April 1. 1828. trustees would have held the rents for him as first called; heirs-male failing, they hold for the next party called, viz. the first son of either daughter attaining majority; then for the nephews; and, lastly, as to the residue, for the daughters. But this appropriation is fatal to the appellants' present plea. Even, however, if this clause had not occurred in the deed, the rest of the deed would, by the ordinary rules of law, and in conformity to the intention of the testator, have belonged to the trustees for the benefit of the heirs and substitutes called by the deed. The maxim, accessorium sequitur principale, regulates this question. Whatever was given to the trustees by the trust-deed, was by the same deed, when the primary purpose of the settlement was accomplished, given to the son of the truster. They could no more have withheld the rents from him, than the solum which produced these rents. But whatever had been given to the son was, on his failure, directed to be given to the daughter's son. There is, therefore, nothing unappropriated that can fall to the appellants as heirs-at-law; and as the rents in question do not enter into the 'residue,' the rents cannot be taken up by the appellants as residuary legatees.

The House of Lords 'ordered and adjudged, that the appeal 'be dismissed, and the interlocutors therein complained of affirm-'ed; and further, that the expenses of both parties in this 'cause be paid out of the trust-funds in dispute.'

Appellants' Authorities.—Hyslop, Jan. 18. 1811, (F. C.); Arkwright, Dec. 3. 1819, (F. C.); Niven, March 6. 1823, (2. Shaw and Dunlop, No. 250.); Souter, Jan. 22. 1801, (No. 2. Ap. Imp. Will); Earl of Stair, May 24. 1826, and June 19. 1827, (ante, Vol. II. Nos. 31. and 54.)

Respondents' Authority.—Gillespie, Dec. 7. 1802; (No. 2. Ap. Acc. Seq. Prin.)

MOORE—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 5.

JOHN WILSON and Others, Appellants.—*Shadwell—Adam.*

Sir WILLIAM FRANCIS ELIOTT of Stobs and Wells, Respondent.—*Spankie—Brougham.*

Et e contra.

Sale—Entail—Land-tax—Fraud.—Part of an entailed estate, which was greatly more than sufficient, having been sold under the 42. Geo. III. c. 116. for redemption of the land-tax; and no evidence having been taken that it could not have been divided, so that an adequate part only might have been sold; or that the sale of the whole would have been more eligible and advantageous for the estate and heirs-substitutes than the sale of a part only;—Held, in an action at the instance of an heir-substi-

tute, (affirming the judgment of the Court of Session, but superseding their findings),—1. That the sale was not effectual; and, 2. That a singular successor infeft, and whose author was also infeft, could not be affected by the fraud of his author.

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1ST DIVISION.
Lord Eldin.

By the 61st section of the 42. Geo. III. c. 116. it is enacted, 'That where any heir of entail in possession of an entailed estate 'in Scotland, or his or her tutor or tutors, or where he or she 'is an idiot or lunatic, his or her curator or curators mean to 'sell part of the said estate to purchase the land-tax of the estate 'in terms of this Act, it shall be competent and requisite for 'him, her, or them, to apply by petition to the Court of Session, 'stating the amount of the land-tax payable out of the said 'estate, what part of the estate it is proposed to sell, and the rent 'or annual value of that part of the estate; and praying the Court, 'upon the allegations on these points being proved to the satisfac-'tion of the Court, and it being shewn that the sale of the part 'of the estate proposed to be sold will not materially injure the 'residue of the estate remaining unsold, and that the part so 'proposed to be sold is proper (considering all circumstances) 'to be sold for the purpose aforesaid, to authorize such sale to 'proceed in manner herein after enacted; and the Judges of the 'said Court are hereby authorized and required to order such 'petitions to be intimated upon the walls of the Outer and Inner-'House of the said Court, in common form, for ten sederunt 'days, and also to be advertised weekly for two weeks succes-'sively in the Edinburgh Gazette; which intimation and adver-'tisement shall be a valid and effectual intimation, advertisement, 'and service, to all intents and purposes, as much as if the said 'petitions had been personally intimated to or served upon all 'persons having, or pretending to have, any interest with regard 'to the said estate, as substitute heirs of entail, creditors on the 'said estate, or in any other way or character whatever; and 'such intimation being duly made, the Court shall proceed sum-'marily in the matter, and shall authorize the sale of that part 'of the estate which the petitioner or petitioners are willing to 'sell, which the Court thinks ought to be sold for the purpose 'above-mentioned, and against the sale of which no sufficient 'reason is stated by any person having interest; and the extract 'of the decree of the Court authorizing the sale, shall be sufficient 'authority to the commissioners acting under this Act to carry 'on the sale in the manner herein directed.' Again, by the 63d section, it is declared, 'That if any farm, lands, or tene-'ments, usually possessed together, shall be proposed to be sold

