JOHN VANS AGNEW of Sheuchan, Appellant.—*Gifford—Sugden—Greenshields—Jeffrey.* No. 51.

JOHN EARL of STAIR and Others, Respondents.—*Ross—Warren—Wetherell—Thomson—A. Bell.*

Entail—Pupil—Judicial Sale under Act of Parliament.—Held, (reversing the judgment of the Court of Session,)—1.—That sales made of part of an entailed estate in a process raised in virtue of an act of Parliament, requiring the heirs of entail to be called as parties, were inept, the next succeeding heir having been cited, but being a pupil, and no tutor ad litem having been appointed; and,—2.—That it was not a sufficient defence that the warrant of his appointment could not be required to be produced, as twenty years had elapsed, there being no statement in the extracted decree, or a recital of an interlocutor, that a tutor ad litem had been appointed.

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2D DIVISION.
Lord Pitmilly.

AFTER the Court had found, (as mentioned in the preceding case,) that the deed of entail executed by John Vans and Robert Agnew of their respective estates of Barnbarroch and Sheuchan was effectual, but that Barnbarroch was liable to be attached for the debts due by John Vans or Agnew at the time of his death, his son Robert (who had succeeded to the estate, and against whom that process had been instituted) brought an action for authority to sell such parts as should be necessary; but it was dismissed by the Court, in respect they had no power to order a sale at the instance of an heir substitute. He then, in 1785, applied for an act of Parliament to authorize him to sell such parts of the estates of Barnbarroch and Sheuchan as might be sufficient for payment of the debts of John Vans. An act was accordingly passed, proceeding on a recital of the entail, and of the judgments of the Court; that the rents of the estates were inadequate to keep down the interest, and discharge the debts; that several of the creditors were proceeding to lead adjudications, and that it would be for the benefit of the heirs of entail that parts of the estates should be sold for payment of these debts. The enacting clause then proceeded in these terms:—'Upon the humble petition of Robert 'Agnew, now of Sheuchan, Esq., for himself, and as administrator 'in law for Robert, John, James, and Patrick Vans Agnew, his 'four sons, and Margaret, Frances, and Georgina Vans Agnew, his 'daughters, all infants, and of Patrick Agnew, Esq., his brother,— 'that it may be enacted, that it shall and may be lawful to and 'for the Judges of the Court of Session in Scotland, upon an 'action to be instituted in the said Court in the name of the said 'Robert Agnew, now of Sheuchan, Esq., or in the name of any 'other heir of entail in possession of the said entailed estates for 'the time, against the other heirs of entail then in being, to in-'quire into and ascertain the extent and amount of the debts

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'owing by the said John Vans Agnew at the time of his death, 'and chargeable upon or effectual against the said entailed estates, 'or any of them; and after having fixed and ascertained the 'extent of such debts by interlocutors or judgments in that be- 'half, to allot, order, and direct the detached parts and portions 'of the aforesaid lands and estates of Barnbarroch, comprised in 'the aforesaid deed of entail, and settled pursuant thereto, to be 'sold for payment of the said debts; and if the price arising 'from such sale shall not be sufficient to discharge the whole of 'the said debts so to be ascertained as aforesaid, then and in that 'case to allot, order, and direct such of the disconnected parts of 'the aforesaid estate of Sheuchan, comprised in the said deed of 'entail, and settled pursuant thereto, to be sold for payment of 'the remainder of such debts; such sale or sales to be made by 'and under the direction of the said Judges of the Court of Ses- 'sion, in such way and manner as shall appear most likely to be 'attended with least detriment or disadvantage to the said en- 'tailed estates, and to the said Robert Agnew, and the other 'heirs of entail thereof: And for carrying such sale into execu- 'tion, to take proofs of the value or number of years purchase 'such parts of the said estates as shall be judged most proper to 'be sold ought to be exposed to sale at; and to award letters of 'publication or intimation of sale or sales, and to settle and ad- 'just the articles and conditions of sale or sales, and to sell or 'order to be sold such parts and portions of the said lands and 'estates, or either of them, as shall be judged most proper and 'necessary for the purposes of this act, in such lots or parcels as 'they shall think fit; and to adjudge the lands and estates so to 'be sold, and the inheritance thereof, to the purchaser or pur- 'chasers thereof, his, her, or their heirs and assigns, in fee-simple; 'and in general to pronounce such interlocutor or interlocutors, 'and to have and hold such proceedings, as the said Judges are 'in use to pronounce and to hold in and concerning processes or 'actions of sale of the estates of bankrupts; and to pronounce 'such other interlocutors, and to order, direct, and hold such 'other proceedings, as to them shall seem proper and necessary 'for effectually carrying this act into execution, any thing in the 'said deed of entail, or the investitures following thereon, or any 'law or usage to the contrary, notwithstanding.' And further,

'That the purchaser or purchasers of the lands and estates under 'the authority of this act, his, her, and their heirs and assigns, 'shall, by the decree or decrees of sale thereof, have good and 'effectual title to the lands and estates so to be purchased, free 'and clear, and freely and clearly exonerated, acquitted, and dis-

'charged of and from the prohibitions, limitations, and irritancies 'of the said entail, and of and from all the debts and deeds of 'the entailers, their heirs and successors, and every of them, and 'of and from every other debt, encumbrance, defect of title, or 'ground of eviction whatever, in as full, ample, and beneficial a 'manner, to all intents, constructions, and purposes whatever, as 'any other purchaser or purchasers of lands and real estates at 'judicial sales before the Court of Session may, can, or ought to 'have by the law or practice of Scotland.' July 31. 1822.

Immediately on obtaining this statute, an action of declarator and sale was raised by Robert Vans Agnew against the heirs of entail then alive. Those who were next entitled to succeed were his own children, who were all in minority, and resided with him at Barnbarroch in the county of Wigton. In particular the appellant, who was at that time the second son, was only about five years of age. An execution of the summons was returned, bearing that these minor children had been cited at their dwelling-place, and their tutors and curators edictally at the market-cross, not of the head burgh of the county of Wigton, but at that of Edinburgh. The summons was then called; and although a tutor ad litem had been appointed to them in the process of reduction, (which was terminated by the judgment of the Court in 1784, and which had been extracted,) yet it did not appear that any tutor ad litem was nominated on their behalf in this action of declarator and sale.

On the case coming before the Lord Ordinary, his Lordship allowed a proof of the rental and the value of the lands, and thereafter made a remit to an accountant to inquire into the validity of the debts. That gentleman having reported several objections, appearance was made for Mrs. Kennedy, a sister of Robert Vans Agnew, and her children, who were heirs of entail, but none was made for his own children; and a debate before the Lord Ordinary took place. Great avizandum was then made with the memorial and abstract in common form; and the Court, on the 11th of March 1788, pronounced an interlocutor of roup, in which they estimated the value of four lots of the entailed lands at £11,500, and the debts, as in a list subscribed by the Lord President, at £12,200, and authorized certain parts of the estate of Barnbarroch, and also of Sheuchan, to be sold for payment of these debts. An act of roup was accordingly extracted; and the lands being exposed to sale, were purchased, in August 1788, by the respondents or their predecessors.

Among the debts for which these lands were sold, there were not included those which had been objected to by the accountant,

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The Court, having repelled the objections, remitted the case again to the accountant; and he having made another report, containing a scheme of division, and an allocation of the debts on the several purchasers of the lots which had been sold, the Court, on the 18th of December 1789, pronounced a decree of sale in favour of the respective purchasers, and finding, inter alia, the subjects sold to be 'for ever thereafter free from the prohibitory, 'irritant, and resolutive clauses contained in the entail thereof 'executed by Robert Agnew of Sheuchan, Esq. and John Vans 'of Barnbarroch, Esq., and dated the 29th day of December '1757, and also to be free and disburdened of all debts and deeds 'of the said Robert Agnew and his predecessors and authors, and 'from all other debts, rights, encumbrances, and grounds of evic-'tion; and that the heirs, apparent heirs, or creditors of the said 'Robert Agnew or his predecessors, and all others having or pre-'tending to have right in the foresaid subjects, without excep-'tion of minority, not compearing, conceiving themselves to be 'prejudged, shall only have access to pursue the receivers of the 'price and their heirs, reserving to the minor leased his relief, as 'accords.' This interlocutor was followed by one of ranking of the creditors on the prices which had been consigned by the purchasers.

Thereafter another part of the estates was sold for payment of the remaining debts, including the provisions which had been made by John Vans in favour of his younger children; and a decree of sale, in terms similar to the above, was pronounced on the 9th of June 1793. These decrees were extracted of their respective dates; and the purchasers, having received assignations from the creditors to their debts and clauses of warrandice, were infeft, and entered to possession of the lands.

Robert Vans Agnew died in 1809, and was succeeded by the appellant, who was now his eldest son, and who, by reason of minority and absence, was entitled to appeal against the judgment of 1784, finding the estate of Barnbarroch attachable for the debts of his grandfather, John Vans, at the time of his death. He accordingly appealed against that judgment, and also against

the interlocutors which had been pronounced in the action of de- July 31, 1822.
clarator and sale under the act of Parliament. In the former of these appeals, a remit was made to the Court of Session to review the judgment; * but in the latter it was found 'not competent, 'in the circumstances of this case, to affect the purchasers by the 'proceedings of the appeal;' and it was therefore ordered and adjudged that the appeal be dismissed, 'reserving to the appel- 'lant such relief, if any, as he may be entitled to in any other 'mode of proceeding.'

