APPENDIX.

No. I.

OPINIONS of the JUDGES of the COURT OF SESSION, in
STEWART *v.* FULLARTON, p. 196.

LORDS JUSTICE-CLERK, GLENLEE, ROBERTSON, PITMILLY, MEADOWBANK, MACKENZIE, and MEDWYN, delivered this opinion:—Frederick Campbell Stewart succeeded to the estate of Ascog in virtue of an entail. The irritant and resolutive clauses, while they apply to the other prohibitions, being silent as to the prohibition against selling and annailzieing, he raised a declarator to have it found and declared, that he 'has full and undoubted right and power to 'sell and alienate the several lands, mills, teinds, fishings, and other 'subjects' contained in the deed of entail; 'and further, that it should 'be found and declared, that upon selling or alienating the whole, &c. 'for a fair price or onerous consideration, the pursuer has the sole 'and exclusive right to the price or prices or considerations thereof; 'that the same are the pursuer's absolute property, and that he has 'full power to use and dispose of the same at his pleasure; and that 'the pursuer does not lie under any obligation to invest, employ, or 'lay out the same, or any part thereof, in the purchase or on the 'security of any other estate,' &c.

A sale having been made of a portion of the estate, the purchaser also presented a suspension, for the purpose of trying the right of the seller.

As the question is one of some difficulty and of great importance, we consider it proper, not merely to give our opinion, but to detail the grounds on which it rests.

I.—As to the suspension.

The Act 1685, c. 22., having been passed for the purpose of regulating every question between third parties, whether purchasers or creditors, contracting with heirs of entail, as the provisions of the Act have not been complied with so far as regards sale and alienation, to which the irritant and resolutive clauses are not applicable, we can have no doubt that the sale is good, so far as regards the purchaser, and that his suspension should be refused.

II.—As to the declarator at the instance of the heir.

We are of opinion, that the Act 1685 is the code by which the rights of third parties are regulated. But we hold, that what was the common law of Scotland before that statute was passed, regulates questions among heirs, and that entails, containing only a simple destination or a prohibitory clause, are still effectual inter hæredes, according to their nature.

It need scarcely be observed on this point, that if a simple destination in a tailzie remain unaltered it will regulate the succession, and the heir of provision will succeed to the prejudice of the heir of line. But it is more material to attend to the operation of a tailzie with prohibitory clauses, merely in questions among heirs.

We are of opinion,—1. That the substitutes under an entail with prohibitory clauses have a jus crediti, which cannot be defeated by any gratuitous deed. 'The obligation upon them not to alien or 'contract debt, when it is not strengthened by irritant and resolutive 'clauses, is only personal against them and their heirs, but does not 'affect creditors or purchasers;' Erskine, b. iii. tit. 8. § 23. Or, to quote from the Annotations on Stair, p. 110. (which is evidently the work of an acute and intelligent lawyer), 'It is clear that if there be 'no irritant and resolutive clauses in the charters and sasines, this 'clause,' (the case put is a prohibitory clause against altering the succession or contracting debt), 'even though repeated in these writs, 'is no more than a personal obligement, and will not affect singular 'successors for onerous causes, and that especially now since the Act '1685, whereby none of these tailzies are effectual against singular 'successors, except such as contain irritant and resolutive clauses.'

Hence, if an entailer prohibit his heirs from contracting debt, or from selling the estate, and if the heir take the estate under that provision, and notwithstanding contracts debt or dispones, the creditor or disponee is safe, because the heir was fiar of the property, and the provisions of the Act 1685, so as to affect third parties, have not been complied with; but if the heir attempt to defeat the prohibition by any gratuitous act, the substitute heir under his jus crediti may set such gratuitous deed aside.

It was held, immediately after the Act 1685 passed, (so little was it then considered that an heir of entail has no other remedy but in virtue of that Act), that a clause prohibiting the disponee and substitutes from doing any deed which might affect succeeding heirs, was a sufficient ground for the next heir, or one who on a bond had adjudged from him, 'to reduce, on the Act 1621, any posterior 'gratuitous or voluntary deeds not depending on prior onerous causes, 'though it wanted a clause irritant, for that would resolve, irritate, 'annul, and reduce even onerous creditors' debts:' Earl of Callender, 27th January 1687, Fount. This right in the substitute is universally recognized: Mackenzie, vol. ii. p. 325. and 487. edit. 1722; Stair, b. ii. tit. 3. sect. 59. in fine; Bankton, b. ii. tit. 3. sect. 139.; Ersk. b. iii. tit. 8. sect. 23.; Craik *v.* Craik, 29th January 1735. This was indeed admitted in the pleadings by the pursuer's Counsel, and it appears to be beyond question.

2. To make an entail effectual against third parties, it must be recorded in the Register of Tailzies; yet an heir of entail cannot found upon the omission of that solemnity as a defence in any action for contravention at the instance of a substitute. He is bound by the limitations in the right by which alone he holds the estate, and an heir-substitute has a jus crediti entitling him to enforce the obligation, although that provision of the statute has not been complied with. This point seems first to have occurred in the case of Leslie *v.* Dick of Grange, 15th December 1710, Fount.; but there was no room for deciding it there. It was, however, decided in Willison *v.* Callander of Dorrator, 26th February 1724, Kames; also in Hall *v.* Cassie, 17th February 1726, in which it was found that 'tailzies are 'good against heirs without registration, but not against creditors.' In a question with a widow the same has been found, that irritant and resolutive clauses, and consequently registration, are unnecessary to make entails effectual intra familiam of the substitutes; Gibson *v.* Ker of Hoselaw, 24th November 1795, also reported in Bell's Cases, 5th

June 1795; Makgill v. Makgill, 13th June 1798; Duchess of Roxburghe v. the Duke, 11th January 1820.

3. To make an entail effectual against third parties, it must be recorded; but any substitute heir may apply to the Court of Session to compel the heir of entail to produce the deed, in order that it may be recorded. This arises from the jus crediti which the substitute has under the entail, although at the same time it is ineffectual, while not recorded, against creditors or purchasers: Ersk. b. iii. tit. 8. sect. 26, 27.; Nairne v. Sir T. Nairne, 10th March 1757; Ker v. Duke of Roxburghe, 7th July 1804.

4. Where an heir, besides being heir of entail, is also heir of line, the substitute heirs of entail have a jus crediti to entitle them, and have an interest to pursue measures for compelling the heir in possession to expede charter and sasine upon the entail, and to possess under those deeds; and if they neglect to use this jus crediti, they will be excluded by prescription: Macdougal v. Macdougal, 10th July 1739; Maule v. Lord Dalhousie, 1st March 1782. But it is obvious that the provisions of the Act 1685 not having been yet complied with, the tailzie is ineffectual under that Act, so far as third parties are concerned.

What we have now stated being points of settled law, we are of opinion that they afford conclusive evidence that an entail, though not completed under the statute 1685, is nevertheless effectual inter hæredes; and if so, it is impossible to assign any reason why an entail with a clause prohibitory should not be effectual inter hæredes, since it is only with a view to third parties that clauses irritant and resolutive were invented, or ever were supposed to be necessary. And again, if an entail with clauses prohibitory be effectual at all inter hæredes, and not absolutely null, or operative only as a simple destination, it can operate in no other way than by producing an obligation and jus crediti. No other mode or principle of operation has ever been assigned; and, in the present case, the existence of obligation arising from the prohibition was distinctly admitted by the Counsel for the pursuers—it was a point, indeed, which they could not dispute, although they endeavoured to limit that obligation so as to give it no higher effect than a simple destination, and therefore to render it not availing against the pursuer's pretensions.

It is true, that when an estate is held under an entail with a prohibitory clause only, or when, from any other cause, the entail has not the protection of the Act 1685, although the jus crediti of the substitute heir will enable him to defeat any gratuitous deed to the prejudice of the tailzie, yet as the heirs of entail in possession continue fiars, if they grant deeds for onerous considerations, these will be effectual to third parties contracting with them; for the obligation against the heirs not to alienate or contract debt is merely personal, and cannot affect creditors or purchasers, whose rights can only be affected by an entail under the Act 1685. Thence arises the question, whether, in the case of contravention by an onerous deed, the substitute has any claim against the heir contravening?

We are of opinion, that the jus crediti in the substitute heirs, which, as to gratuitous deeds, entitles them to set such deeds aside, gives a claim against the heir or his representatives to have the price reinvested, if the entailed estate has been sold contrary to the prohibition of the maker of the entail; or to have it disencumbered of debts, if such have been contracted contrary to a prohibition, and it has been burdened with them.

We find traces of this from as early a period of our law as could have been looked for, as it does not appear that an entail with a prohibitory clause was much known till about the beginning of the 17th century; and the temptation to defeat the provision, and the interest to resist it, would probably not emerge for some time, and would arise only on the existence of an heir of line not being an heir-male, in whose favour the tailzie was altered; or in the case of a contraction of debt, where the heir of entail did not also represent the predecessor in any other character.

In the report of the case of Drummond *v.* Drummond, 3d February 1674, by Gosford, this statement of the law is made :—' That albeit ' in tailzies, where there is no clause irritant, the acquirers for a just ' and adequate right cannot be quarrelled; yet there being an oblige- ' ment in the tailzie, that it shall not be lawful to any of the heirs ' who succeed to annailzie and dispone in prejudice of the next ' person who is substitute in the tailzie, the same furnishes an action ' against the first disponer for damage and interest, and the person ' substitute or his heirs who are prejudged, albeit they cannot succeed ' to the land, yet they will have a personal action super pacto de ' non alienando against the disponer and his heirs, as is clear by ' Hope in his Compend. where he treats of the nature of the tailzies ' of land.'

The point, however, did not occur for decision in that case, and Gosford accordingly remarks, that the point was not decided.

The annotator on Stair, who wrote prior to the year 1725, observes, p. 114. ' The next case therefore may be—If tailzies contain provisions ' that the heirs shall not sell nor dispone any of the lands, nor contract ' debts, nor do deeds whereby the tailzie may be frustrate or irritant, ' and that all such deeds shall be null and void, but contain no ' irritant clause of the contravener's right in case these debts are ' contracted;—there seems no question in that case, that the clause ' not to alter or contract debts would be valid and effectual against ' the contravener and his other heirs, to subject them to the ' reparation of the heir of tailzie's damages by the contravention, ' not only from what has already been said, but likewise from the ' Act 1685, whereby a person may substitute heirs to himself with ' what conditions and provisions he pleases.' In the case supposed it need scarcely be remarked, that the insertion of an irritant clause, which could not be effectual against the creditor, makes no difference as to the heir, and could not strengthen the effect of the prohibition.

The point was first in terminis decided in the case of Lord Strathnaver *v.* the Duke of Douglas, 2d February 1728, where there was a simple prohibition against contracting debt. An heir having contracted debt, his representatives were found liable to disburden the entailed estate, on the ground that he was bound to fulfil the conditions imposed on the grant, and under which he had accepted the gift.

