[30*th* *May*, 1842.]

MISS JANE CARRICK, and Others, *Appellants.*

ROBERT C. BUCHANAN, Esq., *Respondent.*

Tailzie. — Terms of entail held not to impose fetters upon the institute against altering the order of succession.

Id. — Whether a gratuitous *mortis causa* deed by an institute, altering the order of succession prescribed by an entail, which, as to the institute, was defective in the irritant clause, is good against the substitutes. Remit for the opinion of the Court below.

ON 31st December, 1816, Robert Carrick executed an entail of his lands of Burnhead in favour of David Buchanan and others, one of the remote substitutes being Thomas Carrick, the institute in the deed next to be mentioned under the name of George Carrick, junior. On the 18th of July, 1820, Robert Carrick executed another entail of the lands "to and in favour "of George Carrick, junior, son of George Carrick residing at "Balmeno, and the heirs-male of the body of the said George "Carrick, junior, whom failing, to David Buchanan of Dum-"pellier, and the heirs-male of his body," whom failing, a series of substitutes; and bound himself to infeft "the said "George Carrick, junior, and the other heirs of tailzie above "named." The conditions of this entail were, *inter alia*, that "the said George Carrick, junior, and the whole heirs of "tailzie, and heirs whatsoever," should use the name of Carrick; that the wives and husbands of "the said George Carrick, junior, "and the whole heirs of tailzie," should be excluded from all right of terce or courtesy; that it should not be lawful to the "said George Carrick, junior, or any of the heirs of tailzie, and

" heirs whatsoever who shall succeed to my said lands and estate,
" to alter, innovate, or change this present tailzie, or nomination
" to be made by me, or order of succession therein prescribed,
" or to do or grant any act or deed that may import or infer
" any such alteration, innovation, or change, directly or indi-
" rectly: 3dly, That it shall not be in the power of the said
" George Carrick, junior, or any of the heirs of tailzie, and heirs
" whatsoever, who shall succeed to my said lands and estate, to
" sell, alienate, impignorate, dispone, dispose of, or transfer the
" said lands and estate, or any part thereof, either irredeemably
" or under reversion, or to burden the same in whole or in part,
" with debts or sums of money, infeftments of annualrent, or any
" other burden or servitude whatsoever, nor to contract debts,
" or grant deeds whereby the said lands and estate may be evic-
" ted from them, or the said lands and estate and heirs of tailzie
" succeeding thereto may be anywise affected; declaring hereby,
" that all such deeds so to be granted, or debts to be contracted,
" in so far as the same may affect the foresaid lands and estate,
" or heirs of tailzie succeeding thereto, shall be void and null,
" and the said lands and estate shall noways be affected or bur-
" dened therewith, or subjected or liable to be adjudged, or any
" other way evicted, either in whole or in part, for, or by the
" debts or deeds, legal or voluntary, contracted or granted by
" the said George Carrick, junior, or any of the heirs of tailzie
" and heirs whatsoever, who shall succeed to the said lands and
" estate; and that whether such debts or deeds shall have been
" contracted or done before or after their succession to, or ob-
" taining possession of the said lands and estate: 4thly, That
" it shall not be lawful to, nor in the power of the said George
" Carrick, junior, or any of the heirs of tailzie and heirs what-
" soever, who shall succeed to the said lands and estate, to set
" tacks or rentals of the same, or any part thereof, for any longer
" space than twenty-one years, and that without any diminution

