Mar. 2. 1821.

'interlocutors complained of affirmed, so far as they relate to the 'respondents now before this House.'

Appellants' Authorities.—(Competency,) Wight, 340. 341; Kilk. 107. Andrew, Jan. 24. 1775, (1883); Marshall, Dec. 4. 1782, (1887); Tenant, Feb. 23. 1785, (1888); Harrowar, Dec. 5. 1812, (not rep.); Dempster, Mar. 3. 1791, (8868.)

Respondent's Authorities.—(Competency,) Andrew, Feb. 17. 1749, (1842); Dunbar, Jan. 7. 1757, (1855.)

J. Campbell,—A. Grant,—Solicitors.

(*Ap. Ca. No.* 8.)

No. 5.

Sir Wm. F. Eliott, Appellant.—*Fullerton—Brougham.*
George Pott, Respondent.—*Dean of Fac. Ross—Mackenzie.*
Et è contra.

Entail—Lease.—Held,—1.—Reversing the judgment of the Court of Session, that a prohibition in an entail to *dispone*, fortified by irritant and resolutive clauses, deprived an heir of power to grant a lease for 77 years on a grassum, although the word *alienate* was not employed; and,—2.—Affirming a judgment, that a lease of 77 years, with a grassum, was an alienation.

Mar. 14. 1821.

1st Division.
Lord Gillies.

By the entail of the estate of Stobbs, executed in 1719 by Sir Gilbert Eliott, the prohibitory clause declares, 'That it shall not 'be leisome nor lawful to me, the said Sir Gilbert Eliott, nor to 'any of my heirs and successors foresaid, to sell, and I hereby 'bind and oblige me and them not to sell, annalzie, wadset, dis'pone, dilapidate, and put away the said lands, baronies, and 'estate, or any part or portion thereof, heritably and irredeem'ably, or under reversion, (except in so far as the faculties above 'written do extend,) nor contract or ontake debts thereupon, or 'grant bonds or other securities therefor, nor do or commit any 'other facts, deeds, or delicts, civil or criminal, whereby the said 'lands and estate may be anyways apprised, adjudged, forfaulted, 'evicted, or affected, nor to infringe, alter, or innovate this pre'sent substitution, or course of succession, in defraud and preju'dice of the subsequent heirs of provision above mentioned, con'form to the order and substitution above specified: Neither 'shall it be lawful to me, nor to any of my heirs of provision 'foresaid, whether male or female, to suffer the said lands, ba'ronies, and estate, or any part thereof, to be adjudged or ap'prised for debts to be contracted, but shall be obliged to re'deem the same within the space of eight years after deducing 'or leading any such diligence.' The irritant and resolutive

clauses, which immediately follow, are in these terms: 'And if 'I, or any of the said heirs, whether male or female, successive, 'shall contravene the premises, or do any fact or deed in preju- 'dice hereof, by the said heirs-female not using the sirname of 'Eliott, and my arms and title, or by the said unmarried heirs- 'female not marrying a gentleman who and their heirs shall not 'use the same, and my arms and title, as above, or by the said 'heirs-female, and they and their husbands and children, not 'using the said sirname, arms, and title, as aforesaid; or who, 'whether male or female, and I shall dispone the said lands and 'estate, or any part thereof, or contract debts, or commit any 'other fact or deed, during their respective marriages, or in 'favour of their respective husbands, wives, and children, (except 'in so far as is above provided,) whereby the said lands and 'estate may be evicted or affected in manner foresaid, or shall 'permit the same to be adjudged or apprised for any such debts 'and deeds, and not redeem the same within the limited time 'foresaid, after leading thereof; and if I, or any of the persons 'and heirs foresaid, whether male or female, shall infringe or 'alter the succession and substitution foresaid, then, and in any 'of these cases, not only shall all such deeds and contraventions 'to be done by me and the said heirs male and female, or any 'of them, during their respective marriages, so far as the samin 'may burden and affect the said estate, and infringe or alter the 'succession, be ipso facto null and of no effect, by way of excep- 'tion or reply, without any sentence of declarator to follow 'thereupon, but also I shall lose my right of liferent, and the 'other persons, doers of said deeds, and committers of said con- 'traventions, or any of them, shall amit their right of succession, 'and be debarred from said lands and estate; and all the infeft- 'ments and other rights thereof, shall from thenceforth expire, 'and become null and void, as if they had never been granted; 'and the same shall accresce to the next immediate person to 'succeed to the said estate, and so forth successive in case of 'divers contraventions, and that free of all debts, deeds, and de- 'licts done, contracted, or committed by the contraveners; and 'it shall be leisome to the next succeeding heirs to use and pro- 'secute any legal way or method competent for establishing the 'right thereof in their persons, or in the persons of the remanent 'heirs of provision foresaid, to succeed to them in manner above 'expressed.' Under this entail, the late Sir William Eliott, father of the appellant, entered into possession of the estate. On the 20th of March 1794, he granted a lease of the farms of Pen-

