

SCOTLAND.

ON APPEAL FROM THE COURT OF SESSION.

<p>RICHARD HOTCHKIS and JAMES TYTLER, Clerks to the Signet, designing themselves Trustees, nominated and appointed by the deceased Colonel WILLIAM DICK- SON of Kilbucho, - - -</p>	}	<i>Appellants ;</i>
<p>JOHN DICKSON, Esq. Advocate, now of Kilbucho, - - -</p>	}	<i>Respondent.</i>

A pursuer, asserting in an action of declaratur a right as unlimited fiar of lands, has power to execute, and is bound by a deed of entail restricting his estate to a life-rent.

A transaction between parties dealing upon a doubtful question as to their rights, if it be not tainted with fraud, will be upheld, although one of the parties, being an advocate and brother of the other party, acted generally in the transaction as the legal adviser of the other party.

I. being seised of lands in Scotland, executes a deed, vesting the lands in trustees for sale to pay debts, and afterwards to manage the residue of the lands until, by accumulation of rents, they could purchase an equivalent in lands in the place of those which should be sold; and he directed that an annuity of 100 *l.* for life should be paid to *D.* his brother and heir at law, and a like annuity to *W.* the son of *D.*; and when the purposes of the trust should be accomplished, the trustees were to devest themselves of the estate in favour of such person as at that time might be the eldest son of *D.* and his heir; *I.* had never completed his title to the lands, and *D.* not being satisfied with the provisions of the trust, served himself heir to his father, passing by his brother *I.* and brought an action to reduce the deed of trust.

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A judicial sequestration of the estate was the consequence of this action, and other matters in litigation respecting the estate.

In order to settle all disputes, the parties interested, including *D.* and *W.* executed a deed, submitting all differences to the award of chosen arbitrators. The deed, among other things, empowered the arbitrators to determine "in what manner, to what series of heirs, and under what conditions, &c. the lands should be settled.

The arbitrators, by their award, directed that *D.* and *W.* should execute, as to the lands not sold, a tailzie and strict settlement in favour of *D.* in life-rent, and *W.* and the heirs male of his body in fee, whom failing, &c. with the clauses prohibitory, &c. contained in a scroll, &c. and particularly that the life-rent of *D.* should be charged with the payment of an annuity of 250*l.* to *W.* which should be a real burden on the lands.

D. and *W.* executed a deed of entail accordingly; but *D.* refusing to deliver it, another deed of similar import was drawn up and executed by *W.* only, to whom the trustees executed a deed of renunciation and disposed the lands; *D.* having previously, by order of the arbiters, conveyed to the trustees upon his claim of right as heir, and to perfect their title.

The entail contained the usual prohibition against selling the estate.

Upon failure of issue of *W.* the lands by this new entail were limited to *J. D.* next brother of *W.* The entail was executed in 1776.

In 1785, *D.* being dead, and *W.* being in possession of the lands, and claiming a right, notwithstanding the entail, to sell for payment of debts, conveyed the lands to a trustee for that purpose; and the trustee having accordingly contracted with a purchaser, an action of declaratur was raised by *W.* and the purchaser against *J. D.* and the other heirs of entail, concluding to have it declared that the lands were liable to the trust for the payment of debts, and the decree of the Court was according to the conclusion of the summons.

In the year 1808, *W.* being embarrassed and in debt, advertised all the lands, except one farm and a few *parcs*, with the mansion, for sale. Whereupon *J. D.* remonstrated, and having threatened to prosecute, on behalf of himself and the other heirs of entail, a

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declaratur of irritancy, a compromise was effected on the terms that a sufficient part of the lands should be sold to discharge the debts of *W.*, and that of the lands remaining unsold, a new entail should be made, restricting the estate of *W.* to a life-rent, and giving to *J. D.* and the heirs of the former entail, estates in tail general.

In this transaction *W.* had no legal adviser but his brother *J. D.*, who was an advocate, and had usually acted in that capacity towards *W.*

The deed of entail was drawn up under the direction of, and settled by *J. D.* It contained a recital of the former entail; a statement of former sales of parts of the lands by *W.* that he had thereby become liable to a declaratur of contravention of irritancy at the suit of *J. D.*, but that he had agreed, for the accommodation of *W.*, not to object to the sales already made, nor prosecute his right of action, on condition that *W.* would execute the deed; and upon this recital, *W.* thereby limited the lands unsold to himself in life-rent, and to *J. D. in fee*, and the heirs male of his body, whom failing, to the heirs female of his body, &c.

This deed was accordingly executed by *W.*, but he becoming again embarrassed and involved in debt, at the instance of his creditors, brought an action to reduce this deed of entail, on the ground of fraud, want of power, &c. The Court below held that *W.* had power to execute the deed, that it was delivered and irrevocable, that there was no legal ground to set it aside; and that it did not appear, from the tenor of the deed or collateral evidence, that *W.* was improperly or fraudulently induced to execute it.— This judgment was affirmed on appeal.

THE object of this suit was to reduce a deed of entail, and annul a transaction which took place under the following circumstances :

In the year 1767, John Dickson, being seised of the lands of Kilbucho, executed a trust-deed in favour of the Earl of Hyndford and others, wherein,

Trust-deed
made in 1767,
by John Dick-
son.

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after mentioning the destination of the estate, he added a clause referring to a future deed which he meant to execute, “ containing such other destination, and under such burdens, conditions, provisions, restrictions and limitations, as I may hereafter appoint to be therein inserted, by any writing under my hand.” This purpose was not executed; for Mr. Dickson died suddenly, in the beginning of December, in the same year.

By the deed of trust, the trustees were *directed to sell such* part of the estate as might be necessary *to pay the debts affecting it*, and thereafter they were to continue their management, *till, by accumulating the rents of the remaining part of the estate, they could purchase lands yielding a rent equal to the rent of the lands which might be sold.* In the mean time David Dickson, the brother and heir-at-law of John Dickson, was to be allowed an annuity of 100*l.*; and a similar allowance of 100*l.* was to be given to William, who was the original pursuer of this action, and then the eldest son and heir of David; and when all the purposes of the trust were accomplished, the trustees were to denude (devest) themselves of the estate, in favour of whatever person might be the eldest son and heir of David Dickson at the time. John Dickson, the maker of this trust-deed, bequeathed various legacies and annuities, and died considerably in debt, which rendered it probable that the trust would be of some continuance.

These circumstances induced David Dickson to serve himself heir to his father William, and thereupon raised an action of reduction for setting aside the trust-deed of his brother John, who had never

completed his titles to the estate. In consequence of this action, and other subjects of litigation respecting the estate, which occasioned a judicial sequestration, a plan was devised for submitting to arbitration all the matters in dispute between the parties interested in the estate.

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The deed of submission empowered the arbiters
 “to direct what steps should be taken by the parties
 “for denuding (devesting) the trustees, named by
 “the said deceased John Dickson, of the lands,
 “estate, and other subjects which belonged to him,
 “and for removing the sequestration thereof.” It
 also empowered them “to appoint such parts of
 “said estate or other subjects to be sold, as they
 “shall think necessary, for payment of the debts
 “affecting the same,” &c.; also “to determine
 “what provisions shall be settled on the younger
 “children of the said Mr. David Dickson, and in
 “what manner the same shall be secured;” and
 further, “to determine in what manner, to what
 “series of heirs, and under what burdens, limita-
 “tions, conditions, prohibitory, irritant and reso-
 “lutive clauses, the said lands and estate, or what
 “part thereof may remain unsold, shall be settled;
 “and in general to determine and appoint every
 “thing to be done, of or concerning the lands,
 “estate, and other subjects, heritable or moveable,
 “that belonged to the said deceased John Dickson,
 “which the said arbiters, or either of them, in case
 “of the death or non-acceptance of the other, or
 “which the said oversman may judge fit and neces-
 “sary to, be done for the interest of the said parties,
 “and a final and amicable settlement of their whole
 “family affairs.”

