[*27th August* 1839.]

(Appeal from the Court of Session, Scotland.)

Sir WILLIAM FRANCIS ELIOTT of Stobs and Wells, Bart., Sir JAMES BOSWELL of Auchinleck, Bart., and others, his Trustees, Appellants.[1] (No. 39.)

[*John Stuart.*]

JAMES CLEGHORN Esq., of Halkburn, and GEORGE CLEGHORN Esq., of Weens, and the Trustees of the late JOHN WILSON Esq., of Hallrule, Respondents.

[*Attorney General (Campbell) — Sir William Follett.*]

Et è contra.

Entail — Statute 42 *Geo.* 3. *c.* 116. — *Restitution.* — An heir of entail having sold certain portions of an entailed estate, under a warrant from the Court of Session, applied the purchase money, 1st, in redemption of the land tax; 2d, in payment of entailer's debts; and, 3d, in payment of provisions to younger children. The sales were set aside as irregular at the instance of a succeeding heir. In an action of declarator, repetition, and damages, by the purchasers,—Held (affirming the judgment of the Court of Session), 1st, that the estate should be liable to an annual payment corresponding to the land tax, redeemable on payment of a sum specified as the value thereof; 2d, that in so far as the prices of said lands were applied in payment of debts of the entailer, the same should form real burdens upon the estate; and 3d, that such should also be the case with the sums applied in payment of provisions, although the same might not have been kept up by assignation. Farther, that the heirs of entail should not be liable to personal diligence for payment of the principal sums of any of said provisions, but that they should be personally liable successively for payment of the interest

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[1] Fac Coll., 2d June 1837.

of such sums during their possession of the estate respectively. Further, that the same forms of diligence should be competent for the debts of the entailer as if the same had been still subsisting in the persons of the original creditors; and also, that the same form of diligence should be competent for any of the sums of provisions for younger children which would have been competent if the same had not been discharged; "declaring always, that this "decree shall be subject to all the provisions and de- "clarations of the deed of tailzie of the lands in question, "&c.; and declaring all the said findings to be without "prejudice to any questions which may arise as to the ef- "fect of any particular form of action or diligence which "may be raised in any particular case in virtue thereof."

1st Division.

Lord Ordinary Moncreiff.

THE late Sir William Eliott, professing to take advantage of the statute 42 Geo. 3. c. 116., which authorizes entailed proprietors to sell a portion of the entailed estate for redemption of the land tax, made an application accordingly to the Court of Session in May 1803, and having obtained their warrant to sell certain parts of the entailed estate specified in the application, Sir William himself became the purchaser, at the price of 15,420*l.* Sir William afterwards sold the same lands in different lots to the respondents, and thereby obtained an advance of price amounting in the whole to 23,912*l.* 10*s.* Besides redeeming the land tax (which amounted only to 56*l.* 8*s.* 7½*d.*) for the sum of 1,183*l.* 9*s.* 5*d.*, various burdens upon the estate were paid off, viz., two debts of the entailer, amounting respectively to 1,111*l.* 2*s.* 2*d.* and 111*l.* 2*s.* 2*d.*; provisions to three children of a former proprietor, Sir Francis Eliott, of 1,170*l.* each; another provision to a son of a previous proprietor, amounting to 2,500*l.*; and likewise provisions by Sir William himself, amounting to 5,483*l.* 0*s.* 4½*d.* Of these four classes of debts, the first three were paid during Sir William's

life-time on simple discharges. The debts forming the fourth class were paid after Sir William's death, and assignations were taken.

In 1812 Sir William died, and was succeeded by the present appellant, who brought an action of reduction of the sales, founded on various violations of the statute. The Court of Session (7th June 1825) reduced the whole of the sales, and their judgment was affirmed on appeal, 2d May 1828.[1] In the meantime the purchasers brought an action of relief and damages against Mr. Riddell, the statutory trustee, alleging that he, as agent and trustee, was bound to have seen the proceedings regularly carried through under the statute; but Mr. Riddell was assoilzied from that action, reserving liberty to cause Mr. Riddell to repeat and pay back any parts of the sums received by him, and not applied for the purposes above specified, on a proper process to that effect. The purchasers then raised the summons, (dated and signeted 3d January 1827,) which has given rise to the present appeal, directed against the appellants and Mr. Riddell's trustee (he having died), which, after stating in detail the leading facts above mentioned, subsumes, 1st, that the defender Sir William Francis Eliott, as representing the late Sir William, is liable for the whole sum of 23,912*l.* 10*s.*, paid by the pursuers; 2d, that the heirs of entail are liable for the original price of 15,420*l.* paid by the late Sir William, or for such part thereof as was applied beneficially in terms of the act of parliament; 3d, that in so far as the 15,420*l.* was not applied beneficially in terms of the act of parliament, the representatives of Mr. Riddell, the trustee, are liable, and then

[1] 3 Wilson and Shaw's Appeal Cases, p. 68.

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concludes, 1st, against Sir William Francis Eliott, as representing the late Sir William, for the said sum of 23,912*l.* 10*s.*, and for 10,000*l.* of damages; 2d, in the event of the first conclusion not being successful, against Mr. Riddell, for the original price of 15,420*l.*, in so far as the same may not have been applied strictly in terms of the statute; 3d, against Sir William Francis Eliott and the other heirs of entail to repeat and pay back the original price of 15,420*l.*, or at least such part thereof as had been applied in terms of the statute. There is also a conclusion that the entailed estate is liable and may be adjudged in payment of the said price of 15,420*l.*, or at least such part thereof as can be shown to have been applied beneficially in terms of the statute.

In defence it was pleaded for the appellant, 1, that he, as representing his father in no other character than that of heir of entail, is only liable in payment of entailer's debts, and debts which may have been subsequently created upon the entailed estate in virtue and in terms of the deed of entail; 2, that the pursuers are not vested in the right of any of the entailer's debts or other debts legally affecting the entailed estate, and consequently are not entitled to sue for payment of the same, either directly or indirectly; 3, that at the time of the defender's succession to the estate of Stobs, none of the debts specified in the condescendence, excepting the provisions to his younger brothers and sisters, affected that estate, or the portion thereof which had been sold to the pursuers, and it is not competent to claim payment of any debts from the defender as heir of entail, under any of the conclusions of the present summons; 4, that the defender Sir William Eliott, as heir of entail, is not liable for any debts or burdens paid, or any outlay or expendi-

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ture made by the pursuers or their authors upon the estate, the same having been paid and expended in reliance on the security of the late Sir William Eliott, with whom the authors of the pursuers dealt in the character of fee simple proprietor.

