[HEARD 23*rd*, JUDGMENT 25*th February*, 1847.]

SIR DAVID BAIRD, of Newbyth, BART., *Appellant*.

MARGARET BAIRD and Others, substitute heirs of tailzie of the lands of Newbyth, and WALTER JAS. L. GILMOUR, *Respondents*.

*Tailzie*.—Terms of exception from fettering clauses held not to destroy their effect.

*Ibid*.—A power to the heirs in an entail, to dispone in feu-farm—to excamb—or to sell or dispone such parts of the lands as they shall think fit, on condition that, previous to the sale, the heir making the sale purchase other lands of equal value to those sold; and that the titles of the lands purchased or taken in exchange, be taken to the heirs in the entail under the same conditions as in the entail; and that the purchaser of the lands in the entail should see to the performance of these conditions, is not such a power as nullifies the entail, either as being destructive of the fetters or as making the entail inconsistent with the Statute 1685.

ON the 4th of August, 1737, Sir John Baird executed a deed of entail of a variety of lands, including part of the barony of Whitekirk, the barony of Gilmertoun, with the exception of specified parts of it, parts of the barony of Drum, the entire barony of Broomhills, and parts of the baronies of Fordell and Ellam, in favour of himself and the heirs male of his body, and a variety of other substitutes, "declaring always that it shall be "lawful to me to alter, innovate, and change the succession of "the heirs male or female of my own body in the saids lands "and barony of Broomhills, and teinds, parsonage and vicarage "thereof, and in the saids lands of Over Monenet and Wester "Winshiells, and parsonage-teinds thereof, and corn and walk "milns of the same; as also, that it shall be lawful to me to "alter, innovate, and change the succession of the said Alex-"ander Baird my brother, and the heirs male and female of his

" body, as to the lands, barony, and others immediately above " mentioned, and as to the said lands of Hairhead, Rislabridge, " Bothwell, and miln thereof, and Birkencleuch, and parsonage-" teinds of the saids lands of Hairhead."

The conditions of the entail were that the heirs should use and bear the name and arms of Newbyth; " as also, that it " shall not be liesom nor lawful to any of the heirs of taillie " above mentioned, to alter, innovate, or change the foresaid " taillie, and order of succession above mentioned, or to do any " other deed, directly or indirectly, whereby the same may be " anywise altered, innovate, or changed; nor to sell, dispone, " wadsett, or impignorate, the lands, baronys, and others above " mentioned, or any part or portion thereof, except the lands " barony, teinds, and others, after mentioned, which they have " power to sell, or otherwise dispose of, by virtue of the faculty " hereafter specified, conceived in their favour;" then followed prohibitions against contracting debt or altering the order of succession, fenced as to all the prohibitions by irritant and resolutive clauses.

Immediately after these clauses followed this exception, " Ex-" cepting and reserving always, furth and from the saids clauses " prohibitory and irritant, full power and liberty to the saids " whole heirs and members of taillie above mentioned, to sell, " gift, or dispose of, the saids lands and barony of Broomhills, " comprehending as aforesaid, with the teind-sheaves, and whole " pertinents thereof, above mentioned; as also, the saids lands " and roum of Hairhead, and that particle or portion thereof " called Rislabridge, the said lands of Bothwell, with the miln " thereof, the saids lands of Birkencleuch, and pertinents thereof " above mentioned, with the parsonage-teinds of the saids lands " of Hairhead, the saids lands of Over Monenet, and the saids " lands of Wester Winshiels, with the corn and walk milns of " the same, and warrandice lands thereof above specified, with " the teind-sheaves and parsonage-teinds of the said lands of

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"Over Monenet, and that either irredeemably or under rever-
" sion, as they shall think fitt, and to grant infeftments of
" annual-rent or in security in the same, and to sett tacks
" thereof for such spaces and duties as they shall think proper,
" and to contract debts, and do all other deeds in relation to a
" free disposall of the lands, teinds, and others, immediately
" above mentioned, free of the saids conditions, provisions,
" restrictions, limitations, clauses resolutive and irritant above
" mentioned, in the same manner, and as freely in all respects,
" as if the saids conditions, limitations, clauses irritant, and
" others aforesaid, had not been insert and contained hereintill;
" but with this provision always, as it is hereby specially pro-
" vided and declared, that the lands, barony, and others imme-
" diately above mentioned, and which my heirs of taillie have
" power to dispose of by the above faculty, are and shall be
" really burdened and affected with what debts and sums of
" money are resting and owing by me, or shall be resting and
" unpaid by me at my decease."

