GRAHAM, ... APPELLANT.

STEWART ET AL., ... RESPONDENTS.

1855.
May 25th, and June 5th, 7th, and 14th.

Construction.—An entail made in 1726 was supposed to be binding and indefeasible. In 1821, the heir in possession directed his testamentary trustees to convey to those succeeding him in the estate certain fee-simple lands, and the conveyance was to be expressly "under all the conditions, provisions, and clauses prohibitory, irritant, and "resolutive of the said entail, so far as the same might be "applicable, and so as to form a valid and effectual entail "according to the law of Scotland." The testator died in 1843. In 1849, the House of Lords decided that the said entail was defective. *Held*, that the conveyance to be executed by the trustees should be so framed as to "make "a valid and effectual entail;" and, therefore, was not to follow the original entail where it had been found to be defective.

Dissent by Lord St. Leonards.

The Court of Session had decided in favour of the Respondent. Hence this Appeal.

The *Solicitor General* (*a*) and Mr. *Rolt* for the Appellant.

The *Lord Advocate* (*b*) and Mr. *Roundell Palmer* for the Respondents.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*c*):

My Lords, this is an appeal against the interlocutor of the Lords of Session, in an action raised by Robert Graham of Redgorton, against Robert Stewart and Sir Patrick Murray Threpland, who are trustees of the

(*a*) Sir R. Bethell. (*b*) Mr. Moncreiff.
(*c*) Lord Cranworth.

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late Lord Lynedoch. The object of the action was to obtain a declarator establishing the fact that the Pursuer, Mr. Graham, is absolute owner in fee-simple of certain lands as to which the Defenders contend that he is only tenant in tail.

The question arises upon the construction which is to be put upon the first deed of Lord Lynedoch, which is in the nature of an entail, executed by him, directing the disposition of his lands after his death. It is a trust disposition and settlement made by Lord Lynedoch, dated 20th of June 1821, and codicils dated 7th March and 4th May 1838, all registered in the books of Council and Session on the 30th of December 1843.

The facts of the case are shortly these. In the year 1726, the then Mr. Graham was in possession of the property and estates of Balgowan, and executed certain deeds whereby he entailed those estates, as he supposed, with all necessary fetters in strict settlement. Under that settlement, after different heirs, whom it is not necessary to enumerate, the late Lord Lynedoch became entitled, as heir of entail, a good many years ago, somewhere towards the latter part of the last century, in 1770 or thereabouts. At different times, certain of the lands that had been settled were sold, and others substituted in their place. That was done by virtue of three several Acts of Parliament passed in the years 1787, 1805, and 1811.

After Lord Lynedoch's death, the question arose as to the validity of the entail. And, not to trouble your Lordships by recapitulating in detail the proceedings which took place, it was established that there was no fetter restraining alienation and that consequently the entail was invalid (*a*).

(*a*) *Murray* v. *Graham*, 6 Bell, App. Ca. 441.

An Act of Parliament passed very recently, enacting that where one fetter in an entail fails, the whole entail shall fail (*a*), because, in truth, if you want to get rid of the entail, you have only just to go through certain forms, and you get rid of it entirely. That, however, has not much bearing upon the present case. But, my Lords, it was finally established that under the deeds of 1726, Lord Lynedoch was in truth not fettered, but absolute owner of the property.

Lord Lynedoch, by his trust disposition, made in the year 1821, settled his estates, and directed them to be disposed of in a variety of ways, both the personal and the real estates;—in the first place, for the payment of his death-bed and funeral expenses; secondly, for the payment of his just debts; thirdly, to pay legacies; and fourthly, and this gave rise to the present question, that after fully accomplishing the purposes aforesaid, "if any of my lands and heritages before disponed shall remain unsold, my trustees shall, in due form of law, dispone and convey the same to the heirs of entail called after me in and by a certain deed of entail executed by Thomas Graham, sometime of Balgowan, and John Graham, his son, dated on or about the 7th day of February and the 9th day of June in the year 1726, and recorded in the register of entails on or about the 30th of December in the same year, under all the conditions, provisions, and clauses prohibitory, irritant, and resolutive in the said deed of entail contained, so far as the same may be applicable, and so as to form a valid and effectual entail according to the law of Scotland."

Now, his Lordship having died seised of a considerable amount of real estate and of personal estate, which became vested in the same person, the question comes

(*a*) 11 & 12 Vict. c. 36.

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to be, whether the person who is to take as heir of entail, is to take an absolute fee-simple or an estate under the fetters of a strict entail?

The present Pursuer, Mr. Graham, contends that it having been decided that the deed of 1726 did not create an effectual entail, this direction was substantially a direction to settle the lands of which he was seised in fee-simple, or which might be purchased with the residuary personal estate, in the same way as the deed of 1726 had settled those estates. And inasmuch as that settlement gave to him in effect an absolute estate in fee-simple, he is now entitled in fee-simple to the lands of which Lord Lynedoch was seised in fee-simple, or which were purchased by the residuary personal estate. To establish these positions is the object of the present action.

My Lords, the Court of Session has held that that is not the true construction to be put upon this trust disposition of 1821; for although the direction was that the lands of which he was seised in fee-simple were to go to the heir of entail "under all the conditions, provisions, and clauses, contained in the former deed," yet that there were superadded the words "*and so as to form a valid and effectual entail according to the law of Scotland.*" If, therefore, looking only to the "conditions, provisions, and clauses contained in the deed of 1726," there be any defect (as undoubtedly there is), that deed is not a valid and effectual entail according to the law of Scotland. The learned Judges were therefore of opinion that the direction imported that such restrictions must be added as are necessary to form a valid and effectual entail That was the opinion of the Judges of the Inner House, with one exception, the Court determining that, according to the true construction of that deed of 1821, the settlement to be executed was to be made so

as to create a valid and effectual entail according to the law of Scotland.

This decision now comes to be reviewed by your Lordships; and I must own that, in my opinion, the conclusion at which the Court of Session arrived was a perfectly correct one. That opinion rests upon grounds extremely simple, and which may be very shortly stated.

I take it to be a canon of construction, that you are, in the first place, to strike out no words that are sensible, and that you cannot see have been introduced by accident or inadvertence; and you are to give to all words their natural meaning, unless there be something in the context, or in certain cases in external circumstances, to show that the words are not so to be understood.