For Mr. Riddell's trustee it was pleaded, that it is res judicata that Mr. Riddell was not liable in damages to the pursuers for alleged misconduct as Sir William Eliott's agent, or as trustee in regard to the matters set forth in the summons, and consequently his trustee cannot be bound to make good any part of the loss sustained in consequence of the sales being found ineffectual.

Judgment of Court, dated 18th January and signed 7th February 1833.

Upon the report of Lord Moncreiff, the following judgment was thereafter pronounced by the First Division of the Court of Session:—"The Lords having "advised this cause, with the cases for the parties, "and heard counsel, Find the pursuers entitled to "repetition of the several sums of money applied in "payment of burdens and of debts affecting the entailed "estate of Stobs, or for which the said estate was liable "to be affected: Find that the following sums were so "applied; viz. the sum of 1,183*l.* 9*s.* 5*d.* for redemption "of the land tax of the said entailed estate; the sum of "1,111*l.* 2*s.* 2*d.* paid in extinction of the debt of the "entailer Sir Gilbert Eliott to the Countess of Hynd-"ford; the sum of 111*l.* 2*s.* 2*d.* paid in extinction of a "debt of the said entailer to William Calderwood, "advocate; the sum of 1,170*l.* in extinction of a pro-"vision made by Sir Francis Eliott in favour of Miss "Mary Eliott, his eldest daughter, paid to the Countess "of Hyndford; the sum of 1,170*l.* in extinction of a "provision made by the said Sir Francis Eliott in "favour of Miss Anne Eliott his youngest daughter,

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" paid to the Countess of Hyndford; the sum of 2,500*l.*
" in extinction of a provision made by Sir John Eliott
" to Anne Eliott, his only child, paid to the Edinburgh
" Friendly Insurance Society; the sum of 1,170*l.* in
" extinction of a provision made by the said Sir Francis
" Eliott in favour of John Eliott his second son, paid to
" Charles Eliott's trustees; the sum of 5,483*l.* 0*s.* $4\frac{4}{12}$*d.*,
" being the amount of provisions granted by the late
" Sir William Eliott in favour of John Eliott his second
" son, Gilbert Eliott his third son, Bethia Mary Eliott
" his eldest daughter, and George Augustus Eliott his
" fourth son, in terms of the entail, and for which the
" said entailed estate was liable to be affected: Finds,
" that for the above-mentioned sums the said pursuers
" are just and lawful creditors of the heir of entail of
" the estate of Stobs, now in possession thereof, and of
" each succeeding heir of entail of the said estate who
" shall obtain possession thereof, while the said debts
" shall remain unpaid: Find and declare that the pur-
" suers, as creditors foresaid, are entitled, omni habili
" modo quo de jure, to adjudge the said entailed estate
" of Stobs in payment and satisfaction of the said sums
" applied as aforesaid, and decern: And farther, decern
" and ordain the said Sir William Francis Eliott, as
" heir of entail in possession of the said estate, and the
" heirs of entail who shall succeed to him in the right
" and possession thereof as they shall respectively attain
" possession, to make payment to the pursuers of the
" foresaid several sums of money: And in respect of the
" preceding findings assoilzie Claud Russell, the trustee
" for the creditors of the late William Riddell, and all
" others the representatives of the said William Riddell
" and of Edgar Hunter, his cautioner, from the con-

"clusions of the libel to the extent of the said several "sums of money, and decern: Quoad ultra, remit to "the Lord Ordinary to hear parties farther as to the "sum of 622*l.* 8*s.* 1*d.* alleged to have been expended "by Sir Francis Eliott on improvements on the entailed "estate; likewise as to the several dates from which "interest on the said several sums shall run; also as to "the balance still due by the late Mr. Riddell and "his cautioner, and their representatives; and as to "what farther sums fall to be charged against the "entailed estate and heirs of entail; and generally, as "to all other remaining points of the cause, and to do "therein as shall be just: Find the defenders, Sir "William Francis Eliott, and Sir James Boswell, "George Sinclair, and James Brown, his trustees, who "have sisted themselves as parties to this action, and "that only quà trustees, liable to the pursuers in the "whole expenses hitherto incurred by them in this "action, and ordain the account thereof to be given in; "and when so given in, remit to the auditor of Court "to tax the same, and to report."

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This judgment formed the subject of an appeal by the appellants, and a cross appeal by the purchasers against the present appellant and also against Mr. Riddell's trustee, in so far as it fell short of the conclusions of their summons, upon which the House of Lords pronounced the following judgment: — "After hearing "counsel, as well on Monday the 14th, Tuesday "the 15th, and Tuesday the 22d days of April 1834, "as on Monday the 31st day of August last, and "Tuesday the 1st day of this instant September, upon "the original petition and appeal of Sir William "Francis Eliott of Stobs and Wells, baronet, and of

8th Sept. 1835.

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" Sir James Boswell of Auchinleck, baronet, George " Sinclair esq. (now Sir George Sinclair baronet) " younger of Ulbster, and James Brown esq., account- " ant in Edinburgh, trustees of the said Sir William " Francis Eliott, complaining of an interlocutor of the " Lords of Session in Scotland, of the First Division, " dated the 18th January and signed upon the 7th day " of February 1833, and praying that the same might " be reversed, varied, or altered, or that the appellants " might have such relief in the premises as to this " House, in their Lordships great wisdom, should seem " meet; as also upon the cross appeal of James Cleg- " horn esq., of Halkburn, and George Cleghorn esq., " of Weens, and David Watson esq., writer in Edin- " burgh, their commissioner; and Edward Filder esq., " of Mellington Hall, Montgomeryshire; the Reverend " James Glen of Argyle Place, London; Henry George " Watson, accountant in Edinburgh; and William " Wilson, clerk to the signet, trustees of the deceased " John Wilson esq., of Hallrule (which said cross " appeal was, by an order of this House of the 17th of " May 1833, amended, by omitting the names of Bethia " Mary Eliott, Captain John Eliott, Gilbert Eliott, " Daniel Eliott, George Augustus Eliott, Russell Eliott, " Alexander Eliott, Euphemia Eliott, William Eliott, " Georgina Eliott, Eliott, Eliott, " Anne Eliott, and Gay, and " Gay, her husband, as parties respondents), com- " plaining of an interlocutor of the Lords of Session in " Scotland, of the First Division, of the 18th of January " (signed 17th [7th] February) last, in so far as Claud " Russell, the trustee for the creditors of the late " William Riddell, and all others the representatives