Although the judgment in this case contains a finding on another point of law which has not been followed in subsequent cases, the point at present under consideration is not connected with that finding, and it, on the contrary, has been confirmed. Accordingly, when the question again occurred in the case of Cumming Gordon of Pitlurg, 29th July 1761, the principle established in the case of Strathnaver was adhered to. There the pursuer brought an action having two conclusions;—for declaring that he had power to sell the estate,

and that he should be at liberty to dispose of the price at his pleasure: and his argument was founded on this, that there were no words in the prohibitory clause expressly prohibiting sales, and that it was only from construction that such prohibition was inferred. There was no irritant clause in that entail.

The interlocutor of the Lord Ordinary, Alemore, 1st July 1761, applies strictly to both conclusions of the declarator. Mr Miller, afterwards Lord President, who wrote the reclaiming petition against this interlocutor, after laying it down that there is no express prohibition, argues, 1*st*, That the clause does not imply a constructive prohibition against sale; and, 2*d*, That if it did, such would not be sufficient to supply the want of express words. He concludes his argument in the words which were read by the Counsel for the defender, in which this eminent lawyer did not venture to dispute the conclusion, that if there was a prohibition, the heir of entail on contravention was liable in reparation to the substitutes.

This decision was followed by the case of Sutherland *v.* Sinclairs and Baillie, 26th February 1801. The entail in that case contained a prohibition against contracting debt, and an irritancy of the heir's right on contravention, but no irritancy of the debts. Here it is plain, that a resolutive clause alone could not make the prohibitory clause stronger than it would have been without it. Debts were contracted by the heir in possession, and the entailed estate was adjudged and sold by the creditors. The next heir, stating it 'as a 'clear point, that an heir of entail has a claim against the repre- 'sentatives, or separate estate of preceding heirs, for relief of the 'damage he has sustained through the entailed estate being either 'totally evicted or improperly burdened,' brought an action to have it found, that he was a creditor to the extent of the price at which the estate was sold, and that the executors of the heir should be liable for the amount. This was found accordingly. The reclaiming petition argues the case fully, but no attempt is made to dispute the conclusion that reparation is due, if a prohibition has been contravened; and the bent of the argument is to show that the prohibition is not applicable, or that the heir is not in a condition to found upon it.

These cases show pretty clearly that the law was held to be fixed, more especially as no contrary one can be cited; and we have reason to believe, that opinions by the most eminent Counsel at the bar were given in conformity therewith, and that the same has been publicly taught and understood as law in Scotland. It is held by the late Lord Meadowbank, in 1815, as a fixed point, in the opinion delivered by his Lordship in the case of the Earl of Wemyss.—Fac. Coll. p. 274.

The question again occurred in the case of Sir James Stewart *v.* Lockharts, 11th June 1811. It was held, that, under the prohibitory clause, the substitutes had a jus crediti which could not be defeated by any voluntary deed; and that although a purchaser was safe, the heir in possession was bound to reinvest the price of the lands, although it might be afterwards carried off by onerous creditors; and the report bears, that 'the majority held that the point was already 'fixed by the decisions.'

The same decision was also given in the case of the Earl of Breadalbane *v.* Campbell of Monzie, 12th June 1812.

The case of Sir James Stewart, having been carried by appeal to the House of Lords, was remitted in consequence of doubts enter-

tained of the soundness of the principles on which it had been decided; and, although no proceedings have since taken place under that remit, these doubts have naturally called upon us, with the most minute attention, to consider the grounds which induced our predecessors to hold, that under an entail with a prohibitory clause merely, or where the provisions of the Act 1685 have not been followed out, a contravention of a prohibition, though effectual to a third party, may be made the foundation of a proceeding against the contravener himself, or his heir or representative.

On considering the objection stated to the view of the law taken by us, it appears,—

1. That the Act 1685 did not, and was not, meant to supersede every other form of entail, except the strict one which is effectual against third parties.

This we think established by the following considerations, arising out of the history of entails in this country.

The first form of entails was that which contained only a simple destination, and is the only form of entail noticed by Balfour, p. 174. It could be put an end to at pleasure by the joint will of the superior and vassal. The subsequent heirs had no more than a spes successionis.

Attempts were, at an early period, made to limit the power which the vassal had, in concurrence with the superior, to defeat the rights of the substitute heirs. This was first attempted by the fiar imposing personal obligations upon himself in favour of his heir. Of this, two remarkable instances are to be found—one noticed in the Acta Dom. Concilii, 17th October 1478, and the other in the Acta Dom. Audit. 7th June 1493.* Such contracts are also noticed by Dirleton, pages 87. and 198. and instances of such are referred to in the cases of Sharp *v.* Sharp, 14th January 1631, and Ure *v.* Crawfurd, 17th July 1756.

2. Next it was attempted to limit all the subsequent heirs, by laying each in succession under such prohibitions as the entailer thought proper, as to altering the succession, selling, or contracting debt. Such clauses were introduced in the time of Craig; but their validity had not been tried, and he seems to doubt their efficacy, in the case at least of a feu granted to heirs and assignees, L. ii. D. 5. sect. 7. But such doubts do not seem well founded. In the words of Lord Kames, 'It is plain that every single heir who accepts the succession 'is bound by the prohibition, so far as he can be bound by his own 'consent. His very acceptance of the deed, vouched by his serving 'heir and taking possession, subjects him to the prohibition; for 'justice permits no man to take benefit by a deed without fulfilling 'the provisions and burdens imposed upon him in the deed.'—Law Tracts, p. 145. But although the prohibition bound the heir, and all those who contracted with the heir titulo lucrativo, so that gratuitous deeds were prevented, (against which also, as has been adverted to, the provisions of the Act 1621 have been found to be applicable), it was insufficient to affect those who contracted onerously with the heir; so that, with a view to strengthen the effect of this clause by publishing it to the world, inhibition was used upon it, and by this it was attempted to make it effectual against third parties. But it was found

* Recently printed under authority of the Commissioners for printing the Parliamentary Records of Scotland.

'that there may be many ways by which this provision may be 'frustrated.'—Minor Practics, voce Tailzie, sect. 364. edit. 1726.

3. 'To prevent and remeid this, there is a new form found out,' says Sir Thomas Hope, who wrote about the year 1635, 'which has 'these two branches; viz. either to make the party contractor of the 'debt to incur the loss or tinsel of his right in favour of the next in 'tailzie, or to declare all deeds done in prejudice of the tailzie, by 'bond, contract, or comprising, to be null of the law.' Ibid. sect. 367. The object of these clauses was not to make the prohibitory clause binding upon the heirs, which was not then doubted, but to make it effectual against third parties; and their effect came first to be tried in the case of Stormont, 1662, when a tailzie with a resolutive clause was held to be effectual against creditors; but the doubts entertained of that decision, and the desire to validate entails against purchasers and creditors, led to the Act 1685, c. 22., by which, if the conditions and provisions of an entail are affected by clauses irritant and resolutive in the investiture, and published in the Register of Tailzies, they are declared 'to be real and effectual, not only against the con-'traveners and their heirs,' (about which there was not any dispute), 'but also against their creditors, comprisers, adjudgers, and other 'singular successors whatsoever, whether by legal or conventional 'titles.'

That the purpose of this Act was merely to make entails effectual against third parties, Sir George Mackenzie, who is generally supposed to have framed the statute, declares in positive terms; for after giving an account of the decision in the case of Stormont, he adds, 'To strengthen these clauses against singular successors, by making 'them more authoritative and better known, there was an Act of 'Parliament made anno 1685, whereby such clauses were declared 'valid against singular successors, providing they be set down,' &c. Mackenzie, vol. ii. p. 149. See also at p. 325. sect. 2, 3. And in like manner Lord Stair, who was Lord President of the Court at the time, says, 'By Act 22. of Parliament 1685, clauses irritant in tailzies 'are approven as effectual against creditors and singular successors, 'being once produced before the Lords and approven by them, and 'the original tailzie being registered in a separate register for that 'purpose, and being repeated in all the successive sasines.' Stair, b. ii. tit. 3. sect. 58.

If, from the date of the passing of this Act, it was the meaning of the Legislature that an entail was to be altogether ineffectual, even inter hæredes, unless all the requisites of that Act were complied with, Lord Stair could not have failed to have altered, in the edition of his Institutes published in 1693, what he had laid down on this subject in 1681, b. ii. tit. 3. sect. 59. Sir George Mackenzie, in like manner, would not have treated of entails in the way he has done, vol. ii. p. 325.; nor would Erskine, b. iii. tit. 8. sect. 22., have classed entails into three kinds, 'when considered with regard to their several 'degrees of force.' Moreover, this last author subsequently lays down the law thus:—'Entails may be in many cases effectual against the 'heir of the granter, or against the institute who accepts of it, which 'cannot operate against singular successors;' b. iii. tit. 8. sect. 27. Indeed it seems quite impossible to dispute the proposition, that obligations under an entail with a prohibitory clause are effectual against heirs, if it be admitted that it founds a reduction of a gratuitous deed of contravention under the Act 1621; and this point must be disputed, and the right to reduce disproved, before effect can be

denied in a question among heirs to an entail so constructed, on the ground that it has not been completed under such a form as will make it effectual also against singular successors.

Nay, in a question with creditors, it was at one time found by the Court of Session, 'that the prohibitory and irritant clauses in a per-'sonal right were not effectual against creditors when not recorded in 'the Register of Tailzies, on this ground, that the statute 1685 was a 'total settlement of the whole system of entails in such questions; 'but the House of Lords put a more limited construction on the 'statute, as only concerning tailzies upon which infeftment had 'followed,' (Kilkerran, p. 546.), in the case of Baillie *v.* Stewart Denham in 1731; and this has been held as law ever since: Creditors of Carleton, 21st November 1753; Chisholme, 27th February 1800. So that, in one case at least, an entail will be effectual even against creditors without the aid of the statute.

II. We do not consider it as a proof that there is no obligation, no jus crediti under such a deed, because it has been held that inhibition cannot be used upon it.

For, 1. That there is a jus crediti, to a certain extent at least, is unquestionable, otherwise reduction on the Act 1621 would not be competent, for the title to pursue is the being a creditor of the person whose deed is to be set aside. As already noticed, this is admitted.

2. It has also been held, that inhibition cannot be used by the heir of a marriage to secure the provision contained in the contract of marriage; Gordon *v.* Sutherland, 3d January 1748. Neither can any interdict be obtained against a father selling the lands; Cunnynghame, 17th January 1804; and yet it cannot be disputed, that the heir of a marriage has such a jus crediti as will entitle him at the death of the father to the price of the lands settled on him by the contract, which, as fiar, the father has it in his power to sell; Cunningham of Bowerhouses, 20th December 1810; Earl of Wemyss, 28th February 1815.