Now, the direction is that these fee-simple lands are to be settled "under all the conditions, provisions, and clauses prohibitory, irritant, and resolutive in the former deed of entail." If that had been all, no doubt, inasmuch as that former deed of entail had the omission of an irritant clause, whereas it was necessary that there should be an irritant clause in order to make the deed valid, the contention of the Pursuer would have been right, and he would have been entitled to the fee-simple; but the testator having directed that the deed was to be framed with "all the conditions, provisions, and clauses in the former deed," then goes on, "and so as to form a valid and effectual entail according to the law of Scotland." The Court of Session held that you have no more right to strike out those words than to strike out the former words; that the two are perfectly consistent; that you may make the settlement subject to "all the conditions, provisions, and clauses prohibitory, irritant, and resolutive, contained in the deed of entail of 1726, and you may do that,

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"so as to make a valid and effectual entail according to the law of Scotland." What difficulty is there in that? There are two directions given, the first is that all the clauses in the former deed shall be inserted; and the other is, that the settlement shall be made "a valid and effectual entail according to the law of Scotland." You do that by taking all the clauses and conditions of the former deed, some of which may not be necessary for a valid entail, as, for example, taking the name and arms, or in the case of a female, taking the name of the family,—that was not necessary for a valid entail; but that was to be inserted in this deed, and this was to be done so as to create a valid entail. Now, it appears to me, upon that very short ground, that the words are to have their natural meaning, and that you are to strike out none, if it be possible to give effect to all; the Court of Session have arrived at a perfectly correct conclusion.

In the course of the argument, it was strongly pressed that this could not have been the meaning of Lord Lynedoch, because Lord Lynedoch certainly supposed that the deed of 1726 created a valid entail, and that, therefore, he, supposing that that was a valid entail, must be taken to have understood when he directed these lands to be settled according to that deed, "and so as to form a valid and effectual entail," that he was only adding words that were superfluous, and that no real meaning was to be attributed to them, but that they were entirely analogous. And to show that that was his idea, we were referred to certain matters which had taken place in Lord Lynedoch's lifetime, which I will shortly advert to, but with the observation that I reserve my opinion as to how far they can have any legitimate bearing upon the question before your Lordships.

It appears that in the year 1787, Lord Lynedoch

being then heir of entail in possession, and having other fee-simple lands of his own, obtained an Act of Parliament, enabling him to evacuate the entail as to certain portions of the lands that had been included in the settlement of 1726, and to substitute for them some of the lands of which he was seised in fee-simple, upon the ground that the lands which were to be evacuated were less conveniently situated for the bulk of the property than those which he proposed to substitute for them. For that purpose, he obtained an Act of Parliament, which recited the original entail, and then that certain lands in the county of Perth, lying contiguous to the principal part of the entailed estate, had been from time to time purchased by Thomas Graham and his ancestors, and then belonged to him in fee-simple, which are altogether of the yearly value of 1,242*l.* sterling, and that the certain other lands comprised in the deed of entail, lying discontiguous, and of less value, and "that Thomas Graham had proposed, and all the other heirs of entail were desirous, that in lieu of the discontiguous lands, the others should be substituted." Power is given to him to "apply to the Court of Session, and with their direction, to execute a deed of settlement of those lands to go in the same way, and under all the conditions, provisions, declarations," and so on, "contained in the old deed." Now, it is said that that shows that he understood this deed to create a valid entail.

My Lords, if this were a matter before a jury, and I were to decide it, I should say that great weight is to be attributed to this fact. I should say, very likely he did so understand it, but my doubt is whether it has any bearing upon the question. No doubt, whether he did or did not believe so, the fact is that when the thing was to be done, all he did was to substitute cer-

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tain fee-simple lands for certain entailed lands, whether effectually entailed or not.

Precisely the same proceeding took place in 1805, and again in 1811; it was stated in argument, that the language in the Act of 1811 was somewhat stronger than that of the other Acts, inasmuch as the lands which were directed to be substituted were to be in the form of a strict entail, and under all the conditions, provisions, declarations, limitations, and irritances limited, and so on, by the aforesaid deeds of entail, in so far as the same are now subsisting, or capable of taking effect, which settlement and entail shall be so framed as to bind the said Thomas Graham or other person executing the same, as well as the succeeding heirs of entail." When, in conformity with that Act, the deed was made, (merely following the deed of 1726,) the circumstance was relied upon, as showing that these parties must have understood that that deed created an effectual entail, and the more so, as when that deed was made in pursuance of that direction, it was made a few days before the trust disposition, the construction of which is now before your Lordships. It began in this way: "Considering that Thomas Graham, some time of Balgowan, now deceased, did, in and by a certain deed of entail, executed by him and John Graham his son, which is dated the 17th day of February and 9th day of June, 1726, and duly recorded in the Register of Entails, kept at Edinburgh, upon the 30th day of December in the same year, settle and secure, by way of strict entail, his lands and barony of Balgowan, and others in the county of Perth." Then Lord Lynedoch goes on, and settles these substituted lands only a few days before the execution of this trust disposition. That, it is contended, is conclusive evidence to show that he supposed that the deed of 1726 was a valid deed of

entail, and, consequently, that all he was called upon to do, was to make a deed in conformity with it.

Now, my Lords, supposing that as matter of fact, that is a conclusion to which it would be reasonable to arrive, what I venture respectfully to suggest to your Lordships is, that that is not a matter which this House can take into consideration at all. Where the settlor, the testator, or the maker of the deed has used words that in themselves are perfectly clear and unambiguous, you have no right to go into extrinsic evidence to show how he understood those words. That doctrine has been so very often considered of late years, that it would be, I think, mere pedantry to go through the cases on the subject. I merely allude to one which concluded the question in your Lordships' House. It was a case of the very strongest description: I allude to the case of Mr. Oxenden (*a*), in which, having an estate, the largest portion of which was situate at a certain place called Ashton, but other estates situate in adjoining parishes, he was in the habit of always speaking of his estate as "my Ashton estate." He kept his books in that way, and his stewards kept them in that way, and whether an estate was in the parish of Ashton or not (it did not appear to him the least material), he called it his Ashton estate; and in his will he said, "I give all my lands in Ashton." In the first place it was held that that meant "all my lands at Ashton;" but, after the case had gone through all the courts, and eventually had been brought here, Lord *Eldon*, in concurrence with all the Judges,—Chief Justice *Gibbs* expressing the opinion of the Judges,—came to the clear conclusion, that it was an expression which admitted of no doubt whatever upon the face of it, and that you

(*a*) *Oxenden* v *Chichester*, 4 Dow, 65.