He thereupon instituted an action of reduction-improbation, declarator, and damages, concluding, alternatively, either that the sales should be reduced, and the lands restored to him, along with the rents from the period of his succession to the entailed estate,—or that, if he should not be found entitled to them, that the representatives and personal estate of Robert Vans Agnew should be found liable in damages. To this action he called as parties the whole purchasers of the entailed lands, and also the trustees and representatives of Robert Vans Agnew. The case having come before Lord Pitmilly, his Lordship found 'that the de- 'fenders cannot be required, at this distance of time from the 'date of the decrees of sale, to produce the warrants thereof, 'though they must produce the grounds of the decrees,'—made avizandum to the Court, and granted certification contra non producta in usual form. Thereafter the case having been re- mitted back to him, he reported it on informations.

In support of his conclusion of reduction, the appellant rested upon a great many objections to the proceedings, which, with the exception of those on which the ultimate decision was pronounced, it is unnecessary to notice. He maintained,—

1. That as it was required by the act of Parliament that the action should be directed 'against the other heirs of entail 'then in being,' it was essentially requisite that they should be regularly called as parties to that action; but that although the appellant and the other children were the heirs next entitled to succeed after their father, and were in pupillarity, yet they were cited at their dwelling-place as if they had been of full age, and there was no citation of their tutors and curators at the market-cross of Wigton, the head burgh of the shire where they resided, so that they had not been called in terms of law, and consequently the whole proceedings were fundamentally null and void, as not being consistent with the act of Parliament.

2. That supposing the citation were unobjectionable, still it was

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* See the preceding Case.

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absolutely necessary (more especially as their father was pursuer of the action) that a tutor ad litem should have been appointed to act on their behalf:—that although such a tutor was appointed to them in the action of reduction, yet his office came to an end on the termination of it; and as there had not been a nomination of a tutor in the process of declarator and sale, the proceedings were inept on this ground; and were also contrary to the act of Parliament, which required that the heirs of entail in being should be parties to the cause agreeable to law. And,—

3. That it was proved by the extracted decrees of sale, on which the titles of the respondents were founded, that these proceedings took place in absence of the heirs, and without being duly called, and therefore the respondents must be held to have been fully aware that the terms of the act of Parliament had not been complied with.

In defence, it was contended by the respondents,—

1. That as twenty years had expired from the date of the decrees of sale, and as the execution of citation, and the interlocutor appointing a tutor ad litem, were merely the warrants of the decrees, they were not bound to produce them, so as to show that the appellant had been regularly called as a party, and that a tutor ad litem had been appointed, that it must be presumed that every thing had been correctly done; and this the more especially, as an information had been lodged for the appellant and the other children, and for Lord Braxfield as their tutor ad litem.

2. That the objection to the regularity of the citation (even supposing that the above defence could be overcome) was not well founded, because, as the appellant's father was alive, he could have no other tutors or curators, and therefore a citation of them, either at the head burgh or elsewhere, would have been incongruous and absurd.

3. That, at the utmost, the appellant was only entitled to be reheard, as in the ordinary case of decrees in absence. And,—

4. That as the act of Parliament declared that the decrees of sale should have the same effect as if pronounced in a judicial sale, the only right of relief which the appellant could have was in virtue of the statute 1695, cap. 6, which protected the purchasers, and merely reserved to the heir conceiving himself injured a right of recourse against the receivers of the price.

To this it was answered by the appellant,—

1. That if it had appeared on the face of the extracted decrees of sale that he had been duly cited, and that a tutor ad litem had been appointed, he would not have been entitled to object to the

proceedings, or to call for the warrants after the lapse of twenty years, but that the extracted decrees expressly bore that he had been cited in the manner stated; and not only made no mention whatever of the appointment of a tutor ad litem, but stated that they had passed in absence; and therefore he was entitled to maintain that he had not been duly made a party in terms of the act of Parliament. July 31. 1822.

2. That such being the case, the defence rested on the statute 1695 was unavailing, as no sale could be made except by virtue of the act of Parliament, which had been substantially violated; and that at all events the statute 1695 only applied to heirs representing the bankrupt, whereas the appellant took the estate as a singular successor. The Court, on the 2d of June 1818, 'sustained the defences pleaded for the defenders, repelled the reasons of reduction, and assoilzied them from the whole conclusions of the action,' and found the appellant liable in £260 of expenses.*

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* In pronouncing the above judgment, these opinions were delivered:—

Lord Glenlee.—We have nothing to do here with the alleged disposal of part of the proceeds in provisions to the family of Robert Vans Agnew. What the pursuer may have to say as to that, we are not called upon to notice at present. This is a question with the purchasers, and I see no ground for reduction. There is only one thing that could have raised a difficulty in my mind. If the pursuer could show that less land should have been sold, or that the best ways had not been taken to get proper prices, in one view he might still be reponed, so as to have them sold over again; but it would have required him to stand in a very different situation. What I mean is, the neglect of the appointment of a tutor ad litem; that was a fatal blunder, if stated tempestivè; for it is out of doubt that it was essential, even under the act, that the proceedings themselves should have been regular; and it is quite plain, if we were at liberty to go upon what we see now, that it is probable there was no tutor for the children in the process. It is said that Lord Braxfield was the tutor, and that the Court held this to be the case; but the Court could not do so without a regular appointment. It appears to me that now it is not in our power to go into that. There is a distinction between the grounds of a decree and the warrants of steps in the course of a process. Such interlocutors are warrants, not grounds of the decree, and they are not entitled to investigate them, as every thing is presumed to have been rite et solenniter actum. Such an appointment may have been made, and the evidence of it lost. After twenty years and a final interlocutor, a mere warrant is not to be asked after; it is vain to speak of it; and that answer would apply to almost all the irregularities that are charged, if they are all warrants of the decree.

Lord Robertson.—When I first read the papers in this case, it appeared to me difficult upon this ground, that the sale was conducted under authority of a special act of Parliament. We were acting as commissioners under that act, and that act is the measure and rule of our powers; and therefore it appeared to me at first, that where the Court had not strictly attended to the different provisions, in order to secure a fair and proper sale of part of the estate for the purposes specified, that such irregularities must be fatal to the whole proceedings. In the case of the Marquis of Tweeddale against Downie, you held that the provisions of the act were imperative, that such an irregularity was fatal, and that it was not incumbent upon

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Mr. Agnew having appealed, the House of Lords ordered and adjudged, 'That the said several interlocutors complained of be, 'and the same are hereby reversed. And it is declared that 'the appellant, and the other children of Robert Vans Agnew, 'who were named as defenders in the action of declarator and 'sale, raised at the instance of the said Robert Vans Agnew, ap-

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the challenger to specify any damage arising from it. But, on considering further, I came to be of Lord Glenlee's opinion, that whatever effect we might have given to irregularities, and particularly to the non-nomination of a tutor to the young boy—whatever effect we might have given to this objection de recenti, it is a different question how far it is admissible at such a distance of time, when there is no probable allegation of fraud on the part of the defenders.

Now, are we, at the distance of thirty years, on such an omission, which is not the ground but the warrant of the decree—when it is provided by this act that any sale that shall take place under its authority, and any title given to purchasers, shall be of the same force and validity as a decree of sale, (which we all know to have been held to be the best and firmest title in our law,)—are we, in the face of such a declaration in the act under which the proceedings were conducted—are we to overset a sale having all the effect of a judicial decree of sale, on such a ground as I have stated?

It is very true, that if a decree of sale has not been followed by forty years possession, it may not be a prescriptive title sufficient to bar a claim of eviction preferable to the bankrupt, but it is sufficient against any objection such as that brought forward.

Lord Craigie.—I am of the same opinion with those who have spoken; but I do not carry the objection so far as to the tutor ad litem. I do not think it annuls the proceedings, but it gives the minor a right to state the objections that might have been stated, if he had had a tutor; and if the plea had been stated with good objections, there might have been something in it. But I do not think the objections stated should have any influence at all.

Lord Bannatyne.—The proceedings against a minor without a tutor cannot be good. That is my objection to the proceedings.

Lord Justice-Clerk.—So far as any objection in this branch of the litigation is rested on the supposition of sums being taken into account for which the estate was not liable, I cannot enter into it at all, for we have found that the whole debts affected that estate; so that all that reasoning must go for nothing in this question. The question is certainly one of importance, because the powers which the Court exercised were conferred by special statute, and it does require attention from you to say whether the act has been executed in the way and manner required. In deciding as to the validity of these sales, you will recollect how the estate stood before the act of Parliament. After the opinion of the Court was given, that the lands were affectable by the debts, authority was asked from the Court by the heir to sell the lands, in respect he could not maintain his family and pay the interest of the debts; but the Court, looking to the entail, and not questioning their judgment as to the debts affecting the estate, found they could not give effect to the application by the heir alone. Adjudications were in cursu, but there was no application by the creditors for a sale. It was then necessary to apply to the Legislature, in order to discharge the debts which had been found to affect the estate, and this act was obtained.