Then followed a power to the heirs of taillie to grant life-rents to wives and husbands, and to provide for younger children; and after this was a clause in these terms, " And further, reserv-
" ing full power, liberty, and license to the saids heirs, and
" members of taillie above mentioned, to dispone in feu-farm
" such parts of the said taillied lands and estate as they shall
" think fitt, provided the feu-duties payable by these feu-rights
" be without diminution of the rentall, and that the feu-rights
" be to be holden of the granter, and the same heirs of taillie
" who are hereby appointed to succeed to the saids lands and
" estate, and that the feu-duties be payable to the granter and
" the saids heirs of taillie, and no others: as also, to excamb
" such parts of the said taillied lands and estate as they shall
" think expedient, with other lands of the same value and
" yearly free rent with those parts of the said lands and estate
" so excambed: as also, to sell off and dispone such parts and

" portions of the said taillied lands and estate as the said heirs " of taillie shall think fitt; providing that the heirs of taillie so " selling do, previous to the sale, purchase other lands, to the " full value of so much of the saids lands and estates as shall " happen to be sold off; and also, providing that the rights and " conveyances of the lands to be purchased, by excambion, or " otherwise, be taken in favours of that heir so excambing or " purchasing, and the other heirs of taillie and successors, above " mentioned, according to the order of the substitution above " specified, and with and under the same conditions, provi- " sions, reservations, restrictions, limitations, clauses irritant, " and facultys, with which the right of the lands and estate " above mentioned is hereby qualified; as also, that the pur- " chasers of any part of the said taillied estate, whether by " excambion or sale, shall be holden and obliged to see that " the lands purchased by the said heir of taillie are at least to " the value of the lands to be sold by him, and that the rights " and securities thereof are taken to the same heirs of taillie, " and in the same terms and upon the same conditions, restric- " tions, facultys, and irritancys, with this present taillie, and " that the disposition and contract of excambion are duly " registered in the Register of Taillies, and compleated by a " charter under the Great Seal, and infeftment following there- " upon; declaring always, that it shall not be liesome nor lawfull " to the said heirs of taillie to feu out, excamb, or sell off, " the mannor-places of Newbyth and Gilmertoun, nor office- " houses thereto belonging, nor the yeards, parks, or other " inclosures about the said two mannor-places for the time, " which are hereby expressly excepted from the above faculty."

A series of titles was made up by successive heirs under this entail, until the lands came to be vested in the Appellant, who likewise made up his title under it.

In the month of May, 1841, the Appellant brought an action against the substitute heirs of entail, concluding to have it

found generally that he had full and perfect right and power to exercise every power, and do and grant all acts and deeds in relation to the lands embraced by the entail, competent to proprietors of lands in fee-simple, without being liable to any irritancy or forfeiture under the entail, or to any claim for damages or reinvestment of the price of the lands he might sell or otherwise dispose of, at the instance of the substitutes called by the entail, or at all events that he was entitled to sell or dispose of the whole lands except the manor-places of Newbyth and Gilmerton.

The defence to this action was rested generally upon the terms of the entail, as excluding the power which the Appellant sought to have declared.

Subsequently, the Appellant assuming that he had the power, sold a part of the lands to the Respondent Gilmour, who brought a suspension as of a threatened charge for the purchase-money, upon the ground that the Appellant could not give him a title. This suspension and the action, at the instance of the Appellant, were conjoined, a record was then prepared in which a variety of pleas were stated by the parties, which need not be repeated here, as only two points were relied upon at the hearing of the appeal, which will be stated in their proper place.

On advising the record the Lord Ordinary, (*Cunningham*,) ordered the entail and the record to be printed and boxed for the Inner House, in order to the case being reported by him. At the same time he issued the following note, which will give a general idea of the shape the arguments assumed in the Court below.

"The deed of entail, which is the subject of the present "action, contains certain clauses so uncommon, and so much "at variance with the purpose and object of tailzies in general, "that the Lord Ordinary feels it his duty to report the case, as "one of novelty and importance, to the Court.

"The entail was executed by Sir John Baird of Newbyth,

" in 1737. It commences with a dispositive clause, containing " a description of the numerous properties proposed to be " entailed; then follow the prohibitory, irritant, and resolutive " clauses; *after* which sundry powers are conferred on the " future *heirs*, one of which raises the question now to be con- " sidered by the Court.