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could not admit extrinsic evidence to show that the person using words which have a plain meaning was in the habit of using them in a different sense from that which was their ordinary meaning,—that the expression itself was simply to be looked to, and, consequently, nothing passed by the devise, except so much of the lands as were situate in Ashton. That was carrying the case to the greatest possible extent; and, as it seems to me, that decision must govern the present case. The Appellant contends that Lord Lynedoch must have understood that these words which were added, were unnecessary, and that if they had been omitted the object would have been effected without them; but he has fortunately for that which was his object introduced these words, and I think, without infringing upon the rules that govern the doctrine as to the admission of evidence to explain words, your Lordships are not at liberty to look to extrinsic evidence in order to see what he meant, in direct violation of the precise terms he has used.

Those are the short grounds upon which it appears to me that the Court below have come to a correct conclusion. The grounds upon which they proceeded were, that there is nothing inconsistent in the two directions; that it was quite right to direct that the deed should contain all the provisions of the former deed, and that it was consistent with that to say that it should be done, "so as to form a valid and effectual entail according to the law of Scotland;" that that is a direction which may be easily and effectually executed; and that, even if you imagine that Lord Lynedoch had a different intention, you cannot collect that intention; you are not at liberty to look to external circumstances to collect it, but you must be guided, not by what you suppose from external circumstances was his intention, where you can ascertain

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what is the intention that the plain language which he has used already expresses. Upon these grounds I move your Lordships that the Interlocutor of the Court below be affirmed.

Lord Chancellor's opinion.

The Lord BROUGHAM:

Lord Brougham's opinion.

My Lords, in dealing with this case I am prevented by two circumstances from entering at large into the argument. The first is the able and distinct manner in which my noble and learned friend, with whom I agree, has gone into the question; and the other is the accidental circumstance that I really was not aware that this appeal was in the paper to-day, and, I had prepared myself to give judgment in another case, which I believed to be in the paper; and therefore, I had not looked into this case with a view to give judgment upon it to-day. However, after having had considerable doubt upon it in the course of the argument, and at one time having even had an inclination of opinion against the judgment appealed from,—yet during the residue of the argument and before it closed, I had come to the opinion which has been expressed by my noble and learned friend in favour of the decision of the Court below.

My Lords, it is in vain to speculate upon what Lord Lynedoch himself would have done, had he been the party to frame the instrument himself, and to make the entail, instead of only giving instructions to his trustees to make that entail. Probably, and I may say I think it very likely, that he would have taken the course which it is said would have been sufficient, according to his understanding of the law as it then was, before the decision of your Lordships' House, finding the fencing clauses of the old entail of 1726 insufficient. It is very likely that he himself, considering those clauses to be sufficient, might have made

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the entail with those clauses, and possibly with no alteration in them, and possibly with no addition to them. I cannot speculate upon that, any more than I can speculate upon what he probably would have done, nay, I would say, upon what it is quite certain that he would have done, if not only he had been the party to make the entail himself, but also with the knowledge of what was subsequently ascertained, namely, that the old entail was invalid. I have no doubt whatever that if such had been his knowledge, he would not have adopted those clauses, but would have drawn the deed so as to constitute a valid and effectual entail. But I can speculate neither upon the one nor the other of those suppositions. I must look, and in my opinion I am bound to look, only at what he really did.

Now, I cannot get over the argument, which appears to have had weight with the majority of the learned Judges in the Court below, as it has with my noble and learned friend, that in order to reverse this judgment and agree with the minority of those learned Judges, you must really strike out that very essential part of the fourth provision, beginning with the word "*And*," "and so as to form a valid and effectual entail;" and you must leave it as if it were "under all the conditions, provisions, and clauses prohibitory, irritant, and resolutive in the said deed of entail contained, in so far as the same may be applicable." We cannot do that. We have no right to strike out these words, for he qualifies it or he extends it (I care not which) by adding these words. He says you are to make the entail under all the conditions, provisions, and clauses in the said deed of entail contained; and not only does he say so without adding "and none other," or without adding "allenarly," or any other words that would restrict the trustees to those very clauses, and prevent them from adding to or altering those clauses,

but he adds, "*and* so as to form a valid and effectual entail." It is not "so as to form a valid and effectual entail," for then the argument might arise, which I see appears to have had great weight with that very learned Judge, Lord *Cuninghame*, who is a most excellent lawyer no doubt, and great conveyancer, but this is really not a question of the Scotch law of entail, or Scotch conveyancing. His Lordship appears to have thought, that if the word "and" had not been there, and the words had been "under all the clauses so far as the same may be applicable, so as to form a valid and effectual entail," then those latter words "so as to form a valid and effectual entail," would have been what he and the other Judges in the course of the argument have termed merely exegetical or explanatory, and would merely have served to indicate that that was Lord Lynedoch's own opinion or his own impression as to what would be the effect of making an entail with those clauses. My Lords, I have great doubts whether I could say so, even if the material word "*and*" had not been inserted; but with that word "*and*," I really can entertain no reasonable doubt whatever that we are bound to take them, not merely as indicating what Lord Lynedoch's opinion was of the effect that would be given to those clauses in law, if those clauses were put in the deed without any alteration, and without any addition, but that we are to go a step further, and to hold, as the Court below have held, that he gives a direction (whether under the influence of a legal error or not, I will not inquire, and it is unnecessary to inquire,) to insert all those clauses, and to form, he does not say "to form *thereby*," but "to form a valid and effectual entail." I agree therefore with the Court below, that this clause cannot be rejected, occurring as it does, not only in the first part, but in the subsequent part of the deed, where Lord Lynedoch repeats

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the words: "under all the conditions, clauses," and so forth, "in so far as the same may be applicable," the only difference being in the word "in," and then he adds "*and* so as to form a valid and effectual entail." Lord Lynedoch's words taken literally, and taken in the sense which only can be given to them, in my opinion call upon the trustees, and compel the trustees, to make a valid and effectual entail according to the law of Scotland.