May 2. 1828. ‘ under the provisions of this Act, which shall be more than sufficient for that purpose, and it shall appear to the Court of Session, either from the detached situation of such farm, lands, or tenements, or from any other circumstances, that such farm, lands, or tenements cannot be divided, in order that an adequate part thereof may be sold without loss to the parties interested, or that the sale of the whole of such farm, lands, or tenements, would be more eligible and advantageous to the said entailed estate, and to the successive substitute heirs of entail in their order, it shall be competent and lawful for the said Court of Session, in like manner as it is authorized to proceed in other cases by this Act, (due notice having been given to the next substitute heir of entail, being of lawful age and resident within Great Britain, of such proposal to sell and dispose of such farm, lands, or tenements), to direct and authorize the sale of the whole of such farm, lands, or tenements; and the surplus money, after purchasing stock sufficient to redeem such land-tax, and paying and discharging the costs and expenses attending the sale thereof, shall, with the interest and annual produce thereof, be applied and disposed of under the direction and with the approbation of the said Court, in the same manner as herein is directed with respect to the eventual surplus arising from sales, when no more has been exposed to sale than is judged adequate for the redemption of such land-tax.’ By the 65th section it is enacted, ‘ That where any such sale shall be authorized by the Court of Session, the same shall be carried on by public auction, at such time and on such notices as the said Court shall from time to time direct; and further, that previous to any sale to be made in the terms and by virtue of the powers required and given by this Act, the Court of Session shall cause articles of sale to be drawn up in the usual forms required by the law of Scotland for making such sale effectual, and whereby the purchaser shall be taken bound to pay the price to a trustee,’ &c. And, ‘ That the said trustee, upon receipt of the said price or prices, shall be forthwith bound to pay the said money into the Bank of England, and to be there placed to account of the Commissioners for the Reduction of the National Debt, to be by them applied in the manner and for the purposes directed and specified by this Act, and the receipt of the cashier or cashiers of the Bank shall be a full and sufficient discharge to the said trustee, and to the said purchaser or purchasers, for the sum or sums of money so agreed to be paid by him, her, or them, in

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'manner aforesaid; and which purchaser or purchasers, upon 'payment of the sum or sums by the said trustee into the Bank 'of England as aforesaid, shall be entitled to demand and obtain 'from the said heir of entail, or other person or persons in whose 'name, or at whose instance, or for whose behoof the said sale 'or sales is or are carried on, such disposition, conveyance, or 'other title to the subjects so sold, containing all usual and ne-'cessary clauses for rendering complete the right to the same, 'in favour of the said purchaser or purchasers, under the direc-'tion of the said Court.'

In May 1803 the late Sir William Eliott, Bart. the proprietor of the entailed estate of Stobs, presented a petition to the Court of Session, setting forth, that 'he was heir of entail in possession 'of the estate of Stobs, lying in the county of Roxburgh, and 'he intended, under the authority of the Act of Parliament pass-'ed in the 42d year of his present Majesty, cap. 116. entituled 'an Act for consolidating, &c. to sell a certain part or parts of 'the said entailed estate, and to apply the price to the redemp-'tion of the land-tax payable therefrom; that the amount of the 'land-tax of the said estate would be specified in the course of 'the proceedings under the present application; and that the 'most eligible part of the estate for that purpose appeared to be 'the farm of Hallrule, Hallrule-mill, and Town o' Rule, pos-'sessed by George Currie at the yearly rent of L.230 sterling; 'that the sale of the above-mentioned parts of the estate would 'not materially injure the residue of the estate remaining unsold; 'and that the part so proposed to be sold was proper (con-'sidering all circumstances) to be sold for the purposes aforesaid.' The petition prayed their Lordships 'to appoint this petition 'to be intimated in the usual manner; to allow the petitioner 'a proof of the facts herein set forth; and upon the same being 'proved, to authorize the sale of the said lands, directing the 'prices to be applied in terms of the said Act of Parliament.'

