Counsel for the First, Third, Fourth, and Fifth Parties — Macmillan, K.C. — C. H. Brown. Agents—J. & J. Ross, W.S.

Counsel for the Second Party—Blackburn, K.C. — Watson, K.C. — Armit. Agents—Hope, Todd, & Kirk, W.S.

Tuesday, June 16.

SECOND DIVISION.

[Lord Skerrington, Ordinary.

VERNEY *v.* VERNEYS.

Entail—Validity—Prohibitions—Power to Heir of Investiture to Appoint among Members of his Family—Power to Sell—Entail Amendment (Scotland) Act 1848 (11 *and* 12 *Vict. cap.* 36), *sec.* 43.

A deed of entail conferred on certain heirs of the investiture a power to appoint a successor to the entailed estate in each case among any members of his family, and "failing such appointment" devolved the estate on substitute heirs of entail. It provided, further, that each heir of entail should have full power without consent to sell the whole or any part of the lands, "providing always that . . . the price realised . . . be re-invested in the purchase of land either in Scotland or in England or Wales, which land if in Scotland shall be entailed by a valid deed of strict entail, . . . and if in England or Wales by a valid settlement containing all such provisions as counsel shall advise on the same series of heirs," and subject to the same conditions as contained in the original deed of entail. The deed provided, further, that until so applied the price should "be consigned in bank or invested in name of a trustee" upon trust for these purposes, eventual purchasers to be "fully exonerated and discharged by the receipts of the trustee or trustees in whose name" the price should be consigned or invested. In an action at the instance of an heir of the investiture for declarator that the entail was invalid, and that he was entitled to deal with the lands as a fee-simple proprietor, *held* (*diss.* Lord Salvesen) that neither the power of appointment nor the power to sell infringed the prohibitions against altering the order of succession or alienation, and that the entail was valid.

Harry Lloyd Lloyd Verney, Esquire, of Carriden, in the parish of Bo'ness and Carriden and county of Linlithgow, *pursuer*, brought an action against Gerald, Ulick, and Desmond Lloyd Verney, his three eldest sons, and against himself as their curator and administrator-in-law, and also against his sister Mrs Morforwyn Lloyd Verney or Fanshawe, wife of the Reverend Gerald Charles Fanshawe, M.A., and residing with him at the Vicarage, Godalming, Surrey, and against Mr Fanshawe as her curator and administrator-in-law, *defenders*, for declarator that a disposition and deed of entail, dated 28th December 1891, and recorded in the Register of Entails the 7th, and in the Register of Sasines for publication and the Books of Council and Session for preservation the 15th of January 1892, whereby his brother James Hope Lloyd Verney, and his father Lieutenant-Colonel George Hope Lloyd Verney of Clochfaen, Llanidloes, North Wales, disponed to the pursuer and the substitute heirs of entail mentioned in the deed certain lands in Linlithgowshire, was invalid and ineffectual as regards all its prohibitory, irritant, and resolutive clauses, and that notwithstanding these clauses or any other fettering clauses in the deed he was entitled to hold the lands in question free from the conditions of these clauses and to deal in all respects with them as unlimited fiar. The pursuer's three sons, who were in pupillarity, and to whom a *curator ad litem* was appointed, were the three next heirs in succession under the destination, and the pursuer's sister, who did not appear, was the next heir in existence after them.

The deed of entail contained, *inter alia*, the following destination — "To and in favour of me the said George Hope Lloyd Verney, whom failing to me the said James Hope Lloyd Verney, whom failing to such son or daughter of me the said James Hope Lloyd Verney as I shall by writing under my hand appoint, and failing such appointment to the heirs-male of my body, whom failing the heirs-female of my body, whom failing Harry Lloyd Lloyd Verney, second son of me the said George Hope Lloyd Verney, whom failing to such son or daughter of the said Harry Lloyd Lloyd Verney as he shall by writing under his hand appoint, and failing such appointment to the heirs-male of his body, whom failing the heirs-female of his body, whom failing Edward Vortigern Lloyd Verney, third son of me the said George Hope Lloyd Verney, whom failing to such son or daughter of the said Edward Vortigern Lloyd Verney as he shall by writing under his hand appoint, and failing such appointment to the heirs-male of his body, whom failing to the heirs-female of his body, whom failing Mary Levison Lloyd Verney, surviving daughter of me the said George Hope Lloyd Verney and the heirs-male of her body, whom failing the heirs-female of her body, whom all failing to the nearest heirs and assignees whomsoever of me the said James Hope Lloyd Verney, the eldest heir-female throughout the whole course of succession succeeding always without division and excluding heirs-portioners."

It provided further as follows—"Reserving always to me the said George Hope Lloyd Verney, with the written consent of me the said James Hope Lloyd Verney, if living, and to each heir of entail subsequent to me the said George Hope Lloyd Verney, full power by himself or herself alone to sell and dispone the whole or any part or parts of the said lands, subjects, and others without the consent of any subsequent heir called under the destination before written, and without the necessity of obtaining the authority of the Court, but subject always

to the provision and declaration after mentioned, and that either by public roup or private bargain, and at such time or times and for such price or prices as I the said George Hope Lloyd Verney, with consent foresaid, or as I the said James Hope Lloyd Verney or the heirs of entail succeeding to me shall think fit, and for that effect to grant, subscribe, and deliver all necessary articles of roup, minutes of sale, dispositions, and other deeds and writings, but providing always and declaring that in case of a sale being effected the price realised, subject to deduction only of the expenses of the sale and of the reinvesting of the price as after mentioned, and of any debts affecting or capable of being made to affect the fee of the said lands, subjects, and others at the time of such sale, shall as soon as possible be re-invested in the purchase of land either in Scotland or in England or Wales, which land if in Scotland shall be entailed by a valid deed of strict entail containing an express clause authorising registration in the Register of Tailzies, and if in England or Wales by a valid settlement containing all such provisions as counsel shall advise on the same series of heirs and as far as may be in the same or similar terms and subject to the same or similar prohibitions, conditions, restrictions, and others as are contained in the deed of entail under which the lands, subjects, and others, or the portion or portions thereof, so sold were holden previous to such sale, and until so applied the said price shall be consigned in bank or invested in name of a trustee or trustees upon trust for the purpose of being laid out and applied as aforesaid; and it shall be competent for the institute or heir of entail in possession for the time being to name a trustee or trustees for that purpose. . . . And it is hereby declared that purchasers from, and parties lending to, me, the said George Hope Lloyd Verney, or any heir of entail succeeding to me, under the respective powers of selling and borrowing before expressed and reserved, shall have no concern with and shall not be bound or entitled to inquire into the application or non-application of the price or prices of any lands sold or sums borrowed by me or such heir of entail, but shall be fully exonered and discharged by the receipts of the trustee or trustees in whose name the said price or prices and sum or sums to be borrowed are to be consigned or invested as aforesaid."

The pursuer pleaded—"(1) The disposition and deed of entail mentioned in the summons not being a valid deed of entail according to the law of Scotland, and particularly the Statute 1685, cap. 22, on the grounds condescended on and otherwise, and being, in virtue of the provisions of the Act 11 and and 12 Vict. cap. 36, invalid and ineffectual as regards all the prohibitions therein contained, the pursuer is entitled to decree as concluded for."

The defenders pleaded, *inter alia*—"(2) The said disposition and deed of entail being both valid in law and binding upon the pursuer in all its provisions, decree of declarator ought to be refused, and the defenders assoilzied."

On 19th February 1913 the Lord Ordinary (SKERRINGTON) sustained the second plea-in-law for the defenders, and assoilzied them from the conclusions of the summons.

Opinion — "The pursuer Harry Lloyd Lloyd Verney is heritable proprietor of the estate of Carriden under a disposition and deed of entail granted by his elder brother the late James Hope Lloyd Verney, and by his father the late George Hope Lloyd Verney, for their respective rights as proprietors of the respective subjects therein disponed. It was dated 28th December 1891, and was duly registered in the Register of Entails and in the Register of Sasines. Upon the death of the institute, the said George Hope Lloyd Verney, he was succeeded by the first substitute the said James Hope Lloyd Verney. The latter possessed the estate without making up a title. Upon his death without issue the pursuer made up a title by decree of the Sheriff of Chancery under section 10 of the Conveyancing (Scotland) Act 1874, which was duly recorded in the Register of Sasines on 10th April 1911. The three next heirs in succession to the pursuer under the destination are his three pupil sons, who defend the action by their *curator ad litem*. The next heir in existence after them is the pursuer's sister Mrs Fanshawe, who is called as a defender, but has not appeared. The pursuer asks for declarator that the disposition and deed of entail is 'invalid and ineffectual as regards all the prohibitory, irritant, and resolutive clauses therein written or referred to, in terms of the provisions of the 43rd section of the Act 11 and 12 Vict. cap. 36,' and that he holds the estate in fee-simple. The deed contains an express clause authorising registration in the Register of Tailzies and referring to section 39 of the said Act, and also to section 14 of the Act 31 and 32 Vict. cap. 101, which makes it unnecessary to insert the three cardinal prohibitions and irritant and resolutive clauses. It follows that the fetters have been well and effectually imposed unless it can be shown as regards one or other of the cardinal prohibitions that such relaxations have been sanctioned as make the prohibition nugatory. The opinion of the Lord President Inglis in *Malcolm* v. *Kirk*, 1873, 11 Macph. 722, is exceedingly instructive as to the construction of section 43 of the Act of 1848. He negatives the view that a partial relaxation of any one of the prohibitions would make all the prohibitions invalid, and he states that only 'a total invalidity of one of the prohibitions' would lead to that result (p. 730). In the case which he was considering the entail was held valid although a power had been conferred on the heirs of entail to grant provisions to younger children to the extent of two years' rent and to sell portions of the estate sufficient to pay the debts thus contracted. He referred in his opinion to the case of *Howden* v. *Porterfield*, 1834, 12 S. 734, *aff.* 1 Sh. and M'L. 739, where an entail was assumed to be valid although the heirs had not only a power to contract debt for the purpose of paying younger children's provisions but also a power to contract further

debt which must never exceed 6000 merks. He pointed out that the permitted debt had been held to be in the same position as an entailer's debt, and that a landowner, though deeply in debt, may execute an entail which will be valid under the Act 1685. I assume, however, that a permission to incur debt to an unlimited amount, or to an amount which exceeded the value of the estate, would be held to annul the prohibition against contracting debt and would according to section 43 of the Act of 1848 make all the prohibitions invalid.