Lord St. Leonards' opinion.

The Lord ST. LEONARDS:

My Lords, this case was decided in the Court below by three Judges against two. I am of opinion with the minority, and I think that the decision of the Court ought to be reversed. The facts previously to the trust disposition executed by Lord Lynedoch are simply these, that the estate was settled according to the law of Scotland in 1726, by a deed intended to be, no doubt, a strict entail, and which was a strict entail according to the forms of the law of Scotland at that time, except, as it ultimately appeared, that there was one of the fetters not sufficiently fenced, namely, that against selling, which wouldtherefore enable the heir of entail by going through a form to avoid the settlement in question.

Now, at the time the entail was made, of course it was considered a perfect entail, and for a very long period after that time, for upwards of a century, it was deemed a very good entail. It never occurred to the mind of any man that there was a defect in it. Lord Lynedoch himself had purchased from time to time portions of the fee-simple property, which were contiguous to the principal estates, and which he thought of great importance to be attached to them for the purpose of joint holding. He accordingly obtained three several Acts of Parliament, for the purpose of

enabling him to take in exchange outlying parts of the settled estates in return for particular portions of land which he himself possessed, and which were contiguous to, and desirable to be held with, the settled estates. Now, if anybody had imagined at that time that there was a defect in the fetters of the entail, of course the expense of those Acts of Parliament would have been saved, and Lord Lynedoch himself would in another way have effected those several alterations by annexing the three different estates at the three different periods when the Acts of Parliament were passed, so as to save the whole expense and machinery of those Acts.

Now, the Acts of Parliament themselves were very strongly framed. Under the first, Lord Lynedoch was authorized to apply to the Court of Session, and with their direction and approbation to grant and execute disposition of the fee-simple lands in such form and manner as shall appear to the Judges of the Court proper for effectually settling and securing the said lands and estates, free of all debts and incumbrances, upon the said Thomas Graham, and the other persons and heirs of entail, called by the aforesaid deed of entail, in the same form of a strict entail. The Judges at that time were of opinion, that the proper mode of effecting the settlement of these estates was to settle them exactly in the very words of the settlement of 1726.

In the later Act of Parliament, that of 1811, the direction was still more singular. It was, "to grant and execute a disposition of the aforesaid lands in such form and manner as shall appear to the Judges of the Court in either Division thereof proper for effectually settling and securing the said lands and estates, free of all debts and incumbrances, upon the said Thomas Graham," "and the other persons and heirs of entail." Then come these words, "called to the succession in

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the said herein-before in part recited deeds of entail, executed by the said Thomas Græme and John Graham, his son, and by the said Thomas Graham, now of Balgowan, respectively in the form of a strict entail, and under all the conditions, provisions, declarations, limitations, and irritancies limited, provided, mentioned, expressed, and declared by the aforesaid deeds of entail, in so far as the same are now subsisting or capable of taking effect, which settlement and entail shall be so framed as to bind the said Thomas Graham or other person executing the same as well as the succeeding heirs of entail." If anything, therefore, in words could have directed the making an effectual entail, it would have been the words which I have just read.

But there was also a clear intention expressed, which was to convey these estates to the uses of the deed of 1726. These deeds are all recited in the trust disposition of Lord Lynedoch, upon which the House now has to decide; and therefore this is not a question as to how far you may go into extrinsic circumstances by collateral evidence, in order to place yourself in the situation in which the testator or grantor stood at the time that he directed the settlement to be made, because, upon the very face of the settlement those different dispositions and instruments are stated, and consequently you are entitled to look at them, not for the purpose of striking out these words—I disclaim any such intention,—nor for the purpose of giving to them a meaning which they will not admit of, but for the purpose of enabling you to ascertain the sense in which ambiguous words were used by the testator in the clause in question.

Now, so far, it is perfectly clear that this was the great object of Lord Lynedoch's life, to annex to the family estate all the portions of the estate which he

acquired, and which were desirable to be held with the family estate; and ignorant as he was that there was any defect in the settlement of 1726, he took that deed, as a matter of course, as his guide. That was his model,—that was the thing to which he referred, and he meant the estates to go with the principal estate. The principal estates were not, as he considered, within his power, but they were strictly settled by the deed of 1726. He could, therefore, have but one intention, and that was, that as those estates were to go with the principal estates, they should go according to the settlement of the principal estates; and there was no other way in which they could go with the principal estates except by being annexed to those estates according to and under that settlement.

Let us suppose this case, that immediately after Lord Lynedoch's death there had been a settlement executed, that the Judges had had to settle the estates, how would they have settled them? They would clearly have settled them according to the settlement of 1726,—no one doubts that; according to the extent of knowledge of the law of every professional man in Scotland, from the lowest to the highest, every agent, every writer to the signet, every advocate, every judge, all the parties concurred in the construction of the settlement of 1726, that it was a binding and legal settlement according to the law of Scotland, with sufficient irritant and resolutive clauses to carry the estate, so far as the Act of 1685 would allow any estate to be carried. Then the whole difficulty has arisen, not upon what those words would authorize you to do,—because, when you are talking of striking out the words, as I have said already, I utterly disclaim any such intention,—not merely of striking out the words, but of putting a forced and unnatural construction

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upon them. If the words do not bend to what was clearly the intention of the Testator, of which I have no doubt, then let no effect be given to them. But the words cannot be so exceedingly difficult to manage, if (as in the case I am now putting), supposing that the Judges of Scotland, and the whole weight of knowledge of Scotland in point of law, had been brought to bear upon this settlement immediately after the death of Lord Lynedoch, they would have agreed that the words would have authorized a settlement to the very uses of the settlement of 1726. The words cannot be of a nature that will not admit of that construction, if that is the construction which all Scotland, the Judges, and the Bar would have agreed in.