The Court, on the 24th May 1803, appointed the petition 'to be intimated in terms of the statutes; and when these inti-'mations are made and reported, they will resume considera-'tion of the petition.' On the same day, and on the 31st May, intimation was made in the Edinburgh Gazette, on the walls of the Inner and Outer-House, and in the Minute-book. The report of the intimation stated, that the pursuer proceeded under the 61st section of the statute; and his agent certified, that the intimation on the walls had been done as directed by the same section. It was also alleged, (in the course of the present suit),

May 2. 1828. that at the same time Sir William had made intimation to his sister, Mrs Guy, the next heir of entail of full age, and resident in Great Britain, (his own children, the immediate substitutes, being all in pupillarity), to which he had received this answer:—'Lynford-Hall, Norfolk, June 22. 1803. Sir,—I received your 'letter of the 4th, intimating to me, that you intended to make 'application for leave to sell the farm of Town of Rule, and 'Hallrule, for redeeming the land-tax of the entailed estate of 'Stobs, and for other purposes of the Act of Parliament. I am,' &c. The letter to which this was an answer, was not produced, and it did not appear that any notice had been given as to Hallrule Mill. Of the same date, a minute was lodged, stating, 'that since the petition was given in, the petitioner had obtained 'a certificate from the proper officer, of the amount of the petitioner's land-tax, which is thereby ascertained to be L.56. 8s. '7$\frac{6}{12}$d.; and that the application had also been intimated upon 'the walls of the Outer and Inner-House of the Court, in common form, for ten sederunt days, conform to certificate subjoined to the petition; and also intimated or advertised weekly, 'for two weeks successively, in the Edinburgh Gazette, as appears from copies of that publication, of dates 24th and 31st May 'last, both herewith produced.' He therefore craved, that their Lordships would sustain the notices, and allow a proof in common form. The Court thereupon 'having resumed consideration of this petition, with the intimations thereof, in terms of 'their former deliverance, and having advised the same with the 'minute this day given in for the petitioner, and no objection 'being made by any party having interest, they allow the petitioner to prove prout de jure the amount of the land-tax payable to the public, for the year 1798, out of the petitioner's 'estates in the county of Roxburghe; the rent or the annual 'value of the lands mentioned in the petition, proposed to be 'sold for purchasing the said land-tax; if the same can be sold 'without injury to the remainder of the estate; and if it is the 'most proper part of the estate to be sold, (all circumstances 'considered);—all in terms of the statutes made in that behalf; 'and grant commission to the Sheriff-depute,' &c. A proof was accordingly led, of the amount of the land-tax payable out of the estate,—the rent or annual value of the part of the estate proposed to be sold,—that the sale would not materially injure the remainder of the estate,—and that the part so proposed to be sold was proper under all circumstances; but no proof was adduced to shew that the lands could not be divided, nor that the

sale of the whole would be more advantageous to the heirs than a part only. A regular state was then drawn up, from which it appeared that the land-tax, with the $\frac{1}{10}$th over required by the statute, amounted to L.62. 1s. $5\frac{10}{12}$d.; and that Government stock, to produce a dividend equal to that sum, could be bought for something above L.1200. The state then proceeded in these terms:—'The rent or value of the lands proposed to be 'sold appears to be L.234. 9s. sterling, including conversions; 'and without doubt, in the event of a sale, they must bring a 'price considerably more than is necessary for the redemption 'of the land-tax. But this price will be vested in a trustee for 'fulfilling the purposes of the Act of Parliament,—1*st*, In re-'deeming the land-tax, and defraying the expenses of the pro-'ceedings in carrying through the sale of the lands and purchase 'of the land-tax; and, 2dly, In applying, under the authority of 'the Court, the surplus in payment of debts affecting the en-'tailed estates. These, in the present case, amount to above 'L.7000 sterling, which will fully exhaust the surplus arising 'from the price of the lands proposed to be sold, after purchas-'ing the land-tax. In these circumstances, therefore, it is 'humbly submitted, that there can be no objection to the sale of 'those lands being allowed to proceed.' A draft of the articles and conditions of the roup and sale was laid before the Court, who were craved to authorize the lands to be exposed to sale, and to approve of the trustee and cautioner named by the petitioner. On the 9th July 1803, their Lordships 'found it sufficiently instructed and proven, that the land-tax, payable in the 'year 1798, for the petitioner's estate of Stobs, lying in the 'county of Roxburghe, amounted to L.56. 8s. $7\frac{6}{12}$d. yearly: 'Find, that the yearly rent of the lands proposed to be sold 'amounts to L.234. 9s. sterling, exclusive of an obligation upon 'the tenants to assist, with a specified number of men, women, 'and horses, for casting, winning, and leading peats and hay to 'the landlord: Find, that this is the most proper part of the estate 'to be sold for raising money to purchase the above-mentioned 'land-tax: Approve of William Riddell, Esq. W. S. as trustee 'for the petitioner, and of Lieutenant-Colonel Edgar Hunter, of 'Linthill, as his cautioner, for the due execution of the trust in 'terms of the statute; and likewise approve of the articles and 'conditions of sale subjoined to the state of the proof, with the 'addition* to the 5th article made by order of the Court: Grant