Deed of sub-
mission,
July 14, 1771.

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Preliminary
conditions of
the trustees
denuding.

Mr. David Dickson, as the heir-at-law, and his eldest son William Dickson, as the first expectant heir under the trust-deed, were, in point of form, the only persons named as parties to this submission, and who executed it; but the trustees required the approbation and discharge of every creditor and legatee upon the estate, which was to be obtained in consideration of David Dickson and his eldest son, jointly, giving new heritable securities; and at the same time conveying to a trustee the separate estate of Culter, &c. for the purpose of paying off the debts. In the second place, the direct sanction of at least the immediate substitute heirs under the trust-deed was required; and, in the third place, that the residue of the estate should be freed from debt, and completely secured by a strict entail.

Dr. Michael Dickson, who was a younger brother of David Dickson, and a creditor to a considerable amount, having refused to accede to the arrangement, in order to remove this obstacle, the respondent, with his younger brother David, and another person at the respondent's request, concurred in granting a bond to the trustees for a sum of 3,000*l.*

Award pro-
nounced by
the arbiters.

The preliminaries having been arranged, a decree-arbitral was pronounced, and the trustees executed a conveyance in terms of the trust. These deeds are both dated 11th August 1775, and refer to each other. The decree-arbitral, instead of the annuity of 100*l.* allowed by the trust-deed, awarded to Mr. David Dickson the life-rent of the whole estate, subject to the charge of an annuity in favour of his son; and instead of the annuity of 100*l.* to his eldest son, the sum of 250*l.* charged upon the father's life-estate, was given to him during his father's life, and

upon his father's decease, an estate to him and the heirs male of his body. It contained the following finding as to the execution of a deed of entail :

“ We having now considered the particular situation and circumstances of the estate of Kilbucho, and of the said Mr. David and William Dickson, and the several particulars relative thereto, which have been laid before us, and being desirous, so far as possible, to preserve for the family such parts of the estate as the situation of affairs will permit, &c. decern and ordain the said Mr. David and William Dickson, for their respective rights and interests, on or before the 1st day of October next, to execute a tailzie and strict settlement of the lands and barony of Kilbucho, in favour of the said Mr. David Dickson in life-rent, and the said William Dickson and the heirs male of his body in fee, whom failing, to the other heirs mentioned in a scroll of the said tailzie signed by us of the date hereof, as relative to this decree-arbitral, and with and under the whole conditions, provisions, clauses, prohibitory, irritant and resolute, contained in the said scroll; and particularly with and under this condition, that the life-rent right of the said Mr. David Dickson shall be burdened with the payment of a free annuity to the said William Dickson of 250*l.* sterling money yearly, at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment at the term of Martinmas next, for the half year preceding, and so to continue during the life of the said Mr. David Dickson; and which annuity shall be a real burden upon the lands and estate contained in

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Aug. 11, 1775.

Strict entail
ordered.

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“ the said entail ; and the said William Dickson,
 “ in case the same is not regularly paid to him,
 “ shall have access to the rents of the said estate
 “ to the extent of what is unpaid, notwithstanding
 “ the life-rent disposed to the said Mr. David Dick-
 “ son : but it shall be declared by the said entail,
 “ that although the said William Dickson shall have
 “ access to the rents of the estate for payment of
 “ the above annuity, yet that the by-gones of such
 “ annuity shall not be the ground of any adjudication
 “ of the property of the said entailed estate ; and
 “ we decern and ordain the said parties to put the
 “ said entail upon record in the register of tailzies,
 “ and to complete the same by charter and infeft-
 “ ment, as soon as the same can be properly done.”

Deed of
 renunciation
 and convey-
 ance by the
 trustees.
 Aug. 19, 1775.

The trustees executed their deed of renunciation and conveyance on the same date as the decree-arbitral, but it was not delivered till the entail was executed.

This deed of entail was executed by David Dickson and his son William ; but David having previously executed an entail, which is still extant, refused to deliver up the new one.

Jan. 7, 1776.

In consequence of this refusal, some delay took place ; and as the trustees would not give up their deed of renunciation till the entail was also delivered up, another copy of the deed of entail was prepared and executed by William alone, who, being formally the disponee of the trustees, was sufficiently *in titulo* to execute the entail alone. The deed was accordingly so executed. It proceeded expressly upon the decree-arbitral, and contained all the usual prohibitory, irritant and resolute clauses, and was executed according to the statute 1685, ch. 22.

John Dickson, who executed the trust-deed, not having completed his titles to the estate, the right of his trustees was incomplete, especially as David had served himself heir to his father, passing by his brother John. In order to remove this objection, David, by order of the arbiters, conveyed the lands to the trustees. The trustees then conveyed to William, and he, by order of the arbiters, executed the entail.

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The entail contained the following provision: Prohibition against selling.
 “ It shall not be in the power of me, the said William Dickson, or any of the heirs of entail succeeding in the said lands and estate, to sell, alienate, or impignorate the same, or any part thereof, either irredeemably or under reversion, or to burden the same in whole or in part, with any debts, or any other burden, incumbrance, or servitude whatsoever.”

The irritant clause, which is coupled with a provision, binding William Dickson and the heirs of entail to redeem adjudications or other legal diligence, is thus expressed: Irritant and resolute clauses.
 “ In case of our failing to redeem accordingly, we shall forfeit and lose our right to the lands and estate above disposed, &c.; and with and under this irritancy, as it is hereby conditioned and provided, that in case I, the said William Dickson, or any of the heirs succeeding to the lands and estate before disposed, shall contravene the before written conditions, provisions, restrictions and limitations therein contained, or any of them, that is, shall fail or neglect to obey or perform the said other conditions and provisions, and each of them, or shall act contrary to the said other limitations or restrictions, or any

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“ of them, then and in either of these cases, I the
 “ said William Dickson, or any other person or
 “ persons so contravening, shall, for ourselves only,
 “ amit, lose and forfeit all right, title and interest
 “ which we have to the lands and estate before dis-
 “ poned, and as such right shall become void and
 “ extinct, so the said lands shall devolve, accresce
 “ and belong to the next heir appointed to succeed,
 “ although descended of the contravener’s own body,
 “ if capable to possess and enjoy the said lands and
 “ estate; in the same manner as if the contravener
 “ were naturally dead, and had died before contra-
 “ vention.”

The concluding clause of the entail was in these words: “ And lastly, I hereby authorize the said
 “ Mr. John Dickson, or any of the substitutes above
 “ named, to apply to the Court of Session to have
 “ this present tailzie judicially recorded; in terms
 Feb. 13, 1776. “ of the act of parliament.” The deed was accord-
 ingly, on the 13th of February 1776, recorded upon
 a petition by the respondent, Mr. John Dickson, the
 first substitute, and thereby completed, agreeably
 to all the forms which are required by the law of
 Scotland.

For several years after the trustees denuded,
 the respondent managed the estate as factor, both
 for his father, Mr. David Dickson, and for his
 brother William, who was the pursuer of the present
 action in the Court of Session. In March 1779,
 the pursuer went in the army to America, and the
 respondent then accepted from him a commission
 and factory, under which he managed all his affairs
 in Great Britain, both before the father’s death, which

took place in 1780, and afterwards until the respondent's return at the peace.