" of the rental, or for any longer space than the lifetime of the " setter, in case of a diminution of the rental; nor in case, or by " any means, directly or indirectly, to take or accept of any " grassum or entry-money for or on account of any such tack or " set to be granted by them or any of them; declaring hereby, " that all such tacks or sets as shall be granted contrary to these " conditions shall be void and null; and these presents are also " granted by me with and under the several irritancies following, " viz., *First*, That in case any adjudications or other legal exe- " cutions shall be obtained or used of or against the fee or pro- " perty of the said lands or estate, or any part thereof, and that " the said George Carrick, junior, or the heir in possession of " the estate for the time, shall fail or neglect to redeem or purge " the same timeously, and three years at least before expiry of " the legal reversion thereof, then and in that case, he or she " shall thereby forfeit and lose his or her right and title to the " said lands and estate, and the same shall devolve to the next " heir of tailzie who would succeed if the contravener were natu- " rally dead, and the next heir shall have access to establish a " right and title thereto in his or her person accordingly: *Se-* " *condly*, That in case the said George Carrick, junior, or any " of the heirs of tailzie and heirs whatsoever, who shall succeed &c., " to my said lands and estate, shall contravene any of the con- " ditions, provisions, restrictions, limitations, and others herein " contained, or to be contained in any writing hereafter to be " executed by me, or any of them, that is, shall fail or neglect to " observe, obey and perform the said several provisions and con- " ditions, and every one of them, or shall act contrary to the " prohibitions, restrictions and limitations, or any of them, con- " tained in this deed of tailzie, or to be hereafter added and ap- " pointed by me, (excepting as is herein after excepted,) that " then, and in any of these cases, the person or persons so con- " travening, by failing to obey the said conditions, or any of

" them, or acting contrary to the said conditions, provisions,
" prohibitions, restrictions and limitations, or any of them, shall,
" for him or herself only, *ipso facto* amit, lose and forfeit all
" right, title and interest to the said lands and estate above
" described, and the same shall become void and extinct, and my
" said lands and estate shall accresce, devolve and belong to the
" next heir-male general, or of tailzie appointed to succeed, al-
" beit descended of the contravener's own body, in the same
" manner as if the contravener were naturally dead; and upon
" every such contravention, failure or neglect, it is hereby ex-
" pressly provided and declared, that not only my said lands
" and estate shall not be burdened or liable to the debts and
" deeds of the several heirs of tailzie, and heirs whatsoever, as
" before provided; but also all debts, deeds, and acts contracted, *Irr.*
" granted, or done contrary to these conditions and restrictions,
" or to the true intent and meaning of these presents, shall be
" of no force, strength, or effect, and shall be ineffectual and
" unavailable against the other heirs of tailzie and heirs whatso-
" ever succeeding to my said lands and estate, and that the said
" heirs, as well as the said lands and estate, shall noways be bur-
" dened therewith, but shall be free therefrom, in the same man-
" ner as if such debts, deeds, or acts had never been contracted,
" granted, or done; and also it shall be free and lawful to every
" heir who shall have a title by or through every contravention
" of a former heir, though minor at the time, and whether de-
" scended of the contravener's body or not, to sue for and obtain
" declarators of irritancy of the contravener's right, and to serve
" heir of the person who died last vest and seized in the said
" lands and estate preceding the contravener, and thereby, or by
" adjudication, or any other legal method, to establish in his or
" her person the right and title of and to my said lands and
" estate, in the terms hereof, without being subjected or liable to
" the debts or deeds of the person or persons so contravening,

" and without regard to any alteration made or intended, acts " done, or deeds granted by the contravener, contrary to the " conditions and restrictions before written, or others to be ap- " pointed by me, but that the heir or heirs who shall obtain " possession of the said lands and estate, by virtue of declarators " of the irritancy of the contravener's right, and all the heirs of " tailzie and heirs whatsoever succeeding to them, shall be sub- " ject and liable to the same conditions, restrictions, and irritan- " cies through the whole course of succession for ever; and it is " hereby provided and declared, that every person contravening " and irritating his or her right, as aforesaid, shall be excluded " from the management of the said lands and estate, during the " pupillarity and minority of the next heir of tailzie succeeding, " though a descendant of his own body; and it shall be compe- " tent to any other person to obtain gifts of tutory-dative to such " next heir, or to him or her to elect and chuse curators, one or " more, for the management of the said lands and estate, exclu- " ding always the said contravener."

After making a variety of provisions, this entail contained the following clause:— " And whereas I resigned and conveyed the " said several lands and heritages herein before disponed, along " with sundry other lands, to and in favour of the foresaid David " Buchanan and others, by a deed of entail executed by me dated " the 31st of December 1816, I hereby, in virtue of the power " and faculty therein reserved to me, revoke that deed, in so far as " respects the said lands and heritages herein before disponed " allenarly, and to the effect of settling and disposing of these sub- " jects under this present deed of entail, but under the express " provision and declaration, that in case this deed shall be reduced " and annulled upon any legal ground, the said whole lands and " heritages hereby disponed shall revert, continue, and remain " under, and in terms of the said former deed of entail in " favour of the said David Buchanan and others, or any other

" deed to be executed by me in place thereof, in the same " terms and manner as if this present deed had not been " executed by me."

