORD CUNINGHAME.—When the present case was discussed
" before me as Ordinary, prior to the appeal, I ventured to ex-
" press an opinion, that the disposition libelled on was reducible
" as a *mortis causa*, gratuitous and undelivered deed, granted by
" an heir of destination to the prejudice of the posterior sub-
" stitutes.

" The grounds on which such deeds have been held chal-

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" lengeable in our law, are now so perspicuously detailed in " the opinion of Lord Fullerton, that I have only to express " my entire concurrence in it, and to submit a few additional " considerations and authorities in support of his Lordship's " views.

" It has been, I conceive, demonstrated satisfactorily in the " opinion referred to, that the efficacy of a settlement with a " substitution of heirs, and a prohibitory clause to bar alteration " of the succession, does not rest on the Act 1685, but on prin- " ciples of common law and equity,—recognised in the law and " practice of Scotland from the earliest period.

" When a party takes an estate under a settlement, contain- " ing a substitution of heirs with a prohibition against alteration, " he comes under a legal obligation not to alienate the estate by " any gratuitous deed in favour of his own heirs, to take effect " only after his own death. The rules of common justice and " good faith forbid him to reject the condition on which the gift " was conferred.

" On that principle it was held, long before the Act 1685 " was thought of, that whatever right an onerous disponee might " acquire to a tailzied fee, from a substitute in possession, at all " events no party could defeat the right of posterior substitutes " by a *gratuitous* deed, placing heirs named by himself in the " room of those appointed by the maker of the principal settle- " ment, when he had expressly prohibited alteration. The " estate might be attached by creditors,—or the heir might " make an extrajudicial sale, to take effect *inter vivos*, which " would involve him in no responsibility to the substitutes, as it " is presumable that, when the entailer inserted no irritant or " resolutive clause in his grant, he meant to leave the estate " substitute to the *onerous* deeds and debts of the heir in posses- " sion. But the case is entirely different when the estate is " *extant* and unsold, and when the substitution guarded by a " *prohibition* against alteration, is attempted to be defeated by

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" the *mortis causa* settlement of an heir who has himself ac-
" knowledged the original grant, and taken benefit under it.

" It is supposed that an alienation of that description would
" be annulled by our law, even when *personal* property is the
" subject of a special destination.

" Take the case of a *sum of money* invested in the public
" funds, or in bank stock, or in any other establishment of
" deposit and investment, and that it were conveyed first to the
" favoured legatee, with a destination in the event of his death,
" before or after the testator, to a second and third substitute in
" their order, with a declaration that in case of the death of the
" primary legatee, without uplifting or onerously burdening the
" fund, it should go to the posterior substitutes in their order, or
" their issue surviving,—the law, it is apprehended, would
" enforce such a destination, and prefer the substitutes of the
" original testator to the *gratuitous* legatees of the prior substi-
" tute, at least so long as the fund was extant, and invested in
" the security conveyed by the settlement.

" But that is not a mere hypothetical case. Many questions
" arose on bonds for money, made payable to a series of substi-
" tutes, at an early period of our law, and, at all events, prior
" to 1685.

" Thus, the case of Grahame against the Laird of Morphie,
" in 1673, is reported under this summary in the *Dictionary*
" (p. 4305):—'A bond of provision was granted to children in
" ' these terms,—" That in case they died unmarried or within
" ' year and day thereafter, that the sum should return to the
" ' granter's heir, and that they should make no assignation or
" ' other right in defraud of his heir." This clause was found to
" ' import that the children could do no *gratuitous* deed, but
" ' that it did not hinder them to uplift for necessary causes.'

" In 1674, the summary of the decision in the case of Drum-
" mond against Drummond (p. 4306) is to the following effect:—
" 'A bond payable to the creditor and certain heirs of tailzie

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" 'contained this clause, that it should not be lawful for the
" 'debtor to make payment without consent of one of the heirs
" 'of tailzie. Payment being made without such consent, the
" 'same was found unwarrantable; and the debtor was ordained
" 'to grant another bond in terms of the former, without pre-
" 'judice to the creditor, to declare in a process that the sum
" 'should be affectable by his creditors, or be disposed of by him-
" 'self for his necessary uses.'

" To these may be added the following cases to the same
" effect, reported under another section of the *Dictionary*:—
" Stewart, 24th June, 1669 (*Dict.*, p. 4337); Drummond in 1679
" (p. 4338); Scot, in 1683 (p. 4341); College of Edinburgh,
" in 1685 (p. 4342).

" As a contrast with the preceding cases, reference may be
" made to that of Strachan and Barclay, in which the species of
" alienation sufficient to affect a destined fund, was clearly defined.
" Colonel Barclay had granted a bond to his nephew James
" Sinclair, for £900 Scots, on which the granter's son (Robert
" Barclay the Quaker), having been sued, 'the Lords found,
" 'though the bond expressly secluded Sinclair the creditor's
" '*assignees*, and was provided to return to the *debtor*, in case
" 'Sinclair the creditor should have no children lawfully begot,
" 'yet he might assign it for so *onerous* a cause as the payment
" 'of his aliment, as he might have uplifted it, or his creditor
" 'might have affected it; and therefore, before answer, ordained
" 'them to condescend and prove how long and by whom he was
" 'alimented.' The proof failed, and Barclay was afterwards
" assoilzied; but the case appears to have been discussed with
" some interest at the time, as sufficiently appears from Fountain-
" hall's curious report of the final discussion.—See *Dictionary*,
" p. 4311—12.

" If these, however, were the rules which governed the suc-
" cession of tailzied *funds*, it is obvious that they are still more
" applicable, and entitled to effect in settlements of *land*. There

" is certainly no reason why a destination of land should be less
" protected than a similar provision of a personal fund. Accord-
" ingly, Lord Fullerton has adverted to the decisions since the
" Statute of 1685, which sufficiently attest, that prohibitions
" inserted in tailzies or destinations of land, not so completed
" according to the Act 1685, as to be effectual against creditors
" and purchasers, have nevertheless been uniformly held sufficient
" to bar *mortis causa* settlements by the heir in possession. The
" following decisions of date prior to those quoted by Lord
" Fullerton, show how early and general the impression was, that
" no *gratuitous* settlement of land, contrary to a subsisting
" investiture, in which alteration was prohibited, could be sus-
" tained. Thus the case of Drummond in 1636, collected by
" Durie, is reported in the *Dictionary* under the following sum-
" mary (p. 4302):—'A person being decerned by decreet-arbitral
" 'to tailzie his lands to another, after expeding charter, and
" 'taking sasine in terms of the charter, sold the lands to a third
" 'party; the sale was sustained, in respect the decree-arbitral
" 'bore *no prohibition* against selling, and no *fraud* on the part
" 'of the seller was qualified.'

" The next case (Binny against Binny, in 1668, *Dict.*, p. 4304,)
" is thus abbreviated:—'A woman bound herself to resign certain
" 'lands in favour of herself, and the heirs of her body; whom
" 'failing, in favour of her brother, and to do no deed in prejudice
" 'of his succession. After inhibition was served on this deed,
" 'she married, and disponed the lands to her husband. This
" 'disposition was *reduced*, as being in prejudice of the brother's
" 'succession.' It is evident that that decision was questionable,
" as, in later cases, a disposition by a bride to her intended
" husband, on an antenuptial marriage-contract, has been held to
" be *onerous* in respect of the provisions accruing to herself, on
" the completion of the marriage. That, however, does not affect
" the principle of the old decision, when that species of alienation
" was viewed as gratuitous.

"At a period somewhat later, in 1717, the following case
" occurs in the *Dictionary* (p. 4343) :—' Part of the family estate
" ' of Douglas being given away "to the heir of a second
" ' marriage, and the heirs of his body; which failing, *to return*
" ' *to the right heir* of the family of Douglas," it was found, that
" ' this estate *could not be gratuitously alienated* in prejudice of
" ' the clause of return, it being argued, that here the proprietor
" ' was giving away an estate from his successors for a special
" ' use, in which this reasonable condition is implied, that, when
" ' the use is at an end, himself or his heirs should have back
" ' the estate.'