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In consequence of the embarrassment of his brother's affairs, and soon after his return, the respondent resigned the factory and commission. But previous thereto he raised an action before the Court of Session, under a power reserved in the deed of entail, for selling as much of the estate of Kilbucho as was necessary to relieve his brother from some debts which were a burden upon the entail. By the decree of the Court, in this action, it was found, "that the pursuer must lay out any surplus price of the said lands, when sold, at the sight of and to the satisfaction of the heirs of entail, in the precise terms of the said disposition and entail."

Decree of the
Court as to
surplus price.
Dec. 16, 1784.

Upon the sale there was a surplus of 600*l.* which was not applied in terms of the decree, but appropriated to his own use by William Dickson, who being involved in debt, soon afterwards conveyed the estate to John Loch, in trust, with power to sell the whole or part for payment of his creditors.

Under this power, a part of the estate was sold by Mr. Loch to a Mr. Cunningham. Whereupon an action of declarator was brought in the Court of Session by William Dickson, and Mr. Loch, as his trustee, to have it declared that they had power to make such sale; and at the same time, a bill of suspension was presented by Mr. Cunningham, the purchaser, to delay payment of the price until the judgment of the Court, as to the right of selling, was obtained.

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In that action the respondent was called with the other heirs of entail ; but the suit, (as represented by the respondent), was entirely amicable, and the expense on both sides was paid by William Dickson. The information, in name of the heirs of entail, though it did not oppose the sale then contemplated, sought some security against further sales. The concluding paragraph was in these words: “ Upon
“ the whole, the defenders hope your lordships will
“ be inclined to sustain the entail in question, even
“ against the pursuer’s creditors. But if, on the
“ contrary, this fair, onerous, and necessary deed
“ shall be found ineffectual against creditors, they
“ trust that it will at least be effectual against the
“ pursuer.”

The information for William Dickson stated, that the question was not between him and the heirs of entail, but a question with his onerous creditors, viz. : “ Whether this deed of entail may
“ be considered a gratuitous or onerous deed in
“ any question betwixt the pursuer and the heirs of
“ tailzie alone, will not affect the present question,
“ which is a case with the onerous creditors of the
“ pursuer, who insist, by their trustee, that the
“ onerous debts and deeds of William Dickson,
“ the maker of the entail, must be effectual against
“ his estate.”

The summons concluded, “ that it should be de-
“ clared, that the trust-deed granted by William
“ Dickson to John Loch affects the lands for pay-
“ ment of the debts therein mentioned, and other
“ debts,” &c.

When the cause came into Court, in the year 1786, Lord Braxfield observed, “ that the arbiters “ designed to bind William Dickson, but they did “ not take the right way. They should have re- “ stricted his right to a life-rent ; for so long as he “ holds the fee of the property his debts must affect “ it.” This opinion was adopted by the Court ; and upon the acquiescence of the heirs of entail a decree was made, corresponding with the conclusion of the summons.

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This decision was not satisfactory to the purchaser, who refused to pay the price unless a judgment of the House of Lords was obtained. Upon this objection, to avoid expense and delay, it was proposed, and upon conference agreed, that the respondent should concur with William Dickson in granting the disposition ; and a conveyance also was granted to the purchaser of the whole of the remainder of the estate, in real warrandice.

In the year 1809, William Dickson, having incurred new debts, in order to relieve himself proposed to sell a further part of the estate ; whereupon the respondent intimated to his brother his intention (on behalf of the heirs of entail) to prosecute a declarator of irritancy, which, though it might not prevent the sale then intended, so far as the interest of the creditors were concerned, yet would prevent any future sales, and in so far secure the interests of the heirs of entail.

Further sale
in 1809.

At the same time the respondent made a proposal and offer to his brother, that if he would do what the

Agreement
and transac
tion between
the parties.

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Court suggested in the year 1786, and which, agreeably to the opinion then given, ought to have been done at the original settlement of the family affairs in 1776, viz. restrict himself to a life-rent, the matter should be amicably settled without further trouble or expense. To this proposal William Dickson assented; and thereupon a transaction of agreement took place between the parties; the respondent, as next heir of entail, assenting to the sale of part of the estate for the sum of 6,300*l.* which was to be applied, so far as required, in payment of the debts of William Dickson, and the surplus was, by the agreement, to be invested upon the trusts of the entail. On the other hand, William Dickson agreed to execute a new entail, reducing his estate in the lands of Kilbucho to a life-rent.

The deed creating this new entail was drawn by John Dickson, writer to the signet, the nephew of the parties to the transaction, and under the direction of the respondent, who made in the scroll, as originally drawn, the marginal additions which appear printed in italics in the following clauses.

1. I bind and oblige me and my heirs and successors whomsoever, without the benefit of discussing them in order, to infest myself in life-rent; *for my life-rent use allenarly*; and the said John Dickson, and the other heirs of tailzie above-named, in fee, with and under the conditions, &c.

2. In the clause which provides against the lands being affected by debt, the words in italics were marginal additions in the hand-writing of the respondent. “Debts or deeds, legal or voluntary, contracted

“ or granted *by me as life-renter*, or by the said
 “ John Dickson as heir, or to be contracted,” &c.

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3. The last addition was in the irritant and resolu-
 tive clause, which originally provided only for the
 case of heirs failing or neglecting to perform the con-
 ditions of the deed ; the marginal addition was,
 “ or shall act contrary to the said other limitations
 “ or restrictions, or any of them.”

The draft was settled by the respondent, and trans-
 mitted to William Dickson ; but the respondent had
 been his ordinary legal adviser, and he had no other
 adviser in this transaction.

This deed, which was shortly afterwards (1809),
 executed, proceeded upon the following narrative
 and statement of considerations, and contained limi-
 tations to the following effect :

“ Know all men, by these presents, that I, Briga-
 “ dier-general William Dickson of Kilbucho, con-
 “ sidering, that by disposition and deed of entail,
 “ executed by me, dated the 27th day of January
 “ 1776, I gave and disponed, heritably and irre-
 “ deemably, to David Dickson, my father, in life-
 “ rent, and to myself in fee, and the heirs male of
 “ my body ; whom failzieing, to John Dickson, ad-
 “ vocate, my first brother, and the heirs male of his
 “ body ; whom failzieing, to the other heirs of tail-
 “ zie and provision therein particularly mentioned,
 “ All and whole the lands and barony of Kilbucho,
 “ comprehending the lands and others therein and
 “ after mentioned, lying in the parish and regality
 “ of Kilbucho; and sherifffdom of Peebles, with and
 “ under the conditions, provisions, restrictions, limi-
 “ tations, exceptions, clauses prohibitory, irritant

Preamble
 of entail,
 Apr. 24, 1809.

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Inductive
cause of the
entail.

“ and resolute, therein specified ; that notwith-
 “ standing thereof, I had sold a considerable part of
 “ the said lands and estate, and have thereby become
 “ liable to a declarator of contravention of irritancy,
 “ at the instance of the said John Dickson, which
 “ he might now raise against me ; but whereas he
 “ the said John Dickson has, for my accommodation,
 “ agreed not to object to the sales already made of
 “ part of the foresaid lands, for payment of certain
 “ debts contracted by me, nor to pursue any action
 “ of declarator or irritancy against me, upon con-
 “ dition of my granting the deed underwritten, for
 “ the purpose of preventing any further sales of
 “ what still remains of the estate : Therefore I have
 “ given, granted and disponed, as I do hereby, with
 “ and under the conditions, provisions, restrictions,
 “ limitations, clauses prohibitory, irritant and reso-
 “ lutive, declarations and reservations after specified,
 “ give, grant and dispone, to and in favour of myself
 “ in life-rent, for my life-rent use allenary, and to
 “ the said John Dickson, my first brother, in fee,
 “ and the heirs male of his body ; whom failing, to
 “ the heirs female of his body, the eldest always
 “ succeeding without division ; whom failing, to the
 “ Reverend David Dickson, my next brother, and
 “ the heirs male of his body ; whom failing, to the
 “ heirs female of his body ; whom failing, to James
 “ Dickson, now James Ranaldson Dickson, my
 “ third brother, and the heirs male or female of his
 “ body ; whom failing, to Elizabeth Dickson, my
 “ sister, and the heirs of her body ; whom all fail-
 “ ing, to the other heirs-substitute in the foresaid
 “ deed of entail, the eldest heir female always suc-

“ceeding without division; and excluding heirs
 “portioners throughout the whole course of succes-
 “sion hereby established, heritably and irredeemably,
 “all and whole,” &c.