The maker of this entail died in 1821. The true name of the first disponee was Thomas Carrick, son of Thomas Carrick, instead of George Carrick, son of George Carrick. This was found by decree of declarator in an action to that effect, and thereafter, Thomas Carrick took infeftment under the entail, and entered into possession of the lands conveyed by it, and continued in such possession until his death, which occurred in May, 1836.

Thomas Carrick died without issue; and after his death, his law agent delivered to the appellants a deed which had been executed by him, upon the 22d October, 1835, whereby he sold, alienated, and disponed to and in favour of himself, and his heirs and assignees whomsoever, heritably and irredeemably, the whole entailed lands.

The respondent, on the 15th June, 1836, procured himself to be served heir of tailzie and provision to Thomas Carrick, and brought an action for reducing the disposition executed by him, as *ultra vires*, in contravention of the prohibitory, irritant, and resolutive clauses of the entail, and in defraud of the respondent, and the other heirs thereby called, and as being null under the act 1621, cap. 18.

Condescendence and answers were put in for the parties, with pleas in law. The pleas for the appellants were: —

" I. The irritant clause founded on by the pursuer, contained " in the deed of entail, is ineffectual against the deeds of the in- " stitute in the entail, as it only provides and declares, that upon " every contravention the entailer's said lands and estate shall " not be burdened or liable to the debts or deeds of the several " heirs of tailzie, and heirs whatsoever; and that such debts, " deeds, and acts, shall be of no force, strength, or effect, and

" shall be ineffectual and unavailing against the other heirs of " tailzie; but the deed contains no provision irritant of the debts, " deeds, or acts of the institute in the entail — the disposition " executed by him, therefore, is perfectly valid.

" II. Entails are *strictissimi juris*, and liable to rigorous inter- " pretation in favour of liberty, and against restriction without " regard to the intention of the entailer, unless it be expressed in " apt and accurate terms; and the entail founded on by the pur- " suer, not being fenced with an effectual irritant clause against " deeds by the institute, the present pursuer has no right to insist " in this reduction.

" III. The disposition and deed of entail libelled wus effectual " to convey the lands disponed to the disponee and institute; and " although he again exercised the right of disponing them to " himself, and his heirs and assignees, that first disposition and " deed of entail has not been reduced and annulled upon any " legal ground; and there is no room for the operation of the " clause of reversion to the former deed of entail of 1816, as con- " tended for by the pursuer."

The pleas for the respondent were: —

" I. The deed of entail, dated 18th July, 1820, under which " the late Thomas Carrick was infeft in the estate of Burnhead, " being in all respects valid and effectual, it was *ultra vires* of " the said Thomas Carrick to grant the disposition now under " reduction.

" II. The said disposition is null in terms of the statute 1621, " cap. 18.

" III. Even supposing that the said entail, dated 18th July, " 1820, were held to be null and defective, the estate of Burn- " head now in question would not be carried by the disposition " under reduction, but would revert, continue, remain under, " and be carried by the former deed of entail, executed by the " late Robert Carrick, on the 31st December, 1816."

CARRICK, &c. *v.* BUCHANAN.—30th May, 1842.

Cases were ordered by the Lord Ordinary, (Cunningham,) upon advising which his Lordship pronounced the following interlocutor, adding the subjoined note: — "11*th July*, "1837.—The Lord Ordinary having considered the record, "revised cases, and the whole process, finds that the disposition "under reduction, executed by the late Thomas Carrick, "on 9th October, 1835, falls under the prohibitory, reso- "lutive, and irritant clauses of the deed of entail executed by "the deceased Robert Carrick, Esquire, in favour of the said "Thomas Carrick, under which the latter succeeded to, and "possessed the estate libelled on, from the period of the entailer's "death in 1821, till his own death in 1836: Therefore reduces, "decerns, and declares, in terms of the libel: Finds expenses "due to neither party, and decerns."

"*Note.*—This is a reduction of a settlement on the ground that "the maker was restrained, by a strict tailzie under which he took "up and possessed the lands, from alienating or altering the order of "succession.

