12th May 1804, and 14th and 29th May 1805, be, and the same are hereby reversed. And it is declared, that the persons entitled, under the deed or disposition, 21st August 1732, made by Sir Alexander Murray of Blackbarony, Baronet, in pursuance of the contract of marriage therein recited, are entitled to hold the teinds of the lands specified in such disposition heritably against the said Sir Alexander Murray, and his successors, patrons, and titulars, of the said parish of Eddleston; and that in localling the stipend of the minister of the said parish, the teinds of the lands of the appellant comprised in such disposition, ought to be considered as having been heritably disponed by the said Sir Alexander Murray by the said deed of disposition of the 21st August 1732. And it be further ordered, that the cause be remitted back to the Lords of Council and Session in Scotland, as commissioners for plantation of kirks and valuation of teinds, to proceed in localling the stipend of the ministers of the said parish, in such manner as shall be consistent with this declaration.

For the Appellant, *Wm. Adam, Jas. Moncrieff.*

For the Respondent, *John Greenshields, Fra. Horner.*

NOTE.—Unreported in the Court of Session.

[Fac. Coll., vol. xvi., p. 279.]

Sir JAMES STEWART DENHAM of Coltness, Baronet,
Appellant;

Colonel WILLIAM LOCKHART of the 30th Regiment of Foot, and the Rev. Dr JOHN LOCKHART, one of the Ministers of Glasgow, ... } *Respondents.*

House of Lords, 20th March 1815.

ENTAIL — SALES — PROHIBITORY, IRRITANT, AND RESOLUTIVE CLAUSES.—An entail contained an express prohibition against selling, but the irritant and resolutive clauses omitted to fence against sales, and the estate was sold. In an action brought by the next substitutes, to have the heir who sold the estate to account for the price to the next substitutes, and to re-employ the same in the purchase of land to be entailed in terms of entail. Held

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that a simple prohibition against selling the estate is good in a question between heirs, to the effect, that though Sir James Stewart might sell the estate, yet he was bound to account for the price to the next substitutes. In the House of Lords, the case remitted for reconsideration.

The appellant was institute in the entail of the Westshiel Estate, the respondent, Colonel Lockhart, was the nearest heir of line of the late Sir William Lockhart Denham of Westshiel, the maker of that entail, and he and the other respondent were substitutes under that entail.

The respondents had, in a former action, brought a declarator to have it found, 1st, Either that the appellant, defender in that action, was specially prohibited from selling the lands, or granting any right by which they might be carried off from the respondents' substitutes in that entail; or 2d, That if it should be found that, notwithstanding the foresaid prohibition and clauses, irritant and resolutive, the said defender might sell the lands, then to have it found and declared, that the said defender was accountable to the substitutes in the said entail, in their order, for the price of the said lands and estate.

1775. The deed of entail set forth in the dispositive clause as follows:—"With, and under the burdens, conditions, pro-"visions, clauses, irritant and resolutive, after expressed, I "bind," &c., "to make due and lawful resignation in the hands "of my immediate superiors, of all and whole the lands and "others after specified, for new infeftment to be made and "granted to the heirs male of my own body, and the heirs "male of their bodies," &c., "whom failing, to Sir James "Stewart of Coltness, Baronet, and the heirs male of his body, "whom failing," to a number of substitutes therein set forth. The heirs of entail were expressly prohibited from selling the estate or any part thereof, by the following clause,—"Nor "shall the heirs of entail have any power or liberty to sell, "alienate, or wadset the lands and others foresaid, or any "part thereof, or even grant provisions to younger children, "sons or daughters, except as hereafter provided, whereby the "lands and others foresaid may be any ways affected; or "grant any heritable or moveable bonds, infeftments of annual "rent, or any other rights or securities whatsoever, whereby "the lands and others foresaid may be any ways evicted or "carried off, to the prejudice of the next succeeding heirs of "tailzie." And, after the irritant and resolutive clauses, it concluded with this clause, "With and under all which pro-

" visions, conditions, restrictions, irritances, and burdens above " mentioned, these presents are granted, and to be accepted " by my heirs of tailzie aforesaid, and no otherwise."

