merely had the effect to ascertain whether the new road was not a sufficient substitute for the one stipulated. July 27, 1831.

2. The appellants have no substantial interest to insist on the road mentioned in the lease being made. The surveyor has reported that the new line of road entirely supersedes the necessity of it, and the appellants have themselves acted upon that footing. If the parties had been aware, when the lease was executed, that the new line was in contemplation, it is quite manifest that the stipulation would never have been made.

Earl of Eldon.—My Lords, having heard the arguments of counsel at your Lordships bar, I have since looked with the greatest attention through the whole of this case; and, having done so, I cannot satisfy myself that the judgment of the Court below ought to be reversed; and, on the other hand, I do not think that this is a case in which I ought to recommend to your Lordships to give costs against the appellant for coming here; and, following the practice of this House, in which it has not been usual to state the reasons which induce the House to form that opinion, where it is an affirmance without costs, I will merely move your Lordships that the judgment be affirmed.

The House of Lords ordered and adjudged, That the interlocutors complained of be, and hereby are affirmed.

Appellants' Authorities.—Pollock, Feb. 24, 1777 (No. 4, Appendix, Tack); Graham, 1789; noticed in Mackenzie, Dec. 13, 1811; F. C. M'Intosh, Feb. 1, 1798 (No. 5, Appendix, Tack); Henderson, Feb. 24, 1802, 10,054; Frazer, Feb. 25, 1813, F. C.

RICHARDSON and CONNELL—J. M'QUEEN,—Solicitors.

CATHERINE MUNRO, Appellant.—*Jeffrey—Lushington—Sandford.* No. 29.

DRUMMOND and others, Respondents.—*Brougham—Keay—Miller—Alison.*

Tailzie—Decision—Held (affirming the judgment of the Court of Session) that an entailed estate held by an heir in possession under a strict entail, on which infeftment had followed in his favour, was liable to be adjudged for personal debt, contracted subsequent to the infeftment, but prior to the recording the entail,

although the adjudication was not raised or decree obtained thereon until after the entail had been recorded.

The case of Smollett, May 14, 1807, (Mor. Dec. App. 12. voce Tailzie,) was not shaken by, nor intended to be shaken by, the judgment in the House of Lords in the case of Agnew of Sheuchan, July 31, 1822.—(1 Shaw's App., page 320.)

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First Division. Lord Newton.

George Ross of Cromarty executed in 1783 a deed of entail, whereby, under the restrictions and limitations therein contained, he disponed the estate of Cromarty to the heirs-male of his own body, and their heirs-male; whom failing, to the heirs-female of his own body, and their heirs-male; whom failing, to his nephew uterine Alexander Gray, and his heirs-male; whom failing, to Jane Kirk, the entailer's sister, and the heirs-male or female of her body,—the eldest heir-female always succeeding without division, and excluding heirs-portioners; whom failing, over. The deed contains special prohibitions against alienation and contracting of debt; and the resolutive clause declares, that if the said heirs-male or female of the said George Ross's own body, or any of the said heirs of tailzie, shall do any thing in the contrary of these provisions, either by disposing of the said premises, or committing any crime or delict, or by contracting debts, or doing any other act or deed as above mentioned, either before or after his or their succession, under and by virtue of the said tailzie, the said acts and deeds used, and all and every one of them, shall not only be void and null in so far as shall concern the said lands, heritages, and estates, so as they shall not in any manner of way be affected therewith, to the prejudice of the said entail and the heirs entitled to succeed to the said tailzied estate; but also, the said contraveners being descended of the said George Ross's own body, for themselves allenarly, and all other contraveners for themselves, as well as for the descendants of their own bodies respectively, shall amit and forfeit their right and interest in the said lands, heritages, and others, and the same shall immediately devolve upon and pertain to the next heir of tailzie. No commission was granted for recording the entail; but, of the same date, he executed a trust deed in the English form, naming, among others, Alexander Gray and John Ogilvie, trustees, with instructions, out of unentailed funds conveyed to them, to pay off the debts affecting the Cromarty estate, and to record immediately the entail. The trustees accepted, and entered on the management under the trust, but did not record the entail.

One object of the trust was to pay off the debts affecting the estate of Cromarty, and there is a special declaration in the trust-deed, that the trustees should immediately record the deed of entail. Aug. 30, 1831.

Upon the death of George Ross, in 1787, Alexander Gray took the name of Ross, and, as the first heir of entail under the deed, succeeded to the estate of Cromarty. He was infeft on the deed of entail; and the whole clauses, prohibitory, irritant, and resolutive, were inserted in the body of the sasine. Alexander Ross was a partner in the army agency house in London, Ross and Ogilvie, and contracted the following, among other, debts. to Messrs. Drummond, bankers in London:—9,000*l.* by promissory note bearing date in the year 1796, in the name of Ross and Ogilvie; 5,000*l.* by a joint and several bond by Ross and Ogilvie in the same year; and 10,000*l.* in the year 1798, also contained in a promissory note by Ross and Ogilvie. As collateral security of these sums, Ross and Ogilvie put in deposit with the Messrs. Drummond private bonds and exchequer bills to a large amount. In 1803, while these debts remained unextinguished except to a partial extent, and while they remained personal, the entail was recorded at the instance of one of the substitute heirs.

In May 1805 a commission of bankruptcy issued against Ross and Ogilvie. In 1805 Messrs. Drummond, by an action in the Court of Session, constituted their debt against Alexander Ross, and thereafter, in 1806, obtained adjudication against the estate of Cromarty; the decree reserving all objections contra executionem. In 1820 Alexander Ross died without lawful issue.* In 1826 Catherine Munro, wife of Hugh Rose, and next heir of entail, raised action of reduction of the adjudication taken by the Messrs. Drummond. Several minor points were involved in the discussion which followed†; but chiefly the pursuers, founding on the above statement, and particularly on the fact that the

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* 4 Wilson & Shaw, page 289.

† In 1788 and 1800 Alexander Ross had executed heritable bonds over the estate of Cromarty for debts contracted by himself, in consequence of which Catherine Munro brought an action of irritancy against him, and in January 1805 obtained decree in absence. But the decree was kept open by representations, and ultimately proceedings on this point were allowed to sleep. Also, in the discussion under the action of reduction, the pursuer raised the objection of pluris petitio, but the question decided in the House of Lords was that stated in the text.