"The first ground upon which the entail is attacked is the fact that the destination after calling the pursuer, proceeds—'whom failing to such son or daughter of the said Harry Lloyd Lloyd Verney as he shall by writing under his hand appoint, and failing such appointment to the heirs-male of his body, whom failing the heirs-female of his body, whom failing' to the pursuer's brother Edward (who afterwards died without issue) and the heirs of his body, whom failing to Mrs Fanshawe and the heirs of her body, whom all failing to the nearest heirs and assignees of the entailer James Hope Lloyd Verney, the eldest heir-female excluding always heirs-portioners. The pursuer avers that he has not exercised this power of appointment, but he maintains that it authorises him to render nugatory the prohibition against altering the order of succession. I am disposed to agree with the pursuer's counsel that if the power of appointment were exercised and afterwards took effect by the pursuer's death, the appointee would hold the estate in fee-simple as being the last member of the destination. The whole of the subsequent destination is, in my view, governed by the words 'and failing such appointment.' I cannot find any destination in favour of the heirs of the body of the appointee, whom failing his brothers and sisters in their order. It is inconceivable that the ulterior destination was intended to carry the estate after the death of the appointee to his uncle and aunt and their descendants to the exclusion of his own descendants and the descendants of the pursuer. Assuming, however, that the succession of an appointee would end the entail, I do not see how the appointment can be described as an alteration of the order of succession when the order in question is directed to come into effect only on the failure of such an appointment. So far as I am aware there is no rule of conveyancing and no principle of the law of strict entails which would prevent an entailer from conferring upon a future heir of entail a power to make an appointment in favour of one of the children of such heir, with the result that on the succession of such appointee the entail would come to an end. The case of *Martin* v. *Kelso*, 1853, 15 D. 950, *aff.* 2 Macq. 556, affords an example of a power to alter the order of succession by postponing or excluding female heirs, and this power was assumed to be consistent with a strict entail. There are plenty of examples where an entailer reserved power to alter the order of succession, but the case of *Martin* was the only one which was cited in which such a power had been conferred upon the heirs of entail. But the case is *a fortiori* of the present one, because the power there in question did, when exercised, bring about an alteration of the order of succession directed by the entailer. I am unable to hold that the entail of Carriden is invalid upon the ground that the prohibition to alter the order of succession has been nullified by the power of appointment conferred upon the pursuer.

"The same legal principle applies to the contention that the wide power of sale quoted in the condescendence nullifies the prohibition against alienation, but the application of the principle is in this case more difficult. The power to sell the estate as a whole and to reinvest the price in the purchase of land either in Scotland or in England or Wales, which land is to be entailed or settled, as the case may be, on the same series of heirs, is quite unprecedented. To sell an estate and transfer the family seat to another country goes far beyond the province of estate management. On the other hand, in the case of a family which, like the pursuer's, has a close connection with Wales, the vesting of such a power in the person of its head for the time being may be as useful and beneficial as the vesting in the head of a purely Scottish family of what Mr Bell (sec. 1733) describes as 'a power to excamb or to sell and reinvest for the purpose of concentrating the estate.' The case of *Breadalbane*, 1830, 8 S. 490, shows that a power of excambion conferred by an entailer was not regarded as anything unusual. In the case of *Baird* v. *Baird*, 1844, 6 D. 643, *aff.* 6 Bell's App. 7, the heirs of entail had power not only to excamb but also 'to sell off and dispone such parts and portions' of the entailed lands as they should think fit, but excepting the manor houses, with their parks and enclosures, upon condition that previous to the sale they should purchase other lands in the same counties of equal value and that the lands so acquired should be entailed on the same heirs and in the same terms as those in lieu of which they were acquired. This power was held not to be inconsistent with a strict entail under the Act 1685, cap. 22. This judgment was affirmed on appeal. It is clear that both in the Court of Session and in the House of Lords the power to sell was regarded as an administrative power similar to the power to feu, which had been held in the *Roxburghe* case not to justify the alienation of the whole estate by means of sixteen feu-dispositions all of the same date—*Roxburghe* v. *Ker*, 17th June 1813, F.C. *aff.* 2 Dow 149, 5 Pat. App. 609. But there are dicta in *Baird's* case which go considerably beyond the case actually decided. The Lord-Justice (Hope) said (6 D. 653) that he was not aware that a power to sell the whole estate would be illegal if it were made a condition that before the sale another estate of equal value should be purchased and effectually entailed. Lord Fullerton (p. 658) expressed a clear opinion in favour of the legality of such a power, and Lord Jeffrey said that in his opinion such a power would not form a ground for the *interim* impeachment of

the existing entail. Lord Fullerton referred to the *Ascog* case, and said that 'nobody seemed to have any doubt that where it' (a direction to re-invest) 'is expressly given it was a perfectly good direction.' In the *Ascog* case the House of Lords reversed the Court of Session and refused to imply a duty to re-invest from the fact that alienation was ineffectually prohibited—*Stewart* v. *Fullarton*, 23rd February, 1827, 5 S. 418, n. e. 396, *rev.* 4 W. & S. 196. In *Baird's* case (6 Bell's App. p. 26) the Lord Chancellor (Cottenham) said, 'Here the entail is to cease—that is to say, the power of selling is to come into operation upon the happen- of a future event; and it is not disputed that the entail of the estate may be made so to determine.' The dicta in *Baird's* case must of course be interpreted with reference to the fact that the deed of entail provided automatic machinery for securing the interests of the future heirs of entail by making it a condition that lands of equal value should previously to the sale be purchased and entailed. It was argued in the House of Lords (6 Bell's App. p. 21) that lands so bought and put under a new entail would be open to adjudication by the creditors of the new entailer, but the argument does not seem to have made any impression, and was, I think, unsound. I have come to the conclusion that the judgment in the case of *Baird* would have been the same even if the power of sale had extended to the whole estate, including the mansion-houses, and even if the exercise of the power of sale had been made conditional on the creation of a trust for re-investment of the price. A trustee may prove dishonest and trust investments may prove valueless, but the law does not require an absolute guarantee that the interests of the postponed heirs of entail shall be conserved. All that it demands, according to my understanding, is that the relaxation of the prohibition against alienation shall not be so considerable as to destroy and eat up the prohibition. For example, if a deed of entail conferred power upon the heirs to sell the estate and imposed upon them a mere personal obligation to re-invest the price, it would not be an entail under the Act of 1685 any more than would be a deed which relied merely upon the personal obligation of the heir in possession for the enforcement of the three cardinal prohibitions. The purpose of that Act was to confer upon the heirs of entail a security of a different and higher character than a mere personal obligation on the part of the heir in possession. In principle, however, I see no difference between a power which, if executed, involves the creation of a trust for re-investment and a power which is limited and conditioned as in the case of *Baird*. An entail is in my opinion entitled to the benefit of the Act 1685, provided that it substantially limits the power to alienate of the heir in possession, and at the same time confers upon the succeeding heirs of entail, something more than a mere personal obligation by the heir in possession to re-invest the price in the event of a sale. The next question is whether the power of sale conferred upon the heirs of entail in the present case requires the creation of a trust for re-investment as a condition of its valid and effectual exercise, or whether it may be effectually exercised so as to confer a good title on a purchaser while leaving the seller under a mere personal obligation to create a trust for re-investment. The clause, as printed in condescendence 3, must be read along with a clause which is not printed, and which is to the effect that purchasers are not to be bound or entitled to inquire into the application or non-application of the price, 'but shall be fully exonered and discharged by the receipts of the trustee or trustees in whose name the said price or prices and sum or sums to be borrowed are to be consigned or invested as aforesaid.' Though the seller is placed under no obligation to appoint a trustee in whose name the price is to be consigned or invested, he cannot avoid doing so if he is to exercise the power in the manner pointed out by the deed. Further, if the purchaser chooses to pay the price to the seller rather than to a trustee for the heirs of entail, he will get a bad discharge for the price, and also, as I think, a bad title, because he has deviated from the course prescribed by the entailer. Accordingly, if the power of sale is exercised in strict accordance with the directions of the entailer, the price of the lands sold must come into the hands of a trustee for the heirs of entail. It is not material to consider whether such a trustee could without committing a breach of trust direct that the money should be consigned in an English bank or invested in English securities, and thus make it difficult or impossible for the Scottish Court to enforce the due execution of the trust for re-investment. If we assume that such was the intention of the entailer, it was a perfectly lawful one, and it does not in any way derogate from the validity of the trust. Nor is it in my view at all material that the valid execution of the power to sell the whole estate will not only bring the existing entail to an end, but may result in the purchase of an estate in England or Wales which cannot of course be settled in a manner identical in its effects with a Scottish entail.