"The plea of the defender is founded on the supposed imperfection "of the irritant clause in the original tailzie, which is said to be "directed only against the acts and deeds of heirs, and not against "those of the institute. But it appears to be impossible to read the "various members of the clause in question, and to hold it of the "limited nature thus contended for.

"On the contrary, the irritant clause in question seems to be un- "usually full and comprehensive, almost to a degree of redundancy. "It consists of different sections, one or other of which renders void "every possible act of any party taking up the estate under the "tailzie. Thus, (1.) it commences with declaring, that 'upon every "'such contravention,' (which referred specially to the possible "contravention of the institute,) 'not only my lands and estate shall "'not be burdened or liable to the debts and deeds of the several "'heirs of tailzie, and heirs whatsoever, as before provided.' After "which the clause proceeds with this proviso, (2.) 'but also all debts, "'deeds and acts contracted, granted, or done contrary to these

" ' conditions and restrictions, or to the true intent and meaning of " ' these presents, shall be of no force, strength, or effect;' and, (3.) " ' shall be ineffectual and unavailable against the other heirs of " ' tailzie, and heirs whatsoever, succeeding to my said lands and " ' estate; and that the said heirs, as well as the said lands and " ' estate, shall nowise be burdened therewith, but shall be free " ' therefrom,' &c. &c.

" It would, it is thought, be denying effect, not only to the obvious " meaning of the entailer, but to the most express words used in the " last members of the clause, not to hold them as reaching acts of " contravention by the institute.

" But even if the irritant clause were held defective, the Lord " Ordinary has great doubt if the settlement under reduction could " be supported. It will be observed, that this was to all intents a " *mortis causa* deed: For it is admitted on record, (see Answers to " article 9th,) that it never was delivered during Thomas Carrick's " life, and no onerous cause is instructed, or even averred.

" The present case, therefore, even if the irritant clause were de- " fective, would fall within a class noticed by all the institutional " writers on Scots law, of a destination fortified by a prohibitory " clause; and it would deserve mature consideration whether such a " destination could be altered by a *mortis causa* deed executed by " one of the heirs, and not delivered, and not to take effect till his " death.

" Both Lord Stair, (B. II., tit. 3, sec. 59,) and Mr Erskine, (B. III. " tit. 8. sec. 23,) lay it down that such a destination cannot be altered " gratuitously; and the same doctrine is said to have been recognized " in one of the branches of the Roxburgh cause, when Lord Eldon " was Chancellor.

" No doubt the older authorities on this question may be supposed " shaken by the latter cases of Hoddam and Speid, in which it was " found that heirs possessing under entails with defective irritant " clauses might make even gratuitous alienations. Still the gratuitous " alienations found competent in these cases, appear only to have been " donations *bona fide* made by deeds *inter vivos*. There has been no " case, as yet, reversing the doctrine laid down by all the authorities

" in our law for upwards of a century, and declaring that a substitu-
" tion fenced with a prohibitory clause can be gratuitously altered by
" one of the heirs in a *mortis causa* deed. This, however, is the
" nature of the deed under reduction in the present case.

" As this last point will come under consideration of the Court in
" considering a question on the Strathbrock entail, lately decided by
" the Lord Ordinary, the two cases should be brought before the
" Inner-House at the same time."

The appellants presented a reclaiming note to the First Division of the Court, praying their Lordships to alter the Lord Ordinary's interlocutor, to assoilzie the appellants, and find them entitled to expenses. The respondent also presented a reclaiming note, in which he prayed the Court, " in addition to the " reason of reduction adopted in the said interlocutor, to find " that, under all the circumstances in which it was granted, and " particularly in its being gratuitous, the disposition dated 9th " October, 1835, is also liable to reduction under the Act 1621, " chap. 18, and generally to sustain the whole reasons of reduc-" tion set forth in the summons, and insisted in by the pursuer, " and farther, to find the pursuer entitled to his expenses."

On advising the reclaiming note for the appellants, the Court pronounced the following interlocutor:—" The Lords " having resumed consideration of this reclaiming note, and " heard counsel for the parties, adhere to the interlocutor re-" claimed against, and refuse the desire of the reclaiming note; " of new, find no expenses due to either party, and decern."

The Court on the same day, on advising the reclaiming note for the respondent, pronounced the following interlocutor:—" The Lords having resumed consideration of this reclaiming " note, and heard counsel for the parties, adhere to the inter-" locutor reclaimed against, and refuse the desire of the reclaim-" ing note; of new, find no expenses due to either party, and " decern."