Something was said, that the requisite steps by the standing orders of Parliament were not observed as to the heirs of entail. But Parliament must be presumed to have gone through all the solemnities required by themselves. A remit was made

'pearing on the face of the proceedings, to have been minors 'at the several times of pronouncing such interlocutors re- 'spectively, and not to have been properly brought before the 'Court as defenders in such action, according to the provi- 'sions of the act of Parliament in the said action mentioned, 'the Court had no authority to pronounce any interlocutor in

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to the Judges,—the regular consent of the heirs obtained, and therefore to the objection upon that head we can pay no attention. We must suppose the act obtained bonâ fide. The sanction of the Legislature was received, and the act passed.

That act proceeded to direct that an inquiry should be taken by the Court of the debts that affected the estate of Barnbarroch, and it goes on to authorize sales, certainly in the first place, of detached parts of Barnbarroch; but, secondly, if these were not enough for payment of the debts, then of such parts of Sheuchan as might be necessary; making a provision, that in case of a surplus, it should be laid out in the purchase of lands, so that the heirs of Sheuchan should derive the advantage of it, and not the heirs of the other estate. That was the leading feature of the act, and it is said the Court did not proceed even then to execute the act correctly; but, on looking into the procedure, there seems to be no foundation for this statement. After the judgment in the former process, a list of debts was made out, and signed by the President, stating the debts to amount to £12,000. Every thing was brought before the Court, and deliberately considered;—particular objections were made to certain bills;—a remit was made to an accountant, and reports upon every thing were made out and authenticated by the President. I for one, therefore, can lay no stress upon that part of the argument, that the Court had not made due inquiry. I must hold they did so, from what I have stated.

It is then maintained that there was another deviation from the act of Parliament, by not directing Barnbarroch to be sold first, before sanctioning the sale of any part of Sheuchan, for the liquidation of the debts. But it is obvious from the proceedings, that after having ascertained the amount of the debts to exceed £12,000, and after ascertaining the value of the only lot of Barnbarroch remaining unsold, the Court had before them demonstrative evidence that a sale of the lot of Barnbarroch would not be adequate to discharge the burdens found to affect the estate, which the Court held to be res judicata. They saw that the sale of that part of Barnbarroch would not give effect to the act of Parliament, and they then authorized an inquiry as to the parts of Sheuchan that should be sold for the liquidation of the debts. That part of Barnbarroch not being nearly adequate, there were three lots of Sheuchan found necessary for that object, according to the evidence; and, as the Court do in every case where they authorize sales of entailed property, an authority was granted for intimation of the sales.

There is another objection stated, (I am satisfied that all hitherto was regular,) that when the sale did take place, instead of following literally the injunction of the act, in selling Barnbarroch first, and then proceeding to Sheuchan, in point of fact, the three lots of Sheuchan were sold first, and Barnbarroch in the second place. At first sight, this might appear a deviation from the act of Parliament; but, on deliberately considering the full evidence the Court had, corroborated by the subsequent sale, that the lot of Barnbarroch could not effect the object of the act, there does not appear any reason for this objection, though we were authorized merely to execute the act. But if, in fact, no more land was sold than was necessary to discharge the debts, this slight deviation of the proceedings was not such a deviation as can sanction your Lordships, at this distance of time, to overturn these sales.

Then we are told there is another objection, which is, that though in the former

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'such action affecting their interests, and especially had no au-
'thority to proceed to a sale of any of the lands of Barnbarroch
'or Sheuchan in the said act mentioned; and therefore, that all
'the proceedings in the said Court in the said action of declara-
'tor and sale, so far as the same affected the interests of such
'minors in the said estates respectively, under the deed of entail
'in the said act and in the said proceedings mentioned, were pro-
'ceedings without the authority for that purpose required by
'the provisions in the said act of Parliament, and were therefore

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process the Court had appointed Lord Braxfield tutor ad litem to the children, there was an omission of going through the ceremony again in the proceedings that followed. As far as we can see, I agree in thinking that there is not any ground for saying that there was any such appointment; it had escaped the man of business and the Court. But I must fairly own, that though unquestionably such an appointment is preliminary, in a litigation going on here, to make the proceedings effectual, yet, in the circumstances which occurred, I am not at present prepared to say, that the non-appointment of a tutor ad litem is sufficient to nullify the proceedings even under this act of Parliament. If it had been stated that injury had ensued from this circumstance, and if a challenge had been brought in time, the Court might have been called upon to inquire into the matter, and it might have given room to be heard. But now, at the distance of thirty years, without there having been a murmur or doubt as to the regularity of the proceedings, to say that, because there is not evidence of a tutor ad litem having been appointed, the sales should be reduced, and that this mere omission nullified the proceedings, is a proposition to which I cannot assent. On the contrary, I agree with you, that even giving full effect to the argument from the act of Parliament, there was not such a deviation from it as to nullify the proceedings.

And it is quite out of the case to suppose there could be the least suspicion of fraud or collusion on the part of those purchasers. I never saw a more feeble attempt made to bring forward such a charge of fraud or collusion. It is a strange act of imagination to suppose that some of the first noblemen and gentlemen of this country were in a conspiracy to ruin this estate.

But there is not a condescendence of any one circumstance to create even a doubt that the purchasers were in bonâ fide, or that the Court had not done every thing that was right under the act of Parliament; and that is a material circumstance in considering what is due to a challenge brought at this late period. We cannot listen to this objection, more than to the other objections at which I have glanced, that the Judges did not proceed in the very order mentioned in the act of Parliament.

There is still one part of this case which I have to notice. This gentleman in his information makes loud complaints of injustice done him by his near relations and the personal representatives of his father. There is no appearance for them here. The present case is as to the purchasers alone. We are not called upon to give any opinion on that question. But whatever may be the opinion on that question, it cannot affect bonâ fide purchasers. Neither the representatives of Mr. Vans, nor of David Balfour, are before us. Loud complaints are made; but these cannot affect the cause of the bonâ fide purchasers—they are not implicated in what is said to be irregular.

And on the other parts of the case I see no grounds for reducing those purchases. Every thing was regular under the act. Though there was one unimportant deviation from it, truly and substantially the act was followed out by the Court.

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'null and void as against the appellant and the several other minor heirs of entail; and particularly that the sales made by the said Court, in pursuance of the several interlocutors pronounced by the said Court in such action of declarator and sale, were null and void as against the appellant and the said several other minor heirs of entail; and that the appellant, on behalf of himself and the said several other minor heirs of entail, is entitled to have the sales made under the several interlocutors aforesaid reduced, and to have the lands restored to him, along with the rents from the period of his accession to the entailed estates, subject to such proceedings as may be had in an action to be instituted in the said Court, under the authority of the said act, for the purpose of inquiring into and ascertaining the extent and amount of the debts owing by the said John Vans Agnew at the time of his death, chargeable upon or effectual against the said entailed estates, or any of them; to the end that the said Court, after having fixed and ascertained the extent of such debts by interlocutors or judgments in that behalf, may proceed to the sale of such parts of the said estates respectively as may be necessary, in such order, manner, and form as directed by the said act: And it is therefore ordered and adjudged accordingly; and it is further ordered, that the cause be remitted back to the Court of Session in Scotland to execute this judgment, and further to proceed as shall be consistent with this judgment, and as shall be just.'

LORD CHANCELLOR.—In the causes, my Lords, in which Mr. Agnew is appellant, the first appeal brings into question a judgment of the Court of Session, which, I think, was delivered so long ago as the year 1784. The other appeal brings into question the titles of purchasers, many in number, to lands which they assert to belong to them, under the operations that have been carried on in the Court of Session, in the execution of a private act of Parliament.

My Lords, an entail appears to have been made, the substance of which it will be necessary to state very accurately to your Lordships, without entering now into the antecedent history of the parties, who appear upon this entail to have been married; and without stating more than that the father of the lady seems for some time to have been very unwilling to be reconciled to the husband that she had chosen, it appears that at length they executed what is called a mutual contract of tailzie.—[His Lordship then read the narrative and dispositive clauses, see ante, p. 320-21.]—I observe, as I pass along, that it has been stated in answer to this recital, that the lady would have been entitled to her terce, and that she would have been entitled to the sum of £500. Your Lordships will also observe, that Mr. Agnew binds himself to make over his lands, not to John Vans, but

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to John Vans and Margaret Agnew. You will also notice, that in the dispositive clause Mr. Agnew makes use of these words, 'gives, grants, 'alienates, and dispones;' and that John Vans, after acknowledging the receipt of £3000 as part of the consideration, 'gives, grants, *sells*, alien- 'ates, and dispones.'

Then there is a specification of his lands:—'In the which lands and 'estates of Sheuchan and Barnbarroch aforesaid, comprehending therein 'the several lands, tenements, and others above disponed, the said Robert 'Agnew and John Vans bind and oblige themselves and their heirs, as 'well male as of line, tailzie, conquest, or provision, and all others their 'successors whatsoever, jointly and severally, for their respective concerns, 'renouncing the benefit of the order of discussing them, but under the 'limitations and conditions after specified;' then the manner of infefting Vans and his spouse and the other heirs of tailzie is pointed out:— 'For expediting the said infeftment by resignation, the said Robert Agnew 'and John Vans, by these presents, make and constitute [certain persons] 'and each of them, jointly and severally, their very lawful and irrevocable 'procurators, for them and in their names to resign and surrender, as 'they by these presents, for their respective interests, but with and under 'the reservations and conditions after mentioned, resign, give up, and sur- 'render all and whole the foresaid lands and estates of Sheuchan and 'Barnbarroch, comprehending therein the particular lands and subjects 'above disponed, lying in manner foresaid, and herein held as repeated, 'brevitatis causâ.' This is the usual procuratory of resignation.