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* The addition is in italics:—V. 'Upon the purchaser's making payment of the price

May 2. 1828. 'warrant to and authorize the petitioner and his said trustee to 'sell the before-mentioned lands by public auction, in terms of 'the articles and conditions of roup before referred to, and of 'the statutes made in that behalf; appoint the sale to proceed in 'Edinburgh, &c.; and authorize an act and warrant to go out 'and be extracted hereupon, the trustee and his cautioner always 'lodging in process, before extract, a bond for the due execu-'tion of the trust in terms of the statute.'

The draft of the articles of roup and sale was blank in the names of the trustee and cautioner, and in the upset price.

The trustee and cautioner lodged bond, and an act and warrant was extracted in favour of Sir William and the trustee, authorizing the roup and sale, and fully setting forth the tenor of the petition, and the detail of the intimations, proceedings, and interlocutory orders. In this act and warrant, the upset price remained blank. Sir William afterwards filled up the blank in the articles and sale with the sum of L.9000. He also added a clause, declaring, that the bond to be granted by the purchaser should be also signed by a sufficient co-obligant; that the right to the teinds of the lands under sale was reserved; and that the land-tax payable for and in respect of the lands under sale, was not to be redeemed by the exposer. At the sale, which took place in September 1803, the tenant of the lands at once offered L.12,000; and after some competition Sir William bought them for L.15,420, and granted the trustee a bond for the price. In April of the following year, he agreed to sell Hallrule to John Wilson for L.6912. 10s. At this time Sir William had not completed his own fee-simple title in the lands; but he bound himself forthwith to complete that title, to be holden of the Crown, and to infeft Wilson in due form à me vel de me. Thereafter, in May 1804, Sir William completed his own title, by executing a disposition of the lands, as heir of entail in possession, (with consent of the trustee), in favour of himself, his heirs and assignees, founding upon the act and warrant of Court, and of the roup following thereon, and granted procuratory of resignation and precept of sasine. He, of same date, executed a disposition in favour of Wilson, which bore, that in regard the price at which I, the said Sir William

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'to the said trustee, *and the trustee producing evidence of the application thereof in 'terms of the statute*, the said Sir William Eliott shall be bound and obliged to grant 'and subscribe a formal and valid disposition of the foresaid subjects to the purchaser, 'containing all usual and necessary clauses,' &c.

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'Eliott, purchased the foresaid parts of my said entailed estate 'of Stobs, (whereof the lands herein after disponed are a part), 'has not yet been paid or applied in terms of the foresaid act 'and warrant, nor the application thereof been approved of by 'the Court of Session,' it has been agreed, that the price of the lands herein after disponed, purchased by the said John Wilson, should be paid to the trustee to account of the price of the whole entailed lands purchased by Sir William, to be applied in terms of the act and warrant; which payment was made and receipt acknowledged by the trustee. Wilson was infeft in August following; and in December thereafter, and February 1805, Sir William took infeftments and recorded them; and in March he made resignation ad remanentiam, the instrument of which was also recorded.

In January 1805, Sir William agreed to sell to Wilson another parcel, being a part of the lands of Town o' Rule, with the teinds, and of valued rent sufficient to afford a freehold qualification. He executed a regular disposition thereof in January 1806, which also contained the clause just quoted, and Wilson took infeftment. Thomas Cleghorn subsequently bought the remainder of Town o' Rule, and the superiority of Weens, from Sir William, and also from Wilson a portion of the lands of Hallrule.

The whole of the property which Sir William had thus purchased under the proceedings in the Court of Session, he sold for L.23,600.

In the meanwhile, Sir William and the trustee presented an application to the Court of Session for approbation and exoneration, resuming the state of the previous proceedings, and detailing what had been done. They stated, that besides redeeming the land-tax, debt affecting the entailed estates had been paid to the extent of L.7854. 12s. 5d., and that there remained an unappropriated balance of L.6157. 3s. 7d.; which, in terms of the statute, must be laid out in the purchase of lands, to be limited and settled in the same way as the lands sold were limited and settled, or otherwise applied and secured as the Court should direct; and suggested, that it should be heritably secured over the lands of Town o' Rule and others now belonging to Sir William in fee-simple, or otherwise; and that such part of these lands as were equal in value to that balance should be disponed back to himself and the heirs of entail. The Court remitted to the Lord Ordinary, with power to intimate to the substitute heirs of entail, (and these failing to appear), to appoint an agent

May 2. 1828. to attend to the interests of the entailed estate. Intimations were made, and an agent appointed. But although a draft of his report was drawn up, it never was presented; nor did the Court ever approve of these proceedings, or exoner the trustee; and, in the interim, the lands had been sold as above-mentioned.