Aug. 30, 1831. entail was recorded, although not until after the debts were contracted, yet before they were made real on the entailed estate, contended that the estate could not be carried off, to the prejudice of the heirs of entail, in payment of these debts and obligations. The Lord Ordinary, in ordering cases to the Court, observed,—

" The Lord Ordinary sees nothing in the pursuers argument to " induce him to think that the case of Smollet was erroneously " decided; but as the authority of this case is alleged to have been " weakened by the judgment of the House of Lords in the " Sheuchan case, he thinks it proper to report the present case, " that the opinion of the Court may be obtained;" and the Court (11th June 1828), on advising these cases, and whole proceedings in the cause, sustained the defences, assoilzied the defenders from the whole conclusions of the libel, and decerned, but found no expences due.*

Catherine Munro appealed.

(*Jeffrey*) for Appellant—The present question is of deep interest to the parties concerned, and of even greater importance to the law. It involves the first principles of entail law; at the same time it is simple in its nature, and capable of being presented in a very distinct view. It has been considered as ruled by the case of Smollet; but that decision was not appealed. It was not unanimous; it is single, and in its circumstances does not apply to the question here at issue.

There the entail had not been recorded. The heir in possession contracted personal debt; then the entail was recorded. After his death the right heir made up titles to the estate, and served himself heir of entail to the contravener; then the creditor of the deceased heir adjudged the estate. The Court took this view of the question,—that, except as far as the heir is tied up by fetters, he holds in fee-simple. The persons who contract with him look to the record of tailzie, to ascertain in what character he holds the land, and what power he has over the land. They are entitled to rely on the record, and, not finding an entail of the land, are authorized to hold that they can deal

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† 6 Shaw and Dunlop, p. 945.

with the heir as an unlimited proprietor. But, while this appears to have been the principle on which the Court proceeded, two distinctions were overlooked:—1. That here the contraction of debt was not with an individual, but with a copartnery;—2. That the documents of debt did not afford action against Alexander Ross's person without the intervention of other proceedings, for instance, an action of constitution; but this action was not raised until after the entail was recorded. This case being toto cœlo different, the appellant was entitled to a different judgment from what was pronounced in Smollet's case; and at all events the House should send it to the Court below for reconsideration, especially since Smollet's case, even upon its own facts, has always been doubted by the bar. Aug. 30, 1831.

The appellant relies on this great and important point, that, independent of legal principles of genuine equity, the statute 1685 affords an invulnerable protection to all estates, fenced as directed, against all attempts to carry them away for debts contracted by the person on whom the entail is binding. The statute, right or wrong, (we think rightly,) has rendered harmless all adjudications on debts contracted by any heir of entail bound by the entail. There is an immense waste of learning on the part of the respondents, in order to show that the estate is not protected against the entailer's debts; and it is clear that the estate is not (with certain exceptions). Heirs who succeed take titulo lucrativo, and necessarily represent the entailer. It is the statute 1685 which introduces the necessity of recording. Without a reference to the statute, to see what on this point is directed, the respondents have not a shadow of a case. It may be difficult to say whether the recording is an actual enjoinment; but, waiving that inquiry, it is enough to say, that the declarator of irritancy is directed primo loco and alone against contravening. Now, we say that the mere contraction of debt is not a contravention of the entail. If it were otherwise no heir of entail could run an account with a tradesman; he could not live according to the ordinary habits of society. But it is the contracting debt, whereby the estate may be evicted and carried away and adjudged, which the statute contemplated. The mere contraction of debt is not a contravention. It is admitted by the respondents, that, after the entail is recorded, debts contracted subsequently to the recording are not effectual against the estate;

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why then direct a denunciation against mere contracting personal debts, and why should the statute protect the estate against debts contracted before? The personal creditors only can potentially create an act of contravention. But while the debts remain personal, where is the danger? But we are asked, how is the estate protected against personal creditors? and we answer, it is not necessary to protect an estate against personal debts. It would have been absurd and preposterous if any such protection had been attempted; a man cannot live without contracting debt; and did any sane person ever contend that an heir of entail had disobeyed the injunctions of the entailer because he ran accounts with tradesmen? It implies an absurdity to allege that the statute protects the estate against such personal debts. The statute expressly says, that the entail is not to be operative until certain things be done, and then to be good against contraveners and their creditors. But there is no contravention while the debts are personal, and therefore there are, while the debts remain personal, no debts of a contravener. In short, we maintain that what is prohibited is, not the contraction of debt, but the adjudication of the estate by the creditor, or a voluntary conveyance of, or burden granted over, the estate, to the creditor, by the heir in possession who has contracted debt (the legal and conventional titles mentioned in the statute.) But if there has been no contravention, then nothing has been done contrary to the injunctions of the entail. The creditor has not been let in before the recording, and the recording, while matters stand thus, closes the cheque.

The statute says, whenever the injunctions are completed, then the entail is a bulwark against all eviction. It is admitted that the entail becomes so if the debts have been contracted after the recording; and why should it not have the same effect before the recording? If the statute is to have this effect upon all debts contracted after recording, of what consequence is it that some debts were personal before? Are we not covered sufficiently if we have the whole panoply of arms on us before the debts are made real? The previous contraction is no contravention. The statute is imperfect in common sense and principle if it did not mean to protect the estate from all debts, if not already made real. The object of the statute was to strike at voluntary conveyances, or allowing an adjudication to be led,

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but not to strike at the mere contraction of debt. We maintain, that if the requisites of the statute be attended to, and if the entail be recorded, that the substitute heir of entail springs up like Minerva armed from head to foot, and being thus armed before any attempt has been made to touch his estate, how can personal creditors injure him? Observe also, that it is not made a ground of forfeiture in the heir that he does not record the entail; yet, if the whole estate is exposed to be carried away by personal debts contracted before the recording, would the legislature not have provided against this fatal consequence by making it a forfeiture not to record. The only inference which fairly follows is, that the legislature did not for a moment contemplate that debts allowed to remain personal at the date of the recording could affect the estate.

Various views of the statute lead irresistibly to the same conclusion. The statute clearly had in view, in this enactment, both personal and real creditors; but it directs its injunctions only against the latter. It classes the creditors, and places the creditors whose claims are to be effectual along with singular successors,—"creditors, comprysers, adjudgers, and other singular "successors whatsoever." But singular successors are persons who have bargained for and purchased a right. They stand in contra-distinction to a mere general representative, who succeeds to a right, and takes on him the responsibility of his author. The singular successor has a single title—an onerous right acquired for a consideration; and here it is quite plain that the statute did not contemplate a mere personal right, but a right of the nature of a right vested in a compryser or adjudger. If the heir in possession contracts personal debt, but which debt has not been made real, and the next heir sues (on a valid ground) a contravention, and makes up titles, and records, we deny that there is any authority for holding that the personal creditors of the forfeited heir could claim the character of singular successors, and take the estate. We may here observe, that the argument in Smollet's case was not well treated. Great part of the reasoning by the creditors was founded on a fallacy,—a mere sophistical reading of the act,—that the person who dealt with the heir is to be protected, even if the heir be forfeited; but they carried this too far, for the clause founded on by them does not relate to recording, and it cannot in con-