"For the foregoing reasons I sustain the defenders' second plea-in-law, and assoilzie them from the conclusions of the summons."

The pursuer reclaimed, and argued—The entail was bad. Under the Act 1685, cap. 22, the deed of entail must contain three cardinal prohibitions against altering the order of succession, alienating the estate, contracting debt. The Entail Amendment (Scotland) Act 1848 (11 and 12 Vict. cap. 39), section 43, provided that where an entail was invalid in any one of these prohibitions it should be invalid in all. The present deed was invalid in respect of (1) the power of appointment, which struck at the prohibition against altering the order of succession, and (2) the power to sell, which contravened the prohibition against alienation. Under the power of appointment the appointee became a fee-simple proprietor, and the entail was thus brought to an end. It was true the power had not been exercised,

but if its exercise would invalidate the entail it was not necessary to wait till it had been exercised to have the entail declared bad. This was the effect of the Entail Amendment (Scotland) Act 1848 as interpreted by the Court in *Rogerson* v. *Rogerson*, May 17, 1872, 10 Macph. 698, *per* L.P. Inglis, at p. 702, and Lord Deas at p. 703; *Malcolm* v. *Kirk*, June 21, 1873, 11 Macph. 722. The effect of the exercise of the power of appointment could be tested in two ways. (1) Even on the assumption that the destination was in conformity with the law of entail, the pursuer was entitled to have himself declared fee-simple proprietor. Under that law an heir in possession could always propel the fee to the next heir of entail—Duff on Entails, p. 53. The pursuer could thus propel the fee to an appointee; but the appointee in the present case was the last person in the destination, any further destination depending on a failure of appointment. The appointee being thus the last destinee would become fee-simple proprietor and could re-convey the estate to the pursuer. The pursuer could thus come to terms about the transaction, and the whole entail would be rendered ineffective. But (2) the destination was not in conformity with the law of entail, because it introduced in three cases an appointee of one of the heirs called, and thus infringed the prohibition against altering the order of succession. This was a power to will the estate to any child, whether that child was within the entail destination or not. It was thus a power to certain members of the entailed destination to bring the destination to an end and take the estate out of entail. If the destination had said "failing appointee" it might have been good, but it said "failing appointment." The appointee of an heir of the investiture was not himself an heir of the investiture, but was merely a donee or fee-simple proprietor. On entry with the superior he might be required to pay a composition. A superior was only bound to grant investiture to a named order of heirs—M'Laren on Wills, vol. i, p. 493, section 892; *MacGillivray* v. *Souters*, March 12, 1862, 24 D. 759. For the purpose of determining the validity of the entail the heir of the investiture must be the entailer's heir; but under the present destination the last heir of the entailer was the appointer and not the appointee. There must be an order of succession to make an entail valid. A power to appoint, even among members of a family, would not comply with this. An entail was not necessarily a deed to maintain a family. An entailer, it was true, could reserve a power of appointment for himself—*Kenny* v. *Taylor*, March 19, 1875, 2 R. 636, 12 S.L.R. 393; *Blair*, January 24, 1877, 4 R. 308, 14 S.L.R. 244—but he could not confer such a power on an heir of the investiture. Again, heirs-portioners would break an entail—*Farquhar* v. *Farquhar*, November 29, 1838, 1 D. 121—this too not being an "order of succession." In *Martin* v. *Kelso*, July 19, 1853, 15 D. 950, March 21, 1857, 2 Macq. 556, founded on by the respondents, this point was never raised, and could not have been raised, as both parties claimed under the entail. The entail there differed from the entail here in that it was not a power of appointment but merely a power to pass over certain heirs, the entail being unaffected by the excision of these heirs. This was accompanied by a power to the heir so doing to settle the estate on the parties thus chosen, subject to the fetters of the original entail. The operation of shifting clauses was quite consistent with the validity of the entail, because it depended on something external, such as succession to property, and did not affect the order of succession. Such a power of appointment as the present was inconsistent with the whole theory of the law of entails and with all modern legislation on the subject. It would be impossible with such a power in the destination to disentail, because it would not be possible to tell whether the next heir was presumptive heir or not. He could only be defeasibly presumptive heir subject to the appointment. He could not be treated as entitled to compensation. A defeasible entail was no entail. The prohibition against altering the order of succession was more important than the prohibitions against selling or contracting debt; but the Lord Ordinary had fallen into the fallacy of thinking that what constituted a fatal invasion of the order of succession was the same as a fatal invasion of the prohibitions against selling or contracting debt. But even judging this power by the relaxations allowed in the latter cases it was bad. A relaxation of the fetters of the entail was only permissible in so far as it amounted to reasonable powers of administration—*Catton* v. *Mackenzie*, July 19, 1870, 8 Macph. 1049, March 1, 1872, 10 Macph. (H.L.) 12, *per* L.C. Hatherley at p. 19, and *per* Lord Westbury at p. 24; *Malcolm* v. *Kirk* (*cit. sup.*); *Howden* v. *Porterfield*, June 17, 1834, 12 S. 734, *per* Lord Mackenzie at p. 738, 1835, 1 S. & M'L. 739; *Roxburgh* v. *Kerr*, February 12, 1808 F.C., 2 Dow 149; *Ker* v. *Innes Ker*, June 17, 1813 F.C., 5 Paton's Appeals 609; *Earl of Breadalbane*, February 11, 1830, 8 S. 490. The power in the present case was not one of rational administration, but was a substantial relaxation. (2) The entail was invalid because of the power to sell. No doubt limited powers of sale were good so far as they amounted to reasonable powers of administration—*Catton* v. *Mackenzie* and other cases (*cit. sup.*). Here, however, the power to sell was not one of reasonable administration, but applied to the whole estate, and there was no obligation on the heirs or anyone else to re-invest. It was true the deed provided for the appointment of a trustee, but he could without contravention hand over the money to the heir. He was simply a stakeholder, and had no control over the prices or the places where or the times when the money was to be reinvested. There was no obligation on the purchaser to hand the money to a trustee, and there might be cases where no trustee would be appointed at all, *e.g.*, where the money passed direct from the purchaser of the entailed estate to the seller of the estate to be entailed. Where there was a defect in the prohibition against sale it was impos-

sible to enforce re-investment of the price, and such an obligation could not be implied —*Stewart* v. *Fullerton*, February 23, 1837, 5 S. 418, 4 W. & S. 196, *per* Lord Wynford at p. 237; *Bruce* v. *Bruce*, July 16, 1830, 4 W. & S. 240; *Eglinton* v. *Montgomerie*, August 18, 1843, 2 Bell's App. 149; *Duke of Queensberry's Executors* v. *Marquis of Queensberry*, July 16, 1830, 4 W. & S. 254. The cardinal prohibition in the present case could only be enforced by a personal action, and in that respect the case differed from that of *Baird* v. *Baird*, February 10, 1844, 6 D. 643, *per* L.J.-C. at p. 653, and *per* Lord Fullerton at p. 658; 6 Bell's Appeals, 7, *per* L. C. Cottenham at p. 25, where at any point a declarator of contravention could be brought for breach of the irritant and resolutive clauses. The entail to be valid must give the entail remedies enabling the money to be vindicated in the hands of anyone, and this deed did not do so—*Earl of Breadalbane* v. *Jamieson*, March 16, 1877, 4 R. 667, *per* L.P. Inglis at p. 670. But even if the trust was infallible the entail was bad, because it authorised the re-investment of the money in English land outside the limits of the entail law—*Lord Advocate* v. *Stewart*, May, 15, 1902, 4 F. (H.L.) 11, 39 S.L.R. 617. The fact that the exercise of this power might be a contingent and possibly remote event was irrelevant, the validity of the entail depending not on the contravention but on the infallibility of the prohibition.