The trustee did not pay the price into the Bank of England; nor did he ever produce evidence of the price having been applied in terms of the statute.

Sir William died, and burdened the entailed estate with certain provisions to his younger children, four of whom in 1819 petitioned the Court to have this balance applied in payment thereof, which was authorized, (leaving a very trifling balance still to be accounted for by the trustee), on the petitioners assigning their claims in trust for behoof of the heir of entail in possession of the estate of Stobs for the time.

The purchasers from Sir William entered into possession, and laid out large sums in ameliorations.

In 1822 Sir William Francis Eliott, Bart. of Stobs, eldest son of the deceased Sir William, raised an action of reduction against Wilson and Cleghorn, the purchasers, calling for production of the act and warrant of the Court authorizing the sale of the lands of Hallrule, Town o' Rule, and Hallrule Mill; the articles and conditions of roup, and minutes of roup; the dispositions granted by Sir William in favour of himself as purchaser, and all the subsequent titles; and concluding, that these deeds and writings should be reduced and declared to be null and void, and the pursuer restored thereagainst in integrum; and being so reduced, it should be found and declared, that the pursuer had the only good and undoubted right and title to the said lands, and to possess the same, and uplift the rents thereof; with conclusion of removal against the defenders, and those holding under them.

The Lord Ordinary, on the 10th June 1824, reduced, decerned, and declared in terms of the reductive conclusions of the libel. The Court, on advising a petition and answers, on the 23d June 1825, pronounced this interlocutor: 'Find, that the defenders cannot 'be hurt by any alleged fraud on the part of the late Sir William 'Eliott, in carrying through the sale under the authority of the 'Act of Parliament, or, as alleged, in deceiving the Court against 'the pursuer or other heirs of entail, if the sale, in other respects, 'had been regularly conducted in terms of the Act of Parliament; 'but find, 1mo, That the original petition to the Court for autho-'rity to sell the lands in question did not, in terms of the Act.

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'of 42. Geo. III. c. 116., set forth the amount of the land-tax proposed to be redeemed, and that the petition was intimated under the authority of the Court in this imperfect state: Find, that a minute was afterwards given in, containing a certificate of the amount of the land-tax; but that this minute, even if it could be held as supplying the original defect in the petition, was not intimated as the Act requires the petition to be, and therefore cannot supply the defect in the petition. 2do, Find, that as the petition prayed for authority to sell lands in point of rent and value much more than sufficient to redeem the land-tax of the whole estate, it was requisite, by the 63d section of the Act, that the petition, besides being intimated on the walls of the Court, should be intimated personally to the next heir of entail in Great Britain being of lawful age: Find, that no evidence of such intimation was laid before the Court: Find, that the letter from Mrs Guy, which has since been produced in this process, does not contain evidence that sufficient intimation was made to her; as from that letter it does not appear that the Mill of Hallrule and mill lands had been included in the intimation to her, of which her said letter is an acknowledgment. 3tio, Find, that the articles of roup, as prepared by Sir William Elliot for the approbation of the Court, did not specify any upset price, but left that blank, and the upset price was thereafter fixed by some private authority, without any warrant from the Court. 4to, Find, that the articles of roup, even as thus imperfectly prepared, were afterwards altered by Sir William Eliott, without any authority of the Court, by excepting the teinds, and by declaring that the lands to be sold were to remain subject to their proportion of the land-tax. 5to, Find, that this alteration was not only not warranted by any authority from the Court, but was in itself in the face of the statute, which provides, that no lands shall be sold, except for the redemption of the land-tax thereof. 6to, Find, that no proof was offered to the Court of the necessity or expediency of selling so large a quantity of land and superiority to redeem this comparatively small amount of land-tax; while, from subsequent proceedings, it appears that these lands might have been disjoined, and any part of them sold separately, which, in fact, was soon afterwards done by Sir William Eliott to these defenders. 7mo, Find, that the price was not paid into the Bank of England, as required by the Act, before granting dispositions to the purchasers. 8vo, Find it proved by the terms of the dispositions to the defenders, that they were made aware that the Act had not been followed out. 9no, Find,