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sistency with fair argument. That is quite clear; and if so, how can you account for forfeiture for non-recording being omitted, if the legislature intended that the estate should be liable when the heir in possession contracts personal debts, and does not record? The true answer is, that it was considered necessary only to protect a certain class of creditors; namely, those who had clothed themselves with another character than merely that of personal creditors, and had become adjudgers, comprysers, or singular successors. Therefore, tota re perspecta, and giving the most natural consideration to this statute,—the charter of all entails,—have we not made out, that it means only to afford a protection against the sale, or the encumbering of the entailed estate, and that the mere existence of personal debts was regarded by the legislature as a matter of perfect indifference? On this view, that the heir in possession committed no contravention of the entail, and that personal creditors are not contemplated by this statute, and that they took no step to let themselves in, we are inclined to rest with perfect confidence: we cannot anticipate a satisfactory answer. In aid of what we have stated, there comes a most important inquiry. On what principle should the vested interests of substitute heirs give way to the claims of personal creditors, rather than the claims of personal creditors give way to the vested interests of the substitute heirs? Take an instance from the analogy of unfettered property. A possessor of a fee-simple estate sells or grants heritable securities over the land after he has contracted large debts. This conduct may be blameable, but the personal creditor will be excluded. They left their debts personal, and the preference of the purchaser or real creditor (except in cases of bankruptcy, as provided for in the bankrupt statutes,) will be unchallengeable. The answer to the claims of the personal creditor is simple, "sibi imputet," that he did not secure himself on the land. The personal creditor cannot be at a loss. He has the record of infeftments to go to. If the infeftment of his debtor, or rather of the person who purposes to become his debtor, is silent as to fetters, the party can deal with him in safety; but if the existence of fetters is seen in the recorded infeftment, as directed by the statute, then the creditor perceives that he is exposed to the utmost hazard to deal with the heir. Even if the record of tailzies does not yet contain this entail,

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every creditor knows that the next instant the entail may be recorded; and if, nevertheless, he still deals with the heir, he does so at his own risk, and must be supposed to look to the heir's personal sufficiency, and not to the entailed estate. But, in such circumstances, can a creditor be allowed to make a clamour that he is a loser; or will the Court strain principles, and strive to shut out justice, in order to relieve him? Look for a moment to the principle on which the respondent places his case. He says, that a man's property should be subject to his debts, and a person without an onerous title has no right to stand in competition with claimants who have an onerous title. Now, in answer, we shall shortly say, that, first, the respondent must show he is a creditor, and a creditor contemplated by the statute—of this we have largely spoken; second, that the heirs substitute have no onerosity. We are unwilling to enter upon a great deal of legal detail to be found in the case of Sheuchan. We shall satisfy ourselves by saying, that, long before the statute 1685, entails had been introduced, and were known, and held to be valid at common law. How far, under any circumstances, the entailer's estate could be saved from the entailer's debts, has been the subject of much discussion and difference of opinion. The ground on which the Sheuchan case was decided appears from the report, and needs no further detail here. It fixes, that if an heir of entail possessing an estate is under a personal obligation, in favour of substitutes, to preserve these substitutes' rights entire, then the substitutes can compete with personal creditors; and it follows, that if the recording has taken place before the personal debts are made real, the substitute heirs will exclude the creditors. Here the creditor of one heir of entail is competing with the creditor of another. We say creditor; for although, as relates to the entailer, a substitute may be merely a gratuitous donee, yet, in a question with another heir of entail, he is an onerous creditor. The onerosity is plain. Alexander Ross was himself a gratuitous disponee; but is not the appellant his onerous creditor? There is a great deal of authority on this point to be obtained from the recent decisions in the case of Ascog and Bruce; but even on these cases it is not necessary for us to rely altogether. If an entailed estate be actually gone, there may be a difficulty in protecting the succeed-

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ing heirs; but we are not contending for the recovery, but for the preservation of the estate. If substitutes act with diligence and promptitude, and creditors hang back, why should the creditors not suffer? The case of Sheuchan affords a valuable commentary in that view. Indeed it supports us equally as we have shown that the statute 1685 itself does. There are other minor observations, all tending to the same conclusion; but we are anxious to place our case on those simple and prominent principles which stand by themselves, and do not require the aid of ample elucidation. One important commentary, however, is afforded by the case of Denham. But if, as there found, personal creditors of a personal heir in possession have no claim on the land, because they can only take the estate tantum et tale as it stood in their debtor, how much more should that be the case when the creditors are told by the infeftment that it is unsafe to deal with him unless they immediately make their right real. All the argument of the respondent has been unavailing to strike out an intelligible distinction between the two cases; and if, in Denham and Baillie, the creditor could not reach the estate, neither ought the respondent in the case before the House. The case of Sheuchan deserves minute attention, as the principles on which it rests support every argument of the appellant. Even where in its facts that case differs from the present, that very distinction acts as a favourable authority; and the opinion of the learned Lord (Eldon), who entered so fully into the law of the question, shakes to the foundation all that has been said and reasoned in favour of the case of Smollet.

Earl of Eldon.—Are you instructed to state, what has been the dealing out of Court, as to creditor and debtor, in consequence of this judgment; what has followed the decision of Smollet?

Jeffrey.—Since that decision transactions have in several instances been entered into, in reliance on Smollet being well decided. I have been consulted, but I have always given my opinion that many doubts existed as to the soundness of the case.

Earl of Eldon.—It would be proper for us to know how much our judgment, if a reversal, would be disturbing the practice and transactions of men, and how much we would not be disturbing.

Jeffrey.—Speaking from my own experience, I have always found it doubted, whether Smollet's case was well decided, and the

profession were anxious that the matter were settled by a judgment of your Lordships. Aug. 30, 1831.

Brougham.—We shall soon show your Lordships the extent to which transactions have been gone into, and what has been the practice following that judgment.