Argued for the respondents—The entail was good. There was no stereotyped form of entail. The entailer was entitled to insert any condition that was not forbidden by the Act 1685, c. 22—*Gray* v. *Gray's Trustees*, May 24, 1878, 5 R. 820, 15 S.L.R. 571. The Act said nothing as to what "order of succession" meant. It was not an alteration of the order to insert a power of appointment in the entail, and a mere exercise of the power would not be a contravention of the prohibitions of the entail — *Hay's Executors* v. *Hay's Trustees*, July 11, 1895, 3 S.L.T. 86. In that case the consent of the trustees was equivalent to the re-conveyance of the estate by the appointee postulated in the present case by the appellants. It might be contended, further, that the destination in the present deed did not really end with the appointee—*Martin* v. *Kelso* (*cit. sup.*). In that case the House of Lords held that the estate was carried to the children of the appointee. A power to appoint among children was a power of a strictly limited character and was good — *Wedderburn* v. *Halkett*, 1762, M. 15,416, 2 Pat. 231; Bell's Prin., sec. 1733. The case of *Roxburgh* v. *Kerr* (*cit. sup.*) depended, not on any speciality of entail law but on principles that were common to other deeds, viz., that powers must be used in a fair way and not so as to frustrate the object of the deed. In the present case the powers conferred by the deed did not exceed reasonable powers of administration by the heir in possession. The pursuer's argument as to the position of the superior was good for the twelfth and thirteenth centuries, but the state of the law at that date could not be used to interpret the Act of 1685, at which date it was competent for the owner of lands to dispone them with a large amount of freedom. The "order of succession" was the order prescribed by the entailer. To carry out what he enjoined or allowed to be done could not amount to an alteration of that order. The argument on propulsion was founded on a fallacy. The law of propulsion was dealt with in *Lord Advocate* v. *Earl of Buchan*, 1907 S.C. 849, 44 S.L.R. 572, 1909 S.C. (H.L.) 35, 46 S.L.R. 791. All entails came to an end when they came to "heirs whomsoever"—*Moubray's Trustees* v. *Moubray*, June 26, 1895, 22 R. 801, 32 S.L.R. 593. The ultimate heir held in fee-simple. The penultimate heir could propel to him, but it could not be said that the penultimate heir held in fee-simple. The appointee in the present case was in the same position as the ultimate heir before "heirs whomsoever" in any entail. The appointee was in the same position as the penultimate heir in an ordinary entail destination. The fact that the one could appoint and the other propel did not mean that either was entitled to be declared a fee-simple proprietor, or that the appointee or person to whom the estate was propelled would necessarily convey it back in fee-simple to the author. In the case of heirs-portioners, again, the entail was brought to an end, because the representation could no longer be embodied in one person—Sandford on Entails, p. 548. In the present case the appointee must be a single person. There was no real difference between nomination and exclusion, and the latter had been held valid in *Martin* v. *Kelso* (*cit. sup.*). Whenever there was a power to pass over heirs there was a power of appointment. There was further no difficulty in reconciling this deed with the law of the Entail Act of 1848. The consents required were those of the three nearest heirs, but their rights might be evacuated at any moment by the birth of a son. (2) The power of sale was good. The power was given only under the condition that the money should be reinvested in the purchase of other entailed lands. This was quite different from a naked power of sale, and was more equivalent to a power to excamb. A power to sell was not necessarily inconsistent with the Entail Acts—*Baird* v. *Baird*, February 10, 1844, 6 D. 643, 6 Bell's App. 7. In the present case there was a distinct trust for re-entailing. "An obligation to do an act with respect to property creates a trust" — *Fleming* v. *Howden*, July 16, 1868, 6 Macph. (H.L.) 113, *per* Lord Westbury at p. 121, cited with approval by Lord Kinnear in *Dunn* v. *Pratt*, January 25, 1898, 25 R. 461, 35 S.L.R. 365. [LORD SALVESEN — This dictum has just been disapproved by the House of Lords in *Bank of Scotland* v. *Liquidators of Hutchison, Main, & Company, Limited*, February 6, 1914, 51 S.L.R. 229.] The purchaser in the present case could only get a title on a receipt for the price from trustees appointed to see that the money paid was reinvested. To make an executory trust effectual it was not necessary that machinery should be found in the deed carrying out its purposes —*Sandys* v. *Bain's Trustees*, December 7,

1897, 25 R. 261, *per* Lord Kinnear at p. 267, 35 S.L.R. 211. There was in the present case an executory trust which indicated compendiously the intention of the testator, and in such cases the Court would lend its help to carry out the trust. That intention was binding on everyone who took under the deed. It was a condition attaching to the lands, though it might not be a real burden. The remedy in the present case was regulated by the ordinary law of trust, and the case of the *Earl of Breadalbane* (*cit. sup.*) was not in point. It was further a good direction to settle lands under English law as nearly as possible similar to a Scotch entail—*Studd* v. *Cook*, May 8, 1883, 10 R. 53, 20 S.L.R. 566; *Earl of Zetland* v. *Lord Advocate*, February 12, 1878, 5 R. (H.L.) 51, 15 S.L.R. 373.

At advising—

LORD DUNDAS—I think the interlocutor reclaimed against is right, and I agree not only with the Lord Ordinary's conclusion but also with his reasoned opinion. But as the reclaimer's arguments were elaborate, and were said to include matters not submitted in the Outer House, it is proper that I should state my own views upon the various points discussed.

The pursuer asks for declarator that the deed of entail, under which he is at present heir in possession of the estates is invalid and ineffectual as a strict entail, and that he is entitled to hold the lands free from the fetters of the deed, and to deal with them as fee-simple proprietor. He challenges the validity of the entail upon two distinct and separate grounds, which I shall deal with in their order.

In the first place, the pursuer maintains that the destination is inconsistent with and destructive of the prohibition against altering the order of succession. He says that the power given to several of the successive heirs, including himself, to appoint as his successor any one of his own children, amounts to a power to alter the order of succession; that the appointee would not be a substitute heir of the entail investiture but a stranger to the destination; and that he himself would accordingly, in the event of his appointing one of his children, be the last heir-substitute in the entailed destination, and is therefore now entitled to declare the entail at an end. I think these arguments are quite unsound. They appear to me to proceed upon a misconception as to what does, and what does not, amount to an alteration of the order of succession. In the case of a fee-simple destination to A and the heirs-male of his body, whom falling to B. &c., &c., the destination will subsist until it is altered. But each successive heir in possession can alter it if he pleases. He may convey the lands to X, who would take them as his disponee, and not as heir of provision under the original investiture. That would be a proper alteration of the order of succession. But if the original destination were to A, whom failing to any person whom he may nominate and appoint by writing under his hand, and failing such appointment then to the heirs-male of the body of A, whom failing to B, &c., &c., then A might if he pleased nominate and appoint X without disponing the lands to him at all, and X would take them not as A's disponee but as heir of provision under the original investiture. In the latter case X is a proper substitute, in the former he is not. In the first case the order of succession has been altered, in the second it has not. The case of a strict entail under the Act of 1685 is precisely similar. That Act enables the lieges to tailzie their lands, "and to substitute heirs in their tailzies with such provisions and conditions as they shall think fit," and to affect the tailzies with irritant and resolutive clauses which should be effectual against purchasers and creditors, as well as against the heirs themselves. But the question who is a proper substitute or heir of provision, and who is not, is just the same in case of a strict entail as it is in that of a simple destination. All this is elementary, but it is necessary to state it looking to the argument of the reclaimer's counsel. I do not think it is doubtful that if the pursuer should execute an appointment in favour of one of his sons, that son would take as a proper substitute under the existing investiture, and the appointment would not constitute or involve an alteration of the order of succession inconsistent with or destructive of the prohibition against such alteration. It does not appear to me that authority is required for the propositions I have stated, but I may refer to the important case (not cited to us) of *Stewart's Trustees* v. *Porterfield*, (1826) 2 W. & S, 367, (1831) 5 W. & S. 515, 3 Ross's Leading Cases (Land Rights), 569. The case was one where an entailer had reserved to himself two powers, one to nominate heirs by a writing under his hand who should come in at a certain point of the destination, the other to alter the succession subject to certain limitations. With the actual dispute and its decision we are in no way here concerned. But it seems clear from the opinions delivered not only that the appointees under the hand of the entailer took as substitutes under the original investiture but also that the case would have been the same if the power of nomination had been one not reserved by the entailer himself but conferred by him on a subsequent heir in possession. Lord Justice-Clerk Boyle considered the case to be "precisely the same in principle with those where we have sustained a power to nominate heirs vested in a third party. There all that is necessary is a writing by the person who has the power of nominating heirs. If so, then *a fortiori* such power may be exercised by the granter who has reserved it to himself." His Lordship added "the original deed is the title to the estate" (2 W. & S. at p. 377). In the course of that case a remit was made by the House of Lords to the Scots judges, and an opinion (amongst others) was returned by six of them, including the Lord President and Lord Corehouse, who pointed out that the instrument of nomination was merely the evidence and not the source of the nominee's right, the source being the deed