We consider the use of inhibition, in order to enforce a prohibition against third parties, has been virtually superseded by the Act 1685, which declares that no tailzie shall be effectual against third parties except when completed and published in terms of that statute; and therefore, to attempt to enforce any such obligation against the heir in possession by inhibition is obviously inept, as it would in effect be constituting an entail against the person inhibited, as strictly as if the prohibitory clause had been fenced by irritant and resolutive clauses, and recorded in the Register of Tailzies. But although this cannot be done, it seems impossible from this to infer that no obligation arises from a prohibitory clause against the heir himself, because it cannot by using inhibition be made effectual against onerous creditors.

And upon the same view of the law we conceive was founded the refusal to grant an interdict against the heir, even when it did appear that he intended to violate the prohibition, which occurred in the case of Sir James Stewart already mentioned. At any rate it is certain, that that refusal could not have proceeded from an opinion that the prohibition did not constitute any obligation, since there the Court found that the heir was bound to reinvest the price.

III. Neither do we think, because the Act 1685 puts it in the power of an entailer to execute a strict entail, by which the prohibitory clause may be effectually fenced against third parties, that if he does not take the benefit of this Act, the legal effect, which, prior to

that Act at least, was consequent on the deed he has executed, is not now to follow. The heir under a simple destination will unquestionably succeed, if it be not altered; and an entail with a prohibitory clause will be effectual, unless where the subject of it has been disponed for an onerous consideration; and a gratuitous alteration will even be avoided. But the irritant and resolutive clauses have no operative effect in themselves independent of the prohibitory clause, which is the limiting or restricting clause, while the object of the other clauses is only to make these limitations and restrictions upon the heir's right effectual against third parties. That the maker of an entail has not availed himself of his right to insert irritant and resolutive clauses, is probably an unintentional omission on his part; but even supposing it otherwise, this only can be inferred from it, that he did not mean to prevent onerous transactions with third parties, leaving their effects, so far as heirs are concerned, entire. That he might have tied up his heirs more than he has done, is no reason why effect should not be given to the restrictions he has imposed.

IV. It is further objected, that the avowed object and intention of the entailer in the present case was to secure the estate of Ascog to his heirs, and not to entail upon them a sum of money, or a separate estate purchased with the price of Ascog; that to reinvest the money is not fulfilling the intention of the entailer, in terms of the deed out of which the obligation is said to arise; and that to infer such an obligation from the prohibition to sell, is violating the rules of strict construction which ought to be applied to entails as restraints upon property.

The doctrine of strict construction we fully admit; and from this it arises, that no fetters are to be imposed from implication or inference, or any clause which is usually made use of in creating a limitation supplied, although the omission be obviously through inadvertence, and by mistake. But when limitations, after applying the doctrine of strict interpretation, are found to exist, these limitations are to be construed according to the usual and legal import of the words, and according to the meaning affixed to them by the entailer. Upon this ground were decided the case of the competition for the estate of Cumbernauld, 19th January 1804; the case of the Roxburghe feus, 11th January 1808; and the cases of the Queensberry, 21st February 1816—Turnerhall, 6th December 1811—and Stobbs' leases, 10th March 1814;—all of which, except the first, have also been decided in the Court of the last resort. Now it appears to us, that as the prohibition to sell in the present case is the declared will of the entailer, although he has not fully and absolutely provided for specific implement by using the statutory means, whence it arises that onerous sales must be effectual, still we do not see why the legal consequence of contravening such a prohibition, according to the solemn determination of the Court, just two years before the present entail was made, which was in 1763, should not have effect. Hence, to make the heir reinvest the price, is not implying any condition or restriction not imposed by the deed; on the contrary, it is giving legal effect to the prohibition contained in the deed.

The same takes place on the breach of the obligation for settling the estate on the heir of a marriage: if it be sold by the father for an onerous consideration, the sale is good; but if any part of the price remain unspent at his death, the heir is entitled to it, although he by this does not get specific implement of the obligation, namely, the estate.

V. Even although it should be held, that an heir succeeding under an entail with all the clauses pointed out in the Act 1685, and duly recorded in terms of that Act, can do no more than irritate deeds in contravention of the entail, and has no claim for damages or reparation, (upon which we offer no opinion, as the case is not before us), it would not affect the present question. For if an entail with prohibitory clauses merely raises an obligation against the heir, although it be ineffectual against third parties, that the entailer might have imposed upon his heir a prohibition with a different mode of enforcing it, does not seem to us to alter or impair the right which arises out of the prohibition as it stands. Besides, the refusal of damages for an attempt to alienate, when the alienation is not effectual, but void as ultra vires, and the refusal to give redress for an alienation actually made and effectual, though done contrary to an obligation in favour of the heir, seem to rest on very different grounds; and hence the decision given by the House of Lords in the case of the Queensberry leases, 10th March 1824, does not affect the views we entertain. For the present question neither did nor could arise there; that being the case of an heir who, under the statute 1685, had set aside the deeds of contravention, and where what he claimed was damage suffered by himself individually, which, if due, was due solely to himself, and was not to be reinvested for the benefit of the subsequent heirs; and it arose, because, either from his delay in bringing the action, or from the necessary procedure for setting aside the deeds of contravention, damage beyond what the remedy under the statute would repair was said to have arisen to him individually.

We are therefore, upon the whole, of opinion, that while the sale must be effectual to the purchaser, because the prohibition to sell has not been guarded in terms of the Act 1685, yet, as the entailer declared that the heirs should 'not have any power or liberty to sell,' the pursuer has done what he had no right to do, (in the same manner as one who grants double rights does, yet the disponee last in date, if first infeft, will be secure), and must therefore be liable in reparation to the extent of the price obtained for the lands sold; and that the security for this price must be taken to the heirs of entail in succession, in terms of the entail of Ascog.

Lords PRESIDENT, HERMAND, CRAIGIE, and BALGRAY, concurred in the above opinion.

Lord CRINGLETIE delivered this opinion:—By the entail of Ascog and others, executed by John Stewart of Ascog, afterwards John Murray of Blackbarony, dated 28th May 1763, he conveyed to his heirs the lands of Longcoat, Borland, Milkingston, Windylaws, and others, in the shire of Peebles; and, with regard to selling, the deed contains this clause:—'Nor shall they have any power or liberty to 'sell, annailzie, or wadset the lands and others foresaid, or any part 'thereof, except allenarly such a part and portion of the same as shall 'be found necessary for relieving, paying, and satisfying the debts and 'obligements contracted and granted by me,' &c. This declaration of want of power to sell (for it is not a prohibition in direct words) is not protected by any sanction of an irritant and resolutive clause applicable to it; so that the faculty of selling or not rests solely on this clause, that the heirs shall not have power to do so, whereas the other conditions and provisions of the entail are enforced by irritant and resolutive clauses annulling the deeds done in contravention, and

forfeiting the right of the heir. Mr Murray, moreover, conveyed to his heirs of entail 'all and sundry lands, heritages, annualrents, tene- 'ments, or houses within burgh, tacks, steadings, rooms, possessions, 'and all other heritable subjects whatsomever, pertaining and belonging 'to me, in any manner of way, at my death, and all other heritable and 'moveable means and effects whatsoever, pertaining and belonging to 'me undisposed on at the time foresaid of my decease, and all bonds, 'bills,' &c. This conveyance of the whole estate, other than the entailed lands, was under this condition—That the disponees 'are and 'shall be holden and obliged in the strictest manner, by their accept- 'ance hereof, to convert the said heritable and moveable subjects, 'generally above disponed, into money, and to uplift the debts and 'sums of money above assigned; and, after payment of my proper 'debts and the legacies, if any be, to ware, employ, and bestow the 'free residue or remainder, &c. on purchasing of land in Scotland, 'and to take the rights and securities of the lands so to be purchased 'in the form of a strict entail, to the same series of heirs, and with 'and under the same conditions, provisions, burdens, reservations, 'restrictions, limitations, clauses irritant, and faculties, as are above 'set down with respect to my tailzied lands herein mentioned,' &c. Accordingly the lands of Drumfen and others were purchased and settled on the same series of heirs, under the same system of tailzie as those originally entailed by Mr Murray himself; so that the obligation imposed on the heirs has been fulfilled. But the lands being entailed in terms similar to those applicable to Ascog, they are equally liable to be sold.

The present heir, Mr Campbell Stewart, has sold the lands in Peebles-shire; and the question now at issue is, whether he is bound or not to re-employ the price of them in the purchase of other lands, to be entailed in the same terms as those contained in the original tailzie? The subsequent heirs plead that he is bound, while Mr Stewart says that he is entitled to dispose of the money as he thinks proper.

The ground on which the heirs proceed is, that the declaration of the want of power to sell, which I shall call a prohibition, constitutes a claim of damages or reparation against the heir who acts in contravention of the terms under which he holds the estate; and these damages are the value obtained for it, which becomes a surrogatum to be re-employed in the acquisition of other lands. This appears to me to be a total mistake, arising from converting the simple prohibition, or want of power to sell, into a declaration, that in case any of the heirs should sell, he should be obliged to lay out the price in purchasing other lands, which, in my apprehension, is contrary to all the rules which have hitherto been applied to the construction of tailzies, one of which, and the great and leading one, is, that no obligation is to be imposed on the right of property by implication. In a question at present before the Court, between the Duke of Gordon and John Innes, Esq. the opinions of the Judges of the Second Division on a different point are printed; and there it was distinctly laid down,—'That all presumptions drawn from implied intention are 'to be rejected; 2*dly*, That fetters are not to be raised on inferences, 'nor extended by analogy, from cases expressed to cases not expressed, 'however similar; and, lastly, That no effect is to be given to inten- 'tion, unless expressed in clear terms.' The prohibition is therefore effectual to prevent a sale, or it can have no force at all. If one obligation can be inferred from a breach of it, why may not another? Why shall the construction not be, that the heir has forfeited altoge-