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" of the said William Riddell, and of Edgar Hunter " his cautioner, are assoilzied, and praying that the " same might be reversed, varied, or altered, so far as " complained of, or that the appellants might have such " relief in the premises as to this House, in their Lord- " ships great wisdom, should seem meet; as also, upon " the answer of James Cleghorn esq., of Halkburn, " and George Cleghorn esq., of Weens, and David " Watson, writer in Edinburgh, their commissioner; " and Edward Filder esq., of Mellington Hall, Mont- " gomeryshire; the Reverend James Glen of Argyll " Place, London; Henry George Watson, accountant " in Edinburgh; and William Wilson, clerk to the " signet, trustees of the deceased John Wilson esq., " of Hallrule, put in to the said original appeal; and " also upon the answer of Sir William Francis Eliott " of Stobs and Wells, baronet; and of Sir James Bos- " well of Auchinleck, baronet; George Sinclair esq., " of Ulbster; and James Brown esq., accountant in " Edinburgh, trustees of the said Sir William Francis " Eliott; and also upon the answer of Claud Russell " esq., accountant in Edinburgh, trustee for the cre- " ditors of the late William Riddell esq., of Camies- " ton, severally put in to the said cross appeal; and " due consideration had this day of what was offered on " both sides in these causes: It is ordered and ad- " judged, by the Lords Spiritual and Temporal, in Par- " liament assembled, that the said cause be remitted " back to the said First Division of the Court of " Session, to review their interlocutor complained of " in the original appeal; and farther, to state to this " House whether, in pronouncing the same, they have " had regard to the eighth finding of the interlocutor

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" pronounced by the Court of Session of the 7th day of " June 1825, in the action of reduction brought by " the defender Sir William Francis Eliott, which finds " it proved, by the terms of the dispositions to the " defenders in that action, that they were made aware " that the act of parliament had not been followed out[1]; " and also to state to what extent, and under what " form of diligence, the present defender Sir William " Francis Eliott, as heir of entail in possession of the " said estate, and the heirs of entail who shall succeed " him in the right and possession thereof, as they shall " respectively attain possession, may be compelled, " according to the law of Scotland, to make payment " to the pursuers of the several sums of money in the " said interlocutor mentioned: And it is further ordered " that the said First Division of the said Court, in re- " viewing their said interlocutor, do order the matter " thereof to be heard before the whole Judges of the " Court of Session, including the Lords Ordinary: " And this House does not think fit to pronounce any " judgment upon the said appeals until after the said " Court of Session shall have reviewed their said inter- " locutor according to the directions of this order."

Judgment of Court, 1st July 1836.

In consequence of the preceding judgment the cause was heard before the whole judges of the Court of Session, in February 1836. Thereafter the following interlocutor was pronounced: — " The Lords of the " First Division having considered the letters of the " Lord Chancellor to the Lord President, with the " letter by the Earl of Devon to the Lord Chan- " cellor, explanatory of the remit by the House of " Lords in the case of Cleghorn and Wilson v. Sir

[1] See 3 W. & S. 68.

" William Eliott, direct the said letters to be printed " and laid before the Lords of the Second Division " and Lords Ordinary, in order that they may furnish " the First Division with their opinions in writing on " the points contained in the said remit, as explained " by the letter of the Earl of Devon, transmitted by " the Lord Chancellor."[1]

In obedience to this interlocutor the consulted judges (Lords Justice Clerk (Boyle), Glenlee, Meadowbank,

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[1] The letters referred to were as follow:—

" My Lord, " House of Lords, 27th June 1836.

" Having instituted an inquiry into the circumstances of the case of " Sir William Eliott of Stobs v. Cleghorn and Wilson, and having for " that purpose thought it right to apply to the Learned Lords who gave " their particular attention to that appeal, when argued before this House, " I have obtained from the Earl of Devon a letter in explanation of the " terms of remit, as made to your Lordship and the other judges of the " Court of Session, of which I have the honour to inclose a copy. I " should also state, that I have communicated upon the subject with Lord " Denman, who concurs with the Earl of Devon in the explanation " offered in that letter, and which I trust will be satisfactory to your " Lordship and the other judges.—I have the honour to be, my Lord, " your Lordship's most obedient humble servant,

" (Signed) COTTENHAM."

" To the Right Honourable the Lord President
of the Court of Session, &c. &c."

" My Dear Lord Chancellor, June 11, 1836.

" I am sorry that accidental circumstances have prevented my sooner " writing to you upon the subject of the case of Eliott v. Cleghorn, with " reference to the letter of the Lord President. I have now carefully " gone over the papers, and think that I can explain with confidence what " was the view with which Lord Brougham and the Lords who assisted " him framed the judgment in question. The case was first argued " during the time that I sat at the table as clerk; but the last argument " took place after I had taken my seat as a peer, and I attended to it, and " had much conversation with Lord Brougham upon the case.

" The printed copy of the petition to apply the judgment gives the " general history of the case. The short substance appears to be this: —

" An action was raised by Cleghorns and others to recover from Sir " William Eliott certain sums of money alleged to have been paid by the " pursuers as the price of certain lands and estates purchased under a " judicial sale thereof, made at the instance of a preceding heir of entail,

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Medwyn, Corehouse, Fullerton, Moncreiff, Jeffrey, and Cockburn) returned the following opinion:—"We understand that this cause having been remitted by the "House of Lords, in order that the interlocutor of the "First Division of the Court, under appeal, might be reviewed generally, subject to the particular instructions "given, as explained by the letters of the Lord Chancellor "and Lord Devon now laid before us, our opinion is

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"but which sale had been in the year 1825 reduced and set down as "irregular.

"The Court of Session sustains this claim to a considerable extent by "the finding set forth in page second of the printed petition.

"This judgment being brought under review by appeal, the House of "Lords thought that it might assist them in coming to a right conclusion "upon the case, if they should be informed, first, whether the judgment in "question was pronounced with or without reference to the fact that the "parties claiming repetition were aware of the irregularity of the sale in "respect of which their claim is now made; and secondly, to what extent, "and by what form of diligence, the claims which are declared valid by "the judgment, can, by the law of Scotland, be made available against "Sir William Eliott, and succeeding heirs of entail. There was some "discussion at the bar upon this latter point. It is not necessary, nor "am I competent to say in what manner the information thus sought for "would affect the ultimate judgment of the House.