May 2. 1828. 'that the sales in question never were reported to and approved 'of by the Court. Therefore, on the whole matter, adhere to the 'interlocutors complained of, and refuse the desire of the peti- 'tion, reserving to the defenders their claims for repetition of 'the price from the pursuer, in so far as any part of it was 'applied to redeem the land-tax, and to discharge the burdens 'which either affected, or which could have been made to affect, 'the entailed estate, or the pursuer, the heir in possession; as also 'reserving to the defenders any claim they may have for amelio- 'rations on the lands respectively purchased by them; and to 'the pursuer, on all these points, his objections, as accords; also 'reserving to the pursuer his claim for repetition of the rents, 'and to the defenders their objections thereto, as accords: 'And remit to the Lord Ordinary to hear parties on all these 'points, and to do therein as he shall see cause, and decern.'

And thereafter, on the 9th February 1826, their Lordships adhered, but gave leave to the defenders to appeal. The pursuer had also petitioned the Court on two points, with which he was dissatisfied:—1st, As to the defenders not being hurt by any alleged fraud on the part of the late Sir William Eliott; and, 2dly, As to the intimation to Mrs Guy being to the proper party. But the Court refused his petition, and adhered; giving him, however, also leave to appeal.*

Both parties, accordingly, appealed.

Wilson and others (appellants in original, respondents in cross appeal).—I. The plea of the respondents is, that Sir William Eliott ought to have proceeded under the 63d, and not the 61st section of the statute, he having in contemplation to sell more land than sufficient to redeem the land-tax. But the 63d section is merely supplementary of the 61st section. The Act of 42. Geo. II. on which Sir William founded generally, consolidated the previous statutes on the subject; and these statutes shew that the respondents' objections are unfounded. The 63d section was never intended to operate by itself, since it is quite silent as to advertisements and intimation on the walls.† Even if the respondents were right, that the Court had in some respects deviated from the strict letter of the statute, this would not

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* See 4. Shaw and Dunlop, No. 289.

† The appellant went into a great deal of argument, to shew that the different findings of the Court of Session were erroneous; but as the House placed their judgment on a different ground, it is not necessary to advert to it.

nullify the proceedings. It might perhaps found a claim by the purchaser against the exposer, but not against a bona fide purchaser himself. However, all the alleged deviations did not exceed the bounds of fair discretion,—none of them counteracted or defeated the purposes of the statute. Besides, the appellant should, on legal principle, be protected. No third party acquiring onerously is liable for the mistakes or blunders of a Court, or for the misconception into which Judges may be betrayed. A purchaser is safe if it appears that the Court was truly addressing itself to execute the statute under which the warrant was granted, and that the matter was so brought before the Court as to enable them to exercise the powers with which the statute has intrusted them. Accordingly, in the present case, however ill-founded the warrant may have been upon the merits, still it protects the bona fide onerous purchaser. The Court had a public statute before them, and, if they erred, that error cannot affect the appellants, who were no party to the suit, nor participators in the blunder. The very issuing the warrant implies that the provisions of the Act had been obeyed, and that the Court had considered itself in a situation to exercise its statutory powers. Error in merits does not nullify a proceeding, and there is no principle why an error in form should have a different effect. The Legislature reposes confidence in the ability of Judges, and if they have been mistaken, a purchaser who reposed like confidence in the ability of the Court, who acted with undoubted bona fides, and who gave full value for the subject, ought to be protected from loss.

II. But it is also alleged, that Sir William wished to appropriate the lands to himself at an under-value. There is no evidence of that charge; but even if true, it cannot affect the appellants.—'Fraus auctoris non nocet successori.' They acquired the properties for value,—were in perfect good faith,—have been long feudally invested in the subjects they bought; their rights therefore cannot be touched by any fraud of their author. To meet this defence the respondent contends, that the sale and fee-simple title in the person of Sir William never having been approved of by the Court of Session, there is even yet, in the eye of law, no feudal title at all, and therefore no protection afforded to the appellants against the fraud of their author. But the interference and approval of the Court of Session are not required by statute to give validity to the title of a purchaser; and the fee-simple investiture of Sir William, and of his disponees, was as complete as any express sanction of the Court could have