of entail itself. They said that "in further illustration, and as a decisive proof of this point, reference may be made to grants of honours before the Union, which in this respect were exactly upon the same footing as lands, except that a grant of honours necessarily flowed from the Crown, and could not be extended, varied, or modified by a subject. But in Scotland it was usual to obtain grants of honour not only to the grantee and his heirs-male and of tailzie, referring to the particular entail then made, but also to the heirs of tailzie whom he might thereafter appoint . . ." (5 W. & S. at p. 519). The learned Judges pointed out that as the Crown is the sole fountain of honour it is plain that any nominee so taking owed his title to the original Crown grant, and not to the deed of nomination by the subject. These authorities make it clear that the appointment of an heir in virtue of a power reserved or conferred by the deed of entail is a fulfilment not a contravention of the order of succession prescribed by the entailer himself. Again, *Martin* v. *Kelso*, 15 D. 850, *aff.* 2 Macq. 556, referred to by the Lord Ordinary, affords an example of a case where the Court accepted an entail as perfectly valid, though it contained powers to substitute heirs to exclude altogether certain persons from the succession. It is true, as Mr Clyde pointed out, that neither of the parties to that case did (or could) challenge the validity of the entail upon which both had to rely; but if there had been any ground for such a challenge I can hardly suppose that all the eminent Judges who took part in the decision would have overlooked it. I may add that there are indications in the "System of Stiles" by that highly reputable authority, Dallas of St Martins, that powers of nomination might validly be conferred by an entailer upon third parties of a latitude far greater than anything to be found in the deed under consideration—"Stiles," pp. 559, 560. I have dealt at perhaps unnecessary length with this part of the case owing to the insistence of the reclaimer's argument, but I confess that I have no doubt that the deed contains nothing inconsistent with or destructive of the probibition against altering the order of succession, and that if the pursuer should appoint one of his sons, the appointee would take as a substitute heir under the entail investiture. I am disposed (like the Lord Ordinary) to think that such appointee would on the pursuer's death hold the estate in fee-simple as being the last member of the destination. But that assumption would plainly afford no ground for a declarator that the pursuer himself is now free from the fetters and entitled to deal with the estate as proprietor thereof in fee-simple. Before leaving this part of the case I must notice—but only to dismiss it—a further argument which was pressed upon us mainly by the junior counsel for the reclaimer. It was contended that the pursuer might make a deed of appointment in favour of one of his sons; might then propel the fee in favour of that son; and thereafter, by arrangement with him, have the estate reconveyed to himself in fee-simple; and that, all this being within the pursuer's power and competency, the Court ought, without insisting upon the performance of unnecessary and circuitous steps, now to grant the declarator of freedom which the pursuer asks. The mere statement of this argument involves to my mind its rejection. The simple and conclusive answer to it seems to me to be that, assuming the pursuer's power to propel the fee to an appointed son, the Court has no guarantee that the appointee would reconvey the estate to his father; on the contrary, the reconveyance would necessarily depend upon the volition of a third party, and of one who (as the pursuer's sons are all in pupillarity) could not grant an effectual disposition. The Court is in effect asked not to dispense with mere needless circuity of procedure, but to presuppose and give its sanction *ab ante* to some sort of arrangement which could not as matters now stand be legally carried into effect, and which there is no reason to suppose that the son, even if *sui juris*, would make. For these reasons I am of opinion with the Lord Ordinary that the pursuer's first ground of challenge fails entirely.

The pursuer's second line of attack upon the deed of entail is quite distinct from the first. It is argued that the deed contains such a relaxation of the prohibition against sale as to render that prohibition nugatory. I am satisfied that the Lord Ordinary has rightly negatived this argument, and upon the right grounds. The case of *Baird*, 6 D. 643, *affd.* 6 Bell's App. 7, to which his Lordship refers seems to me to go a long way towards this result. The actual decision in that case—a most authoritative one, pronounced unanimously by the whole Court and affirmed by the House of Lords—established that a power to any heir of entail in possession to sell certain parts of the estate on condition that before the sale he should purchase other lands of equal value, the title to which should have been taken (to the satisfaction of any purchaser of the originally entailed lands) to the heirs in the entail, under the same fetters and conditions as were contained in the original deed of entail, did not nullify the entail, either as being destructive of the fetters or as making the entail inconsistent with the Statute of 1685. But weighty dicta by distinguished judges went a good deal further than the actual decision; and I agree with the Lord Ordinary in thinking that "the judgment in the case of *Baird* would have been the same even if the power of sale had extended to the whole estate including the mansion-house, and even if the exercise of the power of sale had been made conditional on the creation of a trust for reinvestment of the price." The correctness of the first of these hypotheses is not, I think, open to dispute, and the soundness of the second seems to me to follow from a just appreciation of the case of *Baird*. I think that case establishes that where a deed of entail contains a prohibition against sale, duly fenced with irritant and resolutive clauses, and also a qualified permission to sell, it is obviously immaterial that the conditions attached to the permission are

not so fenced so long as they are lawful conditions capable of enforcement; that the qualifying conditions of the permission must be strictly and faithfully observed by anyone who seeks to avail himself of the power to sell—else he is outside of and can take no benefit from the power; that the permission may be validly clogged with the condition of a trust for the protection of the substitute heirs; and that in considering whether the reserved power is or is not inconsistent with the prohibition it is (I quote the words of Lord Justice-Clerk Hope in *Baird's* case, 6 D. at p. 650) "fixed that you must not construe the deed in such a case as to introduce, by the construction adopted, inconsistency between the different parts of the deed; that the rule of construction is to interpret the one clause in subserviency to the other, and not to admit an interpretation of the reserved power which is either in construction or in exercise to defeat the general prohibition." If these considerations are attended to, I think it will be found that in the present deed the qualified permission to sell under certain conditions is not so repugnant to the general prohibition against sale as to warrant us in declaring that the entail is invalid, and that the pursuer is in the position of fee-simple owner of the estate.

The pursuer contends that he could, in accordance with the conditions of the deed, sell the lands and appropriate the price without risk of successful challenge by any heir-substitute. I do not think he could do so. But in considering his argument it is necessary to attend closely to the terms of the deed. It is true that power is thereby conferred on the heir in possession "by himself alone," and without consent of any substitute heir, to sell the estate, and to grant a disposition to the purchaser, but he can only do so "subject to the provisions and conditions" of the deed. If he sells otherwise than in strict conformity to the provisions and conditions, he does not effectually sell. In the words of the Lord Justice-Clerk in *Baird's* case, 6 D. at p. 651, *sub fin.*, "the heir may exercise the reserved power or not as he chooses. The entail remains in the meantime complete. He cannot sell except in virtue of the reserved power. If he attempts to sell in virtue of the reserved faculty he must act within the clause reserving the power. The clause says that in order to be entitled to exercise (the) power, certain things must first be done. If these are not done the heir does not bring himself within the permission. They are as much part of the power reserved as any other part of the clause. The faculty is only to sell after performing certain other things. If these are not done the permission does not attach, and no sale can be within the exercise of the reserved power." Now it is expressly provided by the deed of entail that "the price realised . . . shall as soon as possible be reinvested in the purchase of land" to be entailed or settled in manner therein prescribed, "and, until so applied, the price shall be consigned in bank or invested in name of a trustee or trustees"—(I think that consignation, as well as investment, must plainly be in the trustee's name)—"upon trust for the purpose of being laid out and applied as aforesaid." It is true, but I think immaterial, that the selling heir is not expressly *directed* to appoint a trustee or trustees; it does not matter who makes the appointment, but in order to remove doubt the deed says "it shall be competent" for him to do so. I have quoted the conditions upon which alone the entailer gives permission to sell. Any sale not made in conformity with these conditions would be outside the special power, and therefore struck at by the general prohibition against sale, and the irritant and resolutive clauses expressed or implied in the deed of entail. I apprehend that any purchaser would, for his own sake, have to see that the disposition granted to him was one which the seller had power to grant—in other words, he would have to see that the conditions were satisfied upon which alone the seller had power to sell. The course contemplated by the deed is that "until so applied, the said price shall be consigned in bank or invested in the name of a trustee or trustees," and it is specially provided in a later clause, for the protection of a purchaser, that he (the purchaser) "shall have no concern with, and shall not be bound to inquire into, the application or non-application of the price . . . but shall be fully exonered and discharged by the receipts of the trustee or trustees in whose name the said price or prices are to be consigned or invested as aforesaid." If the course contemplated by the deed is followed it is plain that the price must pass, not into the hands of the pursuer, but into those of a trustee or trustees.

It was, however, ingeniously suggested by the pursuer's counsel that it might not be necessary to follow this course; that the appointment of a trustee is not prescribed as an essential condition of sale, and might not be at all necessary; that, simultaneously with the sale of the estate, the pursuer might arrange for the purchase and entail or settlement of another estate at the same (or not smaller) price; and that the two transactions might be settled together, the price paid by the purchaser of the now entailed estate, in exchange for the disposition in his favour, being handed direct to the seller of the new lands, in exchange for his disposition and entail of these. It is not to my mind clear that the appointment of a trustee or trustees, whether strictly necessary or not, is not made by the deed one of the conditions upon which alone the faculty to sell may be lawfully exercised. But assuming that this is not so, and that, in the way suggested, any necessity for having a trustee to hold the price, pending the purchase of a new estate, could be obviated, I do not think the pursuer's case would be materially advanced. If he exchanges his disposition for a valid entail or settlement of other lands, these would still not be his property absolutely and in fee-simple. But the pursuer (as I understood the argument) put his case still higher, and maintained that there is nothing in the deed of entail to prevent him from

selling at his own hand, and giving a good title to the purchaser, and appropriating the price to himself, without purchasing or settling other lands at all. I do not think he could do this, because the purchaser, in the absence of any trustee to give him a good discharge for the price, would, for his own protection, have to see that the price was applied in the purchase of other lands, and that these were validly settled as prescribed by the deed—in other words, that the condition was duly satisfied upon which alone the heir of entail was permitted to sell. The pursuer refers to the clause I have already quoted, declaring that the purchaser shall have no concern with the application of the price, but shall be discharged by the receipt of the trustee in whose name it is to be consigned. But that clause will not avail a purchaser who has not chosen to obtain the receipt of a trustee for the price—a step which I conceive that any prudent law agent would, as matter of course, insist upon—and the whole transaction of sale would, in my judgment, be struck down by the prohibition against selling, coupled with the irritant and resolutive clauses contained (or by statute implied) in the deed of entail. An action for that purpose would, I apprehend, prevail, if brought by any substitute heir of tailzie, in respect of the contravention by the selling heir of one of the cardinal prohibitions of the entail. The Lord Ordinary therefore seems to me to be quite right in holding that, in order to the effectual exercise of the faculty to sell, the price must be committed to the hands of a trustee—unless perhaps, in the case, which probably was not suggested to his notice, of a simultaneous purchase and settlement of new lands. In neither case, so far as I can see, could the selling heir get the price into his own hands. The machinery of the permissive clause appears to me to have no flaw in it upon this head.