(*Brougham*) for Respondents.—This is an appeal of a solemn judgment, involving a point already decided by the cases of Grahame, Ferrier, and Smollet; cases which at the time received great and deliberate attention, which ever since have been uniformly acted upon, and repeatedly, and in very peculiar circumstances, sanctioned by the legislature. Under such circumstances we feel no apprehension of failing in satisfying this House that the judgment under appeal rests on sound and legal principles. Let us then take the case where it truly lies:—the consequences of the recording the entail after the debts were contracted, but before they were made real on the entailed estate. Much light will be thrown on the inquiry by attending to the principles which govern cases of this kind. 1. It is clear that wherever an owner of a landed estate, by contracting debts, becomes personally bound to the creditors, he gives to the creditors a right to proceed against that estate, which right they may make real and obligatory upon the estate. Until legal means are taken to tie up the owner, and prevent creditors contracting with him, the estate is a subject from which the debts can be recovered; and although a jus in re be not instantly created, yet, by measures to be adopted, the debts can be fastened on the land. 2. If an heir succeeds to an entailed estate, that heir represents his ancestor, and is liable to the creditors of that ancestor in every case, and to the whole extent of the claims, except in so far as the entail has effectually prohibited the ancestor from contracting debt. But if the entail has permitted or not effectually prohibited debt to be contracted by the ancestor, then the heir of entail is liable, in the same way as the ancestor would have been. We have stated the exception,—"unless effectually prohibited." If he be not effectually prohibited, then, we repeat, that the next succeeding heir of entail becomes liable, and is liable. In the case of Reidhaugh, because the entail irritated the deed of contravention, but did not irritate the contravener's right, and left no effectual and absolute prohibition

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against contracting debt, the Court, on account of this absence of resolving the contravener's right, held a succeeding substitute liable for the debts of the preceding substitute. There are several reports of the case, all strongly elucidating and strengthening our argument. Now, where, in principle, does the difference lie between that case and the present? Unless the appellant means to contend that an entail can be effectual without registration, it is quite clear that the case we have cited is a distinct authority for the respondent. Just change the objection, from want of resolving the contravener's right, to want of recording, and the very words of the argument become applicable to the case before us.

Then take the case of Phelp. There the substitute heir in possession was obliged to pay a predecessor's debt, because the entail had not been recorded. We have shown, that the case cited before afforded an instance where the same consequence followed from want of the contravener's right being resolved. The same principle was the foundation of both judgments. The case of Baillie confirms this doctrine. In short, if, where, through a defect in the fetters of the entail, the succeeding substitute is liable for the debts contracted by a predecessor, so ought a succeeding substitute, where the entail not having been recorded, the entail has not been perfected according as the statute enjoins. But the appellant says, that there is a class of creditors who, notwithstanding of the imperfection of an entail, cannot go against the estate, and that the respondent is one of that class. But the appellants, while they assume the existence of such a class as a principle, have not attempted to show us a warrant for such a distinction—for a distinction between one kind of debt and another, or between one kind of creditors and another,—nor would it be easy to discover such a warrant. In truth, the position is inconsistent with the principles of the law of Scotland applicable to cases of this kind, and unsupported by decision or dictum. Thus, for a moment, consider the kind of obligations against which the fetters of an entail are directed. The parties named are "creditors, comprysers, and adjudgers." It is said, the creditor here named is an heritable creditor—a creditor who has by the process of law clothed himself with the character of compryser or adjudger, and therefore, the respondent being only

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a personal creditor, there was no contravention, and the respondent was not let in before the cheque was shut by the recording. But if the word "creditor" meant an heritable creditor, why use other descriptive terms? If a creditor holds an heritable bond, he takes infeftment, and enters into possession. He does not need to compryse or adjudge. Clearly, therefore, when the statute speaks of a compryser and adjudger, it does not mean that kind of creditor; but if it does not mean a real creditor, it must mean a personal creditor. If you look to the whole statute, you will find that it is utterly irreconcileable with its provisions to give the meaning to the word creditor on which the appellants have now chosen to build their whole case. How are you to get quit of the express clause at the beginning of the statute, that it shall not be lawful, &c. to contract debt, &c.? Where is the authority for adding—"debt made a real charge on the land?" Besides, what more fit term could have been used than "creditors?" Are there any more general terms which would include personal creditors?—and is it not clear, that when you add, "whereby the said land may be evicted," &c., the meaning is sufficiently explained to be, that it is a contravention for an heir to contract debt whereby the land may be evicted? If I contract personal debt, do I not do a deed whereby the land may be evicted; and is not that as much a contravention as if, from the instant of its creation, the debt had been real? and if so, (which seems undeniable,) what becomes of the appellant's argument? To say a word as to the jus crediti of the succeeding heirs: any plausibility which the argument on that point possesses arises from the incorrect view, taken in relation to this matter, of the term jus crediti. This phrase is rather figurative than strict; it is rather a right in the nature of a jus crediti than a pure jus crediti itself. From analogy, the heirs are described as standing in the relation of debtor and creditor, but not in the strict meaning of these words. Accordingly, although it be held that an heir has a good claim for reparation, or specific performance, against a previous heir who contravenes, that is not because the one is the creditor (in the ordinary acceptation of the word) of the other. The appellant's doctrine would let in a pari passu preference between heirs and creditors; a doctrine too absurd to require refutation. In all questions with creditors the heir holds the

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gratuitous character of the first donee; of this he cannot divest himself. What character he may be entitled to in questions inter hæredes is not the point at issue; we need not therefore discuss it, nor shall we detain the House a moment longer on the point. As to the cases, the appellant seems to hold it strange that a judge should feel himself bound by a former judgment; but with us we are accustomed to think that following precedent is a salutary and a wise rule. Feeling how weak the appellant's case was here, Smollet's case has been very critically canvassed. The minority in that case were, we believe, three; the rest, many of them composed of the ablest judges who have ever sat on the Scotch bench, voted for the creditors, the winning party. That case, we contend, settled the law, and was, by the profession, understood to be the law; and we shall immediately show the House to what extent this judgment has been acted on, as having settled the law. But there are also the cases of Grahame and Ferrier, both tending to the same conclusion. It has, however, been said, that none of these cases were appealed to this House. But would it not be going too far to maintain that a rule of law, adopted by the Court below after the most solemn deliberation and discussion, acted on by lawyers in their opinions, by the people in their transactions, by the judges in their proceedings, is to be taken for nothing because in these cases the losing party has not appealed? How many valuable interests, how many extensive estates are there, the rights to which depend on decisions which never have been appealed? It is unnecessary to pursue this matter; but we may add, that there may be often a very good ground for not appealing; namely, where the party thinks his case too hopeless to proceed further. Would it not be too much to expect that a party would still appeal, merely that, at a great expense, he might have the satisfaction (or rather for the satisfaction of others) of going the utmost possible length of litigation. We could add many elucidations of the soundness of the doctrine for which we contend. We shall only venture on one more; the case of interdiction (a very apt case, for the doctrine of entails was introduced into the Scotch law by analogy to interdictions). If a person be grossly improvident, he can be interdicted. If he has executed a disposition of his property before interdiction,