" According to the first branch of the tailzie, and, in par- " ticular, by the leading clause of prohibition (Deed of Entail, " p. 17), the heirs of entail are expressly prohibited from selling; " but, towards the conclusion of the clause, there is a *reserva-* " *tion* of a faculty to sell the lands of Broomhills, and certain " parts or pertinents, apparently connected with the same, " which the heirs are permitted to sell at any period they might " think fit, and without any onerous cause or restraining pre- " caution, it being only provided that the price of that portion " of the lands, if sold, should be liable for any debts or dona- " tions that might be left by the entailer.

" It is not on *that* permission of the tailzie that the question " at issue arises. But, by a subsequent and separate clause of " the entail, a power is given to sell or excamb *the whole estate*, " and even any lands that might be acquired *in lieu thereof*, for " ever; the only *exceptions* from that power being the manor- " houses of Gilmerton and Newbyth, and the pleasure-grounds " and lawns connected therewith. The question is, If that " power be consistent with the spirit or letter of the Act 1685; " and *next*, If it is regulated and restrained by such irritant " and resolutive clauses as the Act requires to keep every right " conferred on heirs within the limits indicated by the entailer.

" I. The first question arising for consideration, it is sup- " posed, must be decided on general principles, without the aid " of precedents in point, as it does not appear that any entail of " similar structure and powers has ever fallen under review of " this Court in any prior case.

" The extensive powers conferred by this entail, as to *selling*

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" and *exchanging*, are apparent on the face of the deed. They " may be exercised for perpetuity to the effect of alienating the " whole estate, with the exception of the manor-houses of Gil- " merton and Newbyth, and their immediate pertinents. For, " supposing the ancient estate sold, and new properties substi- " tuted for it, according to the unusual, and not very prac- " ticable, course of proceeding pointed out in the tailzie, the " new deeds of entail must have the *same clauses* inserted *lite-* " *ratim*, which occur in the original tailzie, and *inter alia* with " the same extensive powers of sale which that deed confers. " It is, therefore, a question which remains now to be tried for " the first time, whether an entail, whereby the whole estate, " with certain trifling exceptions, may be sold, and resold, and " exchanged, twenty times in the course of a single life, be the " sort of entail which the Act 1685 intended to legalize.

" As at present advised, the Lord Ordinary views this as a " question at least of great doubt, well entitled to the most " deliberate consideration of the Court. It is thought that the " view of the Legislature, in passing the Act 1685, was to " enable proprietors to secure the succession in their families of " *specific estates*, to which they had an attachment of longer or " shorter duration. In the case of Ascog, that was a leading " consideration to show that the heirs, after sale, were no longer " bound to reinvest the price. But an entail with a never- " ending power of sale, of nearly the whole entailed subjects, is " truly not an entail of land, but it is an entail of its *price* or " *value*, which the statute never contemplated.

" When it is found, however, that a species of succession " is attempted to be created, in the form of an entail, which is " not consistent with the true object and purpose of the Act " 1685, it will not be sustained as an effectual or subsisting " entail under the statute. Thus, in a class of cases of a dif- " ferent description, which were long the subject of very learned " discussion, when the succession of a tailzied estate falls to

" the *heirs whatsoever* of any of the substitutes, without a dis-
" tinct exclusion of *heirs-portioners*, the entail is held as no
" longer consistent with, or protected by, the Act 1685, because
" the possible subdivision of the estate, by its transmission to
" heirs-portioners, and to an indefinite series of heiresses, puts
" an end to the preservation of the estate. That doctrine is
" not the subject of any special enactment in the Act; but it
" was first deduced, from a reference to the purpose and scope
" of the Act, in the noted case of Culzean, in 1760, (Dict.,
" p. 15412,) which has been uniformly followed as a precedent.
" See the late cases of Farquhar in 1838, (1 Dunlop and Bell,
" page 121,) and Craig against M'Culloch, page 545 of same
" volume.

" II. A second and relative inquiry falls to be discussed in
" the present case, founded on the position and phraseology of
" the power of sale in the deed of entail, which is, Whether the
" perpetual, and (in one sense) unrestrained powers of sale,
" given to the heirs under this tailzie, are so framed and guarded
" as to place the rights and titles, both of the sellers and the
" buyers of new estates purchased, effectually beyond the reach
" of the *onerous creditors* of heirs making the purchases?