"It is sufficient to say that it was conceived that such information "might throw light upon the case, and I cannot think that there will be "any difficulty on the part of the Lords of Session in giving their "answers, when the object of the inquiry is explained.

"The consulted judges can of course give no assistance to their brethren "of the First Division, in answering the first of the special inquiries; "but, upon the second point, the opinion of the whole may be given, "and the whole judgment (which may, I should think, include within it "the answer to the special inquiries) will be in point of form the judg-"ment of the First Division, as in the case of an ordinary remit for con-"sultation of the whole judges.

"This particular form of remit being, as the Lord President observes, "unusual, there is not any particular form in which the judgment given "upon it should be framed; but any form of words which, after reviewing "the former judgment in the ordinary way, conveys an answer to the "first inquiry, and gives the opinion of the court upon the second, will, I "think, be satisfactory to the House, and enable it to come to a final "decision upon the case.—Yours, faithfully,

"(Signed) DEVON."

"To the Lord Chancellor, &c."

" required on the general merits of the case, with par-
" ticular reference to the question, ' To what extent, and
" ' under what form of diligence, the present defender,
" ' Sir William Francis Eliott, as heir of entail in pos-
" ' session of the said estate, and the heirs of entail who
" ' shall succeed him in the possession thereof, as they
" ' shall respectively attain possession, may be compelled,
" ' according to the law of Scotland, to make payment
" ' to the pursuers of the several sums of money in the
" ' said interlocutor mentioned.'

" With reference to the state of the case as thus pre-
" sented to us, we have considered the written pleadings
" of the parties, and the arguments of counsel in presence
" of the whole court, and now beg leave to deliver our
" opinion as follows:—

" 1. We are of opinion, that the claim made by the
" respondents, in their action directed against the ap-
" pellants and the heirs of entail in the estate of Stobbs,
" in so far as it is a claim for relief, or restitutio in
" integrum, is, in its general substance, a well-founded
" claim in equity, to which this court, as a court of
" equity, ought to give effect, to such extent, and in
" such manner, as the circumstances will admit of con-
" sistently with the general principles of law and justice.
" The case, divested of all specialties, is, that the lands
" in question, having been offered for sale under
" warrants of this court, proceeding on the statute for
" redemption of the land-tax, were purchased by the
" respondents or their predecessors; and that, on the
" faith of having obtained a good title to these lands,
" they paid the prices in the manner set forth in the
" record. And the sales having been reduced and set
" aside in respect of irregularity in the proceedings,

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" and the lands restored to the heirs of entail, while, in " the meantime, the money of the respondents had been " applied to relieve and disburden the entailed estate " of debts and charges, which previously stood as real " and effectual burdens affecting the estate and the heirs " of entail, the respondents claim, by their action, relief " or restitution to the extent of the money so paid and " beneficially applied. The conclusions of the summons " go farther than this, in regard to the form and mode " of redress which is sought. But, on the general " merits of the claim, we are of opinion, that the de- " fender and the other heirs of entail are not entitled " to take benefit by the transaction which has been " reduced, to the manifest loss of the respondents in the " specific sums of money ascertained, and that there is " a good right in the respondents to be restored " against it.

" Without entering into any argument on the subject, " it may be proper to mention, that in forming this " opinion, we have not overlooked the eighth finding of " the interlocutor of the First Division of the Court in " the process of reduction, or the fact therein referred " to, that from the dispositions received by the respon- " dents one irregularity in the execution of the statute, " though not that on which the sale was reduced by the " House of Lords, might have been discovered. But " that circumstance does not affect our opinion as to " the equity of the present claim, so far as it appears " to us to be in other respects just and competent.

" 2. Being of opinion, that the principle of liability, " on which alone the action can be maintained, is that " of restitutio in integrum, in as far as the powers of " the court, and the circumstances of the case, will admit

" of it, we farther think, that that principle necessarily " requires, that the appellant and the heirs of entail " shall in no case be placed in a worse situation, than " that in which they would have stood if no such trans- " action had taken place; and that, in so far as there " may be, in any of the particular objects or purposes " to which the money may have been applied, a legal " impracticability of recalling or replacing it as paid by " the respondents, the loss or inconvenience of a less " perfect remedy must be borne by the respondents.

" 3. We are therefore of opinion, that the respon- " dents are not entitled to obtain any decree against the " defender Sir William Francis Eliott, personally or " individually, for payment of the several sums of money " concluded for, by which any greater or more direct " liability to diligence for payment thereof might be " incurred, than that to which he might have been " subject, if the sales had never taken place, and the " burdens on the entailed estate, as they previously " stood, had remained unaltered. We think, that, " merely as the party at whose instance the sales were " reduced, he did not incur any such personal liability; " and that it is only in respect of the direct and defined " benefits to the estate, to which he has succeeded in " the first instance, and the other heirs of entail may " eventually succeed, that the claim of the respondents " is just and well founded against him or them. Being " of this opinion, we so far differ from the judgment " under appeal, in respect of the findings and personal " decerniture therein expressed, that we do not think " that the respondents are entitled, according to the " principles of equity on which they found, to any decree " for payment in such terms.

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" 4. The sums of money, for payment of which the " summons concludes, are of three descriptions: 1. The " sum paid for the redemption of the land-tax, being " 1,183*l.* 9*s.* 5*d.*: 2. Various sums, stated to be the " amounts of entailer's debts, or debts which were " effectual burdens on the entailed estate, as created " within the powers of the entail, and which have not " by any deeds of assignation been kept up against the " estate: And 3. A sum of 5,483*l.* 0*s.* 4¼*d.* of pro- " visions stated to have been made effectual burdens on " the estate, but which have been duly kept up by " assignments. It is unnecessary to say anything of " the last sum, as it is not now in dispute. The other " two classes require particular notice.

" One of the most difficult points in the case, as it " now stands, appears to us to be that which relates to " the money applied for redemption of the land-tax. " We think that neither Sir William Eliott nor the " heirs of entail can be required to repay the capital " sum so applied; because that would be to place them " in a much worse situation than that in which they " would have been if the sales had never taken place, " contrary to the principles above laid down. For no " one of them could ever have been compelled to pay " any such sum in redemption of the land-tax; and to " require them now to pay it would not be restitutio in " integrum, but something much more to their prejudice. " And, as the land-tax, once actually redeemed, cannot " be precisely replaced with the legal remedies appli- " cable to it, this raises a serious difficulty in the means " of extricating this part of the case.