The deed contained an obligation to infest procuratory of resignation, precept of sasine, and the usual prohibitory, irritant and resolute clauses, against altering the order of succession, or burdening or alienating the estate. Upon this deed infestment was taken by the agent of William Dickson, and recorded in the record of sasines.

In the year 1813, William Dickson again became embarrassed in his affairs; and being pressed by his creditors, and advised that the entail of 1809 was invalid, he raised an action to reduce that entail. At the same time, the appellant William Tytler obtained from William Dickson a minute of sale of the estate, raised an action of suspension against a threatened charge for payment of the purchase-money, on the alleged ground that the vendor could not give the purchaser a proper right to the estate, but in truth to try the validity of the entail; both which actions came before Lord Balgray, as Ordinary, and were conjoined.

On the 6th of July 1813, the following interlocutor was pronounced; “The Lord Ordinary, having con- sidered the memorial for Colonel William Dickson of Kilbucho, charger and pursuer; memorial for James Tytler, writer to the signet, and suspender; defences for John Dickson, against the action of reduction at the instance of the said William Dickson: In respect that the pursuer and charger asserts and maintains, that he was unlimited fiar

Lord Balgray's
first interlocu-
tor appealed
from.
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“ of the estate of Kilbucho, and had the right o
 “ disposing thereof as he thought proper, *1mo*, finds
 “ that so far as he is concerned he had power to
 “ execute the deed of entail, dated 28th April 1809:
 “ *2do*, finds, that the said entail is a delivered deed,
 “ and irrevocable ; and that the pursuer has con-
 “ veyed away the right of fee, and has restricted
 “ his right to that of life-rent allenary ; *3tio*, finds,
 “ that no legal, just, or reasonable ground is assigned
 “ by the pursuer or by the suspender for setting aside
 “ the said deed : therefore, in the process of reduc-
 “ tion, assoilzies the defender ; and in the suspension,
 “ suspends the letters *simpliciter*, and decerns.”

Represent-
 ation by
 Appellants.

Upon a representation by the appellants, the Lord Ordinary again minutely considering the whole argument on both sides, pronounced a second interlocutor.

Lord Balgray's
 second interlo-
 cutor appealed
 from.
 Nov. 16, 1813.

“ The Lord Ordinary having resumed conside-
 “ ration of this representation (the pursuers), with
 “ the answers thereto, and having also resumed
 “ consideration of the former papers in the cause,
 “ with the deed of entail 1809, and scroll thereof:
 “ In respect, *1mo*, that it does appear that the exe-
 “ cution of the deed of entail 1809, was, under all
 “ circumstances, a measure highly proper, prudent,
 “ and expedient on the part of the pursuer : *2do*,
 “ that it is admitted by the pursuer, that he volun-
 “ tarily executed the said entail, and had power to
 “ do so ; and that there does not appear, from the
 “ tenor of the deed itself, or any other collateral
 “ circumstance, any foundation for the allegation
 “ that the pursuer was improperly or fraudulently
 “ induced to execute said deed ; and that the pre-

“ sent proceedings seem to arise rather from a
 “ change of mind on the part of the pursuer, than
 “ the discovery of any facts attending the execution
 “ of the entail 1809: therefore, refuses the desire
 “ of the representation, and adheres to the inter-
 “ locutor reclaimed against.”

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Upon a second representation by the appellants, the Lord Ordinary, on January 21, 1814, appointed informations to be ready in a fortnight; but in the mean time the minute of sale was renounced by a discharge, dated February 7, 1814. Whereupon William Dickson became nominally the sole party. By a deed, dated the 31st of January 1814, William Dickson conveyed to the appellants, as trustees, all his estate and interest in the matter in dispute, with power to carry on the action, or raise a new action in their own name, or in the name of William Dickson, or of his creditors.

By an interlocutor of the Inner House, dated June 2, 1814, “ The Lords having advised the
 “ mutual informations for the parties and whole pro-
 “ cess; the suspension at the instance of Mr. Tytler
 “ being withdrawn, assoilzie the defenders from the
 “ whole conclusions of the actions of reduction, and
 “ find and decern in the terms of Lord Balgray’s
 “ interlocutors of the 6th July and 16th November
 “ last, &c.” By a second interlocutor (June 28, 1814,) a reclaiming petition was refused, without answers; and by a third interlocutor costs were given against William Dickson.

Soon after these judgments had been pronounced William Dickson, the pursuer, died in extreme pecuniary distress, having before his death given to

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his creditors the power of prosecuting the suit then in process, by the trust-deed before mentioned, which was recorded in the books of council and session in Scotland, 9th February 1816, conveying his lands to the appellants, for behoof of his creditors.

The deed commences as follows: “ Be it known
 “ to all men by these presents, that I, Colonel Wil-
 “ liam Dickson, of Kilbucho, taking into my consi-
 “ deration, that upon the 24th April 1809, I was
 “ induced to execute a disposition and deed of entail
 “ of my lands and estate after mentioned, in favour
 “ of myself, in life-rent, and John Dickson, esquire,
 “ of Culter, advocate, my brother, in fee; whom
 “ failing, certain other heirs of tailzie therein men-
 “ tioned, to my enormous lesion, as well as to the
 “ great injury of my just and lawful creditors; and
 “ that I have brought an action before the Lords of
 “ Council and Session against the said John Dickson,
 “ and the heirs substituted to him in the said deed,
 “ for setting aside the same on various grounds; and
 “ which action is now in dependence before Lord
 “ Alloway, as Ordinary thereto: And I being desir-
 “ ous to do every thing in my power for the benefit
 “ of my said creditors, and to enable them the better
 “ to set aside the said deed executed by me to their
 “ prejudice, and to obtain justice for themselves in
 “ the said matter, I therefore hereby give, grant and
 “ dispone, to and in favour of Richard Hotchkis
 “ and James Tytler, writers to the signet, and the
 “ survivor of them; whom failing by death, non-
 “ acceptance, or otherwise, to any other person or
 “ persons who shall be nominated and appointed by
 “ the majority of my creditors in value, assembled at

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“ a general meeting, as trustees, for and to the use
 “ and behoof of all my present just and lawful credi-
 “ tors, all and whole,” &c. (the lands of Kilbucho).

After the powers usually conferred by such deed, it proceeds thus : “ And for rendering the above-
 “ written disposition more effectual, with special
 “ power to my said trustees and trustee acting
 “ for the time, to insist in and follow forth, at the
 “ expense of me and my heirs and successors, the
 “ aforesaid action of reduction, or to raise such new
 “ actions as they shall be advised to prosecute against
 “ the said John Dickson, my brother, and all others
 “ concerned, and that either in my name, or in the
 “ names of themselves, as trustees aforesaid, or in
 “ the names or name of all or any number, or any
 “ one of my said just and lawful creditors, as they
 “ shall think most conducive for obtaining a void-
 “ ance and reduction of the said deed, and to employ
 “ agents and counsel, and to take all other neces-
 “ sary and lawful steps, at the expense of me or my
 “ aforesaid, for conducting to a termination the said
 “ questions at law.”