" The power of sale, under the latter clauses of the entail,
" is given under the condition, (printed Entail, p. 20,) 'that
" 'the heirs of tailzie so selling shall, *previous to the sale*, pur-
" 'chase other lands to the full value of so much of the lands
" 'and estate as shall happen to be sold off;' and the right of
" *the purchaser* of the entailed estate is qualified with the fol-
" lowing provisions, that 'the purchasers of any part of the said
" 'taillied estate, whether by excambion or sale, shall be holden
" 'and obliged to see that the lands purchased by the said heir
" 'of tailzie are at least to the value of the lands to be sold by
" 'him, and that the rights and securities thereof are taken to
" 'the same heirs of taillie, and in the same terms and upon the
" 'same conditions, restrictions, faculties, and irritancies, with

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" ' this present taillie, and that the disposition, and contract of " ' excambion, are duly registered in the Register of Taillies, " ' and completed by a charter under the Great Seal, and infeft- " ' ment following thereupon.'

" These clauses are explicit and clear in their import; but " the pursuer contends that they are ineffectual and inoperative " against third parties and creditors, as the contravention of " them, either by heir or purchaser, is not fortified with *irritant* " *and resolutive clauses.* The Lord Ordinary conceives this to " be a plea attended with great difficulty; and it does not " appear to have been presented to the Court, under the same " specialties, in any preceding case.

" The answer made to it by the substitute heirs is, that the " primary clause of prohibition prohibited all sales, excepting " only under the *faculty* created by the subsequent general " power to sell, conferred towards the conclusion of the deed; " and, therefore, that sales not in precise conformity with the " faculty, fall expressly within the irritant and resolutive clauses " of the entail. But it is manifest that the faculty reserved in " the prohibitory clause, here referred to, applies solely to the " lands of *Broomhills* and pertinents, which immediately follows " the irritant and resolutive clauses, (see Deed of Entail, " pp. 17 and 18,) and does not apply to the more general and " extensive sales permitted under the latter clauses of the " deed.

" The general and very material question, then, which arises " here, is, whether, when an entailer first prohibits sales gene- " rally, and afterwards recalls that prohibition, and grants a " power of sale almost unlimited, in point of extent and occur- " rence, that condition of the tailzie can be effectual against " onerous third parties, without being fortified by irritant and " resolutive clauses.

" It has been argued that permissive clauses, following pro- " hibitory, irritant, and resolutive clauses, do not, in general,

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" require a repetition of the irritancies to insure the observance, " by heirs and third parties, of all the conditions of the permis- " sion. And certainly, when an entail prohibits any act or " deed affecting the preservation of the estate, such as granting " long leases or feus, and then grants a power of feuing, or of " letting leases of more than ordinary endurance, it has not " been thought necessary, hitherto, to guard against any abuse " in the exercise of the power by a repetition of the irritant and " resolutive clauses. But these cases are not precisely analo- " gous with the present. A permission to grant feus or leases " is consistent with the preservation of a valuable interest in " the estate; and so is a faculty to contract debt to a limited " amount, or to appoint the order of succession, by filling in " one branch of a substitution left blank, and other similar " powers. But a right to sell and alienate the whole estate " (whatever may have been intended) may be viewed as a sub- " stantial recall of the previous prohibition, and as requiring " all the precautions and guards which the statute exacts, to " give effect to new or *separate* prohibitions of an entail.

" As a question occurring now for the first time in the law " of entail, the Lord Ordinary cannot venture to offer a deci- " sive opinion upon it, without farther conference with the " Court.

" The summons contains an alternative conclusion, founded " on the two preceding pleas, to the following effect:—'That " 'it ought and should be found and declared, by decree of our " 'said Lords, that the pursuer is entitled to sell, dispone, " 'wadset, or impignorate, either for onerous causes or gratui- " 'tously, at his own pleasure, the *whole*, or any part, of the " 'lands and estates contained in the said entail, other than, " 'and except, the said two manor-places of Newbyth and Gil- " 'merton, office-houses thereto belonging, and yards, parks, or " 'other inclosures, about the said two manor-places, for the " 'time, without interference from, or consequent claim or

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" ' right of any sort arising to, the said heirs of entail, or any of " ' them: Or, at all events, that in purchasing other lands, in " ' lieu of the lands and others by the said entail allowed to be " ' sold, he is entitled to make the price of the lands so pur- " ' chased a real burden, in whole or in part, on the lands pur- " ' chased; which burden shall be effectual to the creditors " ' therein, notwithstanding of any entail that may be executed " ' of the said purchased lands.'

" Farther, in order to try the validity of *a sale*, the pursuer " has actually *sold* a portion of the estate of Newbyth to his " neighbour Mr. Little Gilmour, *without following out the order* " *prescribed by the entail*, by purchasing and entailing an equi- " valent portion of other land. If that be a valid and effectual " restraint, binding on purchasers and third parties, Mr. Gil- " mour will not be safe in entering into the transaction; and " he has presented a *Note of Suspension*, to try the question, " against a threatened charge for the price. That suspension " has been *conjoined* with the present declarator, and must of " course follow its fate.