The clauses irritant and resolutive, were defective, in so far as they omitted to mention sales. Thus, " If any of the " said heirs of entail shall not use the name and arms of " Denham, or shall alter and innovate this present tailzie, " or invert the succession from the order hereby appointed," &c., " or wadset the lands, or if they shall contract any debts " or grant any provisions, or grant any bonds, either heritable " or moveable, or other rights or securities, whereby the lands " and others aforesaid may be affected, evicted, or carried " away, to the prejudice of the next succeeding heir, then not " only shall the debts and deeds so to be contracted or done " by them," &c.

The Court, of this date, found upon the report of Lord Newton, " That although the defender is laid under a pro- " hibition against selling, as found by the Lord Ordinary's " interlocutor of 8th March 1808, which, on this point, is " final; yet the prohibition is not fenced by irritant and re- " solutive clauses, so as to restrain the defender from making " a voluntary sale to an onerous purchaser, and, therefore, " recall the interdict, and, *in hoc statu*, dismiss the action *quoad* " *ultra* and decern."

June 8, 1809.

The interdict here referred to, had reference to the interdict craved to prohibit a sale of part of the estate which was then in the course of being completed. The appellant thereafter proceeded and accomplished a sale of the estate. Whereupon, the respondents brought the present action of declarator, to have it found and declared that the appellant, having sold the estate, had thereby contravened the prohibition against the sale of the same, and was bound to account to the substitutes in the foresaid entail, in their order, for the price of the said lands and estate, and that he is bound to lay out the same in the purchase of other lands at the sight of such substitute heirs.

The defences to this action were, 1st, That the title under which the estate of Westshiel descended to the appellant did not restrain him from selling or disposing of it or its proceeds on sale as he saw proper. 2d, This point has in fact been already determined by the decision of the Court, in a former litigation between the parties to the present action; and the defender having, under the authority of that decision, sold part of the lands, the price became his own exclusive property, which he is not

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bound to re-employ in the manner stated in the libel, nor to account for, either in whole or in part, to the pursuers (respondents). The respondents, on their part, pleaded *res judicata*, on the ground that the decision in the former action had finally determined the question.

Upon a full argument, and citation of authorities, the Court

June 11, 1511. pronounced this interlocutor:—"Upon report of the Lord "Justice-Clerk, in place of Lord Glenlee, and having advised "the mutual information for the parties, the Lords repel the "defences proponed, and decern, and remit to the Lord "Ordinary to proceed accordingly; find the defender liable "in the expense hitherto incurred, and remit to the auditor "to report on the account thereof when lodged."*

Against this interlocutor the present appeal (leave having been sought and obtained to appeal), was brought to the House of Lords.

Pleaded for the Appellant.—In the deed of entail executed by Sir William Lockhart Denham, and under which the respondents are called as substitutes, there are no irritant and resolutive clauses applicable to the prohibition against selling; in consequence of which, the Court of Session have found that there was nothing in the entail which could prevent the appellant from selling the estate of Westshiel, which has, accordingly, been done. And there is no such *jus crediti* in the respondents as can entitle them to demand a reinvestment of the price. They had only a *spes successionis:* for the entail without irritant and resolutive clauses, could give no more than a hope of succession. Suppose the appellant had been bankrupt, and that his creditors sold and sought to participate in the price. In such cases it surely cannot be maintained that any antecedent, or existing *jus crediti*, in the substitute heirs, could prevent the creditors from appropriating the price in extinction of their debts.

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* Opinions of the Judges:—

"The judges were of opinion that the simple prohibition did give a *jus crediti* to the substitutes, though they were merely personal creditors, that they no doubt had not the benefit of the statute, as they would have had, if the entail had been complete, which would have made them real creditors, and might be disappointed if the heir in possession spent the whole, or if it was carried off from them by his creditors; but that so long as any part of the price remained, they were entitled to insist on its being secured in terms of the entail."

2. The estate, therefore, being sold, the object and intention of the entailer are completely and effectually frustrated, and it is equally impossible to know or to discover what would have been his intention as to the disposal of the money which has been received as the price of the estate.