May 2. 1828. rendered it; and this shews the irrelevancy of the objection, that the declaration that the price 'had not yet been paid or applied 'in terms of the act and warrant,' &c. was inserted in the appellant's titles. Then he maintains, that Wilson made his first purchase before Sir William had completed his own title, and therefore the right conveyed, being personal, was tainted by the frauds of Sir William. It is, however, tritissimi juris, that the infeftment of Sir William accrued to that of the appellant, and perfected it. Besides, the appellants have all been regularly infeft. The whole of the respondent's doctrine proceeds on an erroneous view of true principles of law. Exceptio doli does not, even in personal rights, transmit to the successor upon an onerous title, except in cases of participation in the fraud, or where there is labes realis, and in certain assignations of personal rights continuing personal. This last exception depends on a peculiar ground, that an assignee, although for onerous consideration, is not considered as properly a singular successor, but as a mere procurator in rem suam, and still in his character of procurator representing the cedent; but when that character terminates, as by taking infeftment, then he is no longer answerable for his author. Indeed, the numerous authorities on the point make it too clear to be seriously doubted, that all challenges founded upon the fraud of the author are unavailing against a singular successor, if the challenge has not been brought till after the infeftment of the assignee, or of his author.

Sir William Francis Eliott (respondent in original, and appellant in cross appeal).—I. The late Sir William Eliott, wishing to benefit himself at the expense of the entailed estate, sold (under pretence of redeeming L. 56. 8s. $7\frac{6}{12}$d. of land-tax) entailed property for L. 15,420; he became himself the purchaser; and, although the only hypothesis on which he could have been permitted to sell that amount, was, that the portion sold was not susceptible of expedient division, he, within little more than a twelvemonth, disposed of it in four portions for L. 23,600. At this time the respondent and the rest of the children were in pupillarity. The only way the late Sir William could effect his purpose was by misleading the Court. If he wished to sell more land than the land-tax required, the 63d section was his guide; if only the precise amount requisite for the redemption, then the 61st. But he so shaped matters as to induce the Court to believe that the latter was his purpose; and they issued their orders accordingly, overlooking every part of the statute they ought to have, under the true circumstances of the case, enforced, and

enforcing that which had no application.* If the applicable sections of the statute had been attended to, a proof should have been allowed that 'such farm, lands, or tenement,' could not be divided, in order that an adequate part might be sold, and that the sale of the whole would be more eligible and advantageous. But these particulars were not allowed to enter into the inquiry. The consequence was, that the barony was cut in two, and sold to redeem what any single farm,—what the very superiorities would have been more than equal to. No notice was taken of the value of the wood, of the grassum paid at entry by the possessing tenant, of the tenant's services, and of the valued rent, (the whole property holding of the Crown). By not executing the statutes the Court exceeded their powers. The authority of the Court, in matters of this kind, is a specified and limited authority for a particular purpose; and unless the directions given by the Legislature are obeyed, the Act of Parliament, and the judgment following, could give no title to sell, and convey no right to the purchaser. Here the Court did not obey the statute, and Sir William neither obeyed the statute nor the Court. No doubt, where a Court is acting within its jurisdiction, mere errors in judgment will not be permitted to annul the titles of persons reposing, in bona fide, on the faith of the orders of the Court. But here the Court never assumed, and never pretended to assume, the proper jurisdiction applicable to the facts of the case. The question is the same as if the two situations had been regulated, not by different sections, but by different statutes, and the Court, either from inadvertence and mistake, or by being misled by the party, had proceeded on the wrong statute.

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II. Besides, the appellants were aware of the imperfection of these proceedings, and of the devices practised by Sir William. But, if so, their title must be annulled, as flowing from a person who held a vitious title. It is clear law, that when a purchaser acquires an heritable estate from a party, who has not been infeft in it previous to the sale, or, even when infeft, if he were aware of the fraud of his author, then, Fraus auctoris nocet successori,—under the exceptions of purchasing on the faith of the record, or (as to moveables) in open market. Of course, this destroys Wilson's title to both portions; and also destroys the titles of Cleghorn, whose title-deeds betray their knowledge of the imper-

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* The respondent argued at much length in support of the findings of the Court, but this, for the reason already mentioned, does not require to be particularly noticed.

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fection of the proceedings under which they bought. Wilson's argument, on the effect of his own infeftment in his first purchase, is fallacious. An infeftment may put a person in titulo to dispose to a third party, but cannot cure an objection to his own title, while the property remains in himself. It has no doubt been said, that it is possible to cure defects in the title of a singular successor by his author's subsequent infeftment. But there seems no authority for that supposition. The case of a person purchasing from an heir of entail, and taking infeftment before the entail is recorded, neither applies in principle or analogy. Besides, knowledge on the part of a singular successor has the same effect as want of sasine, and would neutralize the effect of sasine, whatever that might be. But, in truth, it is not necessary to raise this question. Even without fraud, a reduction is fully warranted, where the right sought to be reduced flows from one whose own title to the land is null and void; and that Sir William never vested in himself a good and unchallengeable title, is manifest from the whole detail that has been given.