Then some person discovers that there was a defect in this settlement; but what was that defect? It was not a defect arising out of the natural construction or the proper construction of this settlement of 1726, by no means; but the Courts of Law in Scotland, aided by this House, having taken the same view of the Statute of 1685 which our Courts of Law here took of the Statute *De donis*, that is, setting their minds against the strictness of entail which was allowed by the Statutes, and being desirous of throwing lands into the general commerce of the country, made a forced, unnatural, and I may say without offence, an improper, construction of these instruments, in order to avoid the instruments and to defeat the fetters, and to throw the property for general purposes into circulation; but that was not their natural construction, and when the point was raised with regard to this deed the *Lord Ordinary* was of opinion that the fetters were good. When it went to the Lords of the First Division they called in all the Judges of Scotland and they were consulted upon it, and there

was a majority of opinion that the fetters were not good. Then it went to the Second Division, and what became of it then? The Judges were equally divided. There never was a point, therefore, open to more doubt. The construction put upon the settlement of 1726 turned upon a mere quibble, upon playing with words,—it was not carrying the intention into effect, but defeating the intention. That was the great object of the course of decisions, but it is a course of decisions adopted in no other case. And what does it prove? It proves that the Courts of Scotland, supported by this House as a judicial tribunal, will not go out of their way to encourage fetters, but on the contrary, that they will go out of their way in order to put a forced construction upon an instrument with a view to fetters being defeated.

How has that been followed up by the Legislature itself? Why, by the Act of Parliament, which says, that if there is one fetter in an entail not sufficiently fenced, the whole entail shall be void. That is strong legislation; but it is a strong approbation of the course which had been taken by the legal tribunals. Their object has been that which has been ultimately accomplished by the Legislature, to avoid fetters by every possible construction,—not to look at the intention, but to look and see whether it is possible, upon a mere construction of words, to get rid of the fetters, and so to enable the parties to defeat the entail.

Now, it was stated by my noble and learned friend on the Woolsack—and it does sound somewhat odd—that you are not asked to convey this estate to this gentleman in fee-simple, when a strict entail was intended, that it does not depend upon the settlement, but upon the Act of Parliament; that the intention is not an element to be looked at in this case. You are not at liberty in construing this settlement to look at

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the Act of Parliament at all. The Act of Parliament acts upon this settlement as it does upon all other settlements. This settlement, therefore, let it be made in whatever form it may, must submit in all things just like other settlements to the Act of Parliament, but not to a greater extent. It is an element, but not an element in the discussion of this case. The settlement is the subject of the Act of Parliament, and the Act of Parliament will act upon it just as upon any other settlement, but not in a higher degree or in a different manner.

Now, if we were to look at this case as it stood irrespectively of the discovery of this blot in the entail of 1726, I take it to be perfectly clear that we should have directed the settlement to be made according to the settlement of 1726, and I take it to be equally clear that if the settlement had been so made, no subsequent discovery of the blot could ever have enabled any Court of Justice or this House itself to reform that settlement; but the subsequent settlement, like the original settlement, must have stood precisely as it was formed. Now, the real difficulty here, as it appears to me, arises from this, that two things are confounded. In point of fact, the thing which is the wrong to be complained of, as it turns out, and which the testator, Lord Lynedoch, would have liked to have had corrected, if be had known of it, was, not the settlement, which, in my view, his own deed authorized, but the settlement of 1726. There is the *corpus delicti*, there is the mischief; it is not in the direction to make a settlement in conformity with the original settlement, but it is in the original settlement itself. Nobody knew of that blot, and that Lord Lynedoch, by the words which I will presently refer to, meant to correct that, or to vary it in any manner, I cannot satisfy myself. My Lords, most unwilling as I am to differ

from my noble and learned friend on the Woolsack, I have not come to this conclusion without the deepest consideration, and reiteratedly turning the case over in my mind. I am, however, perfectly satisfied that it is not possible to come to any other conclusion, looking to what the intention was. The fault is in the original settlement, of which nobody complains.

Now, it is a very strong circumstance, and I am entitled to look at these circumstances; we are bound to look at the circumstances of the previous settlement, because here it is no question as to extrinsic evidence; these settlements are recited and made evidence upon the face of the instrument itself. Eight days before this trust disposition, Lord Lynedoch conveyed over this estate to the uses of the settlement of 1726. Now, my Lords, if Lord Lynedoch had himself included the estates now in question in that settlement, or if he himself had executed a separate settlement of that or of any other part of his property, if instead of the trust disposition of 1821, he himself had executed his own purpose,—had made the very settlement which he directed the trustees to make; I ask, can any one doubt what would have been the settlement that Lord Lynedoch would have made of those estates? The answer is clear, that from all that appears, with all the knowledge he had we are entitled to say that in this case he would have followed the settlement of 1726, upon the belief which everybody entertained that that was a perfect settlement. Clearly he would have acted upon that, as he did in all the other settlements: it would not have altered his intention, nor could it have altered the settlement which was made by him. So far, I think, we are agreed. Then comes the trust disposition eight days later; and that trust disposition directed that the remaining estates should be in conformity with the uses of the deed of 1726. He was not sure that there would be any estates

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remaining, but he directs that those estates, if any, which shall remain undisposed of, after paying debts and so on, shall be settled in this manner. So that that was rather an insignificant part of the property; he had settled all the main parts of the property that he meant to settle, and in an irrevocable manner, to the uses of the settlement of 1726; and he treated these as being a very small portion of his property, but he directed them to be settled in the way I shall presently mention, and in doing so he uses these words, which are found at the conclusion of the sentence. Now, supposing that the estates were not all settled, he actully authorizes them to be exchanged for settled estates. Look again at that, and see what he had recently himself done, in exchanging this property for the other settled estates; it is perfectly clear that he meant the land taken in exchange to be settled exactly according to the uses of the settlement of 1726,—of that there can be no doubt. And then there is this circumstance, which has not been referred to by either of my noble and learned friends who preceded me, and which has had great influence upon my mind in coming to a conclusion upon this case; and that is this,—that throughout the trust disposition of 1821 Lord Lynedoch has shown over and over again an intention to unite the two estates, so that whatever he had to settle should go along with the principal estates. Now, there is no way in which that which was his primary intentio n can be effected, except by settling the remnants of these estates exactly as he had settled the other estates as he acquired them, videlicet, to the uses of the settlement of 1726. Let it be recollected that there can be no greater misapprehension than to imagine that the construction which I have put upon this instrument, does not make a strict and effectual entail of the property to a great extent, and to such an extent as might satisfy the parties. It is not