The appeal was brought by the appellants as assignees in trust for the creditors of William Dickson.

On the part of the appellants the case was supported by the following arguments :

I. The deed is void, and of no legal effect, being vitiated *in substantialibus*. It purports to have been executed on the twenty-fourth of April 1809; but the word *fourth* is clearly written upon an erasure. Such a vitiation is laid down by autho-

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rities, and recognised in practice, as fatal to the authenticity of any deed in which it occurs. According to Balfour*, “an instrument, charter, contract, obligation, or other writing, being rased in any substantial part, as in name or surname, subscription of notar or party, is not authentic, neither should make any faith, albeit the parties offer him to prove by the witnesses instrumentar, or *per comparationem literarum et instrumentorum, ejusdem notarii*, the said rasure to be restorit, and the said places to be filled by the notar himself.”

To the same effect is the authority of Stair, in his Institutes, b. 4. tit. 42. § 19; who in the same passage states, that the date as to time, as well as place, is *de substantialibus*.

Erskine, in his Institutes, b. 3. tit. 2. § 26, speaking of the case of erasure and interlineation of deeds, says, “the presumption is, that they have been made after the grantor and witnesses had signed the deed, since no person is presumed to sign a blotted or vitiated writing.”

In support of the same doctrine were quoted the following cases: *Edmiston v. Sym & Skeen*, July 1, 1796. Fac. Coll. N° 228. Mor. Dict. 1458; *Bryce v. Dickson*, Nov. 16, 1810, Fac. Coll. N° 6; *Merry v. Howie*, Feb. 6, 1800, Fac. Coll. App. N° 13. Mor. Dict. App. voce Writ, N° 3.

II. The deed in question is reducible on the ground of fraud, which appears from the mode in which the execution of the deed was procured, from the relative duty of the person by whom it was procured, and from its effect upon the interest of the parties.

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The deed in question was drawn out by Mr. John Dickson, junior, nephew of both parties, exclusively by the direction of the respondent. Its effect and import never were explained to the appellant by the writer; it was neither explained, nor any part of it read over at the time of signing it; and William Dickson was utterly ignorant of its effect, as even after its execution he considered himself proprietor of the estate.

The communication of the draft of the deed to Colonel Dickson was useless. The execution was required and advised by his brother, a lawyer, who had always acted as his confidential and legal adviser. This fact is admitted in various parts of the pleadings of the respondent, who seems to take credit for his exertions in that capacity. In fact, the respondent was the very person to whom he would have applied for advice, whether he should sign any such deed or not. Such was the character in which the respondent had, even by his own account, uniformly acted; and he cannot point out a single circumstance tending to show that he had renounced that character in this transaction. He cannot pretend that he ever suggested to William Dickson the propriety of resorting to any other professional person for advice as to the expediency of the deed. He took upon himself to advise his brother and client to execute a deed, by which, divesting himself of the fee of his own estate, he was made to convey the fee of that estate to his adviser, and to sacrifice to that adviser every right which the character of fiar could confer upon him. This is one of the cases where fraud is necessarily

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implied. It is not enough for the respondent to say, as in the case of parties bargaining with each other, that the deed was executed without compulsion, and that the grantor must be held to have satisfied himself of its prudence and necessity. His responsibility extends farther. In his character of adviser, he is bound to substantiate the soundness of the advice by which it was procured, on pain of incurring the penalties of fraud or breach of trust. It is upon this admitted principle, that various acts, which, between unconnected parties, would be considered perfectly indifferent, are held necessarily to imply fraud on the part of agents, and other confidential persons, who may have derived benefit from those acts at the expense of the person by whom they are trusted. In this case, the brother and professional adviser of the disponent has converted the influence which those united characters conferred upon him, into the means of obtaining the execution of a deed in his own favour, and injurious to the grantor.

It is argued, that the deed under reduction, so far from affording any presumption of fraud, was in itself perfectly rational and proper; that William Dickson had, by the various partial sales, incurred an irritancy under the entail 1776, and consequently exposed himself to a declaratur of contravention at the instance of the respondent, the next heir under that entail. Accordingly, the deed under reduction states in its narrative, as the consideration of granting it, that William Dickson had exposed himself to such declaratur of contravention; and that the respondent had agreed neither to object to the sales

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already made, nor to pursue any such action of declaratur. But the sales made by William Dickson were beyond the reach of any challenge at the instance of the respondent, and William Dickson was exposed to no risk of forfeiture at his instance. The validity of the sales, notwithstanding the entail 1776, was the subject of the action of declaratur in 1786, by William Dickson against the heirs of entail. It was decided in that case, that the debts contracted by William Dickson were good against the estate, and that the suspension offered by the purchaser, on the ground of the sale being challengeable, was unfounded. By that decision, the freedom of William Dickson from the penalties of contravention was established by necessary implication, otherwise his title to prosecute such an action could never have been sustained.

In the case of Stewart against Agnew*, decided in March 1784, upon the authority of which the respondent himself admits that the decision of 1786 rested, the inefficacy of an entail to warrant the infliction of the penalties of contravention against the entailer, though nominally subjected to the fetters, was unequivocally recognised. In that case the question at issue was, whether or not an entail imposing upon the grantor, as well as the heirs, restrictions against alienating and affecting with debt, fortified with the usual irritant and resolute clauses, was good against the creditors of the entailer? The Court found that it was not; and the *ratio decidendi*, as appears from the report, was the necessity, in order to exclude creditors, that the

* Mar. 3, 1784. Fac. Coll. No. 150, p. 235.

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right of the contravener should be resolvable, “ in
 “ which case the statute directs the next heir of
 “ tailzie to serve himself heir to him who died last
 “ infest in the fee, and did not contravene.” “ A pro-
 “ vision totally inconsistent with the predicament
 “ of an entailer imposing restraints upon himself.”
 In short, the debts of the entailer were found in
 that case good against the estate, upon the very
 ground that there could be no effectual resolute
 clause against the entailer ; or, in other words, no
 possibility of declaring a contravention against him,
 and voiding his right. Accordingly, this very rea-
 soning was adopted in the pleadings for William
 Dickson, in the action of 1786. In the information
 presented to the Court in that action, it is main-
 tained, on the part of William Dickson, that the
 statute 1685, in so far as it afforded a security
 against creditors, could not apply to the case of an
 entailer : it is argued*, that by that statute, “ in
 “ case of contravention, the next heir of tailzie is
 “ directed to serve himself heir to him who died
 “ last infest in the fee, which shows clearly that the
 “ right of the maker of the entail could not thereby
 “ be resolved, and yet no entail can be effectual
 “ against creditors, without a clause resolving the
 “ right of the person contravening.”

Supposing that William Dickson had incurred an
 irritancy, and exposed himself to an action of con-
 travention, the deed under reduction was itself in
 fact a gross act of contravention, as it effects a com-
 plete alteration of that order of succession which
 was secured in the former entail, by prohibitory,

* Information for pursuer in action of 1786.

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irritant and resolute clauses, as binding as those directed against the alienations of the estate. By the former entail, the destination of the lands is taken to various substitutes, and their heirs male; while, by the new deed, the destinations are taken to the respondent and various substitutes, and their heirs general; so that the respondent's daughters are now called to that succession which was formerly limited to his sons; and secondly, there is an alteration of the substitution, by introducing the daughter of Mr. David Dickson into the order of succession before Mr. Michael Dickson and the heirs male of his body, who stood before her in the former entail. The new deed, therefore, completely perverts the order of that succession in which it is its proposed object to secure the descent of the remaining estate; and thus the deed, so far from securing William Dickson against actions of contravention, necessarily exposed him to such an action at the instance of any heir of the first entail who chose to insist in it. It affords no answer to this, that the new deed under reduction does not stipulate for the whole heirs of entail, and only bears, that John Dickson, the respondent, had renounced his right of action against the grantor; for it is perfectly obvious that the pursuer would not have abandoned his right of property in the estate to purchase the forbearance of one heir, if he had been informed that the very deed containing that abandonment placed him at the mercy of many other persons having an equal title to vacate his right, and of persons who had not only a title, but a strong interest to take that step, as the

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interposition of the respondent's numerous daughters produced as effectual an exclusion of the succeeding substitutes from the benefit of the entail, as if the estate had been alienated altogether by William Dickson.