ther?—that seeming to be the intention of the entailer, in so far as relates to the contravention of the other conditions of his tailzie. It is admitted on all hands, that a simple prohibition to sell or annailzie does not form any obstacle to a sale to an onerous purchaser; but an idea has found its way into the minds of lawyers, that there is a distinction between the public and the heirs of entail, so that although the public may buy without committing a wrong, an heir is guilty of it by making the sale. With the greatest deference, this appears to me to be a radical mistake, proved to be so by the statute 1685, c. 23. itself. Such are considered to be the powers of a proprietor by the law of Scotland over his property, that his deeds must remain effectual against it as long as he continues to be the proprietor, and therefore, before any of his deeds regarding it can be set aside, there must both be a clause irritating or voiding the deed, and a resolutive clause, whereby his own right must also be forfeited by having done that deed. Nor is there the smallest shade of difference between these deeds with respect to heirs and the public. It is indeed laid down by our authors, that a gratuitous alienation in contravention of a prohibition may be set aside on the Act 1621. I will not controvert this, although I think that it has arisen from old ideas of law entertained before the date of 1685, c. 23., continued down, without attending to the alteration introduced by that statute; and, *2dly*, That, in the cases to which the statute has been found to apply, the prohibition to sell was constituted in the form of an obligation on the heir of the estate not to do it, whereby the succeeding heirs were considered to be creditors of him in possession. But surely if this be true, or indeed whether or not, it is admitted on all hands, that this statute 1621 applies entirely to the protection of onerous creditors, for setting aside gratuitous alienations to their prejudice, and consequently does not apply to an alienation for onerous causes; and it leads to this great conclusion in this question—that there was no ground on common law for setting aside even a gratuitous alienation to the prejudice of creditors, when it required the intervention of the Act 1621 to operate that effect. Accordingly, it is not so much as insinuated by Mr Erskine, that there is any ground at common law for setting aside a gratuitous alienation, and far less for reducing a sale. On the contrary, he says that the heirs may burden the lands, or alienate them for onerous causes. He then alludes to the opinion of older authors, that inhibition might be used on entails, which he controverts, and adds, 'For restraints are not to be multiplied by implication, and 'inhibition is ineffectual where the person inhibited is not laid under 'some prior obligation, which may be the foundation of the diligence.' Here, then, is a passage certainly implying that a prohibition to alienate contains no restraint on the heir to sell, and constitutes no obligation of any sort against them. How, then, can there be any difference between heirs and the public? I cannot discover any, except in the case of a gratuitous alienation, which, it is said, may be set aside on the Act 1621. By common law, the consent of the superior was necessary to make an entail; and it is expressly laid down by Lord Stair, that, by the consent of the superior and vassal, an entail could be evacuated at pleasure. It is therefore no way probable, that, in passing the Act 1621, c. 18., the Legislature had the matter of tailzies in any way in their contemplation; and, in my humble opinion, any one who reads that statute must be satisfied that it had no such thing in view. I admit, however, that it has been applied to the reduction of gratuitous alienations in contravention of a prohibition to alienate, constituted in the form of an obligation not to

do so; and allowing this to be sound law, which, with great deference, I doubt, there is no reason for extending to an onerous sale dubious principles applying only to a gratuitous alienation. The predicament in which the estate is placed by the latter is toto cœlo different from the former. The estate itself is rescued from the gratuitous disponee, and the intention of the entailer is continued in execution. But by the sale his estate is carried off for ever to strangers, and all his views are defeated.

But I have shown, that, by our old common law, there is no difference with respect to the right of the public and that of the heirs of entail; and that to set aside a gratuitous alienation, in contravention of a prohibition to sell, required the force of the statute 1621. But whatever were the old ideas of the power of entailers and the force of their tailzies, I imagine that it must be conceded by all, that these are and have been all regulated by the statute 1685, c. 22. That Act appears to me to proceed on this great principle, that it was possible to affect the public through the medium only of the heirs of tailzie, and consequently it was thought necessary to place both on the same footing, except in one single insulated case. It declares, that it shall be lawful to his Majesty's subjects to tailzie their land and estates, and to substitute heirs in their tailzies, with such provisions and conditions as they shall think fit, and to affect the said tailzies with irritant and resolutive clauses, whereby it shall not be lawful to the heirs of tailzie to sell, annailzie, or dispone the said lands, or any part thereof, &c.; declaring all such deeds to be in themselves null and void, and that the next heir of tailzie may, immediately upon contravention, pursue declarators, and serve himself heir, &c.

Now, it will be observed, that in this clause there is not the least notice of or reference to the public: It is directed exclusively to the heirs of entail; and the mode is specifically prescribed how they are to be restrained. The entailer may impose what conditions he pleases on them, but he must add irritant and resolutive clauses, whereby it shall not be lawful to the heirs to sell, &c.: and if he do not add these irritant and resolutive clauses, surely the conclusion is, that it shall be lawful to sell, &c.

But the statute proceeds to declare, that such tailzies (viz. such as restrain the heir, for hitherto heirs only are mentioned) 'shall be 'allowed, in which the foresaid irritant and resolutive clauses are 'insert in the procuratories of resignation, charters, precepts, and in- 'struments of sasine, and the original tailzie once produced before 'the Lords of Session judicially, who are hereby ordained to interpone 'their authority thereto, and that a record be made in a particular 'register book, &c.; and which provisions and irritant clauses shall 'be repeated in all the subsequent conveyances of the said tailzied 'estate to any of the heirs of tailzie.' Observe what follows:—'And 'being so insert, his Majesty, with advice and consent foresaid, 'declares the same to be real and effectual, not only against the con- 'traveners and their heirs, but also against their creditors, comprisers, 'adjudgers, and other singular successors whatsoever.'

Here, then, it is expressly declared, 1*st*, That there must be irritant and resolutive clauses to affect the heirs; 2*d*, That these must be insert in all the conveyances and transmissions of the estate; and, 3*d*, That the tailzie must be recorded in the Register of Tailzies; all which is necessary to make it effectual against the heirs and the public. There is no distinction between the two, as is proved beyond dispute by the immediately following clause of the statute relative to heirs alone:—

'It is always hereby declared, that if the said provisions and irritant 'clauses shall not be repeated in the rights and conveyances, whereby 'any of the heirs of tailzie shall brook or enjoy the tailzied estate, 'such omission shall import a contravention of the irritant and resolu- 'tive clauses against the person and his heirs who shall omit to insert 'the same, whereby the said estate shall ipso facto fall, accresce, and 'be devolved to the next heir of tailzie, but shall not militate against 'creditors, and other singular successors, who shall happen to have 'contracted bona fide with the person who stood infeft in the said 'estate, without the said irritant and resolutive clauses in the body of 'his right.' Here there is a distinction laid down between the heirs and the public in one single case, which, in my opinion, proves incontrovertibly that in other particulars the statute applied to both indiscriminately; and the consequence of this is plain, that if an entailer do not choose to observe the mode pointed out to him by the statute, he has not taken the proper method to restrain the right of property in his heirs, who are therefore as free as is the public. To say that he has a right to prohibit his heirs to sell, and that if they do contravene that prohibition they are liable for damages, which are, to lay out the price on another estate, is just to repeal the statute, and to make an entail effectual against an heir, although there be no irritant and resolutive clauses applicable to a sale,—to make it not lawful for the heir to sell, by the mere force of a prohibitory clause, when the statute enacts, that to make it not lawful the prohibition must be affected by irritant and resolutive clauses. It is to enable the entailer to entail money, viz. the price, when he has not entailed the land. It appears to me, that the only possible ground on which a prohibition to sell can be converted into an obligation to re-employ the price obtained by a sale, is, that equity demands that the person who takes an estate under a prohibition to sell, ought not to be allowed to violate it with impunity. But I entirely concur with what was observed by the Lord Chancellor on the case of Westshiells, that there is no equity in restraints on the use of property; and I consider this observation to be proved by the statute 1685, which renders certain forms necessary, in order to restrain effectually heirs to estates from alienating them. If the Legislature had thought that there was any equity in enforcing restraints, they would have either not passed that Act, or declared that a prohibition to sell, or contract debt, or alienate, should be effectual both against the heirs and the public. But, as is already said, such an enactment was neither consonant to principles of law or the ideas of the Legislature. A case was put, at the pleading of this case, by the pursuer. It was supposed that an entail contained a prohibition to the heirs to sell or alienate the whole or any part, and also contained a resolutive clause applicable to this prohibition, but no irritant clause: The heir was supposed to make a partial sale, which could not be set aside on account of there being no irritant clause; but, in consequence of the partial sale, the heir's right to the remaining part unsold was forfeited; and it was contended, that he could not be called on to refund or re-employ the price of the part sold. This concession by the pursuer (viz. that the heir could be forfeited for contravention, in virtue of the resolutive clause, when there was no irritant one) was laid hold of by the defender, who replied, that if the contravener could be forfeited for having made a partial sale, the same consequence would follow if he had sold the whole; but, as the subject could not be recalled from an onerous purchaser, the consequence must be, that the heir must be found liable for the whole price, because

otherwise this result would ensue, that the heir would be punished for a partial contravention, by forfeiting his right to the remaining part of the estate, whereas, if he sold the whole, he could not be liable in any way to the succeeding heirs. To solve this difficulty, I am of opinion that the concession was a mistake in law, viz. that the heir could be forfeited for the partial sale, while at same time it remained effectual.

The Act 1685 makes it necessary to have both an irritant and resolutive clause, in order to affect the heir, and make it not lawful for him to sell; and accordingly it has been decided in this Court, and in the House of Lords, that an irritant clause without a resolutive, and, per contra, a resolutive clause without an irritant, are each ineffectual to restrain an heir of tailzie from selling. This was argued by the Court in the case Gardner v. Heirs of Entail of Dunipace, reported by Lord Kilkerran, p. 540. No. 4. And I the more particularly refer to this case, because although, for want of an irritant clause, the debts were found to affect the estate, no use was made of the resolutive clause to forfeit the heir; nor does there appear on record a single instance, so far as I know, in which an heir has been forfeited in virtue of a resolutive clause, when the tailzie was defective in one irritating his deeds. In the case of Dunipace, Lord Kilkerran details the doubts and subtleties that had existed among lawyers relative to irritant and resolutive clauses. He says that no man ever doubted the necessity of a resolutive clause, 'while our lawyers were not 'agreed that an irritancy of the debt was necessary where the contra-'vener's right was irritated.' Thus it was not agreed among lawyers, whether an irritant and resolutive clause were both necessary; and Lord Kilkerran continues,—'And though the statute has no retro-'spect, it has always been considered as settling the several subtleties 'about which lawyers had been so much divided, and particularly the 'import and effect of irritant and resolutive clauses,' &c. The statute then settled these subtleties; and it declares, that it shall be lawful to tailzie, with such conditions and provisions as the entailer shall think fit, 'and to affect the said tailzies with irritant and resolutive clauses, 'whereby it shall not be lawful to the heirs of tailzie to sell, annailzie, '&c.; declaring all such deeds to be in themselves null and void, and 'that the next heir of tailzie may, immediately upon contravention, 'pursue declarators, and serve himself heir.' Both clauses are therefore necessary,—the one to set aside the deed of contravention, and the other the right of the contravener; for if the deed be not voided, the succeeding heir cannot pursue declarators, and serve himself heir. I therefore conclude, that if a tailzie do not contain an irritant clause, the resolutive will be inoperative, as much as an irritant clause is without the resolutive; and consequently no argument can bear on this cause which proceeds on a contrary supposition. In my humble opinion, an entailer who prohibits his heirs from selling, and who does not make that effectual by irritant and resolutive clauses, must be understood to say,—I prohibit you from selling, which is declaring my wish that you shall retain my estate; but if it so happen that you do not find it convenient to comply with my desire, I cannot help it; I do not choose to restrain you.