But the pursuer further maintained that, in any view, the entail was invalid—the prohibition against sale being rendered nugatory by the fact that the deed authorises reinvestment of the price in the purchase of lands in England or Wales, to be settled as therein directed, but which manifestly could not be entailed under the Scots Act of 1685. It was said that the Lord Ordinary had missed this point. I am satisfied that he did not do so; he alludes to the matter at the end of his opinion; and if his reasoning be otherwise correct he had no occasion whatever to deal with it specially *ad longum*. The final answer to this point seems to me to be that with which I have already dealt very fully, viz., that the selling heir can only sell subject to the provisions and conditions prescribed, and that if he adheres to these he cannot, so far as appears, put himself in the position of absolute and uncontrolled owner of the lands directed to be purchased and settled. The pursuer's argument upon this head seems to amount to this, that, inasmuch as lands in England or Wales cannot be entailed according to Scots law, therefore the Court is to disregard altogether the condition prescribed in the deed as to investment and settlement. I cannot accept this argument. That condition is an integral part and portion of the power to sell. If it had been possible for the pursuer to satisfy us that such a settlement as is prescribed by the deed must in effect leave him in the position of absolute aad uncontrolled ownership of the lands to be purchased and settled, the case would have been different. But he has not attempted this. I am not surprised that he has not even made an averment to this effect; and it seems to me to be out of the question to ask the Court to make any such assumption.

For these reasons, which I think are substantially the same as the Lord Ordinary has expressed much more concisely, it appears to me that the second ground of the pursuer's attack upon the entail must fail, as well as the first; and that we ought to adhere to the interlocutor reclaimed against.

LORD SALVESEN—The leading conclusion in this action is for a declarator that a deed of entail under which the pursuer is the present heir in possession of the lands of Carriden and others is invalid, and that notwithstanding the fettering clauses referred to therein the pursuer is entitled to hold the said lands in fee-simple. The deed of entail in question was the joint deed of James Hope Lloyd Verney, who was owner of the lands of Carriden therein described, and George Hope Lloyd Verney, who was owner of certain other lands apparently adjoining and particularly described under the head *secundo*. All the lands which were the subject of the deed of entail are situated in the county of Linlithgow, and the object of the deed of entail seems to have been to consolidate the lands into one estate and to make the granter George Hope Lloyd Verney the institute, and on his death James Hope Lloyd Verney the first substitute heir.

The first peculiarity of the deed on which the pursuer relies is that power was given to James Hope Lloyd Verney to appoint his successor from amongst any members of his own family. Failing his doing so, which actually happened, the estate was to go to the pursuer, in whom similar powers of appointment were vested, and it was only on his failure to execute any deed of appointment that the estate was to pass to the heirs-male of his body. The first ground of attack on the deed of entail as a valid and effectual one is that the power of appointment now admittedly vested in the pursuer enables him to alter the order of succession and so render nugatory the restriction against altering the order of succession which is imposed by the Entail Acts, and especially section 39 of the Rutherfurd Act. Under this section it is unnecessary in a deed executed after the Act and authorising registration in the Register of Tailzies to insert in the deed of entail the three cardinal prohibitions and relative irritant and resolutive clauses, the clause of registration having the same operation and effect as the most formal irritant and resolutive classes duly applied to other prohibitions contained

in such tailzie, except only such as by its terms may be specially excepted.

In approaching this question two considerations require to be kept steadily in view. The first is thus expressed by Lord President Inglis in *Rogerson* v. *Rogerson*, 10 Macph. 698, at p. 702 — "Under the previous law when an entail was invalid as regards one of the prohibitions the entail might be defeated by the heirs doing any act not validly prohibited. Thus if there were no valid prohibition against contracting debt the heir might hold the estate in fee-simple by incurring debt to a confidential person who, having attached it by adjudication, reconveyed it to him free from any fetters. And so where the defect was in the prohibition against sale. But in all cases it was necessary to hit the blot so to speak—that is to say, that the heir should avail himself of the particular defect which existed in the entail by doing the thing which was not effectually prohibited. That led to a great deal of uncertainty in titles, and it was thought very justly that this was an undesirable state of law. Hence it was enacted by the Statute of 1848 that where the heir could in any way get free from the fetters of the entail he should be liberated from them altogether, and without any circuitous proceedings." The second is laid down by the same high authority in the case of the *Earl of Breadalbane* v. *Jamieson*, 4 R. 667, at p. 671, in the following terms — "Now it seems to me that as between an heir of entail in possession and the next heir about to succeed him, there can be no obligation and no liability except that which arises out of the fetters of the entail. The heir in possession is free except in so far as fettered. The fetters are the sole protection of the heir who is next to succeed. If, therefore, the fetters cannot protect the heir next to succeed against that which his predecessor has done, it seems to me to follow of necessity that the heir next to succeed can have no ground of complaint and no claim of any kind in respect of that which has been done. It was said, no doubt, in argument that when a man pulls down the mansion-house, being the heir of entail in possession, he comes under an implied obligation to rebuild it, and that if that obligation is not fulfilled during his own lifetime his representatives must fulfil it as coming in his place. Now I am humbly of opinion that as between an heir of entail in possession and the heir next to succeed there can be no implied obligation. A deed of entail is not to be interpreted in such a way as to extract from it any obligations by implication. It is *strictissimi juris*. If you cannot find the obligation expressed upon the face of the deed of entail it is worth nothing in entail law." It is unnecessary to amplify or expound the propositions in law which have been thus clearly enunciated in the two passages I have quoted. All that we need consider is their application to the deed now under consideration.

I understood it to be conceded, and at all events it appears to be plain enough, that if the pursuer had been given an unrestricted power of appointment he would be entitled to the declarator which he seeks. The power, however, is not unrestricted, but can only be exercised in favour of one of the members of his own family, whether male or female, but such as it is it gives him the undoubted right to make a new destination by which in his opinion the entail can be brought to an end at all events in the person of the appointee, or, if he prefers, transmitted to the other members of his family in succession without necessarily providing for the heirs of the body of any of the substitutes so called. In my opinion such a power of altering the succession, limited though it may be, is quite inconsistent with the notion of a strict entail. Lord M'Laren in his well-known work on Wills and Successions (par. 892), in dealing with this subject says—"It may be asserted as a general proposition that the only kind of destination capable of supporting an entail is one to a series of persons named with or without substitutions to heirs of a determinate class—that is to say, to persons standing in a known order of relationship different from the legal order of succession but constituting a recognisable group of heirs." I do not think that a destination to a series of persons named, each of whom is given the power of choosing the heirs who shall next succeed to him even though such heirs are to be selected from the members of his own family, satisfies the definition of a proper tailzied destination. The heirs who would thus be called to the succession would not be the heirs chosen by the entailer but by each substitute heir who succeeded to the estate, and this would involve an alteration on the original order of succession.

The industry of counsel enabled them to refer us to only two cases any way germane to the matter with which I am now dealing. The first is the old case of *Wedderburn*, (1762) M. 15,461. There the Court of Session held that it was a contravention of the deed of entail for the heir in possession whose eldest son was an idiot to alter the order of succession by settling the estate upon his second son and the subsequent heirs called to the succession. This decision was reversed on appeal to the House of Lords the report being contained in 2 Pat. 231. There is no report of the opinions of the noble and learned Lords, but the ground of their decision may be gathered from the argument of the appellant, which was that the exclusion of an idiot might be implied from the presumed intention of the entailer. If so, it was on no other footing than when an entailer provides that in the case of the substitute heirs being females, and thus heirs-portioners at common law, the entailed estate should pass to the eldest. The decision has never been regarded as settling any general question, and it is significant that it is omitted in the Scots Revised Reports of decisions in the House of Lords. I question whether it has ever been acted on, there being no infrequent cases of the eldest son, even when of insane mind, taking an entailed estate in Scotland just as he takes the title.