because the subsequent Act of Parliament has enabled you to acquire the fee, that therefore you are to consider that it amounted to a declaration that the man is entitled to a fee under the settlement; he is entitled to no such thing under the settlement. Under Lord Lynedoch's trust disposition there was not a strict settlement. As far as his will is concerned, my opinion of course coincides with the opinion of everybody else, that the estates were to be settled to the uses of the entail of 1726, with all the fetters and limitations contained in that entail. If I go further, and obey the Act of Parliament, it is not construction—it is obedience to the Act of the Legislature. It is not because I am of opinion that he is entitled to the estates in fee, that the settlement is inoperative, but it is because I am of opinion that the settlement is binding and operative, and creates a strict entail beyond all possibility of doubt if there is every fetter, so there is every fetter except that with respect to selling, properly fenced. I therefore, look at it as a direction to make that settlement an effectual settlement, according to the uses of the entail of 1726, as the Judges themselves considered three times over, when they settled the property to those very uses they had been directed to entail them in an effectual form of settlement, according to the Act of 1811. I consider that this would be a perfect settlement, except upon that fetter not properly fenced, and that was a defect which went over the whole estate. Now, if I show to your Lordships, as I have satisfied myself, that these estates were all meant to go together, and that if you adopt the construction which hasalready been put by my noble and learned friends upon this instrument, you must sever the estates; you cannot then execute, as I have shown, the directions of that testamentary instrument, the trust disposition, and you cannot accomplish the intentions of the testator.

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Then, my Lords, I have to ask this question,—If Lord Lynedoch had been aware that the settlement of 1726 was defective in one of the fetters, and at the moment that he made his will in 1821 it was quite out of his power to supply that defect, how would he have settled the property, that, is the collateral property which he had acquired, and which was about to be settled by the deed of 1821? It is my firm impression that he would have settled that according to the deed of 1726, with the infirmity upon the face of that deed. What else could he do? He meant his heir of entail to take the property. This was a mere excrescence; it was adjoining land which he thought it convenient to hold with the principal estate. He did not intend to form a new strict settlement of that bit of property; he did not intend that the property which he had left to the last should form a new entail and go to a new heir, and, under the Statute of 1685, be for ever entailed. He meant no such thing. But he meant the whole estate to be bound by the entail, if that could be accomplished. If the accomplishment of that was not within his power, then what did he intend? He intended it to go subject to the settlement of 1726. The estate had been upwards of a century in the family: he himself had enjoyed it as heir, and every heir of entail in succession would enjoy it under the settlement of 1726. No doubt there was a power to sell, but there was no other defect. The settlement of entail was perfectly good, the entail would have carried it to every person who was designated in the order of succession, but no doubt it was open to be defeated by that defect; but I cannot persuade myself that if Lord Lynedoch had had himself to decide this question, if he had asked himself the question, in what way shall my remaining property be settled? He would have said Certainly as to the principal estates there has been a defect in the settlement,

but I cannot correct the settlement of 1726, and I must, therefore, settle this remaining property to the same uses.

Now, my Lords, in my apprehension it is impossible to read the disposition of 1821 without being thoroughly satisfied, as a lawyer, that the great object that Lord Lynedoch had, was to annex this small additional property to the other property. But now, having cleared the way rather, by the observations submitted to your Lordships, very humbly, I will ask your Lordships' attention once more to the actual trust disposition; it is in these words: they are to pay all the debts and so on, and then he says, "Fourthly, after fully accomplishing the purposes aforesaid, if any of my lands and heritages before disponed shall remain unsold, my said trustees shall in due form of law dispone and convey the same to the heirs of entail called after me in and by a certain deed of entail executed by Thomas Graham, sometime of Balgowan, and John Graham his son, dated on or about the 7th February and 9th June 1726, under all the conditions, provisions, and clauses prohibitory, irritant, and resolutive in the said deed of entail contained, so far as the same may be applicable, and so as to form a valid and effectual entail according to the law of Scotland."

Now let us see what the meaning of that is,—In the first place, what is the primary intention? It is clearly as he has told you. He refers to the register of deeds. He refers to the entail of 1726, and to all the conditions, provisions, and clauses prohibitory, irritant, and resolutive contained in that deed. There can be no doubt, therefore, that his original primary intention was to settle these properties to the uses of the deed of 1726. Some of those conditions were no longer applicable. He therefore introduces these words, "so far as the same may be applicable," and in my opinion

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the words that follow are referable to that particular clause of the sentence, and also referable to this—that the settlement which is to be made shall be in itself made so as to form a valid and effectual entail according to the law of Scotland. He settles it to the very uses of the settlement of 1726, and under all those limitations, "so far as the same are now applicable, and so as to form an effectual entail." It is as if he had said, Take care that in leaving out things which are no longer applicable, you do not defeat my intention, and leave it an ineffectual entail; and take care that in making the deed itself you make it an effectual entail. But an effectual entail for what? For the uses of the deed of 1726. Can anything be more direct. Can anything be more conclusive? He directs his trustees in the most solemn manner to convey the property according to the deed so registered, and under the limitations and restrictions of the irritant, prohibitory, and resolutive clauses. He says, You are to do that, and to make it an effectual entail. According to the law at that time, it was an effectual deed of entail; being under those limitations. Undoubtedly, since, it has been discovered that there is a defect; but in my opinion those words admit of an easy and natural construction. According to the whole frame of the sentence, he is to be understood as directing the trustees to make an effectual settlement in point of form, that is to say, the deeds must be properly registered; for example, they must contain the proper clauses, they must repeat the clauses according to the law of Scotland. All that was intended by him. It is as though he had said, You are to take care and make the deed effectual; you are to strike out that which is unnecessary, but in striking that out you are to take care not to damage the effectual entail. But what is to be made effectual according to the law

of Scotland is the settlement of this property in the manner in which the principal estates were settled, viz., to the uses of the settlement of 1726. I know, as far as it is possible for one man to know what was within the knowledge of another, that he had no knowledge, he could have none, of the defect in the settlement of 1726. And I myself, I must say, am clearly of opinion that those words do not admit of any construction like this, that he intended to correct the error, if there was one, in the settlement of 1726, for which it could never have entered his mind that there was the slightest foundation.