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chrise and Langside, consisting of between 4000 and 5000 acres, for 77 years, at a rent of £285, (which was restricted during his life to £200,) and on payment of a grassum of £2904: 15: 9. Sir William having died in 1812, his successor, the appellant, brought an action for reducing the lease, as being an infringement of the restrictions of the entail. In defence, it was pleaded, 1. That the irritant and resolutive clauses of the entail were so loosely, so inaccurately, and so unintelligibly worded, as to render the entail unavailable against third parties contracting with the heirs in possession; 2. (which was the main defence,) That supposing the irritant and resolutive clauses to be effectual to the extent of the acts of contravention there enumerated, they could not invalidate the lease; because, although that enumeration mentioned the act of *disponing*, yet it omitted that of *alienating*, under which alone, in the absence of any express limitation of the power of letting, the lease could be struck at as contrary to the restrictions of an entail; and, 3. That even if the act of alienating had been mentioned, a lease for 77 years was not an alienation. To this it was answered, 1. That although there was no doubt an error in grammar in the expression in the irritant clause, 'who, whether male or female, and I shall dispone said lands,' &c., yet the meaning was sufficiently clear, viz. that if the heirs, whether male or female, should dispone the lands or contract debts, then the irritating part of the clause should take effect. 2. That the terms *dispone* and *alienate* are generally used as synonymous, and that it appeared from various acts of Parliament, decisions, and institutional writers, that the term *dispone* was employed in reference to the granting of feus, long tacks, assedations, and alienations; and as it was made use of in the irritant and resolutive clauses, it was sufficient without the addition of the word *alienate;* and, 3. That a lease of the nature of that under reduction was truly an alienation.—Lord Gillies, on the 27th of January, and 19th February 1813, repelled the reasons of reduction, and assoilzied; and on the 17th of December he found that 'the lease 'in question having been granted in consideration of a grassum, 'and for a period of 77 years, is to be considered as an alienation, 'and that alienations are prohibited by the entail of the estate of 'Stobbs, but that the irritant and resolutive clauses in the same 'deed of entail contain no reference to the specific prohibition 'against alienating, such as is necessary to render the same effec-'tual against third parties;' and therefore adhered to the previous interlocutors. To these judgments the Court, on the 17th of Fe-

bruary and 10th March 1814, also adhered,* but found no expenses due. Mar. 14. 1824.

Both parties appealed—Sir William Eliott in so far as the Court had found that the deed of entail was not sufficient to prevent alienations,—and Pott so far as they had found that the lease was an alienation, and had not awarded to him his expenses. The House of Lords 'Ordered and adjudged that the said interlocutors of the Lord Ordinary, of the 27th of January 1813, and the 19th of February 1813, be reversed: And it is farther ordered and adjudged, that the said interlocutor of the Lord Ordinary, of the 17th of December 1813, be reversed, except so much thereof as finds that the lease in question having been granted in consideration of a grassum for a period of 77 years, was to be considered as an alienation, and as finds that alienations were prohibited by the entail of the estate of Stobbs: And it is further ordered and adjudged, that the said interlocutors of the Lords of Session of the First Division, of the 17th of February and 10th of March 1814, be reversed; and the Lords find, that, according to the true construction of the deed of entail of the estate, the prohibition to dispone extends to the lease in question, and that the irritant and resolutive clauses in the said deed of entail do so refer to the specific prohibition to dispone, as to render the same effectual against third parties; and therefore sustain the reasons of reduction of the lease in question: And it is further ordered and adjudged, that the cross appeal be dismissed this House, and the cause be remitted back to the Court of Session in Scotland, to do therein as shall be consistent with this judgment, and as shall be just.'