The House of Lords, in respect it appears 'that the Court of 'Session, before pronouncing their interlocutor of the 9th of July '1803, authorizing and appointing the sale therein mentioned, 'had not before them any evidence that the farms, lands, or 'tenements thereby appointed to be sold, could not be divided, 'so that an adequate part only might be sold, nor any evidence 'that the sale of the whole of such farms, lands, or tenements, 'would be more eligible and advantageous to the said entailed 'estate, and to the successive substitute heirs of entail, than the 'sale of a part thereof only; It is ordered and adjudged, by the 'Lords spiritual and temporal in Parliament assembled, That 'the said several interlocutors complained of in the said original 'appeal be, and the same are hereby affirmed; but it appearing 'to their Lordships that the said interlocutors ought to be 'affirmed for the reason above stated, this House does not think 'it necessary to pronounce any judgment upon any of the other 'reasons stated in the interlocutor of the 7th of June (signed '23d of June) 1825, adhering to the former interlocutors therein 'referred to: And it is further ordered, that the said original 'appeal, and also the said cross appeal, be, and the same are 'hereby dismissed this House.'

Appellants' Authorities.—42. Geo. III., and previous Redemption of Land-tax statutes; 54. Geo. III. c. 123. § 12.; Lord Wemyss, Feb. 28. 1821, (affirmed on appeal, Feb. 25. 1824.; Shaw, vol. i. No. 1.); Lawrie, Feb. 11. 1806, (App. 1. Pub. Bur. No. 2.) affirmed on appeal, July 27. 1814, (Dow's Rep. vol. ii. p. 556.); Voet, 44. tit. 4.; Kames' Elucidations, art. 3.; Stair's Inst. 4. 40. 21.

Respondent's Authorities.—42. Geo. III., and previous Redemption of Land-tax statutes; Stair's Inst. 4. 40. 21.; M'Donells, Nov. 20. 1772, (4974.); Bankton's Inst. 1. p. 259. § 65.; Burdon, (Elchies on Fraud, No. 11.); Stair's Inst. 3. 1. 21. May 2. 1828.

FRASER—RICHARDSON and CONNELL,—Solicitors.

WILLIAM BURRIDGE CABBELL, Cashier to the Glasgow Bank Company, Appellant.—*Bosanquet—Spankie—Fullerton.* No. 6.

JAMES BROCK, (Newbigging and Company's Trustee), Respondent.—*Sol.-Gen. Hope—Adam—T. H. Miller.*

Title to Pursue—Lease—Assignation in Security.—A mercantile company, in possession of a lease of a printfield, having borrowed money from a private Bank, and granted an assignation of the lease in security to the Bank, which was intimated to the landlord; and the Bank having thereupon granted a sub-lease to the company, who remained in possession, and paid the rents; and no possession having been taken by the Bank; and the Court of Session having held, in a question with the trustee on the sequestrated estate of the company, that the assignation was not effectual against the creditors; and the Bank having appealed in name of the office-bearers;—Question raised, but not decided, 1. Whether they had any title to appear; and, 2. A remit made to take the opinions of all the Judges on the merits.

May 13. 1828.

2D DIVISION. Lord Cringletie.

By two separate deeds of tack in 1800 and 1801, James Buchanan, Thomas Hopkirk and Company, (of whom, among others, Archibald Newbigging was a partner), merchants in Glasgow, obtained certain portions of the lands and estate of Denovan, from the proprietor, Johnston of Alva, on lease for 100 years, with the right, liberty, and privilege of using the same as a printfield, bleachfield, &c. The leases were taken to the Company, and to the partner or partners who might be assumed, and to their heirs, assignees, and subtenants whomsoever, 'but for 'whom always the original tenants shall continue bound.' Having entered into possession, the company converted the premises into a bleachfield and printfield, built houses, erected and placed extensive machinery and utensils, and furnished the subjects with every implement essential to the proposed operations. In 1806 this company was dissolved, and in January 1807 they assigned the whole premises to Archibald Newbigging, and his heirs and assignees.* This assignation was recorded in March

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* In the question which arose, it was maintained by the opposite party, that there was satisfactory evidence in the case, that this assignation was taken solely for the