Then, with respect to the destination to the heirs of entail, it is to be 'made, given, and granted,' &c.—[His Lordship then read the terms of the clause, ante, p. 322.]

So that your Lordships see here that Robert Agnew gives, grants, alienates, and dispones, and Vans gives, grants, sells, alienates, and dispones to Vans and his spouse, for their joint lives, and the life of the survivor of them, with limitations to the issue, male and female, of that marriage, and with limitations subsequent to these to the issue of Margaret by any other marriage, and subsequent to that limitation again to the family of Agnew, under the names by which they are here described,—Mr. Agnew professing to give, grant, alien, and dispone his estates, to be taken by those persons in their respective order,—Mr. Vans purporting to give, grant, sell, alien, and dispone his estate, so as first to go to the heirs of the marriage, and then afterwards in effect to be secured to Mrs. Agnew's family. Then there is a reservation to Agnew himself of a liferent, with power to grant tacks for twenty-seven years. Then there follow provisions binding on the disponees and the heirs of entail. When I say 'the heirs of entail,' I mean to say nominatim, not under the general expression of heirs of entail, but by name, 'that they are to hold and possess the lands entailed 'by virtue of this tailzie, and by no other title,' to procure themselves timeously entered and infeft in the lands; to engross conditions, restrictions, irritant and resolutive clauses, in the charters and infeftments; restrictions and limitations binding upon the disponees, 'naming the dispo-

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'nees again and the heirs of entail,' not leaving it to construction whether the disponees are heirs of entail,—whether the words 'heirs of entail' will amount to a description of disponees, but expressly naming them, 'not to 'alter or change the tailzie or order of succession, nor to sell lands, nor 'to burden the same with debt, nor to grant tacks for a longer period 'than twenty-seven years, nor to diminish the rental.'

My Lords, with respect to this, some argument has been addressed to your Lordships, whether the words were sufficient to prohibit and resolve with respect to binding the disponees; but I do not think it is necessary to trouble your Lordships upon that. Then follow the irritant clauses, binding on disponees and heirs of entail, not obèying the conditions, or acting contrary to the restrictions and limitations, declaring they are to forfeit all right to the estate, and it is to go over to the next heirs of entail; and then follows this clause—[His Lordship then read the clauses declaring that any diligence done against the estates for the debts of John Vans, &c., after the date of the entail, should be ineffectual; but that if it should be led for debt contracted before its date, he and the other heirs should be bound to redeem. See ante, p. 324.]—Your Lordships will therefore observe, that there is a distinction made as to adjudications, apprisings, and diligence for debts of John Vans and Margaret Agnew, contracted prior to the date of the deed, from those contracted by any other of the heirs and substitutes of tailzie, either before or after their succession to the land and estates.

Then, my Lords, there are clauses that it shall be in the power of any heir of entail to redeem the estate from the adjudications; and that if two heirs are willing to redeem, that the nearer heir shall be preferred; that if the nearer heir shall be abroad, or a minor, or heir born after redemption, he shall be entitled to redeem, upon paying double the sum paid to the creditor; and there is an express clause that John Vans's debts are not to affect the lands of Sheuchan. With respect to exceptions to the restriction, it further provides, first, that the disponees and heirs of entail are entitled to feu certain parts of the estate; and, secondly, to grant liferent infeftments to wives and husbands, and also to wives and husbands of the immediate or next substitute, with certain limitations upon the amount of them; and then there follows a reservation made to John Vans, that, in an event which is referred to, he shall take back again the estate of Barnbarroch, save and except so much of it as would be of the value of £3000 sterling, which had been paid by Robert Agnew to him;—that is, in truth, buy it back again.

Then, my Lords, there are the further conditions—debts contracted, or deeds to be done by the disponees and heirs of entail, not only to be void, but unavailable against the other heirs of entail—the other heirs of entail may obtain declarations of irritancy, and obtain themselves infeft in the entailed estates—contravener to be excluded from management of the estate during the minority of the next heir of entail,—and the remoter heir redeeming not entitled to burden estate with provisions to wife or children. Then there is the usual assignation to the title-deeds of the estates, and a provision, that if John Vans or Margaret Agnew should

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marry again, they were respectively to be restricted to a free locality of £200 sterling, but the remainder of the fee to go to the heir of the family.

Your Lordships have observed there was a recital that no provision had been made for Margaret Agnew upon the marriage, and there is therefore an obligation by John Vans and her to accept of the disposition in full of every claim upon Robert Agnew, and an obligation by Robert Agnew and John Vans to free lands and heirs of entail from payment of their debts; and then the deed ends with a procuratory for recording the entail, clause of registration, and precept of sasine; and then there is a certificate, of the 18th of January 1758, that the contract was duly recorded in the Register of Tailzies, and states where it is to be found; so that this is an entail, such in its clauses as I have stated, immediately after the execution of it properly recorded.

My Lords, this having been entered into, the printed Cases upon your Lordships' table proceed to state the death of Robert Agnew in 1774, leaving, besides his entailed estate, a fund of about £20,000; that he left no other will or settlement of his affairs except the contract already mentioned; that his fund of £20,000 was lent upon heritable bonds, which, in general, secluded executors, and, failing himself, were made payable nominatim to Robert Vans Agnew, his grandson, the appellant's father, which, it has been contended, ought to have been accounted for in the course of some of the proceedings. I shall have occasion to take notice of this by and by; but I do not trouble your Lordships with that, because the opinion I have formed upon this case does not rest on the due application or non-application, in any degree whatever, of that fund. In the papers laid before me, there is that which is meant to be evidence of the fact that the personal estate had been duly applied. Whether it had or had not, it does not appear to me necessary to trouble your Lordships with any observations arising out of that circumstance.

My Lords, it is represented that Mr. John Vans died in the year 1780. It is represented that he owed considerable debts; that those debts were upon obligations merely personal, and signed John Agnew, the name which he had assumed and constantly used after the execution of the contract of marriage with his wife and her father, containing a sale and mutual entail of his estate; that Robert Vans Agnew, who was his eldest son, made up titles to these estates, as it is here stated, on the 19th October 1781, none of his father's creditors then interfering; and that he was infeft in them for upwards of a year before any steps preparatory to adjudication were taken by John Vans's personal creditors. I ought to mention to your Lordships, that, on the 20th of May in the year 1775, John had obtained a charter proceeding on the contract of sale, marriage, and entail, and in it, and the sasine following thereon, which from that time became the titles by which he held both estates, the whole prohibitory and other clauses contained in the contract with his wife and father-in-law were inserted.

My Lords, I pass over the circumstances which intervened; but it appears that very soon Robert Vans Agnew and the creditors of Robert Vans Agnew proposed to prove the debts of John Vans upon

this estate; and it becomes here necessary to mention to your Lordships, as a justification of those doubts which have been thought to be very extraordinary, that, upon the 21st of October 1780, a gentleman now living, of very great ability,—I mean Sir Ilay Campbell, who was President of the Court of Session,—gave an opinion on a memorial laid before him for Robert Vans Agnew, and in which he says, 'I have considered this memorial, from which it appears that the memorialist's grandfather and father executed mutual entails of their estates, which were completed in terms of law, and recorded in the Register of Tailzies. I apprehend it to be clear that this was an onerous transaction, which neither party could afterwards defeat, except by mutual consent. By the clauses of limitation recited in the memorial, I apprehend that the memorialist's father,' that is, John, 'was tied up from contracting debts to affect either the estate of Sheuchan or his own original estate of Barnbarroch, as the clauses expressly relate to him as well as to the heirs after, and are prohibitory, irritant, and resolutive. Such debts, therefore, as he has contracted posterior to the executing and recording of the settlement will not affect the estate, though, as to prior debts, if there be any, I think they will affect the lands of Barnbarroch; but I presume all these were paid off by the £3000 which was then advanced to him by his father-in-law.' July 31. 1822.

My Lords, it has likewise been stated that this deed was in fact settled under the inspection of Lord Braxfield. I do not think we have sufficient evidence of that fact; and therefore I do not rely upon that as giving authority to the document. My Lords, it appears also that the creditors presented a memorial to Messrs. Maclaurin and Crosbie, and your Lordships have upon your table their opinion, dated the 22d of August 1781. Upon that memorial for the creditors of John Vans, those two gentlemen, Mr. Maclaurin and Mr. Crosbie, being persons of great eminence, as I have always understood, gave their opinion in these words:—'We have considered the memorial for the creditors of the late John Vans of Barnbarroch, and the deed of entail and contract of marriage therein referred to, (viz. old Mr. Agnew's contract of marriage with Margaret M'Dowall,) and we are of opinion that the deed of entail is not defective in any solemnity, or labours under any nullity, but is very carefully and properly drawn. We think the entail would be considered as an onerous deed for several reasons, and especially because Robert Agnew of Sheuchan was under no obligation, by his contract of marriage, to give his estate to his daughter Margaret. By the contract, in the case of there being only one daughter, he was bound to pay her the sum of £500 sterling, but laid under no obligation to give her the estate. That is provided to the heirs-male of the marriage; which failing, to the heirs-male of his body to be procreated of any other marriage; which failing, to his own nearest heirs or assignees whatsoever. He could not disappoint the heir-male of the marriage gratuitously, but there was nothing to hinder him to execute what deeds he thought pro-

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'per, to the prejudice of his heirs whatsoever, under which character 'only his daughter Margaret could claim his estate: But whether the 'entail was onerous or gratuitous does not appear to us to be material; 'for there was nothing to hinder Mr. Vans to convert the fee-simple that 'was in him into a tailzied fee, and that was done by the entail in ques-'tion. After infeftment was taken upon that entail, and recorded, and 'the tailzie itself recorded in the Register of Tailzies, no debt contracted 'by Mr. Vans could be effectual against the estate; but all debts con-'tracted before execution of the entail, and not only these, but all con-'tracted before registration in both registers, (for the law requires two 'publications,) will be effectual. A process of reduction, calling all the 'heirs of entail in existence at the time, is no doubt the most complete 'and formal method of challenging the entail. At the same time, as the 'present heir of entail' (that was Robert) 'is disposed to give no unne-'cessary trouble,'—which appears to me to be using those words in the mildest sense in which they can be used,—'as the present heir of entail 'is disposed to give no unnecessary trouble, we should think it might do 'for him to appear and oppose an adjudication, and a reduction might be 'repeated. But if the calling of the heirs of entail will not be attended 'with much delay and expense, it would be best to insist in a formal re-'duction.'