" With regard to the other pleas stated for the pursuer, " under the 3rd, 4th, 5th, 6th, and 7th heads of his argument, " the Lord Ordinary has only to state generally, that he has " not been able to satisfy himself that any of these pleas can " be sustained with due regard to late decisions of authority, in " which similar pleas have been overruled upon entails, the " terms of which gave at least as much room for maintaining " the objections as the entail now before the Court.

" In particular, the objection to the irritant clause of the " entail here urged (under the 6th head of the pursuer's case) " does not seem tenable. The clause here sets out with the " comprehensive declaration, that ' if any of the heirs of tailzie " ' above mentioned shall act and *do in the contrair of the par-* " ' *ticulars above specified, or any of them,*' &c., &c., the act shall " be null, &c. If an irritant clause, so expressed, were not

" held to comprehend all the prohibitions of the entail, it would, " it is thought, be carrying hypercriticism to an extreme never " yet countenanced, even in cases of the class to which the " present belongs.

" The whole pleas in the case are, without farther observa- " tion, submitted to the consideration of the Court."

The Inner House directed the papers to be laid before the other Judges for their opinion, and ultimately, by interlocutors of the 10th February and 5th March, 1844, in conformity with that opinion, " sustained the defences and assoilzied the " defenders from the conclusions of the action, and in the sus- " pension suspended the letters simpliciter."

The *Lord Advocate*, *Sir F. Kelly*, and *Mr. Anderson* for the Appellants.

I. The prohibitions in the entail against selling and burdening the lands apply solely to the manor-places of Newbyth and Gilmerton. The only *entire* barony conveyed by the entail is the barony of Broomhills; as to Gilmerton and the other baronies mentioned, only parts of these were conveyed. When, therefore, the exception from the fettering clauses speaks of " the lands, barony, teinds, and others," it uses expressions applicable to the whole lands embraced by the deed. It is no doubt true that there follows a faculty specially applicable to the barony of Broomhills alone, amounting to a power to take it entirely out of the entail; but had the exception from the fettering clauses been intended to apply to this, the leading word would not have been " lands," but " barony," and the name of the barony would have been given, whereas the words used, " lands, barony, teinds, and others," are comprehensive enough to embrace the whole lands, the sole entire barony as well as the parts of baronies conveyed, and for this purpose are strictly accurate in using the word " *barony*" in the singular; no necessity, therefore, arises from that use of the word to

confine the exception to Broomhills alone; moreover, the exception in the fettering clauses follows immediately the prohibition to sell, and in terms is an exception from that prohibition alone; but the power as to Broomhills is greatly more extensive than a power to sell, it is to take that barony entirely out of the entail, *quovis modo*, while the power in regard to the lands generally is confined to sale, or to a power of the same kind as that in the prohibition to which the exception is annexed.

As to the use of the word "faculty," in the singular, in the exception from the prohibitory clauses, there is nothing which should confine the application of that exception to the power to take Broomhills out of the entail, if it could be so applied, and prevent its application, at the same time, to the power to sell any of the other lands conditionally. There is nothing either inconsistent or ungrammatical in using "faculty" to imply a power of one kind as to certain lands, and of another or of several other kinds as to other lands, any more than there would be in confining the exercise of the power to one kind in regard to these other lands, instead of extending it to include several kinds; and yet the entailer has used the word in this plural signification, for he uses the word "faculty" as comprehending powers to dispone in feu-farm—to excamb—and to sell or dispone: all of these he comprehends by the words "the above "*faculty*." The term "faculty," therefore, in this exception from the fettering clauses, is, in the language of the entailer, used in an extensive generic sense, to comprehend powers of various kinds, a power to take Broomhills out of the entail altogether and *unconditionally*, and to dispone in feu-farm, excamb, or sell the other lands *conditionally*, with the exception only of the manor-places of Newbyth and Gilmerton. The exception, therefore, is broad enough to embrace both powers to sell Broomhills unconditionally and the other lands unconditionally. But if it must be confined to one and a choice must be made between the two, a comparison of the language used in both points

out the power to sell conditionally, as that which must be adopted; for that power to sell unconditionally sets out thus:—"Except-"ing and reserving always furth and from the said clauses, pro-"hibitions," &c., as if for the first time mentioned, whereas the power to sell conditionally, as if it had been spoken of before, begins at once:—"And reserving full power, liberty, "and licence to the said heirs and members of taillie above "mentioned, to dispone in feu-farm," &c. If this be so, then all that is included in the faculty to sell conditionally, that is, all the lands except the manor-places of Newbyth and Gilmerton, is excluded from the prohibitory clause, and the entail is as if it had no prohibitory clause except in regard to these manor-places.