it is a good disposition, and will be obligatory; not so, if after the interdict is recorded. But suppose the improvident person contracts debt before he can by legal process make the debt good against the estate,—an interdict is recorded; the debt is good, notwithstanding the recorded interdiction. One of your Lordships asked, if in practice creditors had dealt with their debtors on the faith that the case of Smollet was well decided. Now, we have better evidence of the fact than mere opinions of lawyers; on this point we have the high authority of acts of parliament. We hold in our hands a list of acts of parliament obtained during the reign of his present Majesty, by heirs of entail, to enable them to sell part of the entailed estate for payment of debts contracted before the entail was recorded. The heirs, without such parliamentary authority, could not sell; for although the entail, unrecorded, was not good against creditors, it is against the heirs "themselves," and the diligence of the creditors would be ruinously expensive. The heir in possession, therefore, applies to parliament, and remit is made to the Court of Session to report, and they, in all the cases, have reported that the debt of the substitutes affected, or might be made to affect, the entailed estates of his ancestors, and the act of parliament followed almost as a matter of course. Was that not acting on the law as laid down in Smollet's case? or what more would the appellant require? The sum total for which entailed estates have been sold, during the present reign, for debts in the situation we have described, amounts to above 800,000*l.* sterling. Thus, take the instance of the act to enable Charles Marquis of Queensberry to sell parts of the estates entailed by Charles Duke of Queensberry and Dover in 1769, for payment of debts contracted by the Marquis prior to May 1818, when the Duke's deed of entail was duly recorded. There, in respect the said debts were contracted prior to the recording of the said deed of entail, and affected, or might affect, the said entailed lands, a portion of the entailed estate, to meet debts to the amount of 84,866*l.*, was sold. Now, what was the meaning of all this; According to the appellant's view of the case, all the heir in possession had to do was to record the entail, and that would have shut out the creditors! See also the case of the Galloway estates. There the statute tells you that the great proportion of the debts due were personal; i. e. the very kind of debts the

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contracting of which the appellant has laboured to prove did not amount to a contravention, and cannot compete with an heir of entail who records before the debt is made real; yet lands to the value of above 300,000*l.* were sold to pay creditors, the great proportion of whom were merely personal creditors. But if what the appellant has stated be sound, what wholesale spoliation has been committed! Parliament has robbed unborn heirs of entail to an amount of more than 800,000*l.*, and that in confederacy with the judges of Scotland, who reported that such robbery was legal. Only another point remains to be noticed. It is an incorrect view to assert that entails were recognized at common law before the statute. Had they been recognized at common law, the preamble would have been different. As to the argument as to a race of diligence, and the deduction that the creditors are to blame if they did not timeously secure themselves by making their debts real, it is founded on too obvious a fallacy to deserve detailed refutation. On the whole, whether we look to principle or precedent, or what has followed in the Scotch courts and in parliament, we arrive at the same conclusion, that the creditors are not excluded by the recording the entail after contraction, but before the debts were made real.

(*Jeffrey*) for Appellant, in reply.—When examined, the case of Grahame is not an authority for the respondents, worthy of being regarded in the light of a precedent sufficient to fix in our law a rule of law so important as the one attempted to be reared up; and even if the case of Ferrier were free from specialties, it only followed Smollet, and therefore cannot be held to be an authority for Smollet. But it has been contended that the rule is now fixed in our law, and that on the supposition that the rule was fixed, many interests and transactions have been created and concluded, all of which would be vacated if the present case were reversed; and in support of their averment reference has been made to several private statutes. Now, the first of these is dated in 1824, and in some of the cases, we don't know how many, the debts had ceased to be personal. Thus, in the sale of part of Raith's estate, a conveyance had been made to a trustee, and infeftment actually taken; but what sort of authority is this to set up against a single judgment, doubted by every lawyer, and held unsound by some of the ablest judges who ever

presided? Is it an argument for allowing a judgment, unsound in principle and unjust in its consequences, to remain unrecalled in our records? The respondent rests his case on a single ground, that the contraction of debt is a contravention; that is a vital point; but we submit that we have unanswerably shown that such a view is utterly irreconcilable with the statute itself, and involves the wildest absurdities, while our interpretation is consistent and simple. Indeed, there we regard ourselves as covered with tenfold armour, and that we are invulnerable. It was never dreamt that the simple contracting of debt was a contravention. Indeed, the whole tenor of our authorities shows that the contracting of debt, without something else following, is quite innocuous. The argument of the respondent on this point is ingenious, but we cannot consider it as sound; and, having no other authority but ingenuity, we feel ourselves confirmed in our belief that our reading is correct, and our views are rested on a sure and imperturbable footing. There is a plain distinction between the cases put and quoted by the respondent, to show that where debt is not effectually prohibited the creditor can come against the succeeding heir. In these cases, as you cannot add to a defective entail, and correct its errors, the flaw must remain; but the omission to record is not a durable evil; it is temporary and can be remedied in a moment, and the instant it is cured all personal debts are excluded. In the cases quoted, the personal debts would have been excluded, if it had been competent for any of the heirs to have thrown in a clause, resolving the right of a contravener, or otherwise completing and perfecting the fetters of the entail. We shall not repeat what has been said at the bar as to the jus crediti of the heirs of entail. Even the concession that inter hæredes they are creditors is sufficient for our argument. If we are in any way creditors, then the situation of parties is just the case of a race for priority, and we having recorded, i. e. perfected our right, before the respondent has adjudged, i. e. perfected his right, we have actually reached the goal and gained the preference. It seems to be thought, that because Alexander Ross could have been ousted of his possession had he lived, that therefore a proof is afforded that contracting debt is a contravention. But this is a mistake; he would have been ousted, not because he had contracted debt,

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but because the creditors proceeded to adjudge the estate for payment of that debt.

One word more as to Smollet's case, although what we are about to observe may be gathered from our opening. The present case is, in its feature, totally different from Smollet's; for here the creditor is not like the creditor of the individual, as in Smollet's case, who knew that the debtor had no other funds than the entailed estate, but a creditor of a company. The very decree of constitution of the debt was taken against the company; nay, the documents of debt were not at the time a foundation for immediate diligence to follow upon. Even, therefore, if Smollet's case had been appealed and affirmed, it would not necessarily have decided the present case, and we now come for a judgment on a case which, if it resembles Smollet's, has only been decided once, and if it does not resemble Smollet's, is a point perfectly open. Again, we repeat that on the bench, at the bar, and by our ablest writers, the case of Smollet has not been regarded as an authority fixing this very important point. The very decision on the bench, and the known talents of the minority, are sufficient to create in every thinking mind the most serious doubts whether the same judgment would have been pronounced in the present day. It is quite right that we should adhere to precedent, but not to a bad one, where single. The sound view is, to stand by a series rerum judicatarum: but can that be described to be the situation of the decisions on this point? It was expected that Smollet's case would have been appealed, but minority, or some such reason, delayed the measure, and it was ultimately abandoned. We close our argument with calling the attention of the House to one point. The heirs substitutes know nothing of the contractions of debt by the heir in possession, and ought to be protected. But the creditors cannot be ignorant that they themselves are dealing with an heir of entail; are parting with their money; that the heir of entail is borrowing, and the next moment may record the entail. From the former, activity cannot be expected; the other is bound by every consideration of prudence to make his debts real; if he does not, he must suffer for his supineness, and has no reasonable ground of complaint that this penalty falls on him.