Mr. Maclaurin gave another opinion on the 27th September 1781; and I will take the liberty again to say, that I think myself a little excusable if I doubt whether a man could not tailzie an estate to himself, when I find men of such authority as Campbell, Maclaurin, and Crosbie, of that opinion. He says, 'I have again considered the memorial and queries 'for the creditors of the late John Vans, with the additional memorial and 'different letters and papers therein referred to; as also the decisions in 'the cases Street and Jackson against Manson, Pot against Pollock and 'Reid of Daldilling, which were suggested by Mr. Bell, (the agent for 'the creditors,) in support of the challenge of the entail, on the ground of 'its being reducible as a fraudulent deed between a father and son to 'ensnare creditors. These decisions are collected by Lord Stair, and 'are abridged in the Dictionary, under the word Fraud. I have per-'used them; but the present case does not appear to me to come up 'to them. In these cases, a disposition granted by a father to his son 'was reduced at the instance of creditors whose debts were contracted 'by the father posterior to the recording of the infeftment of the son on 'the father's disposition, but then there was a clear proof brought of this 'being a fraudulent contrivance to disappoint creditors, and there were 'many circumstances that afforded of themselves the most direct evi-'dence of a gross fraud. And, in the first case, that of Street, the father, 'the granter of the disposition, was declared infamous by the Court on 'account of the fraud. The words of the interlocutor, as reported by 'Stair, are, 'Found that the disposition by the father to his son was "done by a merchant, who carried on a public trade and correspondence, "and could have no rational intent but to deceive the pursuers, being

" strangers, and his correspondents, the son being an infant, and no oblige- July 31. 1822.
" ment on the father to infeft him," &c. (Then a variety of other cir-
cumstances are mentioned.) ' Therefore the Lords reduced the dispo-
' sition, and declared Manson, the father, infamous for so great a fraud.'
' In the next case of Reid, the son also was an infant, and a variety of cir-
' cumstances were mentioned in the interlocutor. These decisions appear
' to me to be just, and no doubt establish that the mere recording of an in-
' feftment of a son upon a disposition from his father will not exclude the
' subsequent contractions of the father, if it appear that the father disponed
' to the son merely for the purpose of ensnaring and defrauding creditors.
' And these decisions would apply to the case in hand, if circumstances
' were condescended upon that proved the entail to have been entered
' into for such purpose. If, for example, it had appeared that old Mr.
' Vans, after beginning his house, and entering into a trade and corre-
' spondence, to use the words of the above-mentioned interlocutor, with
' masons, wrights, and the like, had denuded in favour of his son, or
' made an entail such as that in question, I think the tradesmen who con-
' tinued to furnish to him after the deed would have had good reason to in-
' sist that it should not prejudge their debts of posterior date to it, and to
' have set it aside upon the ground adopted on the above decisions; but
' then no such circumstances are condescended on in the present case;
' and particularly the house, I understand, was not begun to be built till
' several years after the last registration. And the deed in question
' seems to be rational and onerous for the reasons mentioned in the
' answers to the former memorial; at the same time, it is true that all
' such deeds are a snare to trading people, and to country people. Banks,
' bankers, and money-lenders, have a list of all the entails, which they
' consult before lending any sum; but country people, and even shop-
' keepers in towns, are, and frequently must be, taken in, from their either
' not knowing of, or not adverting to, the records. This may be an ar-
' gument for abolishing entails altogether, or for having infeftments noti-
' fied to the country in some other method that will more generally spread
' abroad than registration does. But, as the law stands, registration in the
' proper registers does certainly preclude subsequent contractions, unless
' where there is a proof of a fraudulent intention and concert, as in the
' cases above mentioned; and therefore I must still think that there is
' no ground upon which the debts contracted subsequent to May 1775,'
(that is, the time when the infeftment was taken,) ' can be effectual against
' the estate. The advising a reduction at the instance of some of the
' creditors of each class, did not imply that it was thought posterior cre-
' ditors would have a chance of prevailing. It was only mentioned in
' case these creditors should choose to try the question, notwithstanding
' the opinion, which, from one of the letters referred to, it seems probable
' they will do, and they certainly are by no means to blame for doing
' their utmost, but it is to be feared they will not succeed, unless upon
' the head of fraud; and in order to make it good on that ground, they
' must say more than is stated in the memorial.'

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My Lords, Mr. Crosbie's opinion was taken a second time, and he gave an opinion to the same effect.

I have mentioned these opinions to your Lordships, because they appear to me, together with the fact of a contract of tailzie of this sort, being executed so long ago as the date of this contract, to imply that it was not at all understood at that time by conveyancers, and considerable lawyers, that a man could not (putting fraud out of the case) make a tailzie with irritant, resolutive, and prohibitory clauses, that would bind himself, if the transaction was an honest transaction; and if your Lordships refer to the judgment from which this is an appeal, you will find it to proceed upon an idea, that certainly had not got into the heads of any of the lawyers whose opinions I have stated, nor could, I think, have been in the mind of that conveyancer, whoever he was, who drew this mutual deed of tailzie, that it could not be done if it was fairly done, and for considerations that made it onerous. However, my Lords, afterwards the creditors adopted proceedings, with the assistance, as it seems to me, of Mr. Robert Vans Agnew,—I am afraid I should be justified in saying, he colluding, and, as the papers represent, having a very considerable interest himself, in making this entail subject to debts. John Vans Agnew had contracted debts, which, at the time of his death in June 1780, amounted to £11,000 and upwards, and had also granted bonds of provision to his younger children, which at his death amounted to £3000 and a fraction, besides interest and penalties, and two persons of the name of Stewart and Drew, as trustees for the creditors, thereupon led adjudications, and brought an action of reduction and declarator against Robert Vans Agnew and the other heirs of entail then in life, concluding that the entail should be reduced as far as related to the estate of Barnbarroch, and that they should be entitled to pursue all legal diligence against that estate, notwithstanding the entail. The case came before the Court on the 3d March 1784; and there is, first, my Lord Braxfield's opinion. He says, 'No fraud 'here; the entail must subsist, but not to affect creditors; all debts con- 'tracted before recording of infeftment must be good; this is provided 'by the statute of 1685; and this is agreeable to the principles of the 'feudal law of Scotland. A personal deed of entail will not qualify a 'right in a person by charter and sasine.' Here your Lordships see you have the great authority of Lord Braxfield, expressly stating that all debts contracted before recording infeftment must be good. Then he goes on to state himself thus, not in the positive language in which he had stated that proposition, that all debts contracted before recording infeftment must be good; but he says, 'I incline to go further. Prior to the statute 'of 1685 entails were in use, but doubted how far, by the common law, 'a proprietor could lay such extraordinary burdens. The statute of '1685 interposed to prevent such questions. It lays burdens upon heirs 'of tailzie, but nothing in the statute which says that a man may bind up 'his own hands, possess the estate, and yet secure it from creditors; that 'is contrary to the nature of property, and it would have been unlaw- 'ful in the Legislature to do so. No one could make up a title on the'

'estate in case of the contravention of Mr. Agnew, the maker of the en- July 31. 1822.
'tail; it is a different case where the maker of the entail puts the fee in
'the heir, and reserves only a liferent; no difference that here a mutual
'entail; that good as to the person contracting with him, but still the
'debts will be good quoad the creditors—this was determined in the case
'of Barholm,' a case which your Lordships will recollect is very largely commented upon in these papers. My Lords, I think I may venture to say, from respect to the memory of Lord Braxfield, that it is impossible for him to have said that this was contrary to the nature of property, and that it would have been unlawful for the Legislature to do so. Improper it might have been, but not unlawful. Then he puts a case, which, if it be law, (which I apprehend it is,) certainly shows there is a means of doing all the mischiefs which are imputed to this entail. He says, 'It is a different thing where the maker of the entail puts the fee in 'the heir, and reserves only a liferent, and that in that case the entail 'will be good in the heir, and he will only have a liferent.' Taking this to be the law, it is quite obvious that there is a way of so settling, as that the entailer shall only have the liferent, and the heir shall have the fee; the effect of that would be, that all those consequences, which are supposed to be so mischievous as to put men on another mode of entailing, may be consequent on the mode of entailing Lord Braxfield points out; but with respect to what he says, when he uses the words, 'I in-'cline to go further,'—he does not go to the length of saying that he *does* go further. He says, 'Prior to the statute of 1685 entails were in use;' (it is very extraordinary that in some of these papers we should have the assertion that entails were not known in 1685); he says, 'but doubted 'how far, by the common law, a proprietor could lay such extraordinary 'burdens. The statute of 1685 interposed to prevent such questions. It 'lays burdens on heirs of tailzie.' And here your Lordships will permit me to put you in mind how many cases we have had here, in which it has been determined that an institute is not an heir of tailzie; how many cases we have had here, in which it has been determined here, on the authority of the Court of Session in Scotland, that though an institute is not an heir of tailzie, and though he is never mentioned in the act of 1685, if he be nominatim fettered, the fetters upon the institute are just as good as the fetters upon the heirs of tailzie.