It is pleaded by the defenders, that the prohibition is only personal against the heir; but I apprehend this to be a mistake. The prohibition is entered in the infeftment, and thereby must be a real burden on the heir, if it be validly constituted. But my opinion is, that it is neither real nor personal against the heir more than against the public, because it is not validly constituted by law. There are, therefore,

two mistakes;—one in assuming that the prohibition is effectual against the heir, though not against the public; and, 2dly, assuming that the contravention forms an obligation on the heir to make reparation. Nothing can more distinctly prove that a prohibition forms no personal obligation upon an heir than the fact now universally admitted, that an inhibition used against him has no effect whatever, although the contrary seems to have been understood in the days of Lord Stair, and even Lord Elchies. A very ingenious attempt was made by the Counsel for Mr Fullarton to show, that the reason why an inhibition is not competent on an entail is, that inhibition is only effectual to enforce or secure implement of an obligation to do or pay something; whereas here there is only a prohibition to do. But this appears to me just to prove, that, even in a question inter hæredes, there is no obligation constituted by the prohibition. There is only one way appointed by the statute, whereby it shall not be lawful to the heirs of tailzie to sell; and if that way be not adopted, the conclusion surely follows, that it remains lawful to them to sell: and if it be lawful, I cannot, by any process of reasoning of which I am capable, arrive at the conclusion, that they are under an obligation not to sell, and are liable for damages for doing what is lawful to be done; whereas, if there were an obligation, it would secure the performance of it, and prevent the public from aiding to commit the breach. The mistake under which these old lawyers lay, with regard to the effects of an inhibition, accounts for their opinions on tailzies containing a prohibition to sell or alter, &c. They held the prohibition to be coverable by an inhibition; but that being a mistake, it follows that the prohibition constitutes no obligation—it is just a prohibition, and nothing more; and if not made effectual by irritant and resolutive clauses, it has no effect whatever on heirs more than singular successors. It was said by the defender's Counsel, that an inhibition is not effectual in the case of an entail, because the estate is protected by a statutory immunity arising out of the Act 1685. But this is giving in other words the reason which I have already offered. For what is the immunity? Nothing else than this,—that if an estate be not entailed in terms of the statute 1685, the entail cannot be propped by an inhibition. It is saying, that a prohibition to sell forms no obligation upon the heirs; because, if it constituted an obligation, the inhibition would be as effectual to prevent a sale to the injury of the succeeding heirs, as an inhibition is against the proprietor of an unentailed estate selling it to the defeasance of the right of a creditor by bond or minute of sale. The principle therefore is, that a prohibition is a mere restraint, and does not constitute any obligation whatever, either in law or equity.

Another strong proof to me that the public and an heir are in the same situation, and that the former can be affected only through the latter, is, that the public and the possessor of an unentailed estate are placed in the self-same situation by law. If an inhibition be not duly executed against both, it can have no effect. Its object is to secure the landed property of a debtor to his creditor. If the inhibition be not duly executed, the debtor may sell his estate, and the creditor can have no redress. An arrestment may be used to secure the price; but the inhibition alone will have no effect. The same happens if the inhibition, though duly executed, be not recorded within forty days after its execution. The statute 1581, c. 119. declares, 'that na interdiction or inhibition to be raised and executed hereafter 'be of force, strength, or effect, or onie intention; bot the samen to 'be null and of nane avail, except the samen be duly registrat, as

'said is.' In the same spirit, the Act 1685 gave power to the lieges to tailzie their lands and heritages, and to affect the same with clauses irritant and resolutive, whereby it shall not be lawful to the heirs of tailzie to sell, alienate, &c. If the lieges do not choose to affect their tailzies with irritant and resolutive clauses, no other conclusion can follow, than that it remains lawful to the heirs to sell, &c.

It has been endeavoured to assimilate a prohibition to sell, to the obligation constituted by a man providing his estate to his children by an antenuptial contract of marriage, to make that estate or its value forthcoming to them. But to me there does not appear to be the least analogy between the two. The intention is to provide the children, not with this or that estate, but to make a provision for them to the extent of the estate alluded to in the contract. The father is left in the fullest power of administration, in the exercise of which he is understood to act tanquam bonus vir, having always in view the intended object of providing for his children, and may therefore sell the estate, or keep it, as he thinks most conducive to the proposed end; and it even admits a greater license, for he may provide for a second wife and family. It is a contract uberrimæ fidei, a favourite of the law. It contains no prohibition upon the husband to manage as he thinks proper; but it contains an obligation upon him to provide for his family, receiving the most liberal interpretation, and the utmost support; whereas an entail is strictissimi juris, tolerated by the law under certain conditions. It is a deed wherein the granter has respect to one estate, and that alone. All his cares and anxieties bear reference to it. His heirs are to be of that estate, to bear the name and arms of him and that estate, which is to be transmitted to his heirs in tempore futuro. If, therefore, the estate be disposed of, his object is frustrated; and he can never be presumed to intend that his heirs shall sell and acquire other estates, repeating such procedure two or three times in a year. The principle is absurd, and the consequences of it expose it to be so. For, only to mention one of them,—I would wish to know who is to determine what lands are to be bought, or how the money is to be laid out in the mean time, or whether lands are to be bought in Scotland or England, or in any other part of his Majesty's dominions? In further illustration of the distinction of the principles of law which I have laid down, I refer to the case of an heir of entail not recording the tailzie. All authorities are agreed, that if it be not recorded, all his deeds will affect the estate. Thus he and the public, in the first instance, are on the same footing: Both are free to act. But the heir who left the tailzie unrecorded, and contravened its prohibitions, would be liable for damages, if there were in it, as there commonly is, an obligation to record the tailzie, because there would be a direct breach of an explicit obligation, which he could be compelled by an action of law to implement; whereas it is decided, that by any action he cannot be prevented or interdicted from contravening a prohibition, if not fenced by an irritant and resolutive clause. If in the tailzie there was no obligation laid on him to record the tailzie, he might leave it unrecorded, and be liable to no damages for doing so.

One other consideration strikes me as highly illustrative of my opinion, and proves that in law no claim for damages arises out of the contravention of a prohibition. In the Queensberry entail there was a prohibition to alienate, under an irritant and resolutive clause, &c.; and the late Duke of Queensberry let leases, for which he took large

grassums. It is well known that these leases were considered to be alienations struck at by the tailzie, and were set aside; in consequence of which, the Duke of Buccleuch raised actions, in which he claimed from the executors of the Duke of Queensberry violent profits or damages, from the date of the death of the latter; and this he grounded on the principle, that his Grace, by granting such leases, had contravened the prohibition in the tailzie, and thereby deprived the Duke of Buccleuch from drawing the true rents of the farms, which otherwise he would have done. But this Court and the House of Lords both declared, that no such claim arose out of the violation of the tailzie.

The leases were set aside, and that was all the redress that could be obtained. It has been said that there was an irritant and resolutive clause applicable to the tacks, and by these the Duke of Buccleuch might have had his redress, and therefore was not entitled to any other. But this is just saying that the prohibition to alienate, which was judged to apply to these leases, was protected by a sanction; and from that it surely follows, that if there be no sanction imposed by the entailer, when he had it in his power to add one, the Court is not entitled to add one for him. Would it not be an astonishing proposition, that the Duke of Buccleuch would have been better off if there had been no irritant and resolutive clauses, than he was with them? If there had been none, the leases would have subsisted, and his Grace would have obtained damages, if the argument of the defenders be solid; but by having it in his power to set aside the leases, he got none. By the entail being effectual, he was in a worse condition than if it had been defective. But can any man possibly say, that although there were irritant and resolutive clauses, there was not also a prohibition which was violated? And as it is from that violation that the claim for damages arises, it appears illogical to maintain, that, because an additional sanction is introduced, that the other, said to be founded in common law, is lost. I am therefore humbly of opinion, that the case of the Duke of Buccleuch against the executors of the Duke of Queensberry is a case directly in point, and settles that the contravention of a prohibitory clause in an entail does not constitute any claim of damages against the contravener.

But it was also argued, that the doctrine of surrogatum applied to this case; because, since the heirs, after the pursuer, would have had right to the estate if he had not sold it, they are entitled to the price as coming in place thereof. To me this doctrine does not seem to apply. Surrogatum takes place only where the absolute property is vested in the person who claims the subject that comes in its place. For instance, when an heiress of a landed estate marries, without conveying her estate to her husband, the right to the rents only belongs to him, while the property of the subject itself remains with her. If they find it convenient to sell the estate, she must concur in the conveyance; and of course the price, coming in place of the subject itself, belongs to the wife, as a surrogatum for the land which was hers. The same principle applies to all the other cases collected under the word Surrogatum—the actual right of property must have been in the person, or his heirs, who claim the surrogatum. But here the heirs of Blackbarony had no right of property in it. They had nothing more than a spes successionis, defeasible at the will of the pursuer; so that, with much deference, I am clearly of opinion that the doctrine of surrogatum does not apply to this case. It must be solely on converting the prohibition to sell into an obligation to re-employ the price, that the defender can have a chance of success;

and I consider that I have distinctly proved, that no such obligation can be inferred, either in law or equity.

Various authorities were referred to by the Counsel for Mr Fullarton, which I do not mean to investigate; 1st, Because I know that some of my brethren who concur with me in opinion, will do so; and, 2dly, Because I know that in the case of Westshiells, part of which estate was sold in contravention of a prohibition, the Second Division found Sir James Stewart liable to re-employ the price. On an appeal, the Lord Chancellor was of opinion that there was no precedent applicable to the case, and remitted to the Second Division to reconsider it; which their Lordships will probably never be required to do, as it has been at rest for more than ten years. I will only remark, that the case principally relied on by the defender is that of Cuming of Pitlurg *v.* Gordon, 29th July 1761, in which the Court indirectly found that the heir of entail was not entitled to sell the estate, and gave as a reason for doing so, that if he did, he would be liable to re-employ the price. The Court so far altered this judgment in the case of Westshiells, wherein it was found that Sir James Stewart was entitled to sell the estate, although they also found him liable to re-employ the price; and as for the reason assigned by the Court in the case of Pitlurg, the question was not before it, either in the summons or the argument, so that it must properly be considered as obiter dictum; and, on these grounds, I consider it to be noway wonderful that the Lord Chancellor held it to be no precedent.

I would add, that the clause conveying the heritable and personal estate belonging to John Murray to his heirs, and taking them bound to convert it into money to be laid out in purchasing land, shows the difference between an obligation and a prohibition; and it would be strange, to construe in the same way clauses totally different in their object and expression.

Perhaps it may be true that John Murray intended to direct his irritant and resolutive clauses against a sale; but there is no certainty whether he did or not. In law, his meaning must be collected from his words. He only prohibited his heirs from selling more land than was necessary to pay his debts. They were therefore at liberty to sell if it was necessary, and he must have seen that they might sell more than was requisite; yet he did not, even in that case, impose any obligation on them to lay out the surplus on land to be entailed. And I am of opinion, that as he did not constitute his prohibition in the form required by the statute to bind his heirs, it was lawful for them to use their right of property; and as he imposed no obligation on them in case of sale to re-employ the money for behoof of his heirs of tailzie, the defender, Mr Stewart, cannot be liable for damages or reparation for exercising what was lawful for him to do; for I consider it to be a solecism in law or in reason, that any man shall be liable in damages for doing that from which the law cannot restrain him.