" It is unnecessary, however, to multiply the citation of cases;
" they are all, *without a single exception*, to the same effect,
" rejecting gratuitous alienations by *mortis causa deeds*, which is
" truly just a new and voluntary substitution of heirs by a sub-
" stitute, to the prejudice of a subsisting and unexhausted desti-
" nation.

" Upon these precedents, and on the principles of law on
" which they are founded, every institutional writer, for nearly
" two centuries,—from Sir George Mackenzie to Professor Bell,—
" all concur in holding that a disposition, with prohibitions, is
" effectual to bar gratuitous alienations. The quotations from
" the works of Sir George Mackenzie (whose *Institutions* were
" published about 1680) and from Lord Stair, Bankton,
" Erskine, and Mr. Sandford, being all cited at length in the
" case for Mr. Carrick Buchanan, (p. 12—16) are so complete as
" to supersede any repetition here. There never was a point
" more completely settled and put to rest in the law of any
" country, by the consentaneous opinions of all the institutional
" writers, than that now under discussion. The legal doctrine
" applicable to the whole case is clearly and accurately condensed
" in the words of Professor Bell (*Principles of the Law of Scot-*
" *land*, published in 1839, page 620),—' The form of an entail,'
" says he, ' with such prohibitions and restrictions, is not different

" ' from that of any other settlement of land ; the conditions and
" ' destinations, the prohibitions and the irritancies, being clearly
" ' expressed. The effect is either against *heirs*, or against *third*
" ' *parties*. The former depends on the expression of the deed,
" ' and the *principle*, *that the acceptance of a conditional gift*
" ' implies an obligation. The latter depends on due compliance
" ' with the requisites *of the Act*.'

" It is quite unnecessary to add anything to the exposition
" given by Lord Fullerton as to the origin and object of the Act
" 1685, here referred to by the learned Professor. That statute,
" looking to the age in which it was passed, was devised to
" gratify the feelings of proprietors for the permanency and
" hereditary transmission of their estates, and, with that view,
" clauses were framed to protect them from attachment by, and
" alienation even to onerous creditors. From the Scots system
" of land rights, however, and particularly from the registration
" of all titles of property, and of heritable securities, established
" with us since 1617, it was a matter of great legal difficulty to
" place an estate beyond the reach of creditors and purchasers.
" That was at last effected by the registration of tailzies with
" irritant and resolutive clauses, voiding the right both of *creditors*
" and proprietors who contravened the clauses of the entail. But
" that statute neither did give, nor was meant to give, any privi-
" lege to *gratuitous* rights, especially when granted by *mortis*
" *causa* deeds, which they did not enjoy before. There were no
" considerations of public policy which rendered it necessary to
" change the old law as to them, and to give a more extended
" effect to gratuitous and testamentary rights, than previously
" belonged to them at common law.

" It is not surprising, with reference to a question depending
" on principles of law and equity, so clear in themselves, and
" ruled by such a host of authorities early and late, many of them
" prior to the Union, that few examples should occur, of any
" appeal to the House of Lords, of modern date, as to the effect

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" *inter hæredes* of destinations fortified with prohibitions. The
" whole lieges, soon after the Revolution, seem to have acquiesced
" in the doctrine of the Courts and institutional writers on this
" point, that a destination, accompanied with a prohibitory clause,
" could not be defeated by a *mortis causa* settlement, executed by
" any of the earlier substitutes. The only case carried to the
" House of Lords, in which that point seems to have been argued
" among other pleas, is that of Don, a question which excited
" great interest in its day, reported in Mr. Robertson's *Appeal*
" *Cases*, p. 76. In that case an entail of the estate of Rutherford
" had been executed at desire of Sir Alexander Don, the pur-
" chaser thereof, (prior to 1685), under the *same* conditions,
" provisions and limitations, as were contained in a prior *entail of*
" *the estate of Newton*, also executed by Sir Alexander. The son
" and heir under that tailzie made a new entail, with all the
" proper clauses, in favour of a different series of heirs; and the
" institute under that last tailzie attempted to defend it on the
" ground that the first entail, being a mere tailzie *by reference*,
" and not having the clauses *verbatim* inserted in the record, was
" null. But the Court, viewing that as a question *inter hæredes*,
" found that 'the fee was so qualified in the person of the son,
" 'that he could not *gratuitously* alter the order of succession;
" 'and therefore decerned in favour of the respondent.' That
" judgment was *affirmed* on appeal, 14th July, 1713.

" The preceding case is an important authority in this dis-
" cussion, as the entail was such as to be quite insufficient
" against *onerous* creditors; it having been found in the case of
" Garnock, a few years afterwards, (28th July, 1725; *Dict.*, p.
" 15,596), that a *general reference* in an heir of entail's sasine to
" the prohibitory and irritant clauses, as recorded in the former
" charter and infeftment '*is not sufficient to interpel creditors,*
" '*according to the Act* 1685.' But the Rutherford entail, though
" ineffectual against creditors, was sustained in this Court and
" the House of Lords, as against *gratuitous* disponees.

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" Since that period, it does not appear that any case involving
" a claim by a gratuitous disponee, to the prejudice of the substi-
" tutes under a destination prohibited to be altered, was brought
" under review of the Court of Appeal. The case of Ure and the
" Earl of Crawford, in 1756, was *not* appealed. It is apprehended
" that the very absence of reported cases affords incontestable
" proof of the universal acquiescence and understanding of the
" country, in the doctrine laid down by all the authorities, on this
" question of constant and daily occurrence in practice.

" But although there have been few cases since the Union in
" which any party has claimed a right openly to defeat a subsist-
" ing destination, protected by a prohibition against alteration,
" by a gratuitous deed to take effect *inter hœredes*, it humbly ap-
" pears to me, that the acknowledged incompetency of such
" alienations has formed one of the chief grounds for a rule in
" the law of title, now firmly established in a variety of well-
" contested questions. I allude to the determinations in cases of
" *double title*. When parties, having *two* titles in their person
" to the same estate, one entirely *unlimited*, and another more or
" less *limited*, as the case may be, it has been long settled that,
" in the case of two unlimited titles, the party is held as possess-
" ing on both ; but if one be limited, (even when the restrictions
" fall far short of a strict *tailzie*), and the other unlimited, the
" possession is ascribed to the investiture in fee-simple only, so
" as to extinguish the limited title by prescription, whereby the
" right of all those who, before the prescription has run, might
" have been entitled to claim under it, is cut off. It is well
" known that the law, in that class of cases, has been established
" by decisions both of this Court and the House of Lords no
" longer open to question.

" Thus the case of Douglas of Kirkness against Belches, in
" 1753, is reported under the following summary in the *Dic-
" tionary* (p. 4350):—' A charter was granted, containing a
" ' *clause of return*. A subsequent charter (one of renewal of

" 'the investiture only) was obtained without limitation (*i.e.*,
" 'omitting the clause of return). The estate was possessed on
" 'the latter unlimited title for more than forty years, by the
" 'person who was heir to the original limited right. He was
" 'found to have acquired an unlimited fee.' And that decision
" was *affirmed* in the House of Lords.

" Now, on what ground could that decision proceed? The
" limited title, there presumed to be extinguished, was not a
" title constituted by *strict tailzie*, but it was a simple grant,
" containing a clause of *return*, a limitation, notoriously ineffec-
" tual against third parties onerously contracting, but imposing a
" valid restraint against *gratuitous* alienations, by heirs pos-
" sessing under the original grant. That was considered a limi-
" tation fit to be wrought off by prescription. Almost con-
" temporaneously with the preceding decision, it was found,
" that 'a clause of return in a vassal's charter *is not good against*
" '*an onerous purchaser*.' (July 31, 1759, Johnston against
" Marquis of Annandale, *Dict.* p. 4356). Hence the titles held
" to be extinguished by prescription generally contained restraints,
" only effectual against *gratuitous* settlements by heirs in pos-
" session. The present case is analogous, as the question here
" turns on a prohibition against alteration of the order of
" succession, proposed to be held in operation against *onerous*
" alienations, from defect of an irritant clause, while the des-
" tination and prohibition are alike clear and incontestable.