No professional person, unbiassed by interest, could have advised William Dickson to execute such a deed. Holding an estate in fee under an entail executed by himself, he had obtained, in a former proceeding, a decree against the heirs, finding the estate affectable by his debts; which decree appeared from the pleadings to have been pronounced on the very ground that there was no way of resolving his right. Could a professional person *bonâ fide* advise such proprietor to admit, without discussion, that he had incurred an irritancy by the sales taking place under that decree? Could he advise such a proprietor, by way of purchasing the forbearance of the first substitute, to execute a new entail, which instantly denuded him of the fee of the estate in favour of the first substitute, and at the same time infringed the order of succession of the former entail in favour of the daughters of that first substitute? When the first substitute, himself a professional person, and the legal adviser of the proprietor, is found to recommend and procure the execution of such a deed, the circumstances of the case afford, in legal contemplation, a presumption of fraud, fully sufficient to invalidate the transaction.

The *bonâ fides* of the respondent, founded upon his alleged conviction of William Dickson's liability to a declaratur of contravention, his repeated assertions that that liability was unquestionable, are con-

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tradicted by the tenor of the deed under reduction, and the proceedings which have followed upon it. If the respondent held it to be clear, that William Dickson was just as liable to the fetters of the entail executed by himself, as any of the other heirs,—how came the respondent to accept or act upon the deed under reduction? One of the clauses of that first entail provides, “that it shall not be lawful, “nor in the power of the said William Dickson, or “any of the heirs aforesaid, to alter the said tailzie “and the order of succession thereby established;” and this prohibition is fortified by resolute clauses equally extensive. If the respondent, therefore, conceived it to be absurd to entertain a doubt of the efficacy of the prohibitions of that entail against the acts of William Dickson, the grantor, how did he accept as a valid and effectual deed, the deed now under reduction, which, by altering the order of succession, was just as gross an act of contravention as the former sales by William Dickson? But the respondent not only accepted the deed under reduction, but took infestment upon it, and actually holds the entailed estate of Kilbucho, as fiar under this new title. One of the clauses of the former entail, which the respondent affects now to consider as binding, is in the following terms “Also that the said William Dickson, and the whole “heirs of tailzie aforesaid, shall be obliged to possess “and enjoy the lands and estate thereby disposed, “in virtue of the tailzie before mentioned, and of “these presents and infestments to follow thereon, “and by no other right or title whatsoever.” So that at once the respondent must admit, that

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he himself has incurred an irritancy, and forfeited all right to the estate, unless he assumes that very fact which he elsewhere declares to be absurd, that William Dickson was not bound by the limitations of his own entail, and had power to execute the deed; in which case he must *à fortiori* have had power to sell for payment of debt, without incurring a forfeiture.

The single ground upon which the respondent can maintain the validity of the deed under reduction is at variance with the truth of the narrative on which it proceeds. If he holds that the deed is good for any thing, he virtually admits that the former entail had no effect against William Dickson the grantor, that he had a right to alter the order of succession, and *à fortiori* the right to sell for the discharge of his debts; or in other words, the respondent declares, by his conduct, that he knew the narrative of the deed to be unfounded. The respondent, in answer to this alleges*, that “when the deed in question was agreed upon, the parties had a full and deliberate conversation upon this point, and concurred in disapproving of every entail upon heirs-male, which is always absurd, and generally, at one time or other, attended with the worst of consequences. Though, therefore, the entail in 1776 was on heirs male, yet, as the great objects of that entail were now defeated, it appeared unnecessary, and even foolish, to adopt one of the most unreasonable things which it contained. Accordingly, with the pursuer’s fullest approbation, and by his own direction, the

* Information for Defender, p. 37.

“entail was drawn in its present form, which, it is
“believed, is followed in all modern entails, which
“are not fettered by the restrictions of the old
“investitures.”

William Dickson denied that any such conversation had taken place; but if true and correctly stated, that conversation supports the argument of the appellants. The respondent's defence of the prudence and propriety of the line of descent adopted in the new entail, is an evasion of that argument. The appellants refer to that alteration, not merely as an alteration in the respondent's favour, but as showing that the respondent knew to be unfounded that assertion which he assigned in the narrative as the ground for William Dickson's executing any deed at all. They refer to it, as showing that the respondent did not believe William Dickson to be bound by the fetters of the first entail, otherwise he would not have admitted an alteration of the order of succession, which invalidated the second entail, and endangered the right of the respondent himself and all the persons who were to take under it. The appellants do not complain of the respondent's speculative opinions upon the absurdity of limitations to “heirs male;” but they maintain, as proof of fraud, that when the respondent was canvassing (as he admits, in the above passage, that he did,) the expediency of a new line of descent, he concealed from William Dickson that important fact, which he must have known and believed at the time, that upon the very same grounds which authorized such alteration, William Dickson was not liable to a declaratur of contravention, and therefore was not.

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bound, either in necessity or propriety, to grant any new deed, divesting himself of the fee of the estate.

This conversation, as described by the respondent, proves that William Dickson was misled as to the necessity of the new deed; that he was kept in ignorance of its real effect upon his situation; as upon the very grounds that he was authorized to alter the substitution, he must have been enabled to retain the fee without challenge, or dread of declaratur of contravention. If the great object of the entail of 1776 were so much defeated as to warrant a departure from its line of descent, why was William Dickson called upon to execute the new deed at all? And how can the respondent now, justifying that alteration by the authority of "modern entails, not fettered by the restrictions of the old investitures," plead *bonâ fides*, when he assigns in the narrative, as the reason for demanding from William Dickson the fee of his estate, that the restrictions of the investiture were in full force? From these circumstances it is clear that the respondent knew to be unfounded those pretended claims, which he assigns in the narrative as considerations for the execution of the deed. The transaction comes within the description given in our law books of those reducible on the head of circumvention. Stair, b. i. tit. 9. § 9; Bankton, vol. i. p. 258. § 62; Erskine, b. iii. tit. i. § 16.

It was a deed injurious to the grantor, and procured from him by the grantee, his brother and legal adviser, either by the concealment of its real object, or upon pretences which, it appears from the

circumstance of the case, the respondent, the grantee, must be presumed to have known, and did actually know to be unfounded.

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On the part of the Respondents,

The first argument pleaded in the name of William Dickson before Lord Balgray was, that the tailzie 1776 was still an obligatory deed, which prevented him from executing any new entail; but this was evidently inconsistent with the very basis of the pursuer's plea: and, accordingly, in Lord Balgray's first interlocutor, his Lordship, in "respect that the pursuer asserted and maintained that he was unlimited fiar of the estate of Kilbucho, and had the right of disposing thereof as he thought proper, finds, that so far as he is concerned, he had power to execute the deed of entail, dated 24th April 1809." But, further, the right of the substitutes under the former deed, is now most effectually put an end to, in so far as founded upon the first entail; for it is evident, that if the last entail were set aside, then the whole estate was *instanter* alienated from the pursuer himself, and from every other branch of the family. It follows of necessary consequence, that none of the heirs of entail can have any right, because they have no interest, to challenge the present entail, independent of which there will remain no subject of any entail whatever, nor of any succession.