Earl of Eldon.—When an entailed estate is sold at the instance of a creditor, the entail being defective, is there any evidence of what was done with the surplus money? If a debt be contracted, where debts are not effectually prohibited the heir in possession can be called on to pay. If that be ordered by decree of the Court, and the estate be sold, how do the Court deal with the price over the amount of debt? Is the money ordered to be laid out in the same way and to the same uses as before? Aug. 30, 1831.

Jeffrey, in answer, explained the case of Strathnaven.

Earl of Eldon continued.—Much pains have been taken, in other cases which came before us, to show the difficulty of laying out the money, but the Court has never told us how they are to carry into effect the principle of jus crediti. No one can doubt that to some extent entails were good before 1685, but to what precise extent it may be difficult to say.

Lord Lyndhurst.—My Lords, I am to move your Lordships for judgment in the case of Munro *v.* Drummond. This case was originally an action of reduction brought in the Courts of Scotland, for the purpose of reducing a decree of adjudication which had been pronounced in that Court. The Court of Session decided in favour of the defendants, and from that decision the pursuer has appealed to your Lordships' House; and the question is, whether the judgment of the Court below, substantially affirming the decree of adjudication, ought to be sustained. My Lords, the circumstances out of which this case originates are shortly these. George Ross was seised in fee of the estate of Cromarty in the year 1783. In that year he executed a deed of strict entail of that estate, by which he entailed the estate upon himself and the heirs of his body, and on default of such issue then upon his nephew uterine Alexander Gray, and the heirs-male of his body; whom failing, to Jean Kirk the entailer's neice, the pursuer's mother, and the heirs of her body; and upon failure of that issue then over. George Ross dying without leaving issue, Alexander Gray became entitled to the entailed estate, and in the year 1787, took infeftment of that estate, and changed his name from Alexander Gray to Alexander Ross. Alexander Ross, in the year 1820, died without male issue, in consequence of which the present appellant, Mrs. Munro, daughter of Jean Kirk, became entitled as next substitute under the deed of entail. My Lords, this is the nature of the estate. Alexander Ross, who took the estate under this deed of entail, in the year 1787, carrying on business at that time in partnership with John Ogilvy in London, as army agents, contracted a considerable debt with Messrs. Drum-

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mond, the bankers, whom the present respondents represent. That debt originated in a promissory note in the name of the firm of Ross and Ogilvy, for the sum of 9,000*l.*, bearing date in the year 1796. In the same year there was a further debt of 5,000*l.* secured by the joint and several bond of Ross and Ogilvy; and in the year 1798 a further debt of 10,000*l.* was incurred, secured by a promissory note of the firm of Ross and Ogilvy. Exchequer bills to a considerable amount, bonds, and other instruments of a similar description, were deposited with them for the purpose of securing this large debt. In 1803 the deed of entail was recorded. In the year 1804, my Lords, Messrs. Ross and Ogilvy became bankrupts; and in consequence Messrs. Drummond instituted proceedings in the Court of Session, which terminated in a decree of constitution in 1806, establishing a debt to the amount of 18,000*l.*, the original debt being 24,000*l.*, and it being reduced to the sum of 18,000*l.* by the sale of exchequer bills, which I have said were deposited in the hands of Messrs. Drummond by way of collateral security. Upon this decree of constitution, a decree of adjudication, in the year 1808 was afterwards pronounced, and, my Lords, it is that decree of adjudication which is the subject of the present suit of reduction. The recording of the entail was previous to the date of the decree, but posterior to the contraction of the debts. The question for your Lordships' consideration, and which is one of much importance, is this:—The present respondents being the personal creditors of the bankrupt, Alexander Ross, the deed of entail being recorded in 1803, while the debt was a mere personal debt of Alexander Ross, and the adjudication not taking place until 1808, the question is, under these circumstances, whether this decree of adjudication against this entailed estate, pronounced subsequently to the period when the entail was recorded, can or can not be sustained. My Lords, when this case came on, a noble and learned Lord*, conversant not only with Scotch law in general, but conversant deeply with this particular branch of Scotch law, namely the law of entail, attended here, on account of the importance of the question, for the purpose of hearing the discussions and arguments at your Lordships' bar. The case has stood over from time to time, in order that I might have the opportunity of attending with that noble Lord, and that he might move your Lordships for judgment in this case. Circumstances, however, have interfered to prevent it. But I have had an interview with that noble and learned Lord, who, in consequence of indisposition, has been under the necessity of leaving town. I

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* The Earl of Eldon.

know his views of the subject, and they entirely concur with my own, and in moving this judgment I beg that it may be considered I am acting according to the opinion and judgment of that noble and learned Lord, as well as according to the opinion and judgment which I myself have formed, after hearing the arguments at your Lordships' bar, and after reading with considerable attention the printed papers and cases referred to. Aug. 30, 1831.

My Lords, it is unnecessary for me to trouble you with any observations upon the law of entail as it existed at common law in Scotland, because according to my view of the subject this case turns entirely on the construction of the statute 1685. My Lords, by that statute power was given to His Majesty's subjects in Scotland to entail their estates in certain forms, subject to certain restrictions; and those forms and those restrictions are distinctly and clearly pointed out in the statute; and it is declared in that statute, that those entails shall only be allowed in which irritant and resolutive clauses are inserted in the procuratories of resignation, and the charters, precepts, and instruments of seisin, and which are produced before the Lords of Session for the purpose of being recorded, and which are recorded in the manner stated in the act. It appears to me, that nothing can be more distinct than the language of the act in this respect, that those entails only are to be allowed which are executed, registered, and recorded according to the provisions and directions of the act. The act afterwards goes on to say, (for that is the construction which I put upon the act, and the construction which my noble and learned friend puts on the act,) that those regulations having been complied with, the entail shall "be real and "effectual against their creditors, comprisers, adjudgers, and other "singular successors whatsoever, whether by legal or conventional "titles." Some doubt has arisen with respect to the construction of those last words; and it is contended by the appellant, that the meaning is this: that they shall be binding on the creditors, whether they "are comprisers or adjudgers, or other singular successors, by legal "or conventional titles," thereby excluding personal creditors. But my Lords, I apprehend that that is not the natural construction of the clause. The natural and obvious construction, as it appears to me, is this, that they are to be binding against creditors generally, and not only against creditors generally, but against those creditors who claim by comprising, adjudication, or such other creditors as come under the description of singular successors, whether by real or conventional titles. If then this be the construction which I put upon the act, and which the noble and learned Lord puts upon the act, it is binding upon personal creditors, provided the requisites of the act are complied with; and it follows, therefore, as a matter