" The case of Douglas has been sanctioned by a long train of
" decisions uniform in their import and effect. The converse
" of Douglas's case had been decided a few months before, in the
" well known case of Smith against Bogle and Gray, reported
" by Lord Kilkerran (*Dict.* p. 10,203), which is still held of the
" highest authority in practice. It was there determined, that
" when a party and his predecessors have possessed on two titles,
" both equally *unlimited*, his possession must be ascribed to *both*.
" And on that principle the case of Durham was decided in this

"Court in 1803, and the decision affirmed in the House of Lords "5th March, 1811.

"The latest case on the subject is that of Paterson and "Campbell, decided in the House of Lords in 1823 (1, Shaw's "*Appeal Cases*, p. 101), where an imperfect entail, prohibiting "alteration of the order of succession, but wanting an *irritant* "clause, was held to be extinguished by a different settlement "made by one of the heirs, which was followed by possession *for* "*the years of prescription.* The latter settlement, however, was "evidently sustained, solely in respect of the *prescription.*

"According to the plea of the appellant, however, in the "present case, these decisions proceeded upon a needless and "false apprehension; if a *gratuitous* settlement may be made by "any heir in possession under every limited title, short of a "strict tailzie, he has already all the rights of a fee-simple pro-"prietor. The appellant's proposition appears to be, that no "prohibition, however express, against alteration of the order of "succession, if not fortified by the irritant clause of a regular "entail, can prevent an heir from transmitting an estate *gra-*"*tuitously* to his own heirs, in preference to other substitutes "appointed by his author. In that view, he does not require the "aid of *prescription* to give him all the rights of the most unlim-"ited proprietor. His alienation is as good before his fee-simple "title is fortified by prescription as after it. It is apprehended "that this is a doctrine as much at variance with the whole "authorities in the law of Scotland as it is with the universal "understanding and practice of the country.

"It appears to me equally clear that the question is not ruled "by the decision in Ascog;—in fact the present is the converse "of that case. In Ascog, the estate, from the defect or peculiarity "of the entail, was permanently and effectually alienated to an "*onerous purchaser*, whose right, on public and statutory grounds, "could not be disputed. Hence it never could be vindicated *in for-*"*ma specifica.* The Court of Appeal, therefore, held that damages

"could not be awarded for an act which the entailer had left it "in the power of the heir for the time legally to perform,—while "the sum claimable could never be again secured to the heirs of "entail, in such a manner as to be beyond the reach of new "creditors. None of these considerations apply to the case of an "estate still unalienated, and attempted to be conveyed away "*gratuitously*, in the face of a direct prohibition by the maker of "the original settlement.

"It is true that the prohibition here is not accompanied by "an *irritant* clause, because such a clause is only required by "*statute* to exempt an estate from *onerous* acts and deeds of the "heir; while at common law no irritant clause is necessary to "secure a prohibition against *gratuitous* or fraudulent alienation. "If the estate should be sold for an *onerous* cause, the seller will "not be liable in damages for using a right left open to him by "the granter. But it does not follow that a *gratuitous* deed "must be effectual because an *onerous* one would have been "unchallengeable.

"In every view, therefore, which I can take of the present "case, I concur in the opinion of Lord Fullerton, on the following "grounds:

"1*st*, The attempt of any heir of destination, where alteration "is prohibited, to defeat the right of posterior substitutes, by a "*gratuitous* and *undelivered* deed, to take effect only after his own "death, seems to me to be contrary to principles of common law "and equity, entitled to the utmost regard in the adjudication of "such rights.

"2*nd*, The invalidity of *gratuitous* settlements by heirs pos- "sessing on similar titles with that under which the defender's "predecessor took up the estate now in question, has been fixed "from the earliest period of our law, by a series of authorities, of "unusual number and uniformity,—which it would neither be "just nor safe for a court of law now to depart from.

"3*rd*, The determination in the case of Ascog, having been

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" pronounced upon an entirely different question and state of the
" fact from that which here occurs, affords no rule or even analogy
" for the decision of the present case.

" J. CUNINGHAME."

" LORD IVORY.—I concur in opinion with Lords Fullerton,
" Jeffrey, and Moncreiff; but perhaps one or two remarks may
" not be altogether useless in the way of further illustration.

" As a fundamental proposition, it cannot, I think, be dis-
" puted that the Statute 1685 ' makes no alteration in our common
" ' law with respect to the transmission of land property' (Kaimes's
" *Elucid.*, art. 42, p. 345). A man may still convey his estate
" simply or *sub conditione.* And if *sub conditione*, the condition,
" if not illegal in itself, will be binding upon the party who
" accepts subject to the condition, and upon the heirs and repre-
" sentatives of that party, in so far as the law holds them gene-
" rally liable for his obligations.

" It is a different question whether the condition, thus effec-
" tually imposed upon the grantee and his representatives, shall
" likewise be operative and effectual as against third parties,
" strangers to the grant, and over whose conduct and rights the
" granter had no power. But if the condition, lawful in itself,
" be such also as the law holds capable of being imported into the
" grant as a *real quality* of the right,—and if, moreover, it be *de*
" *facto* in due and competent form perfected into the full measure
" of such *real quality*,—it will in that case, as is familiar to every
" conveyancer, be operative and effectual even as against third
" parties.

" This distinction,—between what is *in obligatione tantum*,
" and so to be enforced only through the *persons* liable in the
" obligation,—and what has already passed into completed *real*
" *right*, and so stands good against all and sundry, even onerous
" third parties *extra corpus juris*,—enters deeply into every ques-
" tion connected with the transmission of land titles at common

" law. It forms a not less important element in considering the " question more immediately here in hand, viz., whether the con- " ditions of entail,—though they have not passed into an abso- " lute and completed *real right of entail*, which shall be good " even as against creditors and purchasers,—may not yet be effec- " tual, as affording unquestionable ground of *personal obligation* " against the heirs themselves *intra familiam*.

" The very discrimination, which has constantly been made " between what are termed *strict* entails and those of a *less perfect* " description, proves how little it has entered into the contempla- " tion of lawyers to hold,—that no species of entail could avail *to* " *any effect* except the former,—or that a deed conceived in favour " of a certain series of heirs, and imposing upon these heirs, as they " respectively come to succeed, certain obligations *as the condition* " *of their right*, should have no effect whatever, even *inter hære-* " *des*, unless the statutable formalities of the Act 1685 had also " been rigorously attended to. There are many conditions to " which the enactments of that statute would have no application. " But, independently of this, it has passed into a sort of proverb, " to speak of the remoter heirs, whose interests would be affected " in cases of mere *prohibition*, or other *personal condition*, as being " '*creditors among heirs*, though but heirs among creditors.'

" Accordingly, what gave rise to the Statute 1685 itself, was " not any difficulty of dealing with the legal effect of such condi- " tions, as in a mere question *inter hæredes*,—but the difficulty of " converting what was undoubted matter of personal obligation " binding upon these heirs, into matter also of *real right* qualify- " ing the extent and character of the estate itself, and so entering " into and becoming parcel of the radical title or investiture, in a " question with onerous third parties.

" The notion was, that it was, somehow, inherently incompa- " tible with the very nature of *dominium* or property, that one " should be proprietor, and yet that his deeds executed in that " character should not be operative, so far at least as the estate

" and third parties were concerned. That the proprietor might, " *while he remained so*, create *real securities* or other *burdens* over " his estate,—or constitute *real faculties*, more or less directly, " enabling third parties to exercise powers affecting it,—and that " these, when duly feudalized, and the infeftments registered, " would be effectual against all the world,—was never doubted, " any more than that from the plenary estate of fee, there might " be carved out limited or subaltern estates of *liferent*, *trust*, *feu*, " *servitude*, &c. The difficulty was,—after the death of the pro- " prietor, who could do all this, while he was himself alive,—to " tie up the hands of *his successor*, from exercising in his turn the " same ordinary attributes of proprietorship. This it was, in the " first instance, attempted to effect,—in aid of the ordinary pro- " hibitions and conditions, (the efficacy of which was never " called in question as matter of mere obligation,) by the intro- " duction of irritant and resolutive clauses. And in the case of " *Stormont* the contrivance was held successful. But still the " doubts which hung over the matter as a mere *common law* " *remedy* were not allayed :—And hence it was that the aid of " *statute* was called in, to confer the necessary enabling powers, " and so put an end to all the hazards and perplexities which " must otherwise have continued to prevail.