" But if the principle of equity be once settled, there " seems to be no want of power in the law of Scotland

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" to provide a mode of giving effect to it. The justice " of the case is, that there should be again laid on the " entailed estate, and the heirs of entail successively, an " annual burden equal to the amount of the land-tax as " it formerly stood, viz. 56*l.* 8*s.* 7½*d.*; and that it " should be found, by decree of this court, that this " burden shall subsist in favour of the respondents " against the defender and the other heirs of entail,— " subject, however, to one contingency. That con- " tingency is, the possible, however improbable, event, " that the land-tax in Scotland should be repealed or " diminished. Subject to that possibility, the existence " of which ought justly to exempt the heirs of entail " from all liability, because they would have got the " exemption if no sale had taken place, we are of " opinion, that the said sum of 56*l.* 8*s.* 7½*d.* may still, " by decree of this court, be declared an annual burden " on the estate, and on the defender, and every suc- " ceeding heir of entail. The court cannot give the " precise remedies which were competent for the re- " covery of the land-tax: but they can declare the " annual sums as they fall due to be recoverable by all " the ordinary diligence of the law of Scotland, without " prejudice to the provisions of the entail as to the " obligations of each heir successively in respect of the " substitute heirs. It farther appears to us, however, " that, in any such decree to be pronounced, power " ought to be reserved to any heir to redeem the burden " by payment of the sum of 1,183*l.* 9*s.* 5*d.*

" The six sums of 1,111*l.* 2*s.* 2*d.*, 111*l.* 2*s.* 2*d.*, " 1,170*l.*, 1,170*l.*, 2,500*l.*, and 1,170*l.*, concluded for " successively, and particularly described in the sum- " mons and interlocutor appealed from, consist of pay-

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" ments either of debts which were the entailer's proper " debts, or of provisions stated to have been effectually " appointed under the powers reserved by the entail; " all of which would have been burdens on the estate, " and the heirs to some effect, if no sale had been made. " It appears to us, that the deeds executed for establish- " ing the provisions were sufficient to have enabled the " children, in whose favour they were granted, to make " them effectual as burdens on the estate, according to " the power reserved by the entail. It is therefore " clear as matter of fact, that, in so far as the money of " the respondents was applied in the payment and " extinction of such debts and provisions, the estate was, " by means of that money, to that extent relieved of " burdens, which must otherwise have now affected it; " and, if the principle laid down in the first part of this " opinion be correct, we are necessarily brought to the " conclusion that the respondents, upon reduction of " the sale and eviction of the lands, are entitled to " restitution in regard to all these sums, in so far as the " court, as a court of equity, can give it, consistently " with the just rights of the appellant and the other " heirs of entail.

" In the precise remedy to be given, there may be a " difference between the two sums of 1,111*l.* 2*s.* 2*d.* and " 111*l.* 2*s.* 2*d.*, which were entailer's debts, and the " four sums of 1,170*l.*, 1,170*l.*, 2,500*l.*, and 1,170*l.*, " which consisted of bonds of provision. The former " were proper debts equally against the estate and " against every heir succeeding to it; and it will do no " injustice to find that in restoring the respondents " against the counterpart of the transaction of the sale " reduced, the same sums shall still form burdens pre-

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" cisely to the same effect, and to give decree for pay-
" ment of them against the defender, without prejudice
" to his right to keep them up as burdens on the estate,
" as the entail does indeed in express words permit.
" But with regard to the sums of provisions, as the
" entail only authorizes the heirs 'to burden and
" 'affect the lands with such provisions,' we are of
" opinion that the remedy to be afforded to the respon-
" dents can go no farther than to find and declare
" the sums paid in extinction of them to be still burdens
" on the entailed estate.

" Subject however to this distinction, we are of
" opinion that the Court has power, and that it is
" just and necessary as a matter of equity, to declare
" that these several sums shall subsist and be of
" equal effect as burdens on the estate and the heirs
" of entail, as the debts to the payment of which
" they were applied would have been if they had not
" been paid.

" With regard to the forms of diligence which may be
" competent for the sums thus to be declared to come
" in place of the bonds of provision, we are of opinion
" that those sums, when established by decree as burdens
" on the entailed estate, must be considered as standing
" in all respects in the same condition with the other
" sums amounting to 5,483*l*., &c., which, though paid to
" the original creditors, have been kept up as burdens
" on the estate by direct assignments of the bonds; and
" that the same forms of diligence for making the bur-
" den effectual will be competent in the one case which
" would be competent in the other. As we do not think
" that the equity of the case will admit of any personal

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" responsibility being laid on the defender or any other " heir, to which they would not have been liable for the " debts as they originally stood if no sale had taken " place, we are of opinion that the nature and extent of " the diligence which will be competent must depend " on the special terms of the entail, and the legal effect " of its provisions. The clauses of the entail of Stobs " are very peculiar in their application to this point, " and it is not perfectly easy, and might be attended " with serious inconvenience, to attempt to define before- " hand what shall be taken to be the precise operation " of them. In general, but reserving our judgment if " any case of the kind shall come before us for trial, we " think that personal diligence will not be competent " for compelling the defender or any individual heir to " pay the principal sums of such provisions; that he " may be liable to such diligence for the annual interest " becoming due on them during his own possession of " the estate; that adjudication, and probably inhibition " also, against the estate, may be used for the principal " sums as debts, subject to the effect of the very peculiar " clause of the entail, providing that if any adjudica- " tions shall be led 'for debts to be contracted,' the " heir 'shall be obliged to redeem the same within the " space of eight years 'after deducing and leading such " 'diligence,' in as far as that clause may be held to be " applicable. But the precise operation of such a pro- " vision, as well as the legal effect of deeds held to be " duly executed under the power of appointing provi- " sions for younger children by this entail, may involve " questions of so much difficulty not necessary to be " resolved in the decision of this cause, that we do not

" think that any judgment to be pronounced in it should " be made to embrace any of these points."