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of course, that if the requisites of the act are not complied with, that in that case it is not binding on the personal creditors. Looking, therefore, at the first clause of the act, it is declared that those tailzies shall be allowed which conform to the requisites of the statute, and that those entails shall be binding against the personal creditors only in case those requisites are complied with; and if they are not complied with, then that they shall not be binding against the personal creditors, and the party entitled to the estate will have no claim under the entail. But, my Lords, it is said, that true it is, or true it may be, that an entail is not binding against a personal creditor unless the requisites of the act are complied with; but that when it is recorded, from that moment it is binding against the personal creditor, unless the personal creditor has, previously to the recording of the entail, led an adjudication against the estate. My Lords, I apprehend that that was not the meaning of the legislature. The intention of the legislature, by requiring the entail to be recorded, was, that notice should be given to all the world that the party in possession held under an entail; and the obvious meaning of the act is this, that unless the entail is recorded the party is to be considered, not as holding under the entail, but as holding in fee-simple, and that the claims of the creditor with respect to the land are precisely the same as if, instead of the party being entitled only to an estate in tail, he was entitled to an estate in fee-simple. If that be the case, it is quite impossible, as it appears to me, that the legislature could ever intend that a subsequent recording of the entail should have a retrospective effect, so as to defeat the right of the creditor; because, if that be the construction of the act, the very object of the act would be entirely defeated, for at any moment, the entail not being put on record, parties having advanced money to the person entitled to the entailed estate, advancing that money upon the assumption that the estate was an estate held in fee-simple, would instantly be deprived of their right upon the estate by the mere fact of recording, which recording might instantly be effected. It appears to me, therefore, that the legislature never could have intended that, and that in point of fact to put that construction on the act of 1685 would defeat the very object which the legislature had in view in passing that act. Then, my Lords, here the Messrs. Drummond being personal creditors to a very large amount, continuing personal creditors for a long period after Alexander Ross was infeft in this estate, but the recording the entail taking place before they obtained their decree of adjudication, that did not defeat the right of Messrs. Drummond to go on with their adjudication, and to make their claim against the estate real and effectual, precisely in the same way as if, instead of being an

estate-tail, it had been an estate in fee-simple. This is the view of the subject the noble and learned Lord, to whom I have referred, has taken of it. But, my Lords, this does not depend solely on the construction of the act of parliament; it becomes material to inquire whether there are any authorities upon this subject, and what is the effect of those authorities. My Lords, the well-known case of Smollet was cited at your Lordships' bar. It was not pretended that the case of Smollet differed, as far as relates to the point to which I am now calling your Lordships' attention, in the slightest degree from the case now under consideration. It was admitted by the counsel for the appellant that (to use the phrase of the lawyers) it was a case, as to this point, on all-fours with the present. My Lords, that case was decided by the Court of Session as far back as the year 1807. It was decided, after very full argument, and after much debate and consideration. I am bound to say, that the President of the Court, Sir Ilay Campbell, a very great lawyer, did not acquiesce in that decision; but still, the great majority of the Court of Session were in favour of it. My Lords, that decision was acquiesced in; it was not made the subject of appeal, as it might have been, to your Lordships' House; and from that day to the present period, a period of twenty-four years, this very point, so decided in Smollet's case, has been acted upon, and no contrary decision is to be found. But, my Lords, previously to Smollet's case, the same question came before the Court in the case of the Creditors of Grahame. In that case the point was raised, but not argued. It was decided, without argument, in a manner conformable to the decision in Smollet's case. It may be said, the point not having been argued, not having been agitated, that is a case not entitled to much weight. I cite it, my Lords, not as entitled to much weight as a decision of the Court, but I cite it, as showing what the opinion of the lawyers of Scotland was, with respect to that question, twelve years before the decision of the case of Smollet. But, my Lords, since the decision of the case of Smollet, the question has again arisen in the case of Ferrier. That case arose between six and seven years after the case of Smollet, and the decision originally was the same way with that of Smollet. It was there considered that those personal debts which existed previously to the recording of the entail were binding, when followed up by adjudication subsequent to the recording of the entail; and the decision in the first instance proceeded on that ground; it was in favour of the creditors. That decision, however, was afterwards altered, but altered on special circumstances, entirely conformable with the principle of the original decision, and which was this, that it turned out, on subsequent inquiry, that the money which was the foundation

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of the debt was not actually advanced until after the entail was recorded. I consider the case of Ferrier as a strong authority confirming the decision in the case of Smollet. I have stated that there is no contradictory, no opposing decision. But it has been supposed that the case of Sheuchan, decided in your Lordships' House, is at variance with the principle of the decision in that case of Smollet; and some remarks and observations made by the noble and learned Lord who moved the judgment in the case of Sheuchan have been much insisted on by both sides, in the course of the argument. It is important, however, that I should state, from the knowledge I have of the noble and learned Lord to whom I am referring, from the conversations I have had with him on this question, that he himself does not consider the decision in Sheuchan's case as adverse to the decision in Smollet's case. He does not consider that any expressions which fell from him in moving that judgment, and which are ascribed to him, are at all inconsistent with the view of the case he now takes. My Lords, in Sheuchan's case the entail was executed in consequence of a valuable and monied consideration. There was an actual purchase of the settlement. The parties, therefore, entitled under that settlement, were in the nature of creditors upon the estate; they were as much creditors as any other of the creditors of the person who was the owner of the estate, the settler, who was John Vans; and it was upon that principle, and upon that principle alone, the question was decided. The situation, therefore, in which the parties then stood, and the nature of the transaction, were widely different from the present; and it would be to put a very forced construction on the case of Sheuchan to extend it to a case like the present. It appears to me that the case of Sheuchan does not in principle militate against the case of Smollet, that the case of Smollet falls far short of it in principle, and that the language made use of by the noble Lord who moved that judgment is not at all at variance with the case of Smollet; and, therefore, that that case, supported as it is by the decision in Ferrier, and supported as it is to a certain extent by the case of the creditors of Grahame, stands unopposed by any conflicting authority. Upon the whole, my Lords, it appears to me that the sound and true construction of the act of parliament is that which I have stated, namely, that until every thing that is required by the statute 1685 is complied with the party is to be considered as holding, not an estate in tail, but an estate in fee-simple; that it is liable to his personal creditors; that a subsequent recording of the entail will not have a retrospective effect, so as to defeat the right and title of the creditors; that, if you allowed it such an effect, it would in point of fact destroy and disappoint the very object of