Lords Alloway and Eldin delivered this opinion:—This entail being defective in the irritant and resolutive clauses, is not sufficient to prevent the proprietor from selling the entailed estate. Accordingly, he has sold a part of it, and the purchaser having suspended payment of the price, the case has been brought before the First Division of the Court by suspension at the purchaser's instance, and declarator at the proprietor's instance, against the heirs of entail, concluding that he had right to sell, and the lands being sold, that he has right to the price as his own money. Under these circumstances, the

question is, Whether the proprietor's claim to the price is well or ill founded?

We are of opinion, that the pursuer had power by the entail to sell the lands in question, and the lands being sold, that he has right to the price as his own money, without being liable to any claim whatever on account of the sale.

It is well known, that before the use of entails in Scotland, with irritant and resolutive clauses, all proprietors of land had power, with consent of the superior, to alienate their estates; and when the destination in the charter was so expressed as to transmit the lands, upon the death of the proprietor, to an heir, or a series of heirs, the heir who succeeded had power, with consent of the superior, to make a different destination, and, even without the superior's consent, to alter the investiture of the lands by means of adjudication—a process which the superior could not oppose.

But not long after the beginning of the 17th century, various devices were contrived by lawyers, intended for the purpose of imposing such fetters upon the landed proprietors as to prevent them from alienating or burdening their estates. We are of opinion, that such contrivances were altogether nugatory till the Act 1685 was passed, of which afterwards. It cannot be questioned that the Act is compulsory; but at common law there is no valid entail, and no such entail can be contrived.

Prohibitory clauses were the first restrictions attempted against the heirs of investitures; but they were not sufficient to prevent the proprietor from altering the entail. For he never was without power, in virtue of the right of property, to alienate the lands, or contract debt; and in either case the prohibitions were ineffectual, because no prohibition could prevent a creditor or purchaser from carrying off the lands by his diligence. Nor was the proprietor bound by the prohibitions. A prohibition did not bind him to re-employ the price if the lands were sold; nor to redeem, if they were apprised or adjudged.

Thus it appears that the prohibitory clauses were altogether nugatory, unless they were enforced by inhibition—a diligence which was in use for a long period; but, for the purpose of securing an entail, it is now exploded, and the prohibitory clauses give no disturbance to the proprietor in his selling or contracting debt, because they cannot be enforced by inhibition. See the cases of Bryson against Chapman and Barry, 22d January 1760; Lord Ankerville against Sanders, &c. 8th August 1787; and Lockhart against Stewart, 11th June 1811, in all which inhibition or interdict was refused.

It does not appear that at any time clauses in an entail, when they were merely of a prohibitory nature, and were not enforced by diligence, operated as an effectual restraint upon the proprietors of estates. But they may have had some effect, though they could be defeated; and, very soon after they were introduced, contrivances followed them, apparently of a more powerful nature. The irritant and resolutive clauses were soon afterwards invented and employed. Conditions also were sometimes used by the conveyancer. These did not assume the form of prohibitions, or the threatening aspect of irritant and resolutive clauses, but appeared in the shape of obligations undertaken by the proprietor, and binding on him personally by the terms of the investiture. Some of these were direct obligations, and others of them were in words intended to operate by means of implication. How far such clauses would be useful amidst a crowd of irritancies, it is

unnecessary to consider, as there are no such clauses in the investiture of Ascog.

For, a direct prohibition to sell is not in the form of an obligation. The proprietor is only prohibited, without being laid under the necessity of obeying the prohibition. He is no more bound against selling the lands, than he would be bound by a prohibition in the entail against committing any other act that had no reference to the management of the estate. Nor is there even an implication in the prohibition, to the effect that it must be construed as an obligation. An entail admits of no implication. The words must be direct and plain in their meaning; but if implication were admissible, there is no implication in the words of a prohibition.

Supposing, then, an entail with irritant and resolutive clauses, it is idle in such a case to pretend that prohibitory clauses against selling, &c. can have the smallest effect by implication or otherwise. In such a case, the pretence of an obligation to re-employ the price when the lands are sold is utterly absurd. No such obligation has been expressed in the entail, and no such implication is implied; for some express obligation is necessary to raise an implication of some other obligation. But it is evident that a prohibition creates no express obligation whatever.

Much less does an obligation to re-employ arise from the contravention of irritant and resolutive clauses, which accompany clauses merely prohibitory without having an obligatory form. In such a case, the contravention raises no obligation at all.

The true effect and force of the irritant and resolutive clauses have not been well understood by the defenders. These clauses were invented merely for the purpose of assisting the prohibitory clauses, and, in the performance of their functions, it must be admitted that they proceed in a manner sufficiently menacing. By these clauses the proprietor is threatened with absolute ruin to himself and his family, if he should happen to waste or destroy the estate, or any part of it, however small. Power is given to all and each of the heirs of entail to bring a comprehensive action for depriving him of the estate altogether, without leaving him the smallest hopes of recovering it, or any part of it. Even his descendants, to the latest generation, are in some cases reduced to beggary without relief, though they are totally innocent of any fault. At the same time, all the deeds of the proprietor which might affect the property of the estate are reduced, and he is not allowed the means of paying his most urgent debts from the rents, however ample they may be. Such is the plan of a strict entail, as is contrived for the purpose of preserving the entailed estate.

Such being the rigorous nature of the irritant and resolutive clauses, they have necessarily introduced a considerable relaxation in the legal construction that has been applied to them. Of this the instances are so numerous, that it is unnecessary to enter into the particulars. It is enough to say, that they are so modified in the practice of the Court, that the clauses which appear prima facie to be so full of rigour, are seldom extended to the forfeitures so much denounced by the terms of the entail.

It was, however, the object of these clauses to secure a full and complete protection of the entailed estate, and it was thought necessary, 1st, That all deeds of the proprietor against the prohibitions, or in contravention of them, should be void and null, and so declared by the express terms of the entail itself. The reason for adopting such a clause was sufficiently obvious. It was held in law, that every

deed of a proprietor was necessarily effectual against the estate, unless the right was cut off by a quality inherent in it. For it was held, that no man could be a proprietor, without having power to bind his estate, unless his power was qualified by the condition, that all his deeds contrary to the prohibitions should be absolutely void and null. This clause is directed, not so much against the proprietor himself, the contravener, as against the creditor or purchaser, who had by debt or purchase obtained a right which would have been effectual if it had not been so annulled.

It could not be said that the creditor or purchaser had in any way consented to such a condition, but the proprietor himself had consented to it, by accepting of the investiture qualified by that condition; and the superior who had granted the right was held to have power in granting it to qualify it with that condition, or any other condition consistent with law. Besides, the party to whom the property had previously belonged, and who conveyed it to the superior under the same conditions, was held to have power to restrict the terms of his gift, so as to annul the deeds which were contrary to the nature of the gift, and, at the same time, contrary to the same conditions which had been assented to by the superior.

Further, in order to secure the object of these clauses by a full and complete protection of the entailed estate, it was thought necessary, 2d, That the person who should contravene the entail, &c. should forfeit his right, which should become void and extinct, and the estate should devolve upon the next heir appointed to succeed; and that this should be declared by the entail itself. For this the reason is sufficiently obvious. It was held in law, that no man could possess a right to lands, without having power to bind those lands for his debts and deeds. In this view, the irritant clause, though it was necessary, was not sufficient per se for the safety of the estate. For it was not enough to declare the nullity of the deed of contravention, and to declare that the creditor or purchaser should obtain no right by or through the deed in his favour. The irritant clause did not take away the contravener's right to possess the estate itself; and while he continued to possess it, the law gave him full and complete power to dispose of it; and the estate was exposed, while in his possession, to the claims of every creditor and purchaser.

Thus the two clauses were held to be necessary as counterparts of the same plan. The right proceeded from the will of the former proprietor, who had the absolute power of disposal; and the power which belonged to him was held to be carried into effect by the consent of the superior. But still it was held to be necessary that all deeds of contravention should be declared void and null; because, if they were not so declared, they were not held as being null and void, although they were contrary to the prohibitions: and that, in every case of contravention, the contravener should forfeit his right, as already mentioned, and that this should be declared by the entail itself; because the nullity of the deeds, though declared by the irritant clause, was not attended with the forfeiture of the contravener, so long as there was nothing in the entail, or nothing declared, to prevent him from retaining his right to the property.

In this manner, the prohibitory, irritant, and resolutive clauses, reciprocally assist each other, and are absolutely necessary to preserve the titles of the entailed estate against sales or dilapidation.

But these subtilties of the lawyers, contrived in an early period of the seventeenth century, were of a very questionable nature; and

though there was a decision in favour of an entail, in the famous case of Stormont, in which the entail was so defective that it even wanted an irritant clause, that decision never had any authority; and the greatest lawyers held the whole of the plan to be extremely doubtful. In effect, it is humbly thought the plan was full of difficulties, and could not have been supported by the common law. It may be noticed, in particular, that the irritant clause did not annul the act of contravention before declarator: In the mean time, the contravention was valid. Neither did the resolutive clause take away the right of property before declarator: The heir still remained proprietor, having right to act as such.

In short, the Act 1685 was necessary to establish the validity of entails. It is thought that no view of the common law could have supported them without the aid of that statute. This is a point which may now be considered as absolutely indisputable, as it has been established by the highest authority in the law, against which nothing of any weight can be stated. See Stair, b. 2. t. 3. sect. 43. 58. Tailzies. —Erskine, b. 3. t. 8. sect. 25.—Mackenzie, vol. ii. p. 489.—Opinions of President Miller, and Justice-Clerk Braxfield, and of Court—Hamilton, &c. against M'Donald, 3d March 1815; Fac. Coll. p. 326. and 327.

It may now be considered more particularly, whether the pursuer is under any legal obligation to re-employ the price of the lands which have been sold? Upon this important question the following considerations may be offered:—

It is quite clear in law, that, before the introduction of strict entails in Scotland, proprietors had power to alter their investiture in virtue of their right in the property, and that without being subject to any claim from other parties; and, of consequence, when they sold the land, they were not bound to re-employ the price of it, but had power to dispose of it as they thought fit.

This is the foundation of the present argument, because it will be found that the proprietors of land at the present day have the same powers, excepting in those cases in which they have been restrained by law from selling, or have incurred an obligation to account for the price of the land when it is sold.