II. Assuming that the exception in the prohibitory clause applies only to the power given to sell Broomhills, the question still remains whether the power given in regard to the other lands to sell or excamb them, with a provision that lands of equal value be brought within the entail, does not nevertheless destroy the fetters of the entail. The clause is introduced after the fetters by these words:—"And further reserving full power, "liberty, and licence," &c.; it is a reservation, therefore, or exception from these fetters of a power to sell, *toties quoties*, without end or restriction, and with an introduction of all the inconveniences which were so fully considered, and which formed so material consideration in the judgment of this House in Stewart *v.* Fullerton, 4 *Wil. & Sh.* 196.

Even if this provision, in regard to bringing within the entail lands of an equal value with those sold or excambed, were in the form of a condition annexed to the power to sell or excamb, it would be a condition not incapable of performance, but incapable of performance for any effect. In regard to these new lands, should the heir exercising the power to sell or excamb be in debt at the time, and perform the condition in its terms by executing a new entail of lands purchased by him to supply

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the place of those sold or excambed, the lands sold or excambed, would in this view be freed from the fetters of the original entail, but the lands put under this new entail would be open to adjudication by the creditors of the heir making it, for in regard to them the heir would in truth be an entailer, who cannot by his own deed withdraw his lands from the diligence of his creditors. This would equally be the case, whether the new lands were bought with the price of the old ones, or with the money of the heir, his own, or borrowed for the purpose. Still further, if the provision be a condition, it is a condition not upon the exception or reservation from the fettering clauses, that is absolute and unconditional, but upon the exercise of the power of sale, and is confined merely to the *purchase* of other lands. All that can by possibility give the clause the effect of a condition precedent is the use of the words "previous to the sale," but these do not extend to the title to be taken to the lands to be purchased, or the particular mode of their conveyance. The condition, therefore, would be fulfilled by a purchase resting upon parole agreement, or missive of sale, although the title afterwards taken might be in fee-simple. And even if the title to the new lands should be taken in the form of an entail, there is no obligation upon the heir making the sale and purchase to record this new entail, or voiding the sale unless he do so,—that is left to the purchaser from him, who may or may not see to its performance, and no time is specified within which he must do so. In every view, therefore, assuming the clause to have the effect of a condition, it must be inoperative.

But in truth it is no condition at all. It rests entirely upon obligation—it imposes an obligation upon the heir exercising the power of sale to purchase other lands. This obligation may or may not be the foundation of an action against the heir to compel its performance, but its nonperformance would not void the sale which may have been made—that would stand unchallengeable, for the obligation is no way fenced,

which could alone have made it operative for the purpose desired. If, therefore, the heir desiring to sell part of the lands in this entail should have acquired other lands of equal value by right of purchase, the lands in the entail would be set loose, and a third party would be in safety to deal with him for their purchase. All that would remain to the substitutes of entail would be a power to enforce, against the heir selling, the obligation to take the titles to the new lands in the form of an entail; but should the seller of these lands refuse obstinately or capriciously to give a conveyance in that form, there would not be any means open to the substitutes of entail to compel him to do so—he would not in any way be affected by the provisions of this entail.

III. If the power to sell or excamb be upon condition of a repurchase of other lands, an entail with such a power was not in contemplation of the Statute 1685, and is not protected by its provisions. Such an entail would be an entail in the abstract—capable of being shifted from one set of lands to another, and not confined to any in particular. The policy of the Statute was to enable landowners to preserve their particular estates in their families by putting them *extra commercium*, whereas an entail like this contradicts that policy, by giving a power to sell as often as whim or caprice or any other motive may dictate.

It is under the Statute alone that entails have any validity. Unless, therefore, the deed in question can be brought within the provisions of the Statute, it cannot have any effect against an onerous purchaser; now the Statute in express terms gives power to the lieges to tailzie, not any lands, but "*their* lands," and the tailzie is to be with clauses whereby "it shall not be "lawful" to the heirs "to sell, annailzie, or dispone *the said lands* "or any part thereof, or contract debt, or do any deed whereby "the succession to the lands may be frustrate," and it declares that only "*such* tailzies" shall be allowed "in which these "clauses shall be insert."

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The Statute makes no mention of sale, absolute or conditional, or upon conditions precedent or subsequent, beneficial or injurious. It mentions simply a prohibition against sale. A power which enables the heir to put an end to the entail at once and for ever may be very good; but one that enables him, as the power in the present case does, to do that which is manifestly inconsistent with the entail, and at the same time requires him to keep up the entail, is without the contemplation of the Statute, and cannot be good.