3. By the Act 1685, c. 22, it is lawful to tailzie "lands "and estates," but there is no authority given by that statute to entail a sum of money, while such measure is equally novel, inexpedient and illegal.

4. The interlocutors pronounced by the Court, in the first and the last actions, seem to involve a contradiction. By the interlocutor in the first action, it was found that the appellant might sell; the sale was, therefore, a legal measure. By the interlocutor in the second action, he has been subjected in reparation and damages, which are the usual consequences, not of a lawful, but of an illegal act. But the demand of the respondents is equally inconsistent in another view. The demand is to re-employ the price, and, therefore, he asks the Court to do that for which the entail gives no authority. If he is to re-employ the price, in what manner is this to be done? And who has the requisite authority to prescribe to him how this is to be done? Is it to be done by purchasing lands to be entailed, and is this entail to be *defective* in the irritant and resolutive clauses as the former? or is it to contain complete irritant and resolutive clauses? These are questions which are difficult to solve, in the respondents' view of this case.

Pleaded for the Respondents.—1st, The interlocutor complained of, is a necessary consequence of the previous interlocutor pronounced by Lord Newton, Ordinary in the former action, finding that, "The defender is laid under a prohibi-"tion against selling the lands contained in the said deed," which interlocutor was acquiesced in by the appellant, and accordingly is stated in the subsequent interlocutor of the Court, dated 8th June 1809, as being on this point final. It is therefore *res judicata*, that the entails, under which alone the appellant has any right to the estate, prohibited him from selling the lands so as to disappoint the right of the other substitutes; and it must follow, that by a voluntary breach of that prohibition, he becomes liable to indemnify the respondents. In other words, he must re-invest the price which he has received for the entailed lands, in such a manner as to secure the right of succession belonging to the different substitutes. In that former action, there was an alternative conclusion similar to that which has now been sustained by the Court,

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and though the Court did not then pronounce judgment upon it, yet they signified their opinion very clearly, and from the terms of these interlocutors, used such expressions as imply that opinion. If deeds of entail were to be interpreted and enforced like other deeds, and it does not appear that any good reason can be assigned why a different rule should be applied to them, from what is applied to other deeds, it is plain that the appellant ought to have been prevented, even from accomplishing the sale, especially as an inhibition was used against him, which, according to the opinion, both of Sir Thomas Hope and Sir George Mackenzie, is sufficient to set aside all voluntary deeds. By the publication and recording of inhibition, which, in the law of Scotland, is requisite to make them effectual, every purchaser was put upon his guard, and consequently, could not plead *bona fides* in support of his purchase. In this view the respondents might have had good ground to appeal against the first action; and if there were not some intermediate substitutes which made their right of succession more distant, they would have brought that point also before your Lordships. But however doubtful such a point might be, in respect of the irritant and resolutive clauses being deficient, yet that can only go the length of making the sales effectual, in so far as regards the purchaser; it never can dissolve the obligation imposed upon the appellant not to sell the estate. A person may have a *power* to contravene his own titles, but it is impossible that he can have a *right* to do so. To suppose this, would be nothing less than a contradiction in terms; neither can any thing be more absurd than to suppose that a person, by doing an improper deed, and which he is expressly prohibited from doing, shall thereby enlarge his own right, and convert a limited and entailed fee into a fee simple, unfettered by every limitation, and not even under the destination of succession, so anxiously and explicitly laid down by the proprietor of the estate.