Pursuer's argument on the entail 1776.

The question about William Dickson's powers being thus over-ruled, the appellants then had recourse to an allegation of fraud, which is also specifically repelled in Lord Balgray's second interlocutor.

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It is said that the deed itself contained intrinsic evidence of fraud, particularly in two respects : first, because it reduced the right of William Dickson to that “of a mere life-rent ;” and, in the next place, because “it rendered the respondent himself the unlimited fiar of the estate, by omitting “to impose the prohibition against altering the order “of succession on him as the institute.”

The latter objection is answered by reference to the entail, in which there is the following clause : “And with and under this restriction and limitation “also, that the said John Dickson, and the other “heirs succeeding to the said land and estate before “disponed, are and shall be limited and restrained “from doing or committing any acts, civil or criminal, and granting any deed, directly or indirectly, in any sort, whereby the lands and estate “foresaid may be affected, adjudged, forfeited, or “be any manner of way evicted from the heirs of “tailzie, or the said order of succession be prejudged “or changed.”

This clause, with all the other prohibitions and restrictions, is afterwards fortified by an irritant and resolute clause, in the following terms : “And “with and under this irritancy, as it is hereby conditioned and provided, that in case the said John “Dickson, or any of the heirs succeeding to the “lands and estate before disponed, shall contravene “the other before written conditions, provisions, restrictions, and limitations herein contained, or any “of them ; that is, shall fail or neglect to obey or “perform the said other limitations or restrictions, “or any of them, then, and in either of these cases,

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“ the said John Dickson, or other person or persons
 “ so contravening, shall, for themselves, amit, lose,
 “ and forfeit all right, title, and interest, which they
 “ have to the lands and estate before disponed, and
 “ such right shall become void and extinct.”

The other prohibitory clause is in these words :
 “ And that it shall not be lawful to, nor in the power
 “ of me, or any of the heirs aforesaid, to alter the
 “ present tailzie, and the order of succession there-
 “ by established, or to grant or do any act or deed
 “ which may import or infer any innovation or
 “ change thereof, directly or indirectly, in any sort.”

It might no doubt be said, that the respondent is not an heir, but an institute, and that, therefore, this clause could not affect him ; but the whole of this critical argument is obviated, by attending to the qualification added to the word “ heirs.” The heirs here mentioned are the heirs aforesaid ; and, upon looking back to the preceding clauses, it appears, that the respondent John Dickson is expressly stated and considered as an heir. Thus, immediately after the dispositive clause, the prohibitory clauses are introduced as follows :

“ But with and under the conditions, provisions,
 “ restrictions, limitations, clauses prohibitory, irri-
 “ tant and resolute declarations and reservations
 “ after written, but with and under these conditions
 “ always, that the said John Dickson, and the other
 “ heirs succeeding to the said lands and estate, shall
 “ be obliged to use and bear, and constantly retain,
 “ in all time hereafter, the surname of Dickson, title
 “ and designation of Dickson of Kilbucho ; and with
 “ and under this condition, that I, during my life-

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“ time, and thereafter the other heirs of tailzie
“ aforesaid, shall be obliged to pay annually the
“ feu-duties, cess, stipend, and other public bur-
“ dens and taxations to which the said lands and
“ estate are liable.”

When these clauses, in which it is unquestionable that John Dickson is described as one of the heirs, are connected with the words in the subsequent clause, “ the heirs aforesaid,” it is perfectly clear that the words “ heirs aforesaid” include John Dickson as well as the other heirs in the previous clause. In every view, therefore, the argument, on which so much stress has been laid, proceeds upon a mistake in point of fact.

As to the argument for the appellants, concerning the restriction of W. Dickson’s right to a life-rent :

In the memorial, which was the first paper for William Dickson, the following passage occurs:—
“ Although he admits the deed of entail, executed
“ by him in the year 1809, to have been executed
“ by him voluntarily, without any kind of compul-
“ sion, but merely at the request of, and to give
“ satisfaction to his brothers and other near relations,
“ yet he had not the most distant conception that
“ the deed so executed by him was of the import
“ and tendency, and was followed with the legal
“ consequences which now, upon its being examined
“ by persons of legal knowledge, turns out to be the
“ case. He did not intend to deprive himself of
“ those powers over his own property which belonged
“ to him by law.”

This passage consists of two different points, viz. : first, an admission as to the execution and pur-

poses of the deed ; and, secondly, an alleged misunderstanding of its import.

The first of these admits that the deed was voluntarily executed by the pursuer, in order to satisfy his brothers, and other near relations. But it may be asked, what satisfaction could it possibly give, if it did not restrain William Dickson from contracting debts, and selling the estate ? And how could this be done, except by restricting him to a right of life-rent ? By the entail of 1776, every restriction which was at that time thought necessary, or even possible, was imposed upon William Dickson, to prevent him from affecting or alienating the estate. And, according to the ideas which were then entertained of the law by the learned arbiters, and by every person concerned, that deed was completely effectual for the purpose. But after the decision in the case of Sheuchan,* which came to be applied to the present case, it was understood that the only way of securing the estate against William Dickson's debts was by restricting him to a life-rent. This, therefore, was necessarily the object of the deed 1809 ; and it was impossible that any thing less could give the smallest satisfaction to the relations of the family.

With respect to the second part of the paragraph, that W. Dickson did not know the import or the tendency of the deed which he executed, and that he did not mean at all to deprive himself of his powers over his property, no statement can be more inadmissible or absurd. It is said that he did not know the meaning or consequences of the deed, till it was examined by persons of legal knowledge ; but,

* Post. pp. 340, 341.

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he could not be ignorant of its meaning ; for the very first sentence of the deed is, that it was granted “for the purpose of preventing any further sales of what still remains of the estate.” Surely these words are too plain to require the examination by persons of legal knowledge to make the meaning understood.

It was further said, that the narrative of the deed itself was false, and that the respondent knew it to be so ; because, being bred to the law, he could not suppose that W. Dickson, on account of any contravention of the entail 1776, could be challenged by a declaratur of irritancy. But this argument refutes itself. If the respondent had thought the narrative of the deed false, or if he had not, on the contrary, been fully convinced of the truth and justice of that narrative, he could not have agreed to let it remain as it is, because he must, in that case, have foreseen that it might afterwards give a ground of challenge.

The entail, though ineffectual against creditors, was perfectly valid and complete as to the obligation upon William Dickson, so that his contravening the prohibitions which were fenced by regular, irritant, and resolute clauses, necessarily laid him open to the challenge of any heir of entail who chose to bring an action of declaratur for that purpose.

Mr. Cunningham, the purchaser in 1786, was not satisfied with the decree of the Court, even to the extent of finding the estate affectable by the debts ; and therefore refused to pay the price till the respondent concurred in granting the conveyance.

The decision in the case of Vans Agnew of Sheuchan in 1784, upon which alone, as a precedent, the deci-

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sion in the case of Kilbucho in 1786 proceeded, has been under appeal, and is remitted to the Court of Session, where it is again the subject of discussion; so that it is far from being improbable, that the decision will be reversed*. At all events, the present case is independent of whatever may be the ultimate decision in that or any other, where the question is upon the rigid statutory effect of entails, in a question with creditors, and not upon the plain and equitable interpretation of the meaning of the deed, as to the parties themselves. If there could now be a doubt as to the personal obligations of the deed 1776, it would not follow that a transaction which took place where different ideas were entertained, is to be considered as unreasonable and illegal.