My Lord Monboddo says, 'I have no doubt as to the validity of all 'the debts prior to the recording of the entail by infeftment; nor have I 'any doubts even as to posterior contractions, for the limitations of the 'entail are only against the heirs of entail.' If by that his Lordship meant that the limitations, however expressed, can only be considered as limitations against the heirs of entail, then I understand him; but the limitations of the contract, if you are to determine from the expressions in the contract, are express against the institute, that is, the maker of the entail, as well as against the heirs of entail. 'No man can possess an estate 'without being liable to debts contracted by him, unless there be a pro-'vision irritating the right. No matter that here a mutual entail, that is

July 31. 1822. ‘ merely a personal contract; however onerous, it will not affect creditors ‘ who contract on the faith of the records.’ Now, my Lords, if this is an onerous contract, and if this onerous contract is itself upon the records; if it be duly registered and recorded; and if infeftment has been duly taken upon it, then the lieges had just as good notice of this onerous contract so recorded, and of the steps which were taken, as they had of any other contract which is upon the record.

Then the Lord Justice-Clerk says, ‘ I cannot perceive the principle ‘ which distinguishes mutual entails from simple entails. An onerous ‘ consideration for making the entail will not alter the nature of the right; ‘ that may be a good obligation at common law to make the entail good, ‘ but will not affect creditors. All that they had to do was to look to ‘ Mr. Vans's titles, which contain no prohibition or irritancy,’ not regarding as binding upon him the prohibitions and the irritancies I have read to your Lordships. There is certainly a difference between an entail being good at common law, as affecting the persons to take under it, and as affecting or not affecting creditors: that, I apprehend, will depend upon the circumstances under which it is taken. They then find, ‘ that the ‘ entail subsists, but that it cannot affect the just and lawful creditors of ‘ Mr. Vans, and that the estate of Barnbarroch is subject to, and affect- ‘ able by, the debts due by the said John Vans at the time of his death.’ Your Lordships observe, that the debts described here are the debts, not which were due at the time the contract was entered into,—not which were due at the time the contract was recorded,—not which were due at the time the infeftment was taken,—but the debts which were due at the time of his death; it does, therefore, include every debt at the time the contract was entered into, and between that period and the time of his death.

My Lords, this judgment having been passed, Mr. Agnew of Sheuchan then brought an action of reduction and declarator before the Court against the heirs of entail of the said estates, concluding that the entail should be rescinded and annulled, or at least that the said Robert Vans Agnew should be entitled to sell so much of the estate of Barnbarroch as would be sufficient to pay the whole debts of the said John Vans, and praying for a decree of the Court to sell so much of the estate of Barnbarroch as would be sufficient to pay off those debts. This seems to have been one of the projects which Mr. Robert Agnew of Sheuchan had entered into for getting rid of this entail, it being probably more for his interest, he being a creditor, than as being entitled under the entail. The Court, however, upon the 11th of March 1785, ‘ repelled the reasons of ‘ reduction, and in regard there was no clause or provision in the entail, ‘ by which the heir of entail was empowered to sell the whole or any ‘ part of the estate for payment of debt, and that the Court had no juris- ‘ diction to authorize any such sale, dismissed the action.’

That judgment of dismissal led afterwards to the passing of this private act of Parliament which I now have in my hand; but it becomes material to mention to your Lordships, that at a period very distant from the date

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of the interlocutors, the substance of which I have last stated, an appeal was brought to this House by the present Mr. Agnew, I think; and when that appeal came to this House, your Lordships were pleased, in the year 1814, to remit the cause back to the Court of Session to review those interlocutors. I observe in the papers, intimations are made that there was considerable doubt what were the reasons that led this House to remit this case for review. I think your Lordships will be fully justified in having so done, when you had seen the opinion of such men as those whose opinions I have read, and when your Lordships had seen what were the propositions that I have just stated from the notes of the Judges: when it is recollected that that passed in the year 1784 or 1785, and when your Lordships were not in possession of the doctrines which the Court of Session had laid down in subsequent cases, either confirmatory of the decision of 1784, or departing from that decision of 1784, I think it will be seen that that was not an unwholesome mode of proceeding, and the most respectful to the Court of Session to desire that they would reconsider that interlocutor. They did accordingly do so. They appear to have adhered to it, and from that interlocutor of adherence the first appeal is brought to your Lordships.

In the mean time, my Lords, an act of Parliament passed, which, after stating all the circumstances I have stated to your Lordships, stated these several circumstances:—'Whereas the debts of the said John Vans Agnew 'having been thus decreed to be effectual against the said estate of Barn-'barroch, notwithstanding the said entail, and the rents of both the en-'tailed estates being insufficient for the purposes of paying and keeping 'down the interest on the said debts, affording a suitable maintenance to 'the said Robert Agnew and his numerous family, and discharging or 'paying the principal sum of these debts within the time limited by the 'entail, the present net yearly rent of the said estate of Barnbarroch 'being £913:16:8 sterling, or thereabouts, and the present net yearly 'rent of the said estate of Sheuchan being £920:2:8 5-12ths sterling, 'or thereabouts, and the debts amounting to £14,100 sterling and up-'wards of principal money, besides interest.' It will be in your Lordships' recollection, that in the papers upon the table it is stated that sales were made for the purpose of assisting Robert in the obligation that he would have been under to keep down the interest of the debt upon the estate at his father's death.

Then the preamble proceeds to state, 'That sundry of the creditors, 'whose debts amount to £6400 and upwards, have instituted an action 'of adjudication of the estate of Barnbarroch before the Court of Session, 'for payment thereof, and the other creditors are also about to insti-'tute similar actions, for payment of the principal monies and interest 'owing to them, and penalties incurred, and for accumulating the whole 'into one principal sum, whereby the said estate of Barnbarroch may be 'absolutely and irredeemably carried off from the said Robert Agnew, 'and the other heirs of entail, and the said estate of Sheuchan may be 'forfeited by and carried off from the said Robert Agnew, pursuant to

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My Lords, the appellant then brought his action in the Court of Session, insisting that the sales which have been made under this private act of Parliament were sales which could not be deemed valid and effectual, and upon this ground that they were not made according to the powers and authorities given by the act of Parliament; and the Court of Session having been of opinion that action could not be maintained, for that the proceedings which had been had in the Court of Session were proceedings that gave effectual titles to the purchasers; the two questions your Lordships have to decide therefore are, Whether the opinion of the Court of Session, upon the remit of the interlocutor pronounced in 1784, is right? and, Whether the interlocutor of the Court of Session, with respect to those sales, is also right?

Now, my Lords, with respect to the first of these questions, it would be a waste of time for me to state to your Lordships all the contents of the papers upon the table. The principal objection the Court of Session have taken to the entail, as not being effectual against the creditors, such as were creditors at the death of John Vans Agnew, is, as the papers state, an objection founded on this sort of principle and reasoning,—that a man cannot fetter his estate as against himself; that the act of 1685 enables him to fetter his estate by resolutive, prohibitory, and irritant clauses, as against heirs of tailzie, but that he cannot do it against himself. My Lords, when we come to look at the reasoning why he cannot do it

against himself, it is said that that statute enables him to do it as against heirs of tailzie, but that it only enables him to do it as against heirs of tailzie; to which it was answered, it is true that statute was made to remove doubts, and to enable good and valid entails against heirs of tailzie; but still that statute could not alter what the law was with relation to provisions, as to others than the heirs of tailzie; and it has been repeatedly observed in this House, in the case of Duntreath and a variety of other cases, with which all your Lordships must be familiar, that an institute, for instance, is not an heir of tailzie; that the description of an institute is no where to be found in the act of 1685; and yet you have very few questions whether the institutes are not bound, if you only bind the heirs of tailzie. The description frequently is, John such-a-one and the other heirs of tailzie, where John such-a-one was an institute. It is said that you cannot imply from those words that he was as an heir of tailzie meant to be fettered, because he is not an heir of tailzie. In the case of Duntreath, it will be in your Lordships' recollection, that expressions of that kind are to be found in various places; 'the institute,' naming him, 'and 'the other heirs of tailzie;' but when you come to look at the resolutive, irritant, and prohibitory clauses, they are only on the heirs of tailzie, and though that man was called one of the heirs of tailzie, by the reference to the others as 'the other heirs of tailzie;' and though it is said you cannot by implication fetter the man, but that he must be expressly named, yet if you find, as you have done over and over again, that if the institute is expressly named, he is as much bound as the heirs of tailzie, there does not appear to me to be, in that case, any difference between the institute and the succeeding heirs of tailzie. If your Lordships will look to what is to be found in Stair, in Hope, and in Mackenzie, it appears to me that the maker of the entail himself may be bound; it is said he clearly may be, if the deed of tailzie is an onerous deed. It is very true, that, after these cases, your Lordships will not hastily decide, that if the deed was not an onerous deed he could bind himself, but if it be an onerous deed, made on sufficient consideration, notwithstanding all the reasoning I have seen, it does appear to me to be quite sufficient to support the obligations entered into. I say, such a deed will bind him if he sells the estate for money, and money constitutes the consideration. What is this, in truth, if you come to analyze it, but a sale according to the expression to be found in it? What is it but a sale made by John Vans to Robert Agnew for the consideration there mentioned? If they had thought proper to make a conveyance in another way; that is to say, if they had conveyed to Robert Agnew, for the consideration there mentioned, Robert Agnew might immediately by deed have created an entail, restricting most absolutely John Vans, as well as all other takers; and the question is, whether this is not in effect the same thing, considering the nature of the contract, and the other obligation which arises out of the consideration?