2d, Independent of the effect of the former judgment, the decree of the Court below, now appealed from, is founded upon the clearest principles of law and justice. One of the first principles of the law of Scotland, and it is believed of every other civilized land, is, that every person holding property unfettered by any limitations, may dispose of it, in what manner and to whatever persons he thinks proper. It was in virtue of this principle, and this principle only, that the appellant acquired any right to the Westshiel estate. He was not the heir-at-law of Sir William Lockhart Denham, the

maker of the entail, and it was only in consequence of the validity of the entail, that the respondent was cut out in the first instance from the succession. But surely the same principle which empowered the maker of the entail to alter the legal succession, by bringing in a stranger institute who was not *alioque successurus*, must empower him to lay the institute under a prohibition of selling the estate, by which the estate, through the various substitutes, is made to return to the heir-at-law. In virtue of the prohibition against selling, therefore, there is a *jus crediti* vested in all the substitute heirs, and a corresponding obligation upon the part of the appellant, not to defeat that right *in any manner whatsoever;* and therefore by the appellant voluntarily contravening the prohibition, and so violating his obligation, he becomes liable to indemnify the substitutes, by accounting for the price, and securing it in the same terms as those of the original entail.

3d. The argument of the appellant proceeds entirely upon confounding things which are quite distinct and separate. In questions between heirs and creditors, or onerous purchasers, the rule of law is quite different from what it is amongst heirs themselves. In the first of these, an entail, which is not fortified by all the requisites of the Statute, 1685, c. 22, cannot be effectual against the creditors or onerous *bona fide* purchasers. But, in the other case, the mutual rights and obligations of the *heirs, in question, among themselves, are valid and effectual withont any regard to the* Statute, 1685. These rights and obligations are founded upon the principles of common law; and a voluntary contravention of any prohibition or condition in the entail or deed of settlement, is a direct infringement upon the right of the future substitutes, and as such entitles these substitutes to indemnification and redress.

Cumming Gordon. July 29, 1761. Fac. Coll., iii., p. 127. Mor. 15,513.

4th. The difficulties alleged on the part of the appellant, in carrying the judgment of the Court of Session into effect, are altogether imaginary. Nothing is more common in the practice of the law of Scotland, than similar provisions in various deeds of settlement, and particularly in marriage contracts. There was no difficulty whatever found in arranging matters in the case of Cunninghame of Bonnington, and it will be observed, that the interlocutor now appealed from contains a *remit* to the Lord Ordinary to apply the judgment of the Court; in other words, to arrange the terms and manner of securing the price for the benefit of the substitute heirs of entail.

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After hearing counsel,

THE LORD CHANCELLOR (ELDON) said,*

(After stating the names and situations of the parties, and the clauses of the deed of entail 1775, and mentioning the first action between the parties, and the proceedings therein in regard to the two bills of suspension and interdict, proceeded as follows:)

"On the 8th of June 1809, the Court pronounced an interlocutor, finding, that though the defender, the present appellant, was laid under a prohibition from selling, yet the prohibition was not fenced by irritant and resolutive clauses, so as to restrain the defender from making a voluntary sale to an onerous purchaser, and therefore *in hoc statu* the Court dismissed the action.

"The appellant exercised this power of selling, and sold the principal part of the estate, and thereafter a new action was brought by the respondents, to have it found and declared, that the appellant was bound and obliged to lay out the price of the lands sold, to be settled on the same series of heirs, and under the like provisions and restrictions, as in the former deed of entail, or to lay out the same on landed security, to be settled in a similar manner.

"It is stated that the pursuers were remote substitutes, under the original entail, but with this, I conceive, we have nothing to do; it is not denied that they had a right to appear in Court as pursuers in this action. The defences were, that the appellant was not restrained from selling, and that this having been already decided by the Court, he had, in fact, sold part of the lands, and that thereby the price became his own exclusive property.

"On the 6th of December 1810, the Lord Ordinary, before whom this cause came, ordered the parties to give in informations.

"Informations having, accordingly, been given in, and the cause with these reported to the Court, the Court on 11th June 1811, pronounced the judgment at present appealed from, repelling the defences, and remitting to the Lord Ordinary *to proceed accordingly*.

"A remark was made upon the latter part of the judgment, that the Lord Ordinary had not been instructed how he was to proceed; but, if your Lordships had agreed with the other part of the interlocutor, I should not have considered that you would have thought this latter part of the interlocutor wrong.

"The other part of it decided on the merits of the questions depending between the parties, but as it was only interlocutory the appellant applied for, and obtained, leave from the Court to appeal.

"It has been long and repeatedly settled by decisions of the

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* Taken by Mr Robertson.