The appeal was against the two first of these interlocutors, and the last, in so far as it found expenses due to neither party. The respondent took no cross appeal.

Mr Solicitor General, and Mr Anderson, for appellants. — I. The institute is mentioned by name in the prohibitory and resolutive clauses, but he is omitted in the irritant clause, which is confined to the heirs of tailzie and heirs whatsoever. But it is said, that the declaration subjoined to the prohibition against selling or burdening with debt, amounts to an irritant clause. But each clause has its particular and defined object, and the House cannot, where one is defective, look to another to aid it or supply its place. Morehead *v.* Morehead, 1 *S.* and *M'L.* 29; there Lord Brougham said, "The third rule is, where there are "two different parts of an instrument, and mention is made in "them both of the same matter, we are rather to seek the inten- "tion of the maker in that part whose proper office it is to deal "with that matter, than in the other part, where it occurs inci- "dentally." But assuming the words following "declaring," capable of being used as the irritant clause, it is confined to "deeds to be granted or debts to be contracted," it is not directed against either selling or altering the order of succession. In Lang *v.* Lang, 1 *M'L.* and *Rob.* 871, in which judgment was given before that now complained of, Lord Brougham laid down, that the irritancy must be levelled at the particular act, it was not sufficient that it should be levelled at it as a conveyance or implication.

[*Lord Brougham.* — In that case there were these words, "or "the hopes of succession evaded," which were very important.]

Then, if the proper irritant clause be looked to, it is evident, from the terms used, that the institute is not expressly included.

[*Lord Brougham.* — You are seeking to set free the institute, by implication, from the word "other."]

We are not seeking to set him free, we do not find him bound. In Breadalbane *v.* Campbell, 2 *Rob.* 109, the term "other" was used exactly as here, and there the Court below, after the decision of this case, held that the entail did not affect the institute. Here the institute is neither named nor described, and the intention of the maker seems rather that he should not be bound, where he says, that it shall be lawful to "every heir," who shall have title through the contravention of "a former heir," to sue declarator of irritancy; but, though competent to speculate as to inference of intention in regard to freedom from the fetters, there can be no speculation as to the intention to bind: that must be plain and inevitable from the words used, otherwise the party, whether institute or heir, is free.

[*Lord Chancellor.*—The words here are, "upon every *such* "contravention," but, in Breadalbane *v.* Campbell, the words were, "upon every contravention." In that case, you could not get out of the limited construction; here the institute is named in the contraventions to which "such" is the relative. There seems a distinction.

Lord Brougham.— In Breadalbane's case it was every contravention generally by heirs, without mention of the institute.]

The question is not, whether the clause *may*, but, whether it *must*, include the institute; if it be conceded, as it must, that an institute is not included under the word "heirs," the clause is against heirs only.

II. As to the plea founded on the act 1621, there is no averment of insolvency upon which to found it, and, without insolvency, the statute has no application to the case, and any notion of a distinction of cases occurring, *inter haeredes*, from those between third parties, in regard to the construction of entails as affected by this statute, cannot seriously be maintained, as all the most important questions upon this branch of the law have occurred between heirs.

Mr Pemberton, and Mr James Bruce, for respondents. — I. The deed in this case is *mortis causa*, and, at the granter's death, remained undelivered. At the time this case was decided in the Court below, it was supposed that there had been a decision of this House in the Hoddam case, that an entail could not be defeated by a gratuitous deed of this nature.

[*Lord Campbell.* — That question is touched by the Lord Ordinary, but not by the Court.]

No. Because of the supposed judgment in the Hoddam case, but there never was any such judgment.

[*Lord Brougham.* — That point was not raised in the case.]

Certainly not. On the contrary, your Lordships distinctly repudiated any intention of meddling with it. The act 1685 left questions *inter haeredes* untouched, and it is laid down, both by *Stair*, II. 3, 59; and *Ersk.* III. 8, 23, that the destination of an entail cannot be altered gratuitously; that was decided in Callender *v.* Hamilton, *Mor.* 15476; so in Ure *v.* Crawford, *Mor.* 4315; and in Cathcart *v.* Cathcart, 5 *Wil.* and *Sh.* 315, the Lord Chancellor said, "That the Ascog case would support a *bona* "*fide* lender leading adjudication, if there were no effectual pro- "hibitory clause, but that the transaction being with Kennedy, "which is another name for Sir Andrew Cathcart himself, the "thing is all moonshine."