The Lords of the First Division having concurred in the foregoing opinion, the following judgment was pronounced:—

" The Lords, having considered the judgment of the " House of Lords, find and declare, that in the inter- " locutor appealed from they had fully in their view, " and had given due attention to the fact, that it might " have been discovered from the terms of the dispositions " accepted of by the pursuers, that one particular irre- " gularity in the execution of the statute had occurred, " though of a nature not held to be sufficient to affect " the validity of the sale; and having consulted with the " other judges, and heard counsel in presence of the " whole Court, and reviewed the opinions of the Lords " of the Second Division of the Court and of the Lords " Ordinary, recal their former interlocutor appealed " from, find that the pursuers are entitled in respect of " the sales of the lands made to them and the payment " of the prices thereof, and of the subsequent reductions " of the said sales on account of the irregularities in the " proceedings alleged against them, to be restored in " integrum against the effects of the sales being reduced, " in so far as the circumstances of the case and their " powers as a court of equity enable them to give such " restoration: find, that under any statement now before " the Court in the record, it must be assumed that the " land tax redeemed cannot be brought back, or of new " made a burden on the lands with the remedies for " execution therewith connected; but find that in equity " the heirs of entail are bound to bear a corresponding

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" burden, and that the sum of 1,183*l.* 9*s.* 5*d.*, for which " the said land tax so affecting the lands was redeemed, " must still form a burden on the estate and on the heirs " succeeding thereto, and find, decern, and declare " accordingly, and grant warrant for recording this de- " creet in the register of sasines and reversions; but " find and declare that this decree shall be subject always " to these conditions and provisions, that in case the " land tax at present exigible from all the lands of " Scotland shall be abolished or diminished, the said " burden shall also entirely or proportionally cease; " and further, that it shall always be in the power of " any heir of entail in possession of the estate to redeem " and extinguish the said burden by payment of the " foresaid sum of 1,183*l.* 9*s.* 5*d.*, but that until the same " be paid, the burden shall subsist to the effect of each " succeeding heir being bound to pay the sum of " 56*l.* 8*s.* 7*d.* annually to the pursuers, being the amount " of the sum exigible previous to the said redemption; " and that all the ordinary diligence of the law shall be " competent for the payment thereof, but that neither " the individual heirs nor the estate shall be liable to " any diligence for payment of such principal sum: " find, that in so far as the prices received from the " pursuers for the lands in question were applied in " payment of debts of the entailer, and specially of the " debts of 1,111*l.* 2*s.* 2*d.*, and 111*l.* 2*s.* 2*d.*, specified in " the record, it ought to be found and declared, and find " and declare accordingly, that these sums shall form " real burdens on the lands and estate in question; and " the Lords decern for payment thereof against all the " heirs succeeding to and possessing the said lands,

" without prejudice always to any heir of tailzie, on his " paying such debts, keeping them up by assignation or " otherwise against the said estate, as permitted by the " entail: find, that in so far as the said prices of the " lands have been applied in payment of the provisions " for children of the family successively made by the " heirs in possession, as set forth in the record, although " the same have not been kept up by deeds of assigna- " tion, the sums thereof being 1,170*l.*, also 1,170*l.*, also " 2,500*l.*, and 1,170*l.*, these sums, together with the " sum of 5,483*l.* 0*s.* $4\frac{3}{12}$*d.*, being the amount of provi- " sions granted by the late Sir William Eliott in favour " of John Eliott his second son, Gilbert Eliott his third " son, Bethia Mary Eliott his eldest daughter, and " George Augustus Eliott his fourth son, which has " been kept up by assignation in favour of Messrs. " Douglas and Bell, must still all form real burdens on " the entailed estate to the same effect, but no farther, " as if they had not been so paid, but had still stood as " outstanding debts of the estate according to the terms " of the deeds constituting them, and decern accord- " ingly, and grant warrant for recording this decree in " the register of sasines and reversions, that all may " take notice thereof; but find, decern, and declare that " neither the defender, nor any other of the heirs of " entail, can be made liable by personal diligence for " payment of the principal sums of any of the said pro- " visions for younger children; and find that they are " and shall be personally liable successively for the pay- " ment of the interest of all such sums accruing during " their own possession of the estate respectively: find, " decern, and declare that the same forms of diligence

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" shall be competent to the pursuers for all the debts of " the entailer hereby declared to be still subsisting, not- " withstanding any discharges granted which could have " been by law competent if the said debts had been still " subsisting in the persons of the original creditors; " and find that the same form of diligence shall be com- " petent to the pursuers for any of the sums of provisions " for younger children, paid as aforesaid from the prices " of the said lands, which would have been competent " to the children in whose favour such bonds or deeds " of provisions may have been granted, if the same had " not been discharged; declaring always, as it is hereby " found and declared, that this decree shall be subject " to all the provisions and declarations of the deed of " tailzie of the lands in question, not inconsistent with " the equity declared by the findings and decernitures " in this interlocutor, and declaring all the said findings " to be without prejudice to any questions which may " arise as to the effect of any particular form of action " or diligence which may be raised in any particular " case in virtue thereof. And in respect of the pre- " ceding findings, assoilzie Claud Russell, the trustee " for the creditors of the late William Riddell, and all " others the representatives of the said William Riddell, " and of Edgar Hunter his cautioner, from the conclu- " sions of the libel, to the extent of the said several " sums of money, and decern. Quoad ultra, remit to " the Lord Ordinary to hear parties further as to the " sum of 622*l.* 8*s.* 1*d.* alleged to have been expended " by Sir Francis Eliott on improvements on the entailed " estate; likewise as to the several dates from which " interest on the said several sums shall run; also as to

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" the balance still due by the said William Riddell and " his cautioner and their representatives; and as to " what farther sums fall to be charged against the " entailed estate and heirs of entail, and generally as to " all other remaining points of the cause, and to do " therein as shall be just: find the defenders Sir William " Francis Eliott, and Sir James Boswell, George Sin- " clair, and James Brown, his trustees, who have sisted " themselves as parties to this action, and that only quà " trustees, liable to the pursuers in the whole expenses " hitherto incurred by them in this Court, and remit " the account thereof, when lodged, to the auditor to " tax the same, and to report."

Appellants Argument.