If it had stood upon that alone, I should have put that construction which was conformable to the whole tenor of the circumstances, and then all that would happen would be this, that this remnant of the property would have gone along with all the rest of the property, and be subject to just the same line of succession, no higher or lower, no greater, no less, than these estates themselves. But when I come to look at the dispositions of Lord Lynedoch, I see that throughout he intended those estates to go with the other estates. But if they go as the Act of Parliament now orders them to go, one estate will go to one party and another estate will go to another party. Therefore I know I have defeated his intention. I am making a new separate entail now of that which it never entered into his mind should be so entailed. He thought the whole of the estates would go together, and I believe, as I have said before, that the very last thing he desired is that which your Lordships are now called upon to do, namely, to cut off those estates and leave those remnants of estates separate from the others. Those were estates, I should suppose, of very small value, but under this decision they are to be a sepa-

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rate inheritance with new fences, contrary to his intention.

Nobody admits more than I do that we are to construe this instrument of Lord Lynedoch's according to its plain import, and give effect to it, and if I had the power I would give effect to his intention, and to the words which express it in the most literal way in which it is possible to do it. But I think I am doing so in the view I submit to your Lordships. Now he recites what he has done upon the face of his own disposition of 1821. He recites that he has settled these lands, and he has no notion of course that he has not settled them properly; this is a matter which admits of no doubt. By a codicil executed in 1838 he particularly recites the settlement which he has made, and he states that, after the payment of his death-bed and funeral expenses, he directed the estates to be conveyed as follows—he here recites what the settlement of 1821 was; and I beg your Lordships' attention to this—this is a codicil executed by him in 1838, in which he states what he considered he had done in 1821:—"And whereas by my said trust disposition and settlement I directed the debts and sums of money due to me at my death might be uplifted, and that my moveable estate, and lands, and heritages thereby conveyed might be sold, in whole or in part, at the discretion of my said trustees; and that after payment of my death-bed and funeral expenses, expenses of executing the said trust, my just and lawful debts, and any legacies, donations, and sums of money ordered by me to be paid as aforesaid, if any part of my said lands and heritages should remain unsold, my said trustees should convey and dispone the same to my heirs of entail called after me by the deed of entail of Balgowan, and should also lay out the remainder of my

personal estate and effects, if any should be, in the purchase of lands, and settle the same on my said heirs of entail, in manner more fully set forth and expressed in my said trust disposition and settlement." Does he look at all to anything beyond the mere entail of 1726? Can anything be more express than this, which he does in 1838, giving his own construction of his own disposition?

Then, my Lords, he states in the disposition of 1821, that he has in one part of his disposition directed that if the trustees whom he has appointed shall fail, then certain things shall take place. "And failing all my trustees named or to be named or assumed, by non-acceptance, death, or otherwise, then to the person or persons who shall succeed to me as heir or heirs, male and female, of the Balgowan estate for the time," and so on. Now, I ask your Lordships, was it likely that unless he intended his estates to go strictly together, he even could have ordered that the heirs of entail of the Balgowan estate under the settlement of 1726 should be the trustees of this new settlement? Can anything be more inconsistent than to say that his intention was that his estates should be severed, and yet that the heirs of entail of the Balgowan estate should become the trustees of this separate portion of land? It is quite clear he intended no such thing, but that he expected the estates to go together.

But, my Lords, how are we to get over this clause? This was a point very much relied upon at the Bar. It is as follows:—"I declare and appoint that the rents and profits of my said unentailed lands and heritages, and of my lands to be purchased by my said trustees while vested in their persons, as well as the annual interest and produce of any monies that may be in their hands arising from the sale of any part of my estate, heritable or moveable, whether under the

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said trust disposition or any will executed or to be executed by me relative to my real estate in England, or from any claims that I may have at my death against the heirs of entail succeeding to me in my entailed estates, and generally the annual profits and produce of any funds and estate falling under the said trust, shall be paid and accounted for by them to the heir of entail in possession of the said entailed estate of Balgowan for the time." How is that to be executed if the entail of Balgowan is not to be the measure of the settlement of this property? The heir of Balgowan might become entitled to the estate in fee-simple whenever he pleased, and then would have no relation at all to this property, which must continue, according to your Lordships' probable or necessary decision, separate, and must go in a different manner.

And then to whom are the several debts to be paid? Are they to be paid to the persons who really will have them, or are they to be paid to the heirs of the Balgowan estate? Is the heir of the Balgowan estate to have them, or is the person who is no longer heir of the Balgowan estate, who may have sold it or lost the Balgowan estate, entirely to have them, or is the person to have them under this new settlement? Those are difficulties which it appears to me impossible to get over; but all the difficulties are avoided by giving what I consider an easy and natural construction to the words upon which the difficulty has arisen, and thus making these estates go with the rest of the property.

Now, my Lords, I must say a word upon the question of constructive trusts. It is a matter so well settled now, that it is mere pedantry to go through the authorities. Every trust where an act is to be done, or a common conveyance to be executed, is an executory trust, no doubt, in a

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sense; but not in the sense in which lawyers speak of it. That is a trust executed, but a trust executory means, not simply a trust under which an act is to be done, which applies to every case, but one in which there is something to be performed which is not defined by the original settlor where he has expressed an intention in general words which is to be carried out in a complete and legal form by the persons who are entrusted with the estate. Now the question constantly arises, to what extent the trustees may go in forming a settlement under an executory trust.

There is a case upon the subject which was very much considered before Sir *William Grant*—the case of *Stanley* v. *Stanley* (*a*). It is a case of this nature. The testator directed his estate to go to the second son of one of his nephews for life, and then to trustees to preserve contingent remainders, and then to the first and other sons of that second son; and if that second son died without issue male, or did not attain 21, then it was to go to the third son, and in like manner on his death without issue male it was to go to the fourth son. Then he declared that there was another estate in the family, called Puddington, which he wished not to be united with his estates, and he made a provision of this nature, that in case any of those persons to whom he had thus given this property should become possessed of the estate of Puddington; then "the estate devised to such of them so becoming possessed as aforesaid, shall thereupon cease and become void or not take effect or be made," (that is, under the settlement that was directed to be made,) "as the case may be, and the persons next in remainder under the said limitations or directions shall thereupon become entitled to the estates." Then came this important clause—"And I do further direct

(*a*) 16 Ves. 491.