The arrangement upon which the present entail proceeded was not only a fair and rational, but even a favourable, transaction to William Dickson. If the case had been stated to any man of business, or of common prudence, in the year 1809, and the question put, whether it would be advisable for the General to run the risk of an action of declaratur of irritancy, by which he might instantly forfeit his right to the estate, as the irritancy was not of that nature which could possibly be purged? Or if he should execute a deed for securing the remaining fragment of the estate from being alienated, reserving to himself an entire life-rent, no person would hesitate to say that the last alternative should be adopted.

Supposing, for the sake of argument, that the

* It has been since reversed.

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matter was still a point upon which there might be a doubt, yet even this hypothetical view, which is the strongest that can be put for the appellants argument, would by no means serve their purpose. A *res dubia* between any parties, and especially between parties so nearly connected, is the proper subject of a transaction which is well known to be one of the most favoured contracts in the law of Scotland. Lord Stair says, “Transactions may be interposed
“ in the matter of all contracts; and it is itself a
“ most important contract, whereby all pleas and con-
“ troversies may be prevented or terminated; for
“ thereby the parties transacting quit some part of
“ what they claim, to redeem the vexation and un-
“ certain event of pleas. It is, therefore, the com-
“ mon interest, that transactions should be firmly
“ and inviolably observed, which, both by the Ro-
“ man law and our customs, have been held as
“ sacred and necessary for mens quiet and peace.”

Stair, b. 1.
t. 17, § 2.

The respondent certainly never refused his advice to his brother when it was asked; and he may, without assuming any merit to himself, say, that his brother never had occasion to repent his following that advice. But, at the same time, the respondent did in no case pretend to dictate or direct his brother; and, in the present case, he was so far from stating what he did as a matter of advice, that he plainly and directly stated it as a matter of right, in which he was acting not as an adviser, but as a party.

It is argued, that the deed of entail 1809, instead of saving from a declaratur of irritancy, was itself a contravention which created an additional danger. But, in the first place, if the objection had any weight, it

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would be entirely obviated by what William Dickson had done. By the debts he had contracted, and the sale he had made for payment of them, the subject would be completely swept away, in case the present entail were reduced, so that there would remain nothing to be lost by an irritancy upon the one side, or to be gained by a declaratur upon the other. It was therefore incompetent for any heir of entail to pursue such an action. A party having no interest can have no title.

In the second place, it is evident that after the contravention already incurred, by selling so large a part of the estate, the irritancy became altogether unpurgeable, and of course no new irritancy, supposing such existed, could in this respect make the matter either better or worse with regard to William Dickson.

In the third place, it was observed, that the case was mistated by the appellants, when they supposed that the respondent undertook, for the heirs of entail in general, that they would not pursue an irritancy. The preamble of the deed expressly shows the contrary. It refers only to the declaratur of contravention and irritancy, "at the instance of the said John Dickson, and that the said John Dickson has, for my accommodation, agreed not to object," &c. The compromise was between William Dickson and the respondent alone; and though any challenge by remoter heirs was improbable, the respondent could not make, and therefore did not make, any engagement upon their part.

The deed of entail, made in 1776 in implement of the decree arbitral, was the only title on

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which William Dickson possessed the estate of Kilbucko ; and every condition which it contained was binding upon him. If the action of reduction, at the instance of David Dickson, for setting aside the previous trust-deed of 1767, had been successful, then he would have become unlimited fiar of the estate, and William would have had no right, excepting what David might please to give him, under the fetters of a strict entail. If, on the other hand, the action of reduction had been unsuccessful, then both David and William would have become mere annuitants for 100*l.* each per annum. It was in consequence, therefore, of the arrangement under the direction of the arbiters, and by it alone, that David got the life-rent of the estate, burdened with 250*l.* per annum to William, and that William got possession of the whole estate after his father's death. At the same time, the most essential part of that arrangement was the preservation of the estate by the entail then executed ; and it was only upon the faith of that entail being completely effectual, that the trustees and the heirs substitute under the trust-deed consented to the arrangement taking place. The entail is accordingly ingrossed in the strongest terms that are known in the law or practice of Scotland ; and although, in the amicable suit in 1786, it was found that creditors were not bound by any entail, in such circumstances, yet it was always held, that the maker of the deed himself was bound, by every legal as well as moral obligation, to observe it ; so that the prohibitory, irritant and resolute clauses, which are all expressly directed against him, must, upon every contravention, by contracting debts, selling

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part of the lands, or otherwise, be the ground of declaring an irritancy, or forfeiture of his right, at the instance of the immediate, or even the more remote substitute under the entail.

Considering the situation in which matters stood at the date of the transaction now in question, there are the strongest grounds for the finding in Lord Balgray's interlocutor, adopted by the unanimous judgment of the Court, that "the execution of the deed of entail 1809, was, under all circumstances, a measure highly proper, prudent and expedient, on the part of the pursuer." The repeated sales by which the estate had been dilapidated, were contraventions of the prohibitory, irritant and resolute clauses of the entail 1776; which are declared to be binding upon William Dickson, as much as upon all the heirs of entail. If this were not the case, the whole proceedings under the plan, suggested and carried into effect by the arbiters, would have been a mere delusion for misleading and disappointing the trustees of John Dickson, and all the members of the family who were interested in the succession. It follows, therefore, of necessary consequence, that when a further sale was proposed in the year 1809, the heirs of entail, and particularly the respondent, as the first of them, might not only have objected to that sale, but, by a declaratur of irritancy, have turned William Dickson out of possession. It was therefore not only a wise and prudent, but a most favourable, transaction for William Dickson; because by it, not only the sale to Mr. Forbes was allowed to be completed, and the price thereof applied in extinction of his debts, but

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the right of challenging or disturbing his possession given up during his lifetime. Supposing the matter to have been doubtful, it was a proper subject for a transaction between the parties; and transactions as being the most useful, have always been considered as constituting the most sacred and inviolable obligations known in the law. Stair's Institutes, book i. tit. 17. § 2.

The interlocutors appealed from, find that it is admitted by the pursuer, that he voluntarily executed the entail in question; and this is supported by what appears upon the record. For in the first memorial given in to the Lord Ordinary in name of the pursuer, his words are: "He admits the deed of entail executed by him in 1809, to have been executed by him voluntarily, without any kind of compulsion, but merely at the request of and to give satisfaction to his brothers and other near relations;" which admission, when joined to the foundation of the pursuer's plea, that he had full power to execute the deed, corroborates the validity of the transaction.

The mode in which the transaction between the parties was concluded, was that which was suggested by the Court, in their opinion upon the action of declaratur in 1786. Though the Court then found, that the first entail, in 1776 could not be effectual against creditors, yet they were clear that the intention of the arbiters, and of all parties concerned, was to prevent the estate being affected in any way whatever; and that in order to accomplish the object in view, the right of William Dickson, as well as that of his father, ought to have been

restricted to a life-rent. This they held to be the only effectual mode of restraint, while the party was allowed to continue in the right of the estate, and therefore there was but one of two alternatives; either immediately declaring an irritancy, or now restricting the pursuer's right in the manner which it ought to have been from the beginning, to a life-rent. This restriction, as being the most favourable as well as the most amicable mode of adjusting matters, was adopted, and the necessity as well as propriety of the plan was verified by what happened within a few years, and which gave occasion to the attempt then made for disposing of the last fragment of the property.

The allegation of fraud is unfounded: William Dickson possessed an acute natural understanding, had received a liberal education, and been originally educated to the profession of the law as a writer. It is therefore absurd to suppose that he did not understand the meaning of the deed, till it was examined by persons of legal knowledge. The inductive clause in the preamble of the deed, bears, that it was "for the purpose of preventing any further sales of what still remains of the estate:" Could William Dickson, reading such a preamble, be ignorant that this deed deprived him of