" It is very plain, however, that this,—which was wholly " unnecessary, except as a cure for one particular evil,—did not, " and could not touch what had till then been attended with " neither doubt nor danger. The statute was directed to legalize " the creation into *real rights* of certain limitations upon the " rights of property, which, it was thought, the common law, by " itself, might be too weak to effect. But the law of *personal* " *condition or obligation*, in so far as it did not require for its " binding power, to be converted and perfected into this full " measure of *real right*, remained as before. And, therefore, " though the statute was required to protect the estate as *against* " *onerous third parties*, the common law continued to possess

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" sufficient natural force in itself, in all questions arising merely
" *inter hæredes.*

" In this point of view, the matter is well explained by Lord
" Kaimes, *Elucid.* p. 340;—' A man *may bind his heirs*, by pro-
" ' hibiting them to alien, or contract debt; but he *cannot pro-*
" ' *hibit one to purchase* from his heir, or to lend money to him,
" ' because a purchaser or creditor is *not subjected to his authority.*
" ' A penalty annexed to the prohibition, such as a forfeiture of the
" ' heir's right, will affect him (*the heir*); and upon a declarator
" ' of irritancy will deprive *him* of the estate. And yet, as he
" ' continues proprietor till a decree be pronounced in the declara-
" ' tor, *his alienations must be effectual*, as well as *debts contracted*
" ' by him.' And again (p. 346,)—' A *tenant in tail* is subjected,
" ' *by his own consent*, to the prohibitive and irritant clauses;
" ' he accepts of the estate *under these conditions. All others* are
" ' subjected *by the statute*, discharging them to lend money to a
" ' tenant in tail, or to purchase his land. Hence, no deed done
" ' contrary to these prohibitions is available in law; with respect
" ' to the *tenant in tail*, it is voidable *as a transgression of his*
" ' *engagement;* and with respect both to him and to *the persons*
" ' *he contracts with*, it is voidable *as a contempt of legal autho-*
" ' *rity.*'

" If it were true, that nothing short of an entail, completed in
" strict terms of the statute, could affect *heirs*, any more than it
" does *creditors*, such a rule ought to operate universally, and
" there could be no exceptions to it. But there are many.

" 1. A *separate obligation* binding the party not to grant
" any deed whereby the destination might be affected, is ad-
" mitted to be operative. Indeed, this is just the case of Ure
" *v.* Crawford, the authority of which has been conceded upon
" that very footing. But why should a separate obligation
" avail more than an express prohibition inserted in the body of
" the right? If the question were with an onerous third party,
" the separate obligation would be just as inoperative as the other.

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" Indeed, it is all the weaker where the obligation is not to be
" found *in gremio* of the investiture, because there is just so much
" more room for the third party to plead *bona fides*,—if that were
" otherwise relevant. The importance of Ure's case consists in
" this, that what was mere matter of *personal obligement*, though
" not good against third parties, was still good *against heirs.*
" And if personal obligement be sufficient to protect a destination
" not otherwise brought within the statute, the inevitable con-
" clusion is, that *no more* has to be established in any case in
" order to protect *inter hæredes* a defective entail.

" (2.) Take next the case of *destinations in marriage-contracts.*
" And here it will be found instructive to mark the distinction,
" which Erskine so emphatically explains, between settlements
" ' so drawn as to give the heir a *proper right of fee* in the land
" ' estate,' *Ersk.* iii. 8, 40; and those where ' the heir's right is
" ' not a right of proper credit but *of succession*,' *Ibid.* sec. 39.
" In the former, the father can execute no deed, whether onerous
" or gratuitous, in defeasance of the child's right, and he may be
" interpelled, by the ordinary diligence of the law at the child's
" instance, in protection of his right. But in the latter, the child
" being not in the strict sense a creditor, but only an heir of pro-
" vision, ' cannot come in competition with the father's *onerous*
" ' *creditors*,' and cannot use *inhibition* or other *diligence*, so as to
" enforce his own rights, or disturb the father's powers of admin-
" istration, and is in short, in every point of view, substantially
" in the same position as that wherein a substitute heir of entail
" stands, in a question *inter hæredes*, with reference to the rights
" of the heir in possession. Now here, independently of the Act
" 1685, it is undoubted law, that the marriage-contract, though
" wholly unavailing against onerous creditors, or against a dis-
" ponee for onerous causes,—is yet effectual to ' restrain the father
" ' from *gratuitous deeds* to the prejudice of the heir of the mar-
" ' riage.' And why is this, but that imperfect in some respects
" as the obligation of the father is, it still infers an *obligation*, in

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" which the heir stands, '*quodammodo* creditor to his father,'
" *Ibid.*, sec. 38; and doing so, is entitled to protection against
" every deed which the father may execute, where such protection
" does not happen to be *excluded*, by the preferable and stronger
" right, which, notwithstanding the obligation *intra familiam*,
" may belong to an onerous third party.

" It has been observed, that a marriage-contract is a contract
" *uberrimæ fidei*, and entitled to the most liberal interpretation;
" whereas an entail is *strictissimi juris*, and all construction by
" implication excluded. Now, no doubt this would be a good
" answer, wherever it requires any argument on implication, or
" any strained construction of the deed, to establish the *existence*
" *of the obligation* supposed to have been laid on the heir of entail.
" But, on the contrary assumption, that the obligation is in itself
" clear and express, requiring neither presumption nor inference,
" nor implication, to make it out, the answer has no force. The
" question is, what is to be the effect of the *obligation*—as an
" obligation clearly and confessedly imposed? Is it not to be
" good *inter hæredes*, if the deed declares the heirs to be bound?
" Or, however expressly so declared, is it to be bad even *inter*
" *hæredes*, simply because not fortified and converted into a real
" *quality* or *condition* of the right by attending to the statutable
" requisites of the Statute 1685?

" (3.) Take another case. If it be enough to deprive an entail
" of all efficacy, that the statute has not been followed out, how
" comes it that an entail which has *never yet been feudalized* is
" notwithstanding good, not against heirs merely, but even
" against *creditors?* Yet, unless where the heir is *alioquin suc-*
" *cessurus*, so as to afford him a separate title of possession through
" which creditors can attach the estate under his apparency, it is
" undoubted law, that so long as the entail rests upon mere
" *personal title* its conditions will be effectual against all and
" sundry. In such a case, neither creditors nor purchasers, any
" more than heirs, 'could object to their being barred by every

" ' clause in the tailzie, as if it had been recorded in the Register
" ' of Tailzies, and as if their debtors had been infeft, and the
" ' irritant clauses insert in their infeftment; as was adjudged by
" ' the House of Peers in the question between Mr. James Baillie
" ' and Mr. Archibald Stewart, *alias* Denham of Westshiells.'
" —*Kilk.*, 546, and see Westshiell's case in *Dom. Proc.*, 1 *Craigie*
" & *Stewart*, 113. Russell, Jan. 31, 1792. Bell's *Cases*, 166,
" &c., &c.

" It is impossible to conceive a case more wholly out of the
" protection of the Act 1685 than the one here put. And the
" inference necessarily is, that there may be *obligation* legally
" enforceable, independently of that statute. The statute to be
" sure, is indispensable, in order to give the full efficacy of a *real*
" *right* to the conditions of the entail. But wherever there is a
" party against whom the mere existence of *personal obligation*
" is, *per se*, sufficient, it is not necessary to go farther. In this
" very question, *if the deed of entail had stood unfeudalized*, the
" conditions imposed by it would, upon the authorities referred
" to, have been, without any aid from the statute, a good answer,
" *even to creditors*. *A fortiori*, then, must this be the case in a
" question *inter hæredes*. And if the *unfeudalized* deed would
" have been sufficient for this purpose,—although, *after feudali-*
" *zation*, any mere *personal conditions* would no longer be of
" efficacy in a question with *creditors or purchasers*, because such
" parties, whether under the statute or at common law, *when*
" *dealing with a proprietor infeft*, can only be affected by what
" amounts to *real right*,—surely, in a question with *heirs*, who,
" as regards the operation of *real right*, stand in a totally different
" predicament, feudalization could never weaken, much less
" undo the binding force of the previous *obligation*.