The other case which appears to have more bearing is that of *Martin* v. *Kelso*, 15 D. 950. *affd.* 2 Macq. 556. There a deed of strict entail contained a clause empowering the heir in possession, "so often as the heirs-apparent or presumptive are females, to settle the estate upon a younger daughter in preference to an elder daughter, or to pass by such daughters altogether and settle the estate upon the presumptive heir-male." It was held that this power to alter the succession could be exercised in favour not only of a younger daughter personally but of the heir whatsoever of her body. This case also reached the House of Lords, where it was affirmed. It may be noted, however, that neither of the parties to the case did or could have maintained the invalidity of the deed of entail, as both were claiming under it, and the decision therefore involves a mere construction of the particular clauses contained in the deed then under consideration. The power of appointment was, moreover, a conditional power, and was evidently intended to prevent the entail coming to an end by several persons succeeding jointly to the estate. It therefore does not afford any aid in determining the effect of a power of appointment conferred upon each successive heir in possession irrespective of whether he had a son; nor was there in that case a power given to the heir in possession to bring the entail to an end in the person of the appointee. The decision therefore leaves the general question absolutely open and leaves us free to decide it on principle.

There is a further consideration which in my opinion goes to strengthen the view that the power of appointment here is in effect a power to alter the order of succession, and so invalidates the entail. It is this, that assuming that we should find the deed of entail to be valid and refuse the declarator, the pursuer has it in his power to become the fee-simple proprietor of the estate by a circuitous method. It was held in *Martin* v. *Kelso* that a deed *inter vivos* was not an improper form of executing the power. The present pursuer is therefore in the position of being able to negotiate with the members of his family the terms upon which the appointee he selects and to whom he can propel the fee should reconvey the estate to him in fee-simple. If the pursuer's children were all in majority this could easily be arranged in view of the pursuer's absolute right to appoint any one of them to take the estate in succession to himself; and it makes no difference in principle, nor can it affect the validity of the deed, that at present they are all minors and would require the consent of a curator to validate such a transaction. Even a curator who desired nothing but the interests of his ward might find it to that ward's advantage, for a pecuniary consideration of relatively small amount or a promise of succeeding to a larger share of his father's estate than he would otherwise be entitled to, to enter into such an arrangement. But all this appears to me to be irrelevant. The validity of a deed of entail does not depend on external facts but on its own terms; and I hold that a power of appointment such as is conferred here does in effect render nugatory the prohibition against altering the order of succession. I am therefore of opinion, differing from the Lord Ordinary, that the entail of Carriden is invalid on this ground.

I reach the same result on a consideration of another clause of this very remarkable deed by which power is conferred upon the heir in possession, "by himself or herself alone, to sell and dispone the whole or any part or parts of the said lands, subjects, and others without the consent of any subsequent heir called under the destination before written and without the necessity of obtaining the authority of the Court."

It is true that this power of sale is qualified by a direction that the price realised shall be reinvested in the purchase of land either in Scotland or England or Wales, which land if in Scotland shall be entailed by valid deed of strict entail, and if in England or Wales by a valid settlement containing all such provisions as counsel shall advise on the same series of heirs and subject to the same or similar prohibitions as contained in the deed of entail. But unless the effect of this and subsequent clauses be to prevent the heir in possession from giving a valid title to a purchaser it appears to me simply to impose a personal obligation. The only clause that might be construed as limiting the right of the heir in possession to dispone validly the estates to a third party is one to the effect that the purchaser shall have no concern with the application of the purchase price, "but shall be fully exonered and discharged by the receipts of the trustee or trustees in whose name the said price or prices and sum or sums to be borrowed are to be consigned or invested as aforesaid." I cannot read this last clause as if it were expressed negatively, namely, that the purchaser should not be exonered and discharged except by the receipt of the trustee. That may have been what was intended, but a deed of entail falls to be strictly construed, and the clause on which so much stress has been laid is merely an addendum to a clause that is a superfluity. No purchaser of land has ever any concern with the application of the purchase price. All that he is concerned with is that it should de paid to the seller from whom he acquires right. Even if it were otherwise it would be a simple matter for the pursuer to name a trustee (for the deed expressly empowers him and him alone to make the nomination), and such trustee could without any breach of trust grant a receipt to the purchaser which would give him an unquestionable title. I see nothing to prevent such a trustee thereafter resigning his office if a question should arise between him and the pursuer as to the binding character of the direction to consign in bank and subsequently reinvest, and the deed contains no machinery for the appointment of another trustee. But even if it were otherwise the right of the succeeding heirs of entail could, in the option of the

trustee, be converted into a claim for breach of trust, which is something entirely foreign to the remedies by which the interests of such persons are protected under a strict deed of entail as explained in the passage I have quoted from the Lord President's opinion in the *Earl of Breadalbane*. The remedy certainly would not be one of interdict against him or against the pursuer, nor could there be a declarator of contravention of the entail directed against the pursuer. The truth is that the law which we are in the habit of applying to trusts has no place where one is dealing with the very special law applicable to entails. A prohibition to sell is not valid unless it is fenced with irritant and resolutive clauses. On the analogy of trust law a person who takes an estate subject to such a prohibition and contravenes it would be liable to a personal claim at the instance of those whose rights were thereby defeated, but no such personal claim is competent against an heir of entail, because he holds a fee of the land, subject only to the fetters, and perhaps also because it cannot be known until his death who would have taken the estate in succession to him if the prohibition contained in the entail had not been contravened. For the same reason an entail of a moveable subject, however strictly expressed, gives no right to the succeeding heirs of entail as against the heir in possession who sells it and pockets the price. This was decided by Lord Shand in *Kinnear* v. *Kinnear*, 4 R. 705, at p. 708, in a decision which has never been questioned. Lord Shand said—"Having in view the nature of the property and the fact that a right of fee is given to the disponee and his successors, it appears to me to follow that the right must be absolute, and that it is incompetent to limit or control the fee so as to prevent the fiar and succeeding heirs in all time from disposing of the property as they see fit. . . . The two determining elements against the valid entail of moveables are the direct fee given and the nature of the subjects." The same considerations in my opinion apply where by the terms of the deed of entail the heir in possession is empowered to sell the lands and receive the price into his own hands either directly—as I hold he could do here—or indirectly through the medium of a trustee nominated by himself.

It remains to consider whether any of the decisions necessarily lead to a different result. Great reliance was placed on the case of *Baird*, where power was given to the heirs under a deed of entail to excamb or sell such parts and portions as they should think fit on condition that the lands acquired by excambion or purchase should be entailed on the same heirs and in the same terms as those in lieu of which they were acquired. It was held that this power was not inconsistent with a strict entail, as it could only be exercised upon complying with the conditions under which it was given. The entailer, however, in that case had provided that the limited power to sell or excamb should not be exercised until other lands had first been acquired and entailed to the full value of those which it was proposed to excamb or sell. The succeeding heirs of entail were therefore absolutely protected against any diminution of the value of the estate, for no purchaser could acquire a valid title to the lands sold unless the heir had complied with the condition upon which alone he was entitled to sell. The same observations apply to the power of sale given to the heir in possession in the case of *Hay's Executors*, 3 S.L.T., p. 86, for it was a condition of the exercise of the power of sale that the consent of certain trustees should first be had and obtained, and that the price should be paid to these trustees and not to the heir of entail. The opinion of Lord Low is only narrated, but it contains the following sentences which afford the key-note to his decision—"The prohibition . . . so far as the heirs themselves are concerned is absolute. They cannot at their own hand sell a single acre of land. They can only sell it when they have obtained the consent of the trustees—a consent which the trustees are not bound to give and may never give. There is therefore not that repugnancy between the prohibition and the power of sale for which the pursuers contend. There is room for both the prohibition and the power, and the prohibition will be effectual until the condition upon which alone the power can be exercised can be fulfilled." I see no ground for questioning either this decision or that in *Baird's Trustees*, the latter of which is of course binding; but they do not appear to me to have any application to the powers conferred by the deed of entail here in question.

There is a further point which is peculiar to the present case, namely, that the heir in possession may sell the whole lands and invest the price in an English or Welsh estate. We are not familiar with the conditions on which heritable property can be settled in England or Wales on a series of heirs, but it is obvious that to any lands outside of Scotland the Entail Acts can have no application. It is in my judgment quite repugnant to a Scotch deed of entail that it may be at the pleasure of the heir in possession converted into a settlement of a landed estate in a foreign country; and it is not surprising that such a power seems never before to have been introduced into such a deed. On this separate ground, therefore, I am also in favour of granting the declarator which the pursuer seeks.

LORD GUTHRIE—I think the Lord Ordinary has come to a right conclusion in holding that the pursuer is not entitled to have the entail in question declared invalid, and that he is not entitled to declarator that he holds the estate contained in the disposition and deed of entail in fee-simple. The pursuer's case is that he can do something which will nullify one, or, in another view, two of the three cardinal prohibitions indispensable to a valid Scots entail without thereby incurring an irritancy. These two prohibitions are (first) the prohibition to alter the order of succession, and (second) the prohibition to alienate.