While that error in the Hoddam case remained unexplained, the Judges in Scotland were under the impression, that the law had been shaken, and Speed *v.* Speed was decided under the impression of the same mistake, *Sandford*, p. 103.

The Lord Ordinary's judgment in the present case, and that of the Inner House, were both given previous to the explanation of this mistake in the Hoddam case.

[*Lord Campbell.* — Is any distinction made between deeds *inter vivos* and *mortis causa*?]

We are not aware, but there is a clear distinction as to the

cases with creditors from those with heirs. The validity of the entail, in the first class, depends on the statute, while, in the second, it is wholly independent of the statute, and rested entirely on the conditions. It may be very true, that the cases have occurred with heirs, seeking to void the entail by a prospective act, which, if effectual for that purpose, was indifferent to them in other respects, as in the Hoddam case, where the heir attempted to ascertain a power to burden or sell; but here the act of contravention is accomplished, and, in its nature, is purely gratuitous.

II. As to the irritant clause. The resolutive clause sets out with declaring, that in the case, the institute, George Carrick, junior, by name, or any of the heirs, should commit certain acts of contravention, they should lose their right, and then the irritant commences in these words, "and upon every *such* contra-"vention;" the word "such," here, is the relative to the various contraventions which precede it, and as these are contraventions to be done by the institute, among others, it is impossible to say, that the acts of the institute are not irritated. But, admitting this to be erroneous, the words which follow, "but also all debts, "deeds," &c., is a sufficient independent clause to embrace all acts done, whether by the institute or the heirs; it is limited neither to the one nor the other.

[*Lord Brougham.* — You say that the second branch, commencing with, "but also," &c., is sufficient without the first?]

Precisely.

[*Lord Chancellor.* — What you have to struggle against is the word "other?"]

Undoubtedly. But it is obvious that that word was introduced to make the clause embrace acts done by the heirs; for without it, and had the clause stood, "against the heirs," only, it would have applied to the acts of the institute alone, but by the introduction of the word "other," the acts of heirs, as well as of the institute, are irritated.

There the irritant clause was not co-extensive with the resolutive, and the question was, whether you could go back to the resolutive clause, because, continuously and grammatically, both were one sentence, and the institute was mentioned in the resolutive clause, distinct from the heirs, while, in the irritant clause, he was omitted altogether.

Mr Solicitor General, in reply.—If the principles be looked to, it is quite inconsistent with all the rules of law that there should be a different rule of construction of entails *inter haeredes*, and as with creditors. It is said, that the statute 1685 creates the difference, but the statute in no part requires one set of clauses against heirs, and another against creditors.

[*Lord Campbell.*—What they say is, that the entail before the statute, and now without the statute, is good against heirs, though it do not have an irritant clause.]

The argument seems to lead to this, that the heirs may have an interdict against the heir in possession, to prevent him from disposing of the estate, but no case has been shewn making any distinction between heirs and creditors. *Ersk.* III. 8, 23, no doubt says, that the heirs are creditors under the prohibitions, and may set aside gratuitous deeds on the statute 1621. Without inquiring whether this character given to the heirs is consistent with the authorities, it is sufficient that we are not in that question. It is not pretended that the maker of this deed was in insolvent circumstances, without which the statute cannot have application. But this question was settled by the Ascog case, and the other decisions, since *Erskine* wrote. In the Duntreath case, *Mor.* 4409, the distinction between heirs and creditors was expressly taken and disallowed; and in Lang *v.* Lang, the question was between heirs.

[*Lord Campbell.*—Was the distinction taken there?]

I don't know. So Speed *v.* Speed was a case with heirs, and the question was, whether the heir "might gratuitously alienate." And the common form of declarator is, to have it found that the

party has an absolute right to the estate. In Sharpe *v.* Sharpe it is said there was some mistake in drawing up the order, but it was in conformity with the conclusions of the summons, and no attempt was ever made to have the supposed error corrected.