If conditions are once introduced, where is the Court to stop? May there not be a mere nominal condition? Or if the condition must be valuable, how is the proportionate value to be ascertained? according to what lights, for the Statute gives none? It protects entails with simple prohibitions against sale; but a power to sell, whether absolute or upon condition, is equally against the prohibition and destructive of it, at least as to the particular lands entailed.

The Statute allows parties to entail "their" lands, but if the entail gives power to sell these lands upon condition of entailing others, and so doing, *toties quoties*, the entail is not of any particular lands, as contemplated by the Statute, but of any lands whatsoever.

The *Hon. Mr. Wortley* and *Mr. Rolt* were heard for the Respondents.

LORD CHANCELLOR.—My Lords, in this case the object of the suit in the Court of Session was to have it declared that the entail was entirely void, or at all events, that there was a power of sale, arising from the imperfect mode in which the estate was guarded against sale by the deed of entail; and the question turns principally upon the construction which has been put upon three clauses in the deed.

The deed of entail prohibiting sale has this exception, "Ex-

" cept the lands, barony, teinds, and others after mentioned, " which they have power to sell or otherwise dispose of, by " virtue of the faculty hereafter specified, conceived in their " favours." The argument is, that in the subsequent part of the deed, where the exception is to be looked for, there is an exception equally extensive with the prohibition, and therefore, that it is to be read as if they were prohibited from selling except as they may sell. My noble and learned friend reminds me that there is an exception, at all events, with regard to the mansion-houses; but I am speaking of the rest of the estate.

Now that would be a very strange construction, beyond all doubt, because it would be proving that the party had intended that which was absurd upon the face of it, prohibiting nothing to be done, except that you may do it. It might by possibility happen, that by inadvertence some such provision might have crept into the deed, but it is a construction which a court of justice would be most reluctant to admit, because it is quite clear that it could not be the intention of the party. But when we come to look at the subsequent parts of the deed, it does not appear to me that there is any difficulty whatever in putting a construction upon the clause quite consistent with what most obviously was the intention of the party. It is, " Except the "lands, *barony*," in the singular, "by virtue of the faculty," in the singular, " hereafter specified." There are two faculties. There are two powers after specified. The one applies to the barony of Broomhills, which was not intended to be included in the entail at all; that is to say, power was given of sale absolutely so far as concerned the barony of Broomhills and the lands belonging to it. And there is another faculty, which authorised what we should, in this country, call a power of sale and exchange.

With regard to the barony of Broomhills, the power is, " Excepting and reserving always furth, and from the saids " clauses prohibitory and irritant, full power and liberty to the " saids whole heirs and members of taillie, above mentioned, to

" sell, gift, or dispose of the saids lands and barony of Broom-
" hills," repeating the prohibitions.

Then, when we come to look to this exception, we find it described as reserving out of the clauses prohibitory and irritant, full power to sell, &c. But when we come to the clause giving power of sale and exchange, that form of expression is entirely dropped, and we have a power of sale and exchange, not excepted out of the prohibitory clauses, but " further re-
" serving full power, liberty, and licence to the said heirs and
" members of taillie" to sell such part of the lands as should be thought expedient, substituting other lands in their place.

Here, therefore, there is one barony; and the exception is only of one barony. We find that the first faculty applies to the barony of Broomhills by name; it is so described, and as to it there is given an absolute power of sale. When we come to the faculty or power to sell or exchange, it applies to all the rest of the estate, with the exception of the mansion-houses, which are particularly excepted. Now, to say that the exception applies to the second faculty or power to sell and exchange, would be putting a construction upon this deed as to which there is not a moment's doubt. The intention of the parties is very clearly expressed,—the exception in the prohibitory clause applies only to the barony of Broomhills.

Then other objections have been raised as to the power of sale and exchange. And I believe that the only reason why we thought it expedient to hear the case out on the part of the Respondent, was, that it was stated to be a new point. Now, it was very extraordinary that it should be a new point, and that no case should be referred to where the precise question had arisen, because it is neither more nor less than that which is of continual occurrence in this country—a power to sell and exchange; that is to say, to exchange one portion of land as a substitute for another. The only difference here is, that you do not substitute one portion of land for another, but you sell a

portion of the land, and in substitution for the part so sold other land is bought in some other quarter. Now, this provision is simply to effect that purpose, that whereas it might be difficult to exchange, in the ordinary sense of the word, power is given to the parties to sell a part of the land, upon condition of other land procured *aliunde* being substituted in the place of that so sold.