Appellant's Authorities.—(2.)—3. Craig, 2. 22; Reg. Maj. 2. 20. and 23; Spott. Prac. p. 306. and 168; Balf. 163. 165; Hope's M Prac. MSS; 3. St. 2. 3. 4; 3. Bank. 2. 1; Kilk. 541; Mack. Ob. James I. P. 2. c. 26; 2. Mack. Works, 487; 1571, c. 36. and c. 39; 1581, c. 101; 1587, c. 111; 1593, c. 180; 1594, c. 211; 1597, c. 235. 236. 237. 239; A. S. July 13. 1620; Feb. 29. 1692; Elliot *v.* Elliot, May 19. 1803, (15542);—(3.)—Turner, Nov. 17. 1807, (No. 16. App. Tailzie); Malcolm, Nov. 17. 1807, (No. 17. ib.); D. of Queensberry, Nov. 17. 1807, (No. 15. ib.); Turner, Dec. 6. 1811, (F. C.); Welsh, Nov. 12. 1812.

Respondent's Authorities.—(2.)—2.-Mack. 487; 2. St. 3. 56; 3. Ersk. 8. 25; Young, Dec. 7. 1705, (15483); Redhaugh, March 11. 1707, (15489); Craig, June 13. 1712, (15494); Baillie, July 11. 1734, (15500); Primrose, Jan. 27. 1734, (15501); Hay, Feb. 9. 1758, (15602); Creditors of Hepburn, Feb. 1758, (15605, Aff.); Bryson, Jan. 22. 1760, (15511); Bruce, Jan. 15. 1799, (15539, Aff.); Craig, 340. § 12;

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* See Fac. Coll. Vol. 1812-1814, No. 166, where it is mentioned, that, 'On advising the case, the Lords were perfectly clear that there was no authority for saying that the word 'dispone' was equivalent to 'alienate,' and thus that the entail in question, which was otherwise silent on that point, did not strike against leases.'

Mar. 14. 1821. Hope's M. Prac. 406; 2. St. 3. 38; 3. Mack. 8. 17; 1. Bank. 587. § 149; 3. Ersk. 8. 29; Hepburn, Feb. 15. 1732, Aff.; Campbell, June 17. 1746, (15505); Sinclair, Nov. 9. 1749, (15383); Weir, Nov. 8. 1752, (4314); Nisbet, Nov. 1763, (15516); Case of Tillicoultry, Nov. 1763; Kemp, Jan. 17. 1769, (15528); Stewart, July 8. 1789; Brown, May 25. 1808, (No. 19. App. Tailzie);—(3.)—1449, c. 18; Lord Adv. March 30. 1762, (15196. Rev.); Jordanhill, Dec. 9. 1747, (Elchies' Notes, No. 32. Tailzie); Kilk. 395; 2. St. 9. 26.

J. RICHARDSON,—J. CHALMER,—Solicitors.

(*Ap. Ca. No.* 11.)

No. 6. Mrs. LINWOOD and Children, Appellants.—*Baird—Fullerton.* V. HATHORN, Respondent.—*Romilly—A. Bell.*

Reparation—Assythment.—A landed proprietor residing at a distance from his estate, held not liable in assythment to the widow and children of a person who was killed by the fall of a tree growing on his property, and which his servants were cutting without his orders.

Mar. 19. 1821.

1st DIVISION. Lord Craigie.

ON the 27th of November 1812, while John Linwood was riding along the highway from the Mull of Galloway to Stranraer in company with several other persons, he was killed by the fall of a tree. This tree was upon the estate of Gartland, belonging to Mr. Vans Hathorn, writer to the signet, who resided in Edinburgh. The road ran from north to south, and the tree was on the east side of it, with an inclination in the same direction. At the time when Linwood and his party were approaching on horseback, (which was about mid-day,) Matthew Graham was employed in cutting the tree, under the inspection of one Mackie, who was the servant of Mr. Hathorn. He had cut it in part with a hatchet on the east side, and when the party were passing, he was occupied in cutting it on the west side. At this moment, the tree, by the effect of the wind, which was blowing from the east, fell towards the west, across the road, upon Mr. Linwood, and bruised him so, that he expired within an hour thereafter. No precaution had been taken by ropes or otherwise to make the tree fall in any particular direction; but the operation was perceptible to all who were passing along the road, and it had been expected from the inclination of the tree, that it would have fallen towards the east, or from the road. Graham was indicted at the Ayr Circuit for culpable homicide, but was acquitted in consequence of a verdict of not guilty. Thereafter the widow of Linwood and his children brought an action against Mackie, Graham, and certain other persons alleged to have been directly concerned in