My Lords, I will only refer generally to the arguments on this subject. I could read all this book which I hold in my hand on the subject to your Lordships; but I do confess, after considering the arguments which

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have been addressed to us from the Bar, and on looking into writers, and reading these papers, I have a very strong conviction that, independently of that statute of 1685, such a deed as this,—recollect, my Lords, I do not say a gratuitous deed,—but such a deed as this, proceeding on onerous consideration, and valuable consideration, not a mere mutual entail, but proceeding likewise on money considerations, is competent to bind him; that is to say, that he contracted a personal obligation to make this effectual, and that he did make it effectual by infeftment; and though it appears to me the debts contracted, at the time the contracts were entered into, were personal obligations, yet if adjudications were led upon those debts before the infeftment was taken, it appears to me they would be prior rights; but it does appear to me that adjudication led after infeftment was taken would not be effectual as prior rights,—and that accords with the declaration of Lord Braxfield, to which I have drawn your Lordships' attention. I should therefore propose, with your Lordships' permission, to alter this interlocutor in the manner I will presently mention to your Lordships.

My Lords, the other part of the case is an extremely distressing part of the case—I mean that respecting the purchasers; and I wish to lay it down in language as clear as any in which I can express myself, that if a Court in this part of the island, or in Scotland, is authorized by an act of Parliament to proceed to a sale in the manner in which the act of Parliament provides they shall proceed to a sale, no purchaser is answerable, or can be answerable, for the mistakes or blunders of the Court. Parliament trusts to the wisdom and discretion of the Court; and if the Court acts according to the rule of proceeding which is laid down for its proceedings, although they may be wrong;—for instance, if they were to mistake the amount of the debts—if they were to suppose that debt A. affected lands when it did not affect lands, or that debt B. did not affect the lands when it did affect the lands,—and if purchasers under those mistakes and blunders were not found to be safe, I do not know how any one could deal as a purchaser under an act of Parliament. But then, I conceive that every Court is bound to proceed according to the directions of the act; and that, if the Court of Chancery was bound to proceed according to the prescribed mode, and did not so proceed, then the transactions of the Court of Chancery would be no more a security to the purchaser than the transactions of the Court of Session would have been, if they had not been authorized by law to proceed; and so vice versa, if the Court of Session has not proceeded as the act of Parliament directs, the consequence of that is, that the purchaser under that Court is in no better situation than the purchaser under any other Court, not conforming to the proper course of proceeding.

Then, my Lords, what are the circumstances? The Court of Session should, in the first instance, have ascertained what were the debts—the whole amount of the debts affecting these estates; and they should have ascertained not only what was the whole amount of the debts affecting these estates, but they should have gone quite a different way to work

from that they have pursued, in the case of the judgment creditors of Robert Agnew. They should have called all the heirs; and in case of these being infants, they should have brought before the Court the persons representing them, and in the presence of all, have ascertained the whole extent and amount of the debts,—themselves judging which were to be considered as affecting the estates, before they proceeded to any sale of the property. Now, I cannot believe that the infant children of Robert Vans Agnew were at all represented in the Court below. I think it is clear they were not. It is very true, Lord Braxfield had been appointed tutor ad litem in the suit in 1784; but there is no evidence that they were brought before the Court at all in this suit. The whole proceedings, therefore, appear to me contrary to the powers and authorities given to the Court of Session, in order to make good titles to the purchasers.

My Lords, there are some other objections, namely, an objection that the interest entered into the computation of debts effectual against this estate. It is very true, as has been stated, that Robert Agnew ought himself to have kept that down. I do not, however, enter into that question: I am not quite sure that they have not made a mistake as to what debts meant in the act of Parliament. If the objection were merely that the Court had mistaken in having sold part of the estate of Sheuchan before all the Barnbarroch estate, upon such a ground as that I should be very unwilling to disturb the sales. Your Lordships know it is a very ordinary thing in the Court of Chancery in England to order an account of the personal estate to be taken, and then, if that is not sufficient, that the Master shall proceed to a sale of real estates; but where it is clear that the application of the personal estate will not be sufficient for the payment of the debts, then the Court has, in some instances, anticipated the sale of real estate, and though not strictly within the meaning of the decree, that is not interfered with.

My Lords, I will not allude to cases in which actually existing entails, framed under the direction of the Court of Session, and intending to bind the party himself, are in the terms of that on which this question turns. My noble friend has, I know, such before him; but, without stating more, the result of the opinion I entertain upon this subject is this—that it will be right, in the first case, to reverse so much of the interlocutor of the 3d of March 1784 as found generally that the estate of Barnbarroch was still affectable by the debts due by John Vans of Barnbarroch at the time of his death; and to find that such estate was affectable only by the debts of the said John Vans which were due at the time of the date of the deed of tailzie of the 29th day of December 1757, and which remained due at the time of his death; and such other debts of the said John Vans (if any) as had become real charges upon the said estate before the infeftment of the 16th of May 1775; and to refer the cause back to the Court of Session, to do therein as may be consistent with this finding, and as shall be just.

In the second cause, I would humbly move your Lordships to reverse the several interlocutors complained of, and to declare that the appellant, and the other children of Robert Vans Agnew, who were named as de-

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fenders in the action of declarator and sale in which such interlocutors were pronounced, appearing on the face of the proceedings to have been minors at the several times of pronouncing such interlocutors respectively, and not to have been properly brought before the Court as defenders in such action, according to the provisions of the act of Parliament in the said action mentioned, the Court had no authority to pronounce any interlocutor in such action affecting their interests, and especially had no authority to proceed to a sale of any of the lands of Barnbarroch or Sheuchan in the said act mentioned; and therefore, that all the proceedings of the said Court in the said action of declarator and sale, so far as the same affected the interests of such minors in the said estates respectively, under the deed of entail in the said act, and in the said proceedings mentioned, were proceedings without the authority for that purpose required by the provisions in the said act of Parliament, and were therefore null and void as against the appellant, and the several other minor heirs of entail; and particularly, that the sales made by the said Court, in pursuance of the several interlocutors pronounced by the said Court in such action of declarator and sale, were null and void as against the appellant and the said several other minor heirs of entail; and that the appellant, on behalf of himself and the said several other minor heirs of entail, is entitled to have the sales made under the several interlocutors aforesaid reduced, and to have the lands restored to him, along with the rents from the period of his accession to the entailed estates, subject to such proceedings as may be had in an action to be instituted in the said Court, under the authority of the said act, for the purpose of inquiring into and ascertaining the extent and amount of the debts owing by the said John Vans Agnew at the time of his death, chargeable upon or effectual against the said entailed estates, or any of them, to the end that the said Court, after having fixed and ascertained the extent of such debts by interlocutors or judgments in that behalf, may proceed to sale of such parts of the said estates respectively as may be necessary, in such order, manner, and form, as directed by the said act; and that the cause be remitted back to the Court of Session to execute this judgment, and further to proceed as shall be consistent with this judgment, and shall be just.

Your Lordships observe, that this applies on the general principle to all the purchasers. It is unnecessary to enter into the distinctions to be found in the different cases, or to state the grounds upon which, I think, one may venture to say, that, attending to all which passed, the same principle must govern all;—it would be one of the most difficult things in the world to distinguish between the one and the other.

LORD REDESDALE.—My Lords, the great importance of this cause will, I trust, be a sufficient excuse for my troubling your Lordships shortly upon it. With respect to the doubts which have been suggested, whether, attending to the nature of this entail, it could be binding upon the institute, it appears to me very extraordinary that that matter should be at all in question, because, my Lords, previous to the act of 1685, en-

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tails had subsisted, which entails were, I believe, exactly of this description. The act of 1685 says nothing with respect to the institute; and I should infer, from the statute of 1685 being perfectly silent upon that subject, that it was a recognition of the binding effect of an entail of that description, prior to that statute, on persons, the immediate object of the deed creating the entail, and that the doubt was with respect to the remoter heirs of tailzie; as it seems to me that has been considered by your Lordships as really the doubt on which the statute of 1685 passed; and it is a most absurd thing to suppose that in 1685 the Legislature should confine its attention to the remotest heirs of tailzie, and leave the question open as to those who were the more immediate objects of the conveyance.