" (4.) An entail regularly feudalized, but *not recorded* in the
" Register of Entails, affords another example where, though in
" respect of the statute unavailing against creditors, the condi-
" tions of the entail, as inferring personal obligation, are still

" effectual in a question with heirs. This, however, has been
" already noticed in Lord Fullerton's opinion; and reference
" may only further be made to Hall, Feb. 1726, *D.* 15,373; and
" M'Gill, June 13, 1798, *D.* 15,451.

" (5.) Other illustrations might be drawn, from the effect of
" a *partial* burdening or sale of the lands, where, (as is well
" known,) although, from defect in the irritant clause or other-
" wise, the real debt or sale itself may stand good to the *onerous*
" *third party*,—the very success of the act of contravention
" affords ground, *as against the offending heir*, for the forfeiture of
" *all that remains of the estate*, under the unaided operation of
" the prohibitory and resolutive clauses.

" But it is needless to enlarge. The sum of the whole
" matter comes to this, that it is not requisite in the case of
" *entails*, any more than in the case of other *conditional* grants
" and conveyances, that the conditions of the right should extend
" beyond the mere matter of *personal obligation* in order to their
" being binding and operative, in a question with the *grantee*
" *and his heirs*. No doubt, where the conditions of the entail
" are not perfected into matter of strict *real right*, the existence
" of mere personal obligation will not secure them from being
" defeated, as in a question with *onerous third parties*. But this
" is not peculiar to the case of entails. For, in no case whatever,
" unless where the proprietor's own right happens to be still
" *unfeudalized*, (in which case *assignatus utitur jure auctoris*,)
" is the real estate or its investiture held to be affected by
" any mere obligation personally incumbent on the individual.
" Hence, indeed, the whole doctrine of *real rights*, as rested in
" the ordinary case on infeftment and registration. The only
" difference in the case of entails is, that in order to complete the
" *real right* peculiar to that category (where this is necessary),
" there must, in addition to infeftment and registration, be inter-
" poned the solemnities also of the Statute 1685.

" Upon the whole, therefore, while I am quite prepared to

" recognize the authority and perfect soundness of the decision
" in the case of Ascog, and others of the like class, I am very
" clearly of opinion that there is nothing in that decision to rule
" the present question. In the case of Ascog, there was *no*
" *personal obligation to do that which was asked of the heir.* The
" deed did not order *reinvestment*, and the House of Lords very
" properly refused to construe such an order out of its other
" terms by *implication*. No doubt there was a *prohibition* to
" sell. But a sale had been effected, and, in consequence of
" the indefeasible right thereby conferred upon the *onerous third*
" *party*, not by virtue of any inherent legal right *in the heir*
" who had sold, this sale was in law good and effectual. The
" estate, therefore, which the maker of the entail had meant to
" entail was gone and irrecoverable; and the primary intent being
" thus defeated, there was nothing on which to build anything
" else. If the deed, however, had contained a positive and
" express condition, (leaving nothing whatever to implication,)
" that in case of the entail proving anywise defective, the heir of
" entail should be bound and compellable to do *all that was*
" *necessary to cure this defect*, and,—in case of the original estate
" having, in the meanwhile, been carried off,—to *reinvest* the
" price, or a certain specified amount of money in its stead, in
" the purchase of other lands to be settled on the same heirs, in
" terms of strict entail, *wherein the flaw of the original deed*
" *should be cured*,—so as to exclude the indefinite recurrence of
" alternate sales and reinvestments without end,—there is
" nothing, so far as I am aware, in the case of Ascog, to estab-
" lish that this, as matter of *personal obligation*, and in a pure
" question *inter hæredes*, would not have been available,—and if
" available *inter hæredes*, it must of course have been equally so
" against parties deriving *gratuitously* through them. Accord-
" ingly, having no doubt that, in such a case, the obligation,—
" to reinvest, and of new to entail, in strict conformity with the
" Statute 1685,—would have been a perfectly good obligation,

" and capable of available enforcement *inter hæredes* in a court of
" law, I am humbly of opinion that in the present case, the
" gratuitous deed, whereby, in face of an *express prohibition* to
" alter the order of succession, that order of succession is at-
" tempted to be altered (the estate originally entailed all the
" while remaining with the granter), cannot be supported.

" J. Ivory."

" The Judgments pronounced in the House of Lords in
" the cases of Ascog, Bruce, and the Marquis of Queensberry,
" rest on one ground at least, to which no answer was made at
" the time when the case was decided, and has never been con-
" troverted since, that, where an estate, held under an imperfect
" entail, has been sold, the Court cannot, by finding damages or
" otherwise, make new entails, which the entailer never con-
" templated, and of estates which he never had, and that as often
" as the heir in possession may choose to sell them. That has
" no bearing on the case where the estate remains, and where
" the question is, whether a conveyance, made by a *mortis causa*
" deed entirely gratuitous, has the same effect as a sale to a third
" party. The argument of Lord Fullerton, confirmed by the
" opinions of Lords Moncreiff, Jeffrey, and Ivory, expresses fully
" and clearly what I have always considered to be the law
" applicable to such cases. Lord Cuninghame has referred to
" the law of prescription as applicable to fee-simple and limited
" titles. The decisions which have established and regulated
" that doctrine could not have been pronounced unless entails
" had been held to be valid *inter hæredes*, which were not
" effectual against creditors under the Statute 1685. I know
" that Sir Ilay Campbell, and other great lawyers, attached the
" greatest importance to those decisions, which show that this
" distinction between entails valid under the statute, and those
" which constitute an obligation *inter hæredes* only, is not one
" which rests on insulated decisions or authorities, but is inter-

" woven with what has been long recognized to be the law of
" Scotland.

" JOHN A. MURRAY."

The cause was set down for hearing upon these opinions, and was again fully argued, as well on the construction of the entail as on its efficacy in questions *inter hæredes*, by *The Lord Advocate* and *Mr. Anderson* for the appellants, and *Mr. Kelly* and *Mr. G. G. Bell* for the respondents, but every argument and authority used on either side, was anticipated in the voluminous opinions delivered by the Judges below.

LORD BROUGHAM.—Thomas Carrick, possessing the estate of Burnhead under an entail, as is contended, executed by Robert Carrick, of Braco, disponed the estate by an instrument dated October 22, 1835, to himself and his heirs, and assigns whatsoever. Upon this disposition, which was found in his repositories after his decease, evidently a *mortis causa* deed, the appellants, his sisters, and heirs at law, were served heirs portioners, that is, heirs at law to him, and took infeftment upon that service, in virtue of the disposition which he had so executed.

But the respondent brought an action of reduction of this disposition and this sasine, as next heir of entail, under the settlement executed by Robert Carrick, of Braco, on the 18th of July, 1820, and recorded on the 20th of November, 1828, contending that Thomas Carrick, the disponer, possessed the estate under the tailzie so executed, and that it was fenced with proper clauses, prohibitory, irritant, and resolutive, to prevent his altering the order of succession. This action, therefore, brought in question the validity of the tailzie.

It was determined by the Lord Ordinary, and afterwards by the Lords of the First Division, that the disposition was effectually struck at by the entail, and therefore must, with the service which had followed upon it, be reduced. An appeal

being prosecuted from these interlocutors, your Lordships, on the 30th of May, 1842, after hearing the case argued, remitted it to the Court of Session, with directions to consider, whether upon the supposition, not deciding it one way or the other, that the irritant clause should be held defective, as directed against the institute, the tailzie was or was not still sufficiently effectual to prohibit and prevent the granting the disposition as a gratuitous deed, and to consult the Lords of the Second Division, and the permanent Lords Ordinary.