the act of parliament. Resting, then, my Lords, upon this construction of the statute, and fortified by the decisions to which I have referred your Lordships, it appears to me, the decision of the Court of Session, sustaining the decree of adjudication, is correct, and ought to be affirmed. It is proper, however, my Lords, that I should state, that with respect to that decree of adjudication there were several other points (some of them material and important points) which were urged at your Lordships' bar, and also urged in the Court below. But the attention of the Court of Session appears to have been directed solely to the question to which I have called your Lordships' attention; they seem to have passed over for the present the other objections made to the decree of adjudication. Therefore, acting also in conformity with the opinion expressed by my noble and learned friend, to whom I have referred, I would advise your Lordships to state what your opinion is upon the first point, and then remit the whole case to the Court of Session, in order that they may do what is just and proper with reference to the other points presented to their consideration, and to which they do not appear so much to have attended, waiting your Lordships' decision upon this, which was the great and material point agitated before them. Under these circumstances, I shall move your Lordships that this case be remitted to the Court of Session, with an expression of your Lordships' opinion in the terms I have referred to. Aug. 30, 1831.

It is declared, by the Lords Spiritual and Temporal in Parliament assembled, That the registration of the deed of entail prior to the date of the decrees of constitution and adjudication does not, in this case, bar the claims of the creditors against the entailed estate in respect of debts contracted prior to such registration; and with this declaration it is ordered and adjudged, That this cause be remitted back to the First Division of the Court of Session in Scotland, to proceed therein as shall be just, and consistent with this declaration, it not being the intention of this House to give an opinion upon any other points arising between the said parties in this cause.

Appellants' Authorities.—Grahame, 13th May 1795 (Mor. 15,439); Agnew, House of Lords, 31st July 1822 (1 S. Ap. Ca. 333); Creditors of Smollet, 14th May 1807 (F. C. 13,629, No. 279); Mackenzie on Taillies, vol. ii. p. 489; 3 Ersk. 8, 26; 1 Bell, p. 51; Ferrier, 10th December 1813 (F. C. xvii. 486, No. 131); Case of Sheuchan (1 Shaw's App. p. 356); Syme, 14th February 1801 (F. C.); Denham, Creditors of Carleton, 21st November 1753; 3 Ersk. 8, 32;

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Wauchop, 1st July 1817 (F. C. xix. 365, No. 126); Roxburghe and Queensberry Cases (1 Shaw, p. 169); Mordaunt and Duke of Gordon, 5th July 1822 (Morrison's Dic., Tailzie); Lord Strathnaven, 2d February 1728, and 15th February 1730; Stewart, 23d February 1827 (5 S. D. 418); Marquis of Queensberry, 7th March 1828 (6 S. D. 706); 1685, c. 2; 2 Ersk. 8, 32; M'Whinnie, 4th February 1796 (Mor. 125); Mackinnel's Ranking, 9th June 1797 (M. 312); M'Neill, 7th March 1794 (Mor. 122).

Respondents' Authorities.—3 Blackstone, p. 207, note 11, 15th Edit.; 1 Bell, p. 393, 5th Edit.; Russell, 23d May 1792; 1 Bell, p. 394–5; Rucker, B. R. T. 29, 6, 3; 1 Selwyn's Nisi Prius, p. 137; Searle, 2 Stra. 820; Ves. sen. 4356; Chitty, 378; 2 Stair, 3, 58; 1, 14, 6; 4, 18, 6–7; 3 Ersk. 8, 25; 1685, cap. 32; Case of Sheuchan, 31st July 1822; 1 Shaw's Appeal Cases, p. 325; 3 Ersk. 8, 38, 39, 40; Willison, 26th February 1724 (Mor. 15,369); Douglas, 2d February 1758; Case of Ascog (23d Feb. 1827, 5 S. D. 418; reversed 16th July 1830, 4 W. S. 196); Graham, 9th June 1743 (M. 13,010); Kilkerran, 545; 1 Ersk. 7, 54, 56; 1 Stair, 6, 41; 1 Ersk. 7, 53; Case of Stormont (Mor. Dic. 13,998); 1 Bell, 48, 5th Edition; Philp, 14th December 1758 (M. 15,609); Earl of Rosebery, 22d June 1765 (M. 15,616); 26th November 1761; Lord Kinnaird, 26th June 1776; Irvine of Drum (22d Dec. 1710, Mor. 553); Grahame, 13th May 1795 (Mor. 15,439); Sandford on Entails; Smollet, 14th May 1807 (Mor. Ap. 1, Tailzie, No. 12); Ferrier, 10th December 1813 (F. C. xvii. 486, No. 131); 2 Bell, 46, note 4, 3d Edition; 3 Ersk. 8, 26; 2 Bank. 2, vol. i. p. 585; 2 Stair, 3, 58; Thomson, 2d July 1812; 2 Ersk. 11, 7; 2, 12, 16; 4 Ersk. 1, 38; 2, 11; 3 Stair, 2, 21; 1 Bell's Com. p. 212, 3d Edit.; Jackson, 28th January 1676 (Mor. 8362); Massey, 12th July 1785 (Mor. 8377); 2 Bell, 195, note 1; 4 Ersk. 1, 40; 2 Bell, 212, 3d Edit.; 2 Bell, 215, 8th Edit.; Bank of Scotland, 9th July 1709 (Forbes, 304); Young, November 1688 (Harc. 35); Duff, 22d July 1742 (Kilk. 48); 2 Bell, 192; Duchess of Douglas, 26th July 1764 (Mor. 2833–8390); M'Culloch, 21st July 1627 (Mor. 1689); Binning, 5th December 1749 (M. 2832–8389); Horne and Lyle, Young Dic. 1078; Drummond (Dic. 1079); Mackay, 23d November 1798 (Mor. 11,171) Wauchope, 1st July 1817 (F. C).

RICHARDSON and CONNELL,—BROUGTON and WHITE,—Solicitors.

No. 30. LEYS, MASSON, and Co., Appellants.—*Attorney General (Denman)—Lord Advocate (Jeffrey)—Dr. Lushington.*

LORD FORBES and others, Respondents.—*Spankie.*

Fishing—Process—Issue.—Held (affirming the judgment of the Court of Session), that where an issue was sent to a jury as to whether a dam dyke was "to the "injury and damage of the pursuers" as proprietors of salmon fishings in a river, it was not competent for the judge to direct the jury that the question