Appellants.—The judgment appealed from is at variance with the summons; it gives that which was never demanded or concluded for. The summons is at variance with itself; it concludes for repetition of sums applied in terms of the statute, and yet the groundwork of the action is, that the terms of the statute were not complied with at all. New and unprecedented burdens are attempted to be imposed upon this estate, which are utterly inconsistent with the subsistence of a valid entail, In the first place it reimposes the burden of the land tax, or rather it imposes an annual burden, not the land tax, but to be subject to some of the conditions and laws which would have applied to the land tax,—a new species of burden upon property, and a new species of right reared up against property not concluded for in the summons, and it is believed never before known in the history or practice of the law of Scotland. The burden thus imposed is even worse than the land tax, because the heirs of entail might have sold part of the entailed

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estate to redeem the land tax, but they have no power to sell any part of the entailed estate to redeem this new burden, and nothing less than an enactment as authoritative as the statute for redemption of the land tax can give them such power. In the second place the interlocutor makes and imposes other real burdens upon the entailed estate in a manner alike unsparing and unprecedented; for instance, certain debts of the entailer had been paid off and discharged, and the present heir of entail entered into possession of the entailed estate free of these burdens. They were not kept up by assignation or otherwise. The Court of Session however has, of its own authority, and against the will of the heirs of entail, done that which the heirs of entail themselves could not have done if they had been willing, and which the respondents never thought of asking in the summons; it has imposed a new real burden upon the entailed estate in favour of the respondents to the amount of the debts which had been paid off and discharged. In like manner the interlocutor has done the same thing in regard to other sums, being the amount of the provisions in favour of younger children, which had been paid off. It is apprehended that the Court had no power to do this, and, at all events, that it was not competent for the Court to do it under the present action. The foundation of the claims of the respondents, as stated by themselves, and as dealt with by the Court, is, that the debts paid off were so paid in pursuance and professed implement of the provisions of the statute. But if so, they must have been permanently and finally paid off and extinguished out and out, and could not be revived, it being an acknowledged principle of the law of Scotland that debts once extinguished cannot by any device be revived. Indeed,

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the Court has not revived them; but, finding the entailed estate clear, it has of its own accord done that which is not only at variance with the former precedents, but which nothing short of an act of parliament could effect, viz., created and put upon it a new real burden in favour of the respondents, with all the qualities of the debts that were paid off. The heirs of entail are made personally liable for sums of money which are the personal debts of a preceding heir of entail whom the appellant (the heir of entail) does not represent, which are not legal burdens upon the estate entailed, and for which neither the present heir of entail, nor those who may succeed, incurred any liability either personally or by representation. The judgment appealed from purports to do what has not hitherto been attempted to be done by the Court of Session, either as a court of law or of equity, is contrary to the principles and practice of the law of Scotland, and wholly unsupported by any authority or precedent. To give the respondents a right to recover the sums concluded for, either from the appellant or any of the heirs of entail, or out of the entailed estate, is directly inconsistent with the right of the heirs of entail, sustained and given effect to in the former action to reduce the sales as a fraud upon the entail, and contrary to the act of parliament, and practically denies benefit to the heirs of entail from the judgment they have already obtained reducing such sales.

While the Court of Session has recalled and altered its former judgment, while it has not given to the respondents that which they asked under their summons, but has devised a remedy for them in something which they did not conclude for, it has found them entitled to the whole expenses of the litigation,

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contrary, as the appellants humbly conceive, to the principles which ought to regulate the awarding of costs. Nay, it has even found the respondents entitled to recover from the present appellants the separate expenses which the respondents have incurred in this cause in the discussion between them and Riddell's representatives, in which discussion too the respondents have not been successful.

Respondents Argument.

Respondents.—Nothing can be more clear and distinct than the tenor and object of the summons. It is distinctly averred in the summons that Mr. Riddell was named and approved of as statutory trustee in terms of the act of parliament, under the application for sale at the instance of Sir William Eliott. It is then averred that Mr. Riddell, as statutory trustee, received, directly from the respondents, or out of the monies paid by them, the sum of 15,420*l.*, which, with the exception of a small balance, he avers that he duly applied, in the execution of his duty, in terms of the statute, and under warrant of Court, to the redemption, in the first place, of the land tax, and next to the payment of debts which affected the entailed estate, as being either entailer's debts, or debts contracted under faculties reserved in the entail. The action proceeds upon this ground, that either the statutory trustee on the one hand, or the heirs of entail and entailed estate on the other, are responsible to the pursuers for this sum of 15,420*l.*, the latter being responsible in so far as it has been applied by the statutory trustee for the benefit of the entailed estate, in the manner prescribed by the act, that is to say, in redemption of the land tax, or in payment of debts and burdens affecting the estate, and the former

in so far as it has not been applied by him as statutory trustee, or, in other words, in so far as it remains in his hands, or has been applied otherwise than under warrant of court, and to the purposes prescribed by the statute, namely, the redemption of the land tax and the payment of debts and burdens on the estate. When the respondents speak of sums applied in terms of the statute, they use the words designativè, and as elsewhere used in the summons, to mean the sums appropriated by the trustee in payment of entailer's debts, redemption of land tax, and other burdens for which the estate was liable. The respondents do not seek to constitute against the entailed estate, or against Sir William Eliott, as heir in possession, or against the heirs substitute, any new or extraordinary or enlarged responsibility, or any liability of any kind, or to any effect higher than attached to the entailed estate, and the heirs of entail under the various burdens and debts, in payment of which the price received by the statutory trustee has been applied. The heirs substitute of entail were not called as defenders, in order to obtain any direct or personal decree against them, but only in respect of their interest as heirs substitute in the entailed estate, and to the effect merely of constituting and declaring such responsibility against the entailed estate, and against the heirs succeeding to and holding it, as the estate and those heirs were previously under, in respect of the burdens and provisions which may have been paid by the statutory trustee. In like manner, as against Sir William Francis Eliott, the heir in possession, the conclusions proceeding on the supposition which forms the basis of the present argument, that he does not generally represent his father, are directed against him only as heir in possession, and to the extent

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to which he was liable for the debts and burdens in question. For some of them he was clearly liable personally, out and out, as, for example, for the bonds of provision in favour of his brothers and sisters, granted by his father, under the power of providing for younger children, conferred by the entail; and for which provisions he had given his own personal bond of corroboration, which stands at this moment assigned to trustees. Quoad ultra, the respondents did not demand decree against Sir William Eliott, beyond that liability which, as heir of entail in possession, he had already contracted for the debts and burdens affecting the estate and heirs in possession, and to which the trustee applied the price. For such burdens as entailer's debts, or debts contracted in execution of powers reserved or created by the entail, and as to which there exists no entail, or at least no entail which can exclude the creditor, the estate itself is very clearly liable. Some discussion there may be about the extent of the personal liability of the heir in possession, so far at least as regards the principal, but in no view can there be any discussion about interest, which it is the peculiar duty of the heir in possession to keep down during the term of his possession.[1] Generally, with respect to the principal also, the respondents apprehend it to be plain that an heir of entail, by taking possession of the entailed estate, though he may not be liable ultra vires of his succession, does incur direct and immediate responsibility to the extent of his succession, and so far as he is lucratus by it, for all debts, which, being contracted by an entailer or by former heirs of

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[1] Campbell v. Campbell, 29th Nov. 1815, Fac. Coll.; Erskine and others v. Lord Mar, 7th Jul 1829, 7 S. & D., 844.