In obedience to this remit, their Lordships of the First Division, having consulted those of the Second and the permanent Lords Ordinary, reported the opinion of the whole Court to this House, in answer to the question by your Lordships submitted to them. This answer is in the affirmative, by all the learned Judges except one, the Lord Justice Clerk alone considering the entail as insufficient to prohibit a gratuitous deed altering the order of succession, on the supposition of the irritant clause itself being invalid and insufficient.

The whole question now comes before us, and it is very material in the first place to observe that no opinion whatever was given, and none was formed by this House, upon the preliminary question whether or not the irritant clause is valid.

[LORD CHANCELLOR.—Nor was any opinion intended to be expressed.]

LORD BROUGHAM.—Clearly not. We thought it inconvenient to consider a point on which no opinion had as yet been given by the Court below, and which being decided one way, might make it quite immaterial to discuss the question of the irritant clause being valid or not, namely, what would be the effect of the entail upon the deed under reduction, supposing the irritant clause to be held insufficient. But no opinion was here pronounced, either by the House generally, nor any final and conclusive opinion by any one of its members, I take upon me to say from the most distinct recollection, upon that preliminary

point touching the validity of the irritant clause. The Lord Chancellor gave an indication of the inclination of his opinion upon this point, but his Lordship (and that is material,) guarded himself and the House upon the subject by these express words, which he used after he had said what he inclined to. "It is not "to be considered that we have decided any further than direct-"ing the remit." That was expressly with a view to exclude the supposition of any decision having been pronounced. Two points then remain for decision. First, Is the irritant clause effectual against the institute Thomas, the disponer, called erroneously in the deed of entail *George* Carrick? Secondly, (a question which only arises in the event of our holding the irritant clause ineffectual,) Is the prohibition in the entail, which past all doubt is levelled against the institute, sufficient to prevent a gratuitous deed altering the order of succession? a deed too in this case not delivered, but plainly *mortis causa*.

Now this second point is really very important, and it is material therefore that there should be no doubt left upon it; and I am rather surprised, and a little grieved, that there should have been any doubt thrown upon it by so high an authority as the Lord Justice Clerk, for my opinion is perfectly clear and decided with the rest of the Judges. As Lord Thurlow once said, in a similar case, there is not even a probable argument upon the subject—there is not even a point on which to hang an argument —and it is very important to the entail law of Scotland that there should be no doubt left upon the point when none exists.

First there appears, when the whole structure of the tailzie is closely considered, no ground for denying that the irritancy strikes at the acts of the institute. I certainly at first had a doubt and partook of the inclination of opinion which has been expressed; but upon closely considering it, I think there appears to be no reasonable ground for denying that the irritancy strikes at the acts of the institute. There may be some obscurity occasioned by the needless repetition with which the clause abounds,

the redundancies mentioned in the Lord Ordinary's interlocutor, but still the institute is sufficiently struck at.

It is to be observed, as a sure foundation whereupon to build, that the prohibition plainly affects the disponee, the institute, in the most precise terms, viz., by naming him. This is very material, on account of the reference afterwards made, in terms equally express, to that preceding part of the instrument. Not only is he by name prohibited from "contracting debts or granting "deeds," "whereby the lands and estate may be evicted or the "said *lands and estate* and *the heirs of tailzie succeeding thereto*, "*may be anywise affected*," and not only are *all such deeds so granted* declared null and void, both as affecting the estate and the heirs of tailzie, but there is an express prohibition against the institute, by name "George Carrick," which should be "Thomas Carrick," altering the order of succession; and then in case the prohibition of the granting of deeds and the irritancy following upon it should be held insufficient, from the nature of the essential word "affect," to prevent altering the order of succession, another word immediately follows, upon which the main question here is raised. It begins as a resolutive clause, declaring that if the institute, by name George Carrick, or any heirs of tailzie, or heirs whatsoever, shall fail to observe any one of the aforesaid provisions, or "shall act *contrary to the prohibitions, or* "*any of them*," all of which were levelled at George Carrick, "then the contravener, either by failure, or acting contrary, shall "forfeit and lose, and the estate go to the next heir, as if the "contravener were dead." And then it proceeds to declare further, that upon every such contravention, failure or neglect, not only the "estate shall not be burthened or be liable to the "debts and deeds of the several heirs of tailzie, and heirs what-"soever, as before provided." Now, on this, much doubt would have arisen had the declaration stopped here, because mention is only made of debts and deeds of heirs of tailzie, and it might have been said that these are not debts and deeds of the institute, who

is not an heir of tailzie; but the declaration goes on, and in terms expressly shows that it goes further, for it having begun with "not only," just as happened in the last case of Adam *v.* Farquharson, it now adds "but also," that is, "but in addition," "but "still further," and what is it that is thus added? "But also "all debts, deeds, and acts contracted, granted, or done," (that is, *reddendo singulos singulis*, debts contracted, deeds granted, or acts done,) "contrary to *these conditions and restrictions*, or to the "true intent and meaning of these presents, shall be of no force, "strength, or effect, and shall be ineffectual and unavailable."

Now, this being as general an irritancy as can be imagined of all acts done, and deeds granted, contrary to the preceding prohibition, and that preceding prohibition having been levelled at the institute by his name of George Carrick, this irritancy must be considered as an irritancy of the acts and deeds of contravention done or granted, the acts done or deeds granted by the institute George Carrick.

But then it is said, and this really is the sum of the appellant's objection, the words which follow declaring the other heirs of tailzie not to be affected, are sufficient to restrict the first-mentioned words to contraventions of the substitutes, because the institute not being an heir of tailzie, could not be referred to by the contradistinguishing word "other," because when we say "the institute and the other heirs of tailzie," it is said, if it is doubtful what you have done before, the word "other" shows it not to apply to the institute, but to the heirs of tailzie. But this will not do; for first, besides declaring that the other heirs of tailzie shall not be affected, the clause declares substantively that the contravening acts and deeds shall be of no *force*, *strength*, or *effect*—not, of no force as against the estate, not, of no force as against the heirs, but absolutely of no force, strength, or effect; and what follows, being wholly needless, a sufficient irritancy having been declared by these words now last cited, may be rejected as surplusage.

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Secondly, if any clause, be it in a deed or in an enactment of a statute, sufficiently declares the intention of the Legislature or the maker of the deed, it is always a very dangerous mode of construction to allow that intention to be excepted from, or explained away by the use of such words as "other," and to raise up provisions from such terms. We very often find the word "other" not used in a logical sense. I will give an instance in a Scotch Act of Parliament, in which there are words to this effect:—"The person who commits the awful and abominable "sin of heresy contraire to the laws of God and all other human "laws." Now, the argument here would be, that that shows that the laws of God are human laws, just as it is said that "other heirs of tailzie" shows that the institute before named is an heir of tailzie, and not an institute; but it only means all other laws, to wit human laws. Thirdly, the clause goes on to declare, that the succeeding heirs shall, as well as the lands, be free *therefrom*, that is, from the deeds and acts of contravention, as if the same, repeating the extensive words "debts, deeds, or "acts," had never been contracted, granted, or done.

The introduction of this word "other," the pivot on which the argument against the entail turns, was probably owing to this, that no contravention could possibly affect the institute so as to require a saving of his rights. Any substitute contravening could only affect other substitutes, and the substitute contravening could, of course, not affect his own right, except by way of forfeiture; there was nothing therefore to guard him against.

It is unnecessary to examine the cases to which reference has been made in the course of this argument. The affirmance of the judgment below upon this first point does not in the least degree tend to impeach any one of the cases now held to be law, and to govern the jurisprudence of Scotland respecting entails, nor is it a deviation from any of them. How vain, for example, is it to contend, that there is any possible resemblance between this case and Lang *v.* Lang, which was very much argued upon?