1. Is the pursuer in a position now to alter the order of succession contained in the deed of entail?

It is said that he can do so if he in terms exercises a power conferred upon him by the entailer—that is to say, the power of appointment contained in the disposition and deed of entail. But to say that the exercise of a power conferred by the entailer is to alter the order of succession fixed by the entailer—seems to me to be in the face of it a self-contradictory statement. The pursuer's position is more accurately put in the fourth article of the condescendence, where it is alleged "the destination under the said disposition and deed of entail is therefore not a proper and valid tailzied destination, no definite and fixed order of tailzied succession having been prescribed by the granters of the deed." But whichever way it is put, I think with the Lord Ordinary that this case is *a fortiori* of the case of *Martin* v. *Kelso*, 13 D. 950, *aff.* 2 Macq. 556. I do not, any more than the Lord Ordinary, think it necessary to consider whether a power of appointment not limited to the selection of one of a class, one of whom would otherwise succeed, would not be inconsistent with a strict entail in respect that such a power would be irreconcilable with the fundamental idea of a tailzied succession.

In addition, even if, contrary to the view above expressed, the true question is one of the pursuer's power to alter the order of succession, he is not, in any event, now in a position to do so, because the act which would, it is said, erroneously as I think, amount to an alteration of the order of succession, can only take effect at his death. A method was indeed suggested under which by a conceivable but improbable arrangement with the appointee the pursuer might acquire the estate in fee-simple. But this could not be done by the pursuer at his own hand, nor could it be done in the ordinary course of business, with the co-operation of another, as in the case of borrowing money. It was admitted that in no case has a possible contravention been held fatal to the validity of a deed of entail, except where the contravention could be carried through by the heir of entail at his own hand, or with only such outside assistance as could be obtained as matter of course.

2. It is said that the pursuer can alienate the estate without incurring forfeiture—first, because he may sell the estate and may then defeat the obligation in the deed to reinvest the proceeds in land to be entailed, and, second, because even if he carries out formally the provisions as to reinvestment in land he may reinvest in land so as to be the fee-simple proprietor of the land so bought.

The competency of provisions in a deed of entail authorising an heir of entail to appoint trustees who shall be entitled at his request to sell the entailed estate and who shall be bound to reinvest the proceeds in land to be entailed seems to follow from the reasoning, if not from the decision, in the case of *Baird*, 6 D. 643, *aff.* 6 Bell's App. 7. But in this case it is said that there is no effectual machinery to prevent the heir of entail avoiding the appointment of the trustees contemplated in the deed, and, with the assistance of a purchaser, obtaining the proceeds of a sale into his own hands, which proceeds he could not be compelled to invest in land and to put the land so purchased under the fetters of an entail. Apart from any other objections to this argument, it is open to the answer already made, namely, that it cannot be done at the heir's own hand or with such co-operation as he would be able in the ordinary course of business to obtain. But I agree with Lord Dundas in thinking that if the suggested transaction were arranged between an heir and a purchaser, the heir would incur a forfeiture, and a substitute would be entitled by a declarator of contravention, if not to nullify the sale to the purchaser, at least by himself or through trustees to obtain from the purchaser or the heir the proceeds of the sale for investment in land to be entailed.

Second, it is said that even if the heir carries out the provisions as to the reinvestment in land, he may reinvest in land so that he shall be the fee-simple proprietor of the land so bought.

This question does not, like those above dealt with, involve any operation which the heir cannot fully perform at his own hand and in terms of the deed. It is of course common ground that land in England or Wales cannot be put under the fetters of a Scots entail in terms of the Scots Act of 1685; it is pointed out that the deed itself assumes that land in England or Wales cannot be effectually subjected to the identical prohibitions fenced with the identical irritancies competent under the law of Scotland; and it is asserted at the Bar by the pursuer that however the deed contemplated in the disposition and deed of entail may be conceived, the disponee, or at all events his heirs born after his death, will be fee-simple proprietors. The record contains no averment as to what, if any, fetters and irritancies are competent under the English law of entail, and both parties declined, when the point was brought before the Court, to add averments on this matter. In these circumstances I cannot assume that land purchased in England cannot be effectually entailed on the pursuer and the series of heirs mentioned in the deed of entail in question, or at all events cannot be so settled on the pursuer as to prevent him being the fee-simple proprietor of that land. If so, it seems to me that whatever may be his rights in the event of his purchasing land in England and settling it in terms of the clause in the deed of 1891, it is impossible under this record to give him the declarator he seeks in this action.

LORD JUSTICE-CLERK—There can be no doubt that this case presents difficulty, which is emphasised by the fact that there is a difference of opinion on the Bench. My view is in accordance with that of the majority of your Lordships, concurring as I have come to do with the views expressed by the Lord Ordinary; and the very full opinion of Lord Dundas, which I have

studied, meets with my full concurrence. I am therefore in favour of adhering to the Lord Ordinary's judgment.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Clyde, K.C.—W. H. Stevenson. Agents—John C. Brodie & Sons, W.S.

Counsel for the Defenders and Respondents — Mitchell. Agent — Thomas J. G. Hunter, W.S.

Thursday, June 11.

EXTRA DIVISION.

(Before Lord Dundas, Lord Mackenzie, and Lord Cullen.)

SCOTT *v.* DAVIDSON.

Right in Security—Bill of Exchange—Disposition in Security—Promissory-Note——Sale of Security Subjects by Creditor—Title of Co-obligant in Promissory-Note to Challenge Sale—Price.

Where an obligant under a promissory-note subsequently conveyed heritable property in security of the debt, *held* that a co-obligant in the promissory-note, who was not a cautioner, had no title to challenge the sale of the security subjects on the ground that the price was inadequate, and by this means to avoid liability for the debt.

Miss Jessie Scott, Nellfield Lodge, Braidwood, Lanarkshire, *complainer*, brought a note of suspension against Donald Davidson, Grantown-on-Spey, *respondent*.

The following *narrative* is taken from the opinion of the Lord Ordinary (HUNTER):—"In this action the complainer seeks to set aside a charge proceeding upon a decree obtained against her and others for payment of a sum due upon a promissory-note dated in March 1910. The other granters of the promissory-note were a Mr Lawson and a Mr Agnew, the latter being a brother-in-law of the complainer. The promissory-note was granted in favour of Messrs Howard & Cope, and the charge proceeded at the instance of a Mr Davidson, as assignee of a Mr Krall, who in turn was the assignee of Messrs Howard & Cope. At the time when the complainer and the two gentlemen I have named gave to Messrs Howard & Cope a promissory-note for £500, Mr Lawson and Mr Agnew also granted a promissory-note for £1000. In security of these two promissory-notes for £1000 and £500 respectively, Mr Lawson conveyed to Messrs Howard & Cope the estate of Nellfield, by disposition dated in August 1910. Subsequent to granting that conveyance, Mr Lawson in June 1911 conveyed Nellfield estate to Mr Agnew, who in turn gave a feu-charter of 18 acres of that estate to a company known as the Nellfield Estate Company. That company erected plant upon the estate and went into liquidation. They attempted apparently to sell the heritable subjects, or rather the plant, but without success. There are other bonds upon the estate. To some extent these complicate the different questions raised before me, but I do not think they materially affect what, in my opinion, are very clearly the only material points that are raised in this action. Howard & Cope did not get payment of what was due to them by Messrs Lawson & Agnew, and they took decree against Messrs Lawson & Agnew for the £1000, and against Lawson, Agnew, and the complainer for the £500. The decree was not satisfied, and Messrs Howard & Cope assigned the decree, and at the same time assigned the disposition and security for sums due under the promissory-note to Mr Krall on 17th July 1913. After Mr Krall was thus in possession of the decrees and the security subjects, he exercised a right which had been conferred upon the holders of the security, namely, Howard & Cope, and disponed to another company—which, for brevity, I will call the chemical company — the subjects on 5th August 1913, the deed being registered on 6th August 1913. The price received by Mr Krall was £700. When Mr Krall had received that price for the subjects, he assigned the decrees to the present respondent for a sum of £100. The challenge now made by the complainer is this—She says that the price which Mr Krall received from the chemical company, £700, was a totally inadequate price; that he should have received a much larger price; and that if an adequate price had been received the total indebtedness upon the bills would have been wiped out."

The complainer pleaded, *inter alia*—"(2) The complainer *is* entitled to have the note passed and the charge complained of suspended, in respect—(*a*) That the respondent's cedents being bound to account to the complainer for the price of the heritable subjects sold, the same should be applied *pro rata* to meet the indebtedness of the complainer on the said promissory-note. (*b*) That on a just accounting no sum is due by the complainer to the respondent. (*c*) That the amount of the charge is in any view excessive, and falls to be restricted."

Proof was allowed and led, and on 28th April the Lord Ordinary repelled the reasons of suspension, and found the warrants and charge orderly proceeded.

Opinion.—[*After giving the narrative already set forth*]—"I heard a discussion in the procedure roll in this case, and in the note appended to my interlocutor of 23rd January 1914 the reasons for my allowing a proof will be found. I may say this, that it appeared to me then that the vital point for the complainer was that she should establish, as she undertook to do, that she was merely a cautioner under the £500 bill. I considered that was a point upon which parole proof was competent, and I allowed it. Her other averment of consequence was to the effect that by the inadequate price that had been unjustifiably received by Mr Krall she was continued liable under the bill, whereas had a sufficient price been received she would not have been under any liability. The averment which the com-