Now, it has been argued that there might be difficulties in effecting this purpose. It does not appear to me that, if such was the purpose, those difficulties, whatever they may be, at all affect the question, because here the entail is to cease, that is to say, the power of selling is to come into operation upon the happening of a future event; and it is not disputed that the entail of the estate may be made so to determine. Then what is the event upon which this entail is to determine? It is, upon other lands being procured and substituted and settled for the same purposes as the lands originally entailed, then the entail as to those lands is to cease, and, by means of the power of sale, a good title is to be given to the purchaser. That event is to precede the power of sale. That may no doubt create difficulties, but not difficulties insurmountable, because we know that it may be so arranged that the transaction would be simultaneous, the money coming in for the estate sold may be the means of paying for the estate purchased.

But if those difficulties are such that they cannot be overcome, all that can be said is, that the event has not happened upon which the entail is to cease and the power of sale is to arise. Nothing can be more plain in the terms of this faculty than that, previously to the sale, other lands are to be purchased and to be taken in favour of the same series of heirs, and subject to the same conditions as the lands originally entailed.

Then it is said that there is an omission here, that there is no provision that the entail of these newly-purchased lands is to be registered. All I can say upon that is, that the event

may not happen upon which the power of sale arises. But here the question is, whether the legal entail is void; because that is the object of the present suit. But even this registration is provided for, because the purchaser of the lands entailed is bound to see that the entail is not only properly created, but is registered; he therefore gets no title until that is done; the event does not arise in which he would have a good title; the power of sale does not arise. He therefore is the person of all others most interested in seeing that the newly-acquired lands are properly settled, for the same purposes as the lands originally entailed, before he can venture to accept the title or to pay his purchase-money for the lands, to let loose the lands to be conveyed to him under a good title.

My Lords, these considerations seem to me to remove all doubt as to the present case. In short, except for the construction of the original entail, I apprehend that the question would not have been raised; and when that deed is looked at, the construction appears to be very plain, that the exception applies to the lands of Broomhills; and with regard to the rest of the lands, there does not appear to me to be the least difficulty.

LORD BROUGHAM.—My Lords, I take exactly the same view as my noble and learned friend, and have done so from the beginning and throughout the argument. I quite agree with him, that had it not been for the question upon the entail, we should not have heard much upon this point. But in this I also agree with him, that there is nothing in this case but the question of whether the exception eats up the rule or not—whether if there is a rule laid down, it is entirely eaten up by the exception. I, with my noble and learned friend, do not mean to say that it is impossible that the deed could have been so inadvertently framed. It clearly could never have been the intention of the parties; but I do not say that it might not *per*

*incuriam*, by a clumsiness of expression or by the omission of apt and proper words, have been made so absurd and so contrary to the manifest intention of the maker, as that the exception should be co-extensive or nearly co-extensive with the rule. Nevertheless, that is a construction which every Court would be most slow and most reluctant to put upon it, because, unless it clearly is the inevitable construction, and there is no avoiding it and no escape from it, it is the very last thing that you would do to entirely contravene the intention. It would be, for example, as if the grant of a patent were made prohibiting all the Queen's subjects from using the patent invention for fourteen years, and excepting from the prohibition all the male subjects of the Queen, and excepting from the prohibition also all the female subjects of the Queen, which of course would make the prohibition not worth the parchment upon which it was written. I do not mean to say that the Crown might not *per incuriam* make a grant with such an exception, making the prohibition utterly void,—that would be the same case as this,—but still it would be one upon which such a question hardly could arise, for nobody would take the trouble of bringing a *scire facias* to repeal letters-patent which prohibited nobody, all the males and all the females being excepted, thus exhausting the whole of the Queen's subjects. I do not suppose that anybody would take the trouble of going into the Court of Exchequer with a *scire facias* to repeal those letters-patent. But if they were to be so advised, it would be the most difficult thing in the world to persuade that Court that that was the intention of the letters-patent. So here I think we must have recourse to any construction rather than take that construction—to any construction which the rest of the deed, taken all together, would fairly appear to authorise. My noble and learned friend has shown that this is really not the case here. There is no pretence for saying, when we look at the rest of the deed, that the exception is co-extensive with the prohibition.

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My Lords, I therefore entirely agree with my noble and learned friend, that in this case we ought to affirm the decision of the Court below, and to affirm it with costs.

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

SPOTTISWOODE and ROBERTSON—DEANS, DUNLOP, and HOPE, Agents.