Counsel are constantly bringing up Lang *v.* Lang; and I really must say, once for all, that Lang *v.* Lang means no such thing as is contended for,—it depends upon the peculiar words and frame of the deed in that case, and nothing else. If the institute had in that entail been first prohibited to dispone, and then all such dispositions had been declared null and of no strength, force, or effect, and it had been added that they should not affect any *other* heir of tailzie, can any one doubt that the entail must have stood? The inaccurate use of "*other*" would never have converted the institute into an heir of tailzie, nor would it have prevented the irritancy following upon the prohibition, and connected with that prohibition by express words of reference from effectually irritating his acts and deeds. The argument is really conducted here as if the institute were sought to be brought under the prohibition by the use of the word *other*. In the Duntreath case, he was so brought in, that is, he was held below to be struck at by a clause levelled at heirs of tailzie. Is that, or any thing like that, the case here? It might be admitted, that if the preceding portion of the clause left it quite doubtful whether the acts of the institute were irritated or not, the use of the word *other* might shew heirs of tailzie, and not the institute, to be meant. But that is not the case. The prohibition is clear and not dubious; the institute by name is forbidden to alter the order of succession. Then he is forbidden by name to grant any deeds whereby the lands entailed may be any wise *affected*, or whereby the succeeding heirs of tailzie may be any wise affected; and all *such deeds* affecting either land or heirs, are positively declared to be null. This may possibly be thought to leave some doubt, arising from the word *affect*. But then follows the clause, that "*not only* the debts and deeds of the several heirs of tailzie "contravening shall not burthen the lands, *but also*," that is, but furthermore, "all deeds and acts granted and done in contraven- "tion, shall be null and *void*," without saying by whom done, that is, *all* contraventions whatsoever, and by whomsoever, and

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this after an introduction in which the institute is named, and his possible contravention is supposed. "If George Carrick, or "any of the heirs of tailzie, shall contravene any of the pro-"hibitions herein contained, or shall act contrary thereto, then, "and in any such case, the contravener shall forfeit, and upon "every *such* contravention." That is, whether by George Carrick or by the substitutes, not only the lands and heirs shall not be affected by deeds of heirs of tailzie, *but also* all deeds and acts of contravention shall be null and void. Here, then, is a complete prohibition and irritancy levelled at the institute, and nothing doubtful is left which the subsequent words might be wanted to explain; consequently those subsequent words shall not be suffered, under colour of explaining what is ambiguous, to revoke or alter what is plain.

It therefore appears, that the irritancy being validly framed, the judgment appealed from must be supported; and it becomes unnecessary to deal with the other point, the second question before us—whether or not, if the irritancy were ineffectual, the prohibition is of itself sufficient to prevent a gratuitous deed? But as we have directed the Court below to deal with this point, and as its decision may affect, and indeed does affect other cases, we may as well dispose of it also.

It seems to be a position removed from all reasonable doubt, that an entail, though not sufficiently fenced by irritant and resolutive clauses, and by registration in the Record of Tailzies, may, nevertheless, if it contain a prohibition against altering the order of succession, protect the estate from being carried away by a gratuitous deed from the heirs of entail, called to the succession one after another. It is to be observed in the outset, and with reference to the question alone now before us, the effect of the Braco entail on the deed of disposition of the institute, disponing the lands to himself in fee simple, that this is not in any sense a gratuitous deed of alienation; it is no alienation at all, but a deed, the only object of which was to carry the estate after

his death away from the substitutes to his own heirs at law, who were not heirs of tailzie at all. It was a *mortis causa* deed, simply to alter the order of succession.

It appears very difficult to read the Act of 1685, and not be persuaded that it applied much rather to the rights of third parties, of parties who had given a consideration for the title given by the heir of entail, than to volunteers. The frame of the enactment seems not only consistent with this supposition, but to support it. The king's subjects are told that they may now tailzie their lands, and affect them with such clauses as shall be good against all singular successors. But further, the condition annexed is of a most peculiar application to the rights of such parties, third parties, because it is, that the whole instrument shall be recorded in a particular register created for the purpose. Why? For what purpose? To give all parties warning, that they deal at their peril with a person possessing lands under an entail. The clauses, too, must be inserted as often as any step is taken in the title; they must be made public in the Register of Sasines each time any one of the series of heirs of provision succeeds to the preceding heir of tailzie.

It is quite impossible to regard an Act so framed as abrogating the common law right which fee simple proprietors of estates had to prescribe the order of succession in which their lands should go, as far as regarded the rights and objects of the heirs successively taking under their settlements. This Act is clearly not a restraining Act, but an enabling Act. It goes to enlarge, not to restrict, the right of irritancy. It had even been held in one case, I mean the Stormont case, about twenty years before the Act, that such fencing clauses would avail against purchasers at common law; and the authority of Sir Thomas Hope may be cited in favour of that doctrine prior to the Stormont case. But the sounder opinion was the other way, and the higher authority of Sir George Mackenzie (higher, because he is believed to have framed the Entail Act of 1685) may be appealed to for the

position that a statutory provision was held necessary for this purpose. But he most expressly says, that a simple prohibition was sufficient before the statute to prevent gratuitous deeds. Lord Kaimes distinctly takes this view of the subject in his *Elucidations*. The heir of entail (whom he not very correctly calls, tenant in tail) is, according to his Lordship, tied up by his own consent; purchasers are bound by the statute—" A man,' he says, " may bind his heirs, but he cannot bind purchasers." That is to say, an Act is required for that purpose. The same doctrine is laid down by Erskine and other institutional writers. Indeed, the effect of an unrecorded tailzie and its validity *inter hœredes*, is not to be understood upon any other view except the statutory requisites being intended to extend, and not to restrain the power, or supersede the common law right.

The authorities are all the same way. It may suffice to mention the case of Logan *v.* Drummond, which Lord Monboddo, who reports it, says turned wholly on the question whether the deed was onerous or gratuitous,—the prohibitory clause having sufficiently struck at gratuitous deeds, as was admitted on all hands, but especially the case of Grant *v.* Dunbar, in which an attempt having first been made to obtain reimbursement of the purchase money, on the ground of the sale being onerous, the party relied on its being gratuitous, and so void without any irritant clause. The Court held such deed to be clearly void.

But it is said that the decision of this House in the Hoddam case affirmed the principle of gratuitous deeds being valid, if only prohibited without any irritant or resolutive clause. I gave that decision, and therefore I think I know what the meaning of it was. I am astonished to see the Lord Justice Clerk citing that case: it has no application whatever to this; he might just as well cite Shelley's case. The point never was in any way before us; the question never was raised at all, either at the Bar or by the Bench; and surely no one who, with ordinary calmness and

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candour, reads that judgment, can imagine, that upon a point so important, a point on which groes at a weight of authority lay the other way, I or this House would ever have given a judgment, disposing of that point one way without a word of argument, because there was not a word said about it. What we are supposed to have done is to have overruled a principle of law, upon which all the authorities agree, and all the cases, except the Ascog case, which I am coming to presently, and that only inferentially by way of suggestion, when not a word was said about it; for it is not mentioned except in the judgment,—it is not mentioned in the argument. The fact is,—and this has been more than once stated in this place,—that the judgment was drawn up in terms of the conclusions of the libel; it was a declarator brought by the heir of entail in possession, to have his right ascertained, and he had inserted in his libel a claim to alienate for gratuitous as well as onerous causes; and the Court was called upon to declare, that notwithstanding the fencing clause he had that right: now the fencing clause was insufficient; no doubt it was merely prohibitory. The Court below had found the fencing clause sufficient, consequently they made no question respecting the force of a mere prohibition—it did not arise. Your Lordships reversed the decision, and the conclusions of the summons were, *per incuriam*, no doubt inserted in the judgment. Now, how far this mistake might operate on the question of *res judicata*, subsequently, should the validity of a gratuitous deed come in question, it is needless, or, at all events, it is premature to consider. The statement of the fact when the case is used as an authority, as it is here, coupled with the terms of the argument in delivering the judgment, is quite sufficient to shew that the words inserted give no sanction whatever to the doctrine now maintained by the appellant.