The position taken by the heirs in the Ascog case, as to reinvestment, was a fair deduction from *Erskine's* notion, as to the substitutes being creditors. Lord Cringletie, in his judgment, expressly met the distinction, and that opinion was approved of by this House, and the interlocutor of the majority reversed. If the distinction now raised is to be adopted, the opinions delivered in this House, in the Ascog case, cannot stand. In Cathcart *v.* Cathcart the question at issue was, whether the heir, by colourably contracting debt, contracting debt not being prohibited, could evade a prohibition against selling; but that has no application to the present case.

[*Lord Campbell.* — The great principle in the Ascog and Tillycoultry cases was the absurdity of reinvestment *totis quoties.*]

The absurdity might be observed upon, but it could not form any principle of decision.

[*Lord Chancellor.* — Lord Eldon's decision rested principally upon that absurdity. I remember it well.]

It was hardly possible to refrain from remarking upon so apparent an absurdity, but it could hardly be the principle of his judgment. I submit the law of entail is to be governed entirely by the act 1685, and, if the deed is not valid under that statute, it is not good against either heirs of entail or any one else.

LORD CHANCELLOR. — Since the beginning of the argument, I have been endeavouring to discover how the irritant clause could be made to affect the institute, but I have not been able to do so. I am of opinion, therefore, against the judgment both of the Lord Ordinary, and the judges of the inner Court. I think the other point has never been expressly decided by this House — never satisfactorily decided. That question has not been consi-

dered by the Court below, and I think it ought to go back for that purpose.

Lord Brougham. — Their Lordships seem never to have touched it in their view of the case.

Lord Chancellor. — It strikes me so. They appear to have been so strong in their opinion with the Lord Ordinary, on one point, that they did not at all enter into the consideration of the other point, stated in the judgment of the Lord Ordinary.

Lord Brougham. — In fact, it did not arise.

Lord Chancellor. — We cannot decide that question in the first instance, whatever impression we may have on the argument of the Solicitor General.

Lord Brougham. — They ought to take a consultation of the judges on it, it is a question of great importance.

Lord Chancellor. — Unless it was a question absolutely free from all doubt, not having been presented to the Court below, we are bound to send it back after the doubts expressed by Lord Cunningham, with respect to it. It is not for us to decide it in the first instance.

Mr Solicitor General. — Then it would be a remit on that point. May I suggest on the part of the clients, for whom I appear, who are the heirs-portioners of the institute under that entail, that it is rather hard these costs should fall on them personally; probably your Lordships will be of opinion, that the costs of this remit should be paid out of the estate under the circumstances.

Lord Chancellor. — When the case comes back we will decide that. It is a question of so much importance, and the judgment of the Lord Ordinary, and that of the other learned persons, is so strongly expressed, that it would be the better way to reserve the judgment as to the titles to the estates.

Mr Solicitor General. — The question of the costs of the remit will be reserved?

Lord Chancellor. — Yes, we merely say nothing about them.

CARRICK, &c. *v.* BUCHANAN. — 30th May, 1842.

It is not to be understood, Mr Solicitor General, that in point of form, we have decided. We remit the case generally, with the view of having the judgment of the Court on the point to which I have referred; it is not to be considered that we have decided any thing farther than directing the remit.

Mr Solicitor General. — Might not that rather prevent your Lordships' object? Would not the object be, that the Court below should come to a decision on the subject of the gratuitous deed?

Lord Chancellor. — Merely as to that. In point of form, we pronounce no judgment on the other parts at present.

Lord Campbell. — I apprehend that question will be specially submitted to the Court below.

It is Ordered, That the cause be remitted back to the First Division of the Court of Session, in Scotland, with directions to consider, " whether, if the irritant clause in the deed of entail, in the said cause mentioned, should be held defective as not being directed against the institute, the said deed of entail is otherwise sufficient to exclude or render void the disposition under reduction, on the ground of its being, as alleged by the respondent, a gratuitous deed;" and to take the opinions of the Judges of the Second Division of the said Court, and of the permanent Lords Ordinary thereof, upon the question; and to report the opinions of the whole Judges, including the Lords Ordinary, thereupon to this House. And this House does not think fit to pronounce any judgment upon the said appeal until after such opinions shall have been so reported, according to the direction of this order.

DEANS and DUNLOP — RICHARDSON and CONNELL, Agents.