The introduction of strict entails was an innovation, which interrupted, in various ways, the commerce of land; and ultimately, by the statute 1685, c. 22. when it is applied, the heir of entail is deprived of the power of selling. But where that statute has not been properly applied, he has not only power to sell, but, as we conceive, he has power to dispose of the price; for entails, before the statute 1685, were not warranted by any law whatever. And the statute being passed, it did not apply to nor warrant every entail that might be contrived; for the statute, so far from being intended for every entail, is intended only for entails of a certain form, and when enforced by irritant and resolutive clauses. And certainly, after the statute 1685 passed, no entail could be effectual but those in which the parties had availed themselves of the enactments of that statute; and all other entails, not being warranted by the statute, were not sufficient to bind either heirs or creditors. And such is the entail of Ascog, now in question, as it not only enables the proprietor to sell, but puts him under no restraint as to the price, by re-employing it for the benefit of the other heirs of entail, either by the purchase of land to be entailed, or in any other way. For the entail of Ascog is not one of those which contains fetters or obligations binding the pursuer to employ the price: There is

no such obligation in the entail. There is indeed a prohibition to sell; but such a prohibition in an entail that is not fenced by irritant and resolutive clauses, is a prohibition which may be legally discharged, as it contains no obligatory force. The prohibitory clause is not binding even by implication, though implication, if it could be alleged in this case, is not admissible in a question of strict entail. Now, the entail of Ascog is one of the strictest nature, with irritant and resolutive clauses applicable to the prohibitions. This, therefore, is the case of a strict entail, in which no implication whatever can be allowed.

It is alleged that this is a question among heirs, and that although strangers are entitled to purchase parts of the entailed estate, the pursuer, who is an heir of entail, is barred by his quality of heir from taking advantage of that purchase. But the answer to this is obvious. In selling a part of the estate, the pursuer did no wrong, but only used the right that was competent to him. To pretend that the pursuer did wrong in selling, because he is an heir, is an imagination for which there is no ground whatever. The defenders can point out no authority, either in the statute or in any law, by which the pursuer was barred from selling, nor any law declaring that he did the smallest wrong in selling. In effect, the question among heirs is the very same with the question with strangers who may become purchasers. There is no pretence, therefore, for maintaining, that there is any law or impediment whatever against the pursuer in making use of his right.

Some of the other arguments are still more untenable. For example, it has been stated that the price of the estate is a surrogatum for the estate itself; from which it is inferred that the price, like any other surrogatum, must be employed in the purchase of property to be entailed. But this is an absolute begging of the question, if indeed any dispute on the subject can be maintained. Before it can be made out that the price is a surrogatum, the defenders must establish the fact that they have a right to the price; and if they establish such a right, it signifies very little whether they call it a surrogatum or not. But we conceive that this right of surrogatum cannot be maintained. If it appears that the pursuer had power to sell, and was under no restraint or obligation not to sell; indeed, if he had power to sell, it seems to follow as a necessary consequence, that he has right to the price, because he sold on his own account, and not on account of the defenders.

The defenders have also founded on the principle upon which contracts of marriage are regulated. But we could not have anticipated an argument of that nature; because the obligations contained in these deeds have no resemblance whatever to the obligations in tailzies. A contract of marriage is in every case full of implication, and depends almost entirely upon the good faith of the contractors; whereas there is not the least room in a strict entail for implication of any kind.

And upon the whole of this matter it may be stated with confidence, that the obligations, if such they can be called, in favour of the heirs of entail, cannot be binding in a case in which nothing can be sustained without applying to it the most rigorous construction which is of necessity given to entails. What words are there in this entail that can, without implication, be interpreted as a binding obligation to re-employ the price of the lands which have been sold? Excepting the destination itself, in which the heirs of entail are enumerated, there is not a single phrase in the deed that must not be construed according to the most lax interpretation, before any claim of this nature can be raised upon it. The question then comes to be, whether the rules of interpretation so completely established, are to be wholly abandon-

ed for the benefit of these heirs of entail? So far is this from being tenable, that the defenders would certainly have failed in their case, although the irritant and resolutive clauses, which destroy every kind of implication, had been cancelled.

Prior to the statute 1685, the effect of entails depended very much upon imposing the different clauses or conditions in an obligatory form, so as to be expressly binding upon the granter and his heirs, as well as the heirs of entail. This form gave the substitute heirs some protection under the Act 1621, c. 18. But we conceive, that although this statute might have protected gratuitous alienations, as being contrary to any direct obligations entered into, it never could have applied to the present case. This is not a gratuitous sale, but one entered into for a fair and onerous price; nor is it granted to a conjunct and confident person;—two of the essential requisites of the Act 1621, without which it cannot apply.

And even in the case of a deed expressed in an obligatory form, the Act 1621 had no effect against an entail, in terms of the statute 1685; because that statute had the effect to exclude the other as to the penalties, according to the words of Erskine, (1. 7. 22.), that 'where statute hath inflicted special penalties upon any offence, all others are 'understood to be excluded.' Therefore, since the Act 1685, any feeble aid that entails could previously have derived from the statute 1621 was at an end; and, since the passing of the Act 1685, every entail must stand or fall by that Act alone.

Accordingly it will be found, from a due attention to the different cases which have been stated and commented on at great length by the defenders, that there is not the least ground for the conclusion drawn from them.

Before considering those decisions which were so much founded on as establishing the right of the heirs of entail to insist upon the heir selling to reinvest the money, it is important to observe, that notwithstanding the vast number of entail cases that have occurred in this country, and in which entails have been set aside in questions with the heirs, we do not know of a single case in which the heir has ever been compelled to re-employ the money, or the price of the estate sold, in acquiring lands to be entailed in the form of the first entail; nor, with all the industry and ability exerted on the part of the defenders, has a single case of this nature been discovered.

Indeed, as it is admitted that the defect in the entail could not be cured by reinvestment of the price in the same terms, the operation might be entirely nugatory, even if it could be legally enforced; since the very person who reinvested could again sell the subjects whenever he pleased, and must be the sole judge of this matter, and of the nature and situation of the subject to be purchased; which might again be sold as often as the whim, caprice, or interest of the person in possession might dictate, without restraint from any of the heirs.

The only case referred to, in which it is alleged this principle was ever carried into effect, occurred nearly a century ago. But it does not appear to us to have the least weight. This is the case of Lord Strathnaver against the Duke of Douglas, 2d February 1728. The principles upon which that case was decided, have been long ago exploded. It was there successfully maintained, that a prohibition to alienate and to contract debt implied a prohibition to alter the succession, although the direct contrary has been since repeatedly found, both in this Court and in the House of Lords. Indeed we doubt, from the terms in which this case is reported, and from the terms of

the judgment, whether it was the case of an entail to which the strict interpretation of an entail applied. For the granter of that deed, the Countess of Sutherland, imposed obligations upon her heirs; and as her son, Lord Forfar, served heir of line to her, he was universally liable to implement all her obligations of every nature and description. This would have applied to him as heir of line, even supposing he had not been heir of entail, and must, in the same way, have affected all persons representing him. It seems impossible to hold that case to be authoritative in law; every point, in so far as it relates to the construction of entails, being admitted to be erroneous. And there are also other grounds pleaded by the parties in that case, sufficient to show that it is totally inapplicable to the present.

The next case is that of Pitlurg, 29th July 1761, to which a great deal of importance has been attached. The question, as stated by Mr Wight, 'was relative to power of an heir of entail to sell;' and the clause on which that question rested was, that the heirs of entail, in the event of committing treason, should lose their liferent, but that the right, after their decease, should return and remain with their next heir of tailzie; and that the heirs of tailzie 'shall never have power, by 'any other deed whatsoever, whether treasonable or otherwise, by 'contracting of debt exceeding the sum of 12,000 merks for provi- 'sion of their younger children, or any other manner of way whatso- 'ever, to squander or put away the same, or any part thereof, vel fa- 'ciendo vel delinquendo, any ways contrary to this present settlement.' The whole argument on both sides is merely directed to the point, whether the above clause included a prohibition against selling? And the Court found that it contained a prohibition against selling or alienating the estate, to the prejudice of the substitute heirs of tailzie; and therefore, that however safe an onerous purchaser might be, the pursuer, by a voluntary sale of the lands, would contravene the tailzie, and be subjected to an action of reparation and damages at the instance of the substitute heirs. Upon this the following remarks may be offered.

1. This case, in so far as it adopted a different mode of construction of the entail in a question with heirs and third parties, has been completely overturned by all the cases decided since that time. Perhaps the most nice and difficult cases as to the construction of fetters which have ever been tried were with heirs of entail. Such are the cases of Edmonstone of Tillycoultry, of Lady Dalhousie against Brown, of Henderson, and a great variety of other cases, all of which have been decided in this Court and in the House of Lords, and have completely established the very different doctrine, that there is no distinction in the construction of an entail betwixt heirs and third parties, and that there can be no implication in an entail. This, therefore, is admitted to have been an erroneous judgment.

2. After having erroneously decided that the heir fell under the prohibition to sell, the Court found in that case,—where there was no room for such a finding, after establishing the prohibition,—that by contravening the entail he might be subject to an action of reparation and damages at the instance of the substitute heirs of entail. But after having erroneously adopted the one implication, the Court, upon the same principle, may have implied other obligations. After deciding the first by such a latitude of construction, the same Judges gave an erroneous opinion on the other, although, from the decision of the first point, it was unnecessary to decide the second. This case, therefore, we cannot consider as entitled to any weight whatever.

3. But it was stated that Mr Miller, (afterwards Sir Thomas Miller), who writes the petition for Gordon Cuming, the heir in possession, never so much as argued the present point, but confined his whole argument to there being no prohibition against selling; and that there is no discussion with regard to the question of reparation by either Counsel, which could not have been omitted had it been considered a sound plea.

We think the argument in that case, that there was no prohibition as to selling, was absolutely conclusive, and should have succeeded, as it always did afterwards. But we know that some of the most able Counsel, whose attention and arguments have been applied to one view of a tailzie, which they conceived quite decisive, have allowed other fatal objections to escape them. Without noticing some most extraordinary instances of this, much later than the case of Pitlurg, the recent case of Blairhall may be mentioned. The question was first tried in this Court. Solicitor-General Blair, Mr Charles Hay, Mr Matthew Ross, and another Counsel, were engaged on the same side in that case. Their object was to obtain a judgment that the entail was defective, and that the estate might be sold. It was decided by this Court, and afterwards in the House of Lords, that the entail had not the defect which was alleged. But some time afterwards, the case having come back from the House of Lords, it was discovered that the entail contained no prohibition against alteration of the succession. This had escaped the Court as well as the Counsel. But no sooner had the discovery been made, than a new title was made up, by resignation of the lands for a new infeftment in fee-simple, and the question was then tried and decided without the smallest difficulty; and the estate was afterwards sold.

4. But to return to the case of Pitlurg. There might have been strong reasons for not urging the plea that the heir was not bound to reinvest; for the argument in that case, as to the inadmissibility of implication or construction, could not be stronger than it was upon the point of there being no prohibitory clause against selling. Further, at that time it was not distinctly understood, whether substitute heirs of entail might not, in certain circumstances, apply for inhibition against the heir in possession doing any thing to defeat their right. The case of Bryson was decided only the year before. It was not printed in the Reports until 1772, eleven years after the case of Pitlurg. Neither Mr Miller nor Mr Garden, the two Counsel in the case of Pi tlurg, were Counsel in the case of Bryson, as appears by the report; and the case of Bryson could not be held as quite decisive, until it had been followed by the case of Lord Ankerville, and the case of Westshiells, &c. &c.