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entail under powers and faculties created and reserved by the entail, form a necessary burden on the succession. The mere circumstance of the party interested not having taken an assignation, as he confessedly might have done, is not of itself sufficient to extinguish the debt, or justify the plea that it does not subsist, and cannot be made effectual to any intent or purpose whatsoever.[1]

There can be no doubt that the late Sir William Eliott could have taken assignations, and kept up all these debts. The respondents are in all respects in right of Sir William Eliott, and, through him, in right of the price, and consequently of all those debts or securities affecting the entailed estate, which have been paid by that price. Under the circumstances, the fact that no assignation was taken cannot deprive the respondents of the security which, through an assignation, they might unquestionably have obtained. The case of Sloane Lawrie v. Donald is a clear authority for the respondents on this point. That case is noticed by Mr. Shaw, under dates 1st June 1825 and 7th December 1830, but is only partially reported by him. It is understood, however, that the facts of the case, so far as necessary to be now considered, are very shortly these:—Mr. Walter Lawrie entailed two estates, Redcastle and Bargattan, by two separate entails, which, with respect to the concluding part of the destinations, were not identical, so that the estates came ultimately to descend to different parties. Sloane Lawrie was the heir in possession of both estates in 1799, and in that year, under the authority of the existing statutes for redemption of the land

[1] Temple and Halliday v. Gairns, 22d Feb. 1706, Mor. 15355; Gordon v. Sutherland, 29th January 1731, Mor. 11534; Scott of Harden, 20th Dec. 1751, Mor. 15394; Kerr v. Turnbull, 15th Feb. 1758, Mor. 15551.

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tax, he sold Edgarton, a farm of Redcastle, but for the purpose of redeeming the land tax payable not out of that estate only, but also out of Bargattan. Sloane Lawrie became himself the purchaser, through a trustee. The price was applied in redemption of the land tax of both estates, and in payment of debts due by Walter Lawrie, the common entailer, and with respect to several of those debts there was not an assignation taken, but simply a discharge and renunciation. Sloane Lawrie possessed for some time after this sale, and was succeeded by Kennedy Lawrie, upon whose death the two entails divided, Bargattan going to Kennedy Lawrie's disponees, he having been the last substitute in that entail, and Redcastle, part of which had been sold, going to another party, the substitute in that entail. In the meantime Kennedy Lawrie, who immediately succeeded Sloane, had brought an action of reduction of the sale, which was afterwards insisted in by the heir succeeding to Redcastle, and decree was obtained, first in the Court of Session and afterwards in this House, reducing the sale. An accounting then commenced between the parties in right of Bargattan, which had now become a fee simple estate, and the heirs succeeding to Redcastle. The Court found, or at least proceeded on the assumption, that although the entailer's debts had been paid out of the price, and some of them not upon assignation, but upon discharge and renunciation, they were yet not extinguished, and accordingly they gave Mr. Sloane Lawrie's representatives, who had come also to possess the estate of Redcastle, relief of those entailer's debts against the heir of Bargattan, according to the relative value of that estate, the heir of Redcastle being liable for the remainder; and in like manner they found

the heir of Bargattan liable in the money which had been expended in redeeming the land tax of that estate.

To show the injustice which would result from an opposite rule, suppose that the purchaser at the sale had himself been a previous creditor, and that in part payment of the price he had granted precisely such a deed of discharge in extinction of his debt over the general estate, as those upon which the appellant here founds, could it ever have been maintained that an heir of entail could set aside the sale, thereby depriving the purchaser of his lands, and at the same time withhold from the purchaser, in his quality of previous creditor, the right to have his original debt revived, and this forsooth upon the notable argument that because the heir who made the sale had taken a discharge and not an assignation, the debt was extinguished confusione? The price of the lands sold, or what is purchased with the price, whether land tax or previous debts or other lands or money securities, is to be regarded as constituting in some sort a surrogatum for the lands. The heir of entail who challenges the sale cannot have both the lands and their surrogatum. The party who is entitled to the surrogatum, the lands, being re-vindicated, is not the party who gets back the lands, but the party with whom the lands were at the date of revindication, and from whom by force of that revindication they have since been taken. As between him and the heirs of entail revindicating the entailed estate, there can be no sort of question. The rule of law is universal: "Nemo debet ex aliena jactura lucrari." [1]

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[1] Stair, b. 1. t. 8. s. 607. See to same effect, Ersk., b. 3. t. 1. s. 10. & 11; Bankton, b. 1. t. 9. s. 4.; Pothier, tom. iv. p. 474–5 (Du Droit de Propriété, 343–345).

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Upon the dependence of the present action, the respondents raised an inhibition against the appellants, dated 6th June and executed 7th June and 3d July, and registered 15th July 1828. When the judgment of the Court of Session, of 18th January 1833, was pronounced, the appellants presented an application for recall, on the ground, inter alia, that the judgment had sufficiently secured the right of the respondents to any debt which was due to them, and that the appellant had since succeeded to the estate of Wells, rented at 3,000*l.* per annum, which would also be affected by the inhibition; upon which the Court pronounced the following interlocutor:—"The Lords, having heard counsel "for the parties, refuse the desire of the petitioner; "find expenses due to the respondents, and remit."

Judgment of Court, 4th July 1833.

This interlocutor was also made the subject of a separate appeal.

THE LORD CHANCELLOR, after stating the import of the judgment of the House of Lords remitting the cause to the Court of Session, and the judgment of that Court thereupon, observed that the equity was clear in favour of the respondents, and nothing had been urged against the judgment appealed from which in any degree impeached its accuracy. His Lordship therefore moved an affirmance.

The House of Lords ordered and adjudged, That the said original appeal be and the same is hereby dismissed this House; and that the said interlocutor of the 31st of January (signed 2d June) 1837, by which the said interlocutor of the 18th of January (signed 7th February) 1833 was, upon

the said remit from this House, recalled, be and the same is hereby affirmed: And it is further ordered and adjudged, that the said cross appeal be and the same is hereby dismissed this House.

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JOHN BROWNLEY— SPOTTISWOODE and ROBERTSON— G. & T. WEBSTER, Solicitors.