My Lords, if I had any doubt upon this subject, after having heard it argued so fully as it has been at your Lordships' Bar, I might refer to settlements very recently made, under the authority of the Court of Session, in execution of acts of Parliament, which acts of Parliament had given power to settle estates in lieu of estates given in tail. The usual form and manner in which that is done, is by leaving the Court of Session to direct an entail to be made, which shall be effectual with respect to the estate to be settled, instead of the estate which was previously settled; and if that which I have heard upon the subject of this case is correct, and if the decision which is now in review before your Lordships, in the case of a particular entail, is the law of Scotland, then the Court of Session in Scotland must have been guilty of very gross negligence in what they have done in the execution of the acts of Parliament such as I have described.

My Lords, I have in my hand two settlements very recently made, one in December 1816, the other in January 1817, of property of this description. The first is a settlement made by the Duke of Atholl. The Duke of Atholl being in possession, under an entail executed by his father, by which the property of Tullibardine and other estates were conveyed to the late Duchess of Atholl, and the heirs whatsoever of her body, with a variety of substitutions running through a great number of persons of the family of Murray, and having also estates called Wester Kinnaird, and other estates which lie extremely convenient for the purpose of the enjoyment of the principal estates which he had under this entail, and the estate of Tullibardine not being of that description, he proposed to make an exchange of the estates of Wester Kinnaird for this estate of Tullibardine, and in the deed executed for the purpose, under the authority of the Court of Session, only on the 4th of December 1816, recited the settlement which had been made by the late Duke of Atholl, in the time of the present Duke, under which settlement he held the estate of Tullibardine, and reciting that the Duke stood heritably infeft and seised, as of fee-simple, in the lands and estates of Wester Kinnaird, and other lands particularly described, and stated, that it would be more convenient and advantageous for him, and the subsequent heirs entitled to succeed to and to take the estates which were entailed by the late Duke of

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Atholl, his father, to settle this estate instead of that of Tullibardine; and the act of Parliament reciting all this, it was enacted, that from and immediately after the passing of the act, the Duke of Atholl, at any time during his life, or, failing him, the heir of entail for the time being possessed of the estates comprised in the deed of entail therein before recited and referred to, made by the late Duke of Atholl, and also of the lands and estates of Wester Kinnaird, and the other lands particularly mentioned in the first schedule annexed to the act, should be at liberty to apply by summary petition to the Court of Session in Scotland, in either of the Divisions thereof, and by and with the directions and approbation of the Court to make, grant, and execute a disposition, or deed of settlement, or entail of the lands and heritages comprised in the said first schedule, as the same were contained and described in the title-deeds of the Duke of Atholl, or his predecessors or authors, and that in the manner or form which should appear to the Judges of the Court most proper for effectually settling and securing the lands and heritages, freed of and discharged from all debts and incumbrances affecting, or which should, could, or might affect the same, to and in favour of the Duke of Atholl, and the other heirs of entail entitled to take and to succeed under and by virtue of the deed of entail made by his father, in the way of strict entail, under all the provisions, conditions, declarations, and so on, provided for the heirs in that entail; which settlement and entail should be so framed as to bind the Duke of Atholl, or the person executing the same, as well as all the succeeding heirs of entail. Then it states a summary application to the Court of Session, and that, in pursuance of the directions of the Court, he had given, granted, and disponed, 'as I do hereby, with and under the reservations,' and so on, 'to and in favour of myself, and the heirs whatsoever of my body, whom failing, to the other heirs.' Now, my Lords, this is an entail which appears to me to be precisely in terms of the entail of the estate of Barnbarroch, and it is exactly in the same words, except that in the entail of Barnbarroch there is the additional word 'sell,' and the transaction with respect to the estate of Barnbarroch appears to be as clearly a sale as it was possible for a consideration taken; the consideration was the sum of £3000, and the settlement by Mr. Agnew of Sheuchan of his whole estate, of which he had the absolute disposing power.

My Lords, the other instance I would beg to mention is one of the 27th of January 1817, another settlement, made under a similar act of Parliament, by Mr. Kennedy of Dunure, by which he settled property of which he was seised in fee-simple in lieu of estates which were entailed by a prior entail. He settles this estate exactly in the same manner, under the authority of an act of Parliament, conceived in nearly the same terms as the act of Parliament respecting the Duke of Atholl. By this deed, he gives, grants, and dispones the estate to and in favour of himself and the heirs-male procreated or to be procreated of his body, and their descendants, whom failing, to the other heirs of tailzie.

Now, my Lords, these two instruments are instruments which the Court of Session have declared to be effectual entails against the creditors

of the Duke of Atholl, and against the creditors of Mr. Kennedy. How that can be consistent with the decision that the entail executed by Mr. Vans of the estate of Barnbarroch, in the manner in which it was executed, and for the considerations for which it was executed, was not an effectual instrument for the purposes intended by that deed—effectual against the debts of Mr. Vans, so far as the deed itself could make it effectual—I cannot conceive. The deed itself provides that the debts which he *then* owed the settlement should not affect, so that the deed was so far an honest deed; that it was intended that all the debts he then owed should be a charge against the estate; but it provided, by the usual clauses for that purpose, that debts *subsequently* contracted by him should not affect the estate.

My Lords, upon this settlement, that was so made, immediate infeftment was not given, nor was it taken till after the death of Mr. Agnew of Sheuchan; but, in the year 1775, I think, infeftment was taken upon that settlement, and then, as I conceive, the settlement was completed; and debts contracted after that infeftment could as little affect the estate of Barnbarroch as any debts contracted by the Duke of Atholl after the settlement made by him in the year 1816, or any debts contracted by Mr. Kennedy after the deed of 1817, would have been effectual; and the Court of Session have declared that those two instruments are effectual for the purposes required of them. It appears to me, therefore, my Lords, that they are expressly decisions, if I may so term them, of the Court of Session, in opposition to the interlocutors in the case now before your Lordships for decision. I shall say no more upon that part of the case, perfectly concurring in what has fallen from the noble Lord who has just addressed you.

With respect to the other part of the case—namely, the second appeal, affecting the purchased estates,—it appears to me most clear, that the Court of Session, having no authority whatsoever to decree a sale of the estate, except that which the act of Parliament gave them, they must proceed according to the powers given them by that act of Parliament, and that, if they do not, they are acting without authority. I do not mean, my Lords, to speak of any error in judgment. If they had decided what were the debts with which the estates were affected, and they had improperly so decided—if they had allowed claims that were not within the intent of the act of Parliament, I do not conceive that an error in judgment of that description would have affected the title of the purchasers. But, my Lords, they proceeded without any authority whatsoever. I conceive the Court of Session, in decreeing these sales, had no more authority than I have for the purpose; for the act of Parliament required that a suit should be instituted, to which all the heirs of entail were to be called, and to be made defenders to that suit. In the proceedings instituted for the purpose, the minor heirs of entail, the children of Mr. Robert Vans Agnew, were named in the proceedings, but they were not called before the Court: the proceedings were against them wholly in absence; and, according to all the authorities in the law of Scotland, a

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proceeding against minors in absence is wholly void; and therefore I apprehend that the whole of the proceedings of the Court of Session in Scotland, with respect to the sale of this estate, were null and void.

I observe, my Lords, that, in one of the opinions given in this case, this is treated as a matter of form—I take it to be matter of substance. The learned Judge who has made that observation says, that if they had acted under error in judgment, that might be a ground for invalidating the judgment; but it was simply an error in point of form. Now, I apprehend the error in point of form was substantial; for they had no authority whatever till that form was complied with, and till the minor heirs of entail were brought properly before the Court, so as to have persons to act for them, and to take care that nothing was done to their prejudice; and although they were named in the process, yet, not being brought properly before the Court, it was a proceeding as much without authority as if they had not been named. It is upon these grounds I concur in the opinion of the noble and learned Lord. I have thought it very important to state just so much upon the subject, that I wish it to be understood that it is not for any error in judgment in the Court of Session that I think these purchases are void. If the Court of Session had decreed in a suit properly brought, mere error in judgment would be no ground for setting them aside. If the Court of Session had proceeded in a cause in which all the proper parties were represented, yet if, in the end, justice had been done, though the order of sale which was directed by the act of Parliament had not been pursued, I think that would not have been a ground for overturning the whole of that which has been done; but they proceeded without calling before them those persons whom the Legislature, when it passed that act, particularly intended should be called before them; for it is evident that the Legislature acted with peculiar caution—that they felt that there were interests which ought to be particularly guarded. They directed a new suit, and directed who should be the parties by the very terms of the act of Parliament; but the Court of Session have proceeded without calling before them the most material parties to that suit. On that ground, I concur with the noble and learned Lord, that all the proceedings under the supposed authority of the act of Parliament were without foundation—that they must be therefore wholly voided—and that the Court of Session must be directed to proceed in the cause in the manner which has been stated by the noble and learned Lord, having all persons properly before the Court.

Appellant's Authorities.—4. Ersk. 7. 14; 1. Dow, 18; 4. St. 20. 21; 2. Ersk. 2. 4; 1. Ersk. 7. 13; 1. St. 6. 31; 4. Ersk. 3. 6; Powell on Powers, 113; Sugden on Powers, 176; 3. East, 439; Downie, Dec. 19. 1815, (not rep.)

Respondents' Authorities.—4. Ersk. 1. 22; Brown, Feb. 18. 1675, (5169); Cockburn, Nov. 26. 1725, (5182); Wilson, July 6. 1757, (5184); Irvine, Feb. 28. 1771, (5187); Lane, Jan. 17. 1782, (5179.)

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(*Ap. Ca. No.* 44.)