Now, so long as it was understood that substitute heirs of entail could raise inhibitions according to the old system, before the statute 1685 was introduced, there could be no doubt of an existing obligation. But as this doctrine is totally abandoned, the question must now be considered in a different view. In many cases where an express obligation was constituted in favour of substitute heirs, an inhibition was competent; and this may have led to the opinions of Hope, Mackenzie, and Elchies. It will not be disputed, however, that since the time of Erskine, who expresses great doubt with regard to the former decisions, and since the decisions above referred to, inhibitions upon the prohibitory clauses of an entail are totally incompetent. The nature of entails, and the effect of the statute 1685, from the many discussions which have taken place with regard to that statute, are now

much better understood than formerly. All those authorities therefore evanish, which depend on the competency of inhibition.

Indeed, Lord Elchies' opinion, (p. 110.), and the whole authorities to which he refers, just come to this—That if there be a valid obligation not to alter the destination, or to contract debts, there is no reason why a person should not be bound by such an obligation; and if there be a valid obligation against the maker and his heirs, there is no reason why inhibition should not follow on it: and he founds on the case of Binny against Binny, 28th January 1668, as the authority for his doctrine.

Now, let this case be brought to that criterion. Can inhibition, arrestments, or adjudication, be founded on this entail? It is admitted they cannot. But if there had been an obligation, most certainly one and all of these diligences might have followed, provided the deed had contained no irritant or resolutive clauses. But when there are irritant and resolutive clauses in the deed, any other clauses imposing restraints are superseded, upon the principle already referred to, and to be further noticed in the sequel.

In the case of Binny, to which Elchies refers, Margaret Binny had granted a bond, obliging herself to enter heir of line to her father, and to resign the lands in favour of herself, and the heirs of her body, whom failing, to the heirs of Alexander Binny, her father, and obliging herself to do nothing contrary to that succession. She having married, conveys the lands to her husband by the contract. But inhibition had been used on the bond before the contract. Now, the Court in that case found that the wife was bound to resign, seeing there was 'inhibition used before the contract; but they did not decide whether 'this clause would have excluded the debts to be contracted by the 'said Margaret or her heirs upon a just ground, without collusion; 'but found that she could not make a voluntary disposition to exclude 'that succession, in respect of the obligement to do nothing in the 'contrair.'

If, therefore, any weight could be placed upon the opinion of Lord Elchies, and the authorities to which he refers, it would just come to this, that if there was an obligation either upon the maker or the heir of tailzie, inhibition might be used; but as no inhibition could be used in this case, there is no obligation. And indeed, in the case of Binny, founded on by Elchies, there was a positive obligation by bond upon Margaret Binny and her heirs, and which, quoad the obligee, who was the person with whom the question was tried, was perhaps an effectual obligation, as the question occurred before the statute 1685.

The only other case founded on as supporting this doctrine is the case of Sutherland, 26th February 1801. But in that case we do not see that there was even any argument upon the subject; and it seems to relate to another point altogether. In that case there was a question, whether the destination in the entail was to be regulated by the dispositive clause, or by the procuratory of resignation? The claimant's predecessor had been nominatim called in the dispositive clause, but his heirs had not been called. The question then was, whether it was to be regulated by the dispositive clause, or by the procuratory of resignation, in which the heirs are called? The Court found that it must be regulated by the procuratory of resignation. The entail contained no prohibition against altering the order of succession. The heir in possession had executed a trust-deed, making his trustees accountable, after payment of his debts, to his heirs and assignees. The entailed estate was sold; and the question seems to have been, Who

was entitled to the reversion of the price, after deduction of the entailer's debts,—whether the heirs of entail, or the heirs of the last heir?

As in this case there was no prohibition against altering the order of succession, the general disposition by the heir of entail in possession, in which he makes his trustees accountable to his heirs and assignees, might have been held as an alteration of that succession. If it had, it would have put an end to the claim of the heirs of entail; and if it had not, the heir of entail was entitled to make good his right to the reversion of the price of the lands, according to the entail, the succession to which had not been altered.

We think it unnecessary to take notice of the cases of Westshiells and of Monzie, the first of which was remitted by the House of Lords upon a very full hearing; and the second, we understand, was settled in consequence of the deep impression made by the remit in the case of Westshiells, and of the Lord Chancellor's speech in that case.

We also consider it unnecessary to take notice, at any length, of the decisions of the House of Lords in the Queensberry cases, by which the decision of the Second Division, which had refused the claim of damages, was affirmed, and the decision of the First Division, sustaining the claim of damages by the heirs of entail, was reversed. But these judgments of the House of Lords are of the highest importance, as they adopt the principle laid down by Erskine, already mentioned, that 'where statute hath inflicted special penalties upon any 'offence, all others are understood to be excluded.'

The case of a strict entail unrecorded was also founded on. The entail is not good against creditors, but may be good against the heir by personal exception. In squandering the estate, while he omitted to record the entail, he does a great wrong to the substitutes, nearly the same as if he had burned the entail in his possession. Besides, registration was intended by the statute merely to operate against third parties.

Upon the whole we apprehend, that the law has been so fixed upon these questions, that there is little room for controversy with respect to them; and if, contrary to our expectation, the same question shall again be thrown open, they must necessarily affect every one of the numerous cases decided during the last forty years in which an entail has been set aside. In the sincere hope that such a general calamity may not take place, we shall conclude the statement of our opinion with the following propositions:—

1. Before the introduction of strict entails in Scotland, investitures could be altered by the proprietor, in virtue of his right of property, and of the rights which followed it.

2. The introduction of strict entail was an innovation contrived by the lawyers, the effect of which was at first very little understood; and its effect remained uncertain, until the law was established by the statute 1685, c. 22.

3. During a period before that statute was passed, the conveyances were subject to implications of various sorts, many of which had no foundation in law. Many entails were supposed to be protected under the Act 1621, c. 18. Some of these were in the direct form; but many of them depended upon mere implication, and sometimes upon supposed implication, assumed without grounds.

4. During the same period, prohibitory clauses were introduced, as obligations by an assumed implication, for which there were no grounds.

5. Entails, before the statute 1685, were not warranted by law; and when the statute was passed, such entails as were not warranted by it, were not sufficient to bind either heirs or creditors.

Accordingly, the rule of law laid down by Erskine, and since settled by the judgments of the House of Lords in the Queensberry cases, totally precludes, in the case of a strict entail, any other protection to the estate but the prohibitory, irritant, and resolutive clauses of the entail itself; and thus the Act 1621, and every ground of implication whatever, have been rendered of no force in such a case.

But the most striking proof that the entail has no protection whatever but the prohibitory, irritant, and resolutive clauses, is the rule now so completely established, that an inhibition upon an entail is not competent.

6. Contracts of marriage proceed entirely upon implication, which is altogether inadmissible in strict entails.

7. The price of the estate has been called a surrogatum for the lands, which must be re-employed in the purchase of other lands descendible to the heirs of entail. But this is an evident mistake. The proprietor had power and right to sell the lands, which were his own property, subject to no claim whatever. If they had remained unsold, they might have descended to the next heir of entail; but having been sold, there was no condition in the entail by which the proprietor who sold them could be deprived of the price.

The only ground that can be assumed in such a case would evidently be an implied condition. But there is no such condition even implied, and any implied condition would be inadmissible.

8. It is alleged, that although third parties are at liberty to purchase the entailed lands, heirs are bound by the entail, and commit a wrong in selling; but this is the worst of implications. It cannot be pretended that there is the slightest vestige of a direct or express rule in law against an heir who sells a part of his estate, and who, in doing so, is warranted by law.

9. The question among heirs is the same as the question with strangers. The law is the same with both; and the implication against the heir is as unfounded as any of the other implications.

10. Where an entail, with prohibitory, irritant, and resolutive clauses, is so incorrect that the proprietor has power to alienate or burden the lands, he cannot be compelled to re-employ the price or prices; and if any legal compulsitor were supposed to be competent, it would still be inefficient, because the proprietor could again alienate at any time, without notice to the heirs of entail, and by that means defeat their object; and thus the rule would apply, frustra petis.

11. Taking into consideration the foregoing propositions, either singly or collectively, the necessary conclusion is, that no entail with prohibitory, irritant, and resolutive clauses, under the statute 1685, c. 22. when the clauses are incorrect or defective, and thereby expose the entail to be defeated by sale, contraction of debt, alteration of succession, or any other defect, can be supported; nor can the prices be demanded of the heirs of entail who have sold or disposed of the estate, because, from the nature of the entail, no process can be issued against them to re-employ such prices.

12. None of the former decisions of this Court affect the question now at issue; and the opinion delivered by the Lord Chancellor in the case of Westshiells, when he remitted that case, that there was no precedent applicable to it, is perfectly well founded.

And, finally,—

13. It is not surprising that such is the result of a discussion which demonstrates that every argument of the defenders rests upon assumed implication, for which there is not the slightest foundation in reality, and which, if ever at any time countenanced by some lawyers, has long been completely overruled and exploded.

LORD GILLIES concurred in this opinion.

No. II.

The PRINCIPLES on which the JUDGMENTS of the HOUSE OF LORDS in the late Cases respecting the LAW OF ENTAIL rest, and what seems to be thereby established;—referred to at p. 288.*

I. THE heir of entail in possession by a complete title, is fiar or owner of the estate, entitled to exercise every act of ownership, excepting in so far as he is restrained by the terms of the deed made and registered according to the Act 1685. This is clearly laid down by all the writers since the date of the Act.

This rule seemed to be shaken by the decision in the House of Lords, in the first of the Queensberry cases. The entail did not prescribe any term beyond which leases should not be granted. The House of Lords declared leases for a very long and unusual term to come within the prohibition to alienate; but this was agreeable to what was laid down by some of the best authorities in the law of Scotland, which stated long leases to be 'alienations.'

II. No restraint on the heir in possession is to be raised by implication, nor any right vested in the substitute heirs, that is not clearly given by the entail. The intention of the entailer, however manifest, is not to be regarded, if not clearly and technically expressed in the deed. This was fixed by Lord Mansfield's decision in the case of 'Duntreath,' many years ago, and has been adopted in a variety of cases since.

Lord Mansfield's decision or doctrine in the Duntreath case was, with hesitation, followed by Lord Thurlow, Lord Loughborough, and Lord Eldon, who, as equity lawyers, inclined to think that entails were entitled to fair or liberal construction, and that intention, if clear, as it was in the Duntreath case, might be regarded: yet they held themselves bound by the precedent; and accordingly decided in other cases, where the entailer's intention was equally manifest, as in those of Baldastard, Culdares, &c.

III. The rights of the several parties interested under the deed, and the remedies in case of contravention, can only be ascertained by what the deed itself contains. Judges are not at liberty to go out of it, either to give or take away, however plausible or seemingly equitable the construction may be.

Keeping in view those rules of law, the cases that have been lately decided may be very shortly stated; and it will be obvious that the judgments of the House of Lords are conformable.

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* These notes were made and communicated to the reporters by the late Mr Chalmer, Solicitor in London, recently before his death, and have been thought not unworthy of preservation.