It seems very certain, that were it not for the judgment of this House in 1830 upon the Ascog and Tillicoultry cases, we should have heard little of the argument now maintained for the

appellant; and the only one of the learned Judges who differed from the opinion given by his learned brethren on the remit in the first case, seems to have rested his argument entirely upon what fell from Lord Eldon in disposing of those cases concurrently with the Lord Chancellor. But first of all it is to be observed, that Lord Eldon felt all the difficulty of holding the proposition, that the right of entailing is purely a creature of the statute. He expressly said, that no one could hold this doctrine who considered what happened in the Stormont and other cases twenty years before the statute; and that is totally overlooked by those who cite his authority in this case; and he intimated that he felt extreme difficulty in holding simple prohibitions invalid in questions *inter hæredes.* Then what was the nature of the case before the House, and what the judgment below which was here reviewed and argued, and which was reversed? I mean in the Ascog case. It was no claim to have it found and declared, that a gratuitous alienation is void *inter hæredes:* it was a claim by the heirs of entail under an instrument, not fenced by the clauses irritant and resolutive, not to have it declared that a sale had been void, for a sale for value had been effected, and could not be invalidated; but to have the seller compelled to reinvest or retain the purchase money which he had received. The argument against that, and against the decision which prevailed, (and I think fairly prevailed here, though I doubted it at the time, as Counsel are very apt to doubt when a decision goes against them,) was, that neither the statute nor any provision of the entail, gave this right to the heir who had been damnified by the alienation; and besides, the ground mainly insisted upon was, that the heir of entail had a right to sell, that is to say, that his sale could in no way be set aside, for the entail was not fenced by the irritant and resolutive clauses; therefore he had a right to sell, and no means existed of calling him to account for doing what could not be undone, and could not have been prevented by any previous step. It was said you could not

have gone to the Court to obtain an interdict to prevent him. What he has done cannot be undone, and therefore you have no right to call upon him to reinvest the purchase money, which he has obtained by a due and legal act of sale. No one can read Lord Eldon's argument, and believe that he would have held the same opinion against the subsequent heirs of entail, had the entailer, besides forbidding the sale, provided that the price obtained by the contravener should be reinvested to the uses of the settlement; but it was because there was no such direction. An entailer might have said, "You shall not sell; but if you do "you shall invest the price:" just as he every day says, "You "shall not sell; but if you do, you shall forfeit to the next heir "of tailzie." Lord Eldon repeatedly dwells on the entail having no such provision; and it may be stated as a fact, (I may state that from my own distinct recollection,) that they who argued for the respondents in support of the judgment below, felt throughout extremely hampered by the great difficulty of practically dealing with the *modus operandi*. They complained explicitly, no doubt, of the gross inconsistency of holding simple prohibitions to be binding on the heirs as among themselves, and yet giving each a right to alienate for a valuable consideration without being liable to invest the price. They assumed as quite clear, that gratuitous alienations were prohibited. The question here was not as to the validity of that prohibition *inter hæredes*, but the question was as to the consequence of an onerous alienation, not gratuitous; for there was nothing gratuitous in it, but an onerous alienation, which was not effectually prohibited for want of fencing clauses. The difference between the two, therefore, is great and substantial. The parties were found in the result to be remediless. But that case is not only not this, but the very reverse of it; for it was there an onerous, and not a gratuitous alienation.

In the Ascog case, the estate was gone by a sale which could neither have been prevented beforehand, nor rescinded after it

was made, and no provision had been made either by the law of the land, or of the entail for indemnifying the succeeding heirs. In the present case the question arises upon the validity of a gratuitous deed, which is questioned, which may be prevented if foreseen, which may be rescinded if accomplished. Consequently the difficulty exists not, which in the former case was found to be insuperable, and the known rule of law may very well take its course. The estate remains too in the hands of a gratuitous donee. There the estate was gone—it here remains in the hands of a gratuitous donee, a mere volunteer, who has taken without value, and who in truth represents universally the heir of entail, the contravener of the law of the entail under which he took his possession. All that this House did in the Ascog, Tillicoultry, and Queensberry cases, was to refuse taking a consequence by implication of the doctrine that gratuitous deeds are struck at by a simple prohibition. The pursuers there, the damnified heirs of entail, contended, and the Court below supported them in their contention, that the right to a reinvestment of the purchase money, and a settlement of it to the uses of the entail, followed as a consequence from the heirs of entail being bound by the simple prohibition without fencing clauses. It is plain that this was asking the Court to take a long, an arbitrary, and a novel step. It was calling upon the Court to make a law for the entail, or to devise a legal remedy for an injury, merely because a wrong had been done, and this House refused to take this novel step; and what Lord Eldon repeatedly pressed in the course of that argument (I recollect it as distinctly as if it were yesterday, for it was a case that excited great interest) was, "What means have you of working this? How is the "price to be reinvested? Is the party to be called upon every "time it is sold, to reinvest the money?" And so he went on hampering me at every step with questions, which I found could not easily be answered.

A fact stated by Lord Murray deserves much attention in

disposing of this question: his very learned kinsman, the late President Sir J. Campbell, his Lordship says, and other great lawyers, held, that the cases decided respecting prescription, could not have been so determined, but for the assumption that the distinction is well grounded in law between entails valid by the statute, and entails only binding *inter hæredes* for want of the apt clauses. It is manifest that this opinion shews how intimately interwoven with the whole Scotch law of real property that important distinction is; therefore, both upon the ground of the irritant clause being validly directed against the institute, and upon the separate and independent ground of the simple prohibition being of itself sufficient to prevent any taker under the entail, whether institute or substitute, from gratuitously altering the order of succession, I move your Lordships that this Interlocutor be affirmed.

My Lords, I have one observation to make, and which shall be a very short one, respecting the printed papers in this case and the last. I see in one instance, particularly where the question is reduced to the narrowest compass as regards authorities, the learned persons who framed the papers go into the whole useless, superfluous, prolix statement of all the principles of the law of entail, from the Duntreath case, from the Tillicoultry case of 1799, downwards; and they enter upon page after page of print, to the great expense of their clients, or of those who have to pay. There is no doubt, that if they are appellants they will have to pay themselves; but if costs should be given against some of the respondents, those respondents would have to pay for it. They enter into these matters in the most useless way, because nobody doubts these principles of entail law now. We have been having them year after year for the last forty years. They are just as well known as that two and two make four. The parties ought to confine themselves to the point in the cause: and they very often miss the real point in the cause, by entering into a great number of other points that are not in the

cause, and never will be in any cause whatever. It makes it very difficult to read the cases.

Lord Campbell.—My Lords, I will just say, that having heard this case argued, I entirely concur with my noble and learned friend who has addressed the House upon both points. With respect to the irritant clause, I think it is sufficient upon principles which I shall by and by state when we come to the Aboyne case. (Vide *supra*, p. 289.)

Upon the other point I have no doubt whatever, that by the law of Scotland a deed of entail, with prohibitory clauses, is binding *inter hæredes* without irritant and resolutive clauses. And I must say in this case, without meaning the smallest possible disrespect to the Lord Justice Clerk, that my concurrence with the other learned Judges is strengthened by having read his most elaborate and most learned argument on the other side; because that shews, that all that profound learning in the law of Scotland, extreme ingenuity, and unwearied industry can bring forward to shake that doctrine, has no effect whatever. It seems to me, my Lords, that the only plausible argument that can be urged against the doctrine arises from the Ascog and Tillicoultry cases. But the points in those cases and in the present are wholly dissimilar, because it may very well be that the heir of entail, after an alienation for value, may have no interest at all in having the proceeds reinvested to the same uses, no right to have them reinvested, and no legal remedy to enforce any such right, and yet that if there be an entail with prohibitory clauses, *inter hæredes* the deed shall be binding. The Tillicoultry and Ascog cases I had the honour to argue. I was on the winning side. I had a very strong opinion indeed in favour of the doctrine that I had to contend for, which was so strong, that even my noble and learned friend, I believe, felt at the time, or at least, he now feels, that it was utterly impossible that he should prevail. But we have here an entirely different entail.

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I think that, before the statute, by the law of Scotland, such a destination was binding *inter hæredes*, and that there is no pretence for saying, that that statute has at all altered the power which before existed.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the Interlocutors, so far as therein complained of, be affirmed with costs.

DEANS, DUNLOP, and HOPE—RICHARDSON and CONNELL, Agents.

END OF VOL. III.