Court below, and of your Lordships, that where there is only a prohibition from selling in a deed of entail, and such prohibition is not fenced by irritant and resolutive clauses, the heir of entail may sell. Scarcely a month passes in which we do not hear this doctrine stated, and assented to.

"In many of those cases, it appears that the sale was strenuously opposed; yet it is strange, where so much property was at stake, that these cases had not been followed up by some proceeding enforcing the laying out of the price, and that this point also should not long ago have been at rest; yet it appears that in this cause the question was learnedly discussed, and only carried on the Bench by the narrowest majority against the appellant. The person, too, who gave his casting voice in favour of the respondents, thought the question a very doubtful one; but he deemed it right to rest upon a former case, in which, however, he did not think the point had been minutely discussed.

We have very little help, therefore, from decisions in Scotland. In this country, if a person makes a voluntary settlement of an estate he may, nevertheless, sell it for a valuable consideration; but unless he has reserved a power of altering, he cannot revoke the former voluntary settlement.

"In courts of equity in England, when this matter was discussed, it was said to be strange that if he sold, the price should be his own, and yet that equity should prevent him from gratuitously altering the former settlement; and it was contended that the same equity should attach upon the price. But it is solemnly decided that equity did not interfere in regard to such price.

"What the precise principle was, upon which this point was decided, it is difficult to say, but it has been considered, that where there is a legal power to sell, the most convenient doctrine is to hold that the voluntary settlement should neither bind the purchaser nor the price.

"There is another class of cases in our law which has some relation to the present, those of *quasi* tenants in tail of estates held for lives. Where a mere tenant for life takes a renewal to himself, it is subject to the same trusts as the former estate; but in the case of a *quasi* tenant in tail, if he takes a renewal to himself, he holds the estate discharged of the trust, and is not bound to those in remainder.

"There is this difference between that class of cases and the present case, as decided by the Court below, that here, though you may sell, yet sell as often as you will, you must, if you make a new purchase, have it settled to the same uses as before.

"I have looked upon this as a case of great difficulty, and of great importance. I have looked for decided cases, and for opinions of text writers, but I have found nothing to guide us to a decision on this very important point. I have considered it best,

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therefore, to recommend to your Lordships to remit this cause to the Court below, and to direct the division to which it belongs to take the opinion of the other division.

"I am quite confident that the House would proceed with a degree of rashness, were they finally to decide this important question as it stands at present; we ought previously to obtain all the information thereon which we can have, and I move, therefore, that it be remitted accordingly."

It was ordered and adjudged that the cause be remitted back to the Court of Session in Scotland, to review the interlocutor complained of in the said appeal, and the judges of the division of the Court to which this cause shall, after this remit, belong, are hereby directed to require the opinion of the judges of the other division in the matter or question of law arising in this case according to the Statute.

For the Appellant, *Sir Samuel Romilly, Wm. R. Robinson.*
For the Respondents, *David Monypenny, John Dickson.*

NOTE.—It is stated by Mr Sandford in his Treatise on Entails, that the case did not proceed further under the remit, but in the Ascog case this question was finally settled. *Vide* W. and S. App. Cases, vol. iv., p. 196.

The compiler cannot sufficiently commend a work by Mr Duncan, advocate, on the subject of entails, in the form of a digest of cases where entails have been challenged, on the ground of the prohibitory, irritant, or resolutive clauses being defective. The cases are brought down to the latest date, neatly and succinctly stated, and arranged in a systematic order, such as must prove of great practical utility in this department of the law.

GEORGE BROWN, late Deacon; ANDREW WADDELL, present Deacon; ALEXANDER MORISON, Collector, and WILLIAM COWAN, Clerk of Weavers' Society of Old Monkland, . . . } *Appellants;*

ALEXANDER MURDOCH, THOMAS ROSS, JAMES WALKER, JAMES MEIKLE, THOMAS ALLAN, and JOHN WALLACE, all Feuars of Baillieston, . . } *Respondents.*

House of Lords, 20th March 1815.

DEED—SOLEMNITIES—STAMP ACTS.—Circumstances in which an