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and authorize my trustees, in making the settlement herein-before directed, to correct any defect in legal or technical or other incorrect expression in this my will, and to form such settlement from what appears to them to be my real meaning, with all and every the powers herein-before inserted, and the farther powers of exchanging any of the lands herein-before devised in the usual way,"—"and such other like powers as may appear to the trustees or the survivor of them, or his executors, administrators, and assigns, convenient and proper." That is a very large direction, going infinitely beyond, as it appears to me, these ambiguous words, which are found in the case now before your Lordships. They were to execute his intention according as they could collect it, and to "correct any defect of legal and technical words." The second son became possessed of the Puddington estates, and thereupon of course his life estate ceased; indeed, it ceased before he became possessed of it, because he was under age when he became entitled to the Puddington estate. He had afterwards a son—that son claimed the estate directed to be settled. In answer to which it was said, No; the intention of the testator was to keep these two estates distinct as far as might be; the trustees are authorized to carry his intention into effect, according to what they collect it to be, and it is clear that he intended the estates to go over to the persons in remainder, and he meant them to take, and not the tenant for life, who was living at the time the estate fell in. Sir *William Grant* held that the direction in the first proviso being that the estates should cease and be void, he could give no further effect to the direction than the words actually expressed, and that consequently the trustees, to preserve contingent remainders, must take the estate, they being the persons

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next in remainder to take. And the result, therefore, of that was that the second son of the tenant in tail took the estates devised by the will, though his father had the Puddington estate. And then, when Sir *William Grant* was asked to give effect to this clause, authorizing the trustees to execute the settlement according to the testator's intention, he made this observation (*a*)—"It was said, lastly, that being an executory trust it is to be executed by directing the conveyance so as best to answer the apparent intention, viz., to prevent the union of the two estates in the same person, and to keep them asunder as long as can be by law. The testator has not said that was his intention. It is only inferred from the provision for the purpose of preventing the union of the estates in certain persons specified. What ground is there for extending to other persons the incapacity of holding both estates? He has not said that a son of Thomas shall lose the devised estate by becoming possessed of the Puddington estate. Is the Court to say that, not because he has, but because he may possibly become entitled to, that estate? The testator has not completed his purpose by this proviso. He authorizes the trustees to correct any defect or incorrect expression, and to form the settlement according to his real meaning, not to change the limitations. A direction to them to follow his true meaning rather than the literal construction of his will is very different from an authority to new-mould the limitations, if they suppose those which he has directed will not have the effect he intended. There is no reason to suppose he intended either the trustees or this Court to have such a power."

That appears to me to be a much stronger decision than I should wish to give here. I think it, and

(*a*) 16 Ves. 511.

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have always thought it, a perfectly right decision. It is one of those cases which I have, I may say, a thousand times over, been under the necessity of considering the effect of, in the course of my own professional life, and I think has been properly decided, and I think it goes much further than I should call upon your Lordships to go in this particular case.

My Lords, there is a case which will exemplify the danger of separating properties in this way. It was before the same Judge,—the case of *Brouncker* v. *Bagot* (*a*). That was a case of this nature. It was not a case of an executory trust, but the testator devised his real estate to one for life, remainder to trustees to preserve contingent remainders, remainder to the heirs of his body, so as to give them an estate tail with remainder over, and in every case a remainder to trustees to preserve contingent remainders. And he then gave his leasehold estates to trustees upon the same trusts, with the same limitations, as he had given his real estates upon; and having been Counsel in the case, from the notes I have I see that the words giving the leasehold estates are much larger in the will than they are stated in the report. There were more ample words showing the intention that these leasehold estates should go along with the real estates to those different uses. Now, the question was, in what way those leasehold estates were to devolve. If they were to be taken by the analogies of the common rule, that an estate tail in real property gives an absolute interest in a leasehold estate, then, of course, you are to strike out the trusts, and to substitute, in effect, a simple gift of the leasehold estates to the first man and his executors, administrators, and assigns. It was argued, by Counsel, against the lease-

(*a*) 1 Mer. 271.

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hold vesting in the first taker, that the analogy was not complete; that it was a long time before the Courts could hold that estates for life, with remainder to heirs male, did give an estate in tail male to the tenant for life. It was a long while before they came to that construction, but that has become a construction which is no longer to be denied, and therefore the heir male was to take the real estates; but when the testator devised the leasehold estates and directed the trust to be with limitations and so on, in all those well-known words, he intended the estates to be given in the way in which he thought he had settled the real estates; and though the rule of law was to settle according to the intention as regards the real estates,—and there was a general rule upon that, viz., that all the heirs in tail male would take, if permitted to take under his disposition,—yet that, as regarded the leasehold estates, the first taker would at once, without any act of his own, take the whole property. Sir *William Grant* decided that the leasehold estates must follow the principal estates, and he made this observation, which bears, in my humble apprehension, upon the case now before your Lordships. He said, in the conclusion of his judgment (*a*), "If there is any disappointment of the testator's intention in the case, it is rather in making his devise operate so as to give an estate tail in the real, than in giving the like interest in the personal estate." That is just as here. If Lord Lynedoch's intention is defeated, it is, in point of fact, by the way in which the instrument of 1726 was prepared, and not by the effect that I ask your Lordships now to give to the instrument of 1821. And, therefore, as you cannot correct the original instrument, you may do that which he intended—let these estates go with the others.

(*a*) 1 Mer. 282.

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My Lords, I have a strong impression upon this case; I have stated to your Lordships the grounds upon which I have this impression; I regret to be compelled to differ from my noble and learned friends. The decision is given in a way which, in my opinion, it ought not to be. I suppose they have come to a right conclusion; but after all the attention I have given to the case I have arrived at a different conclusion, and I am not able to agree with them.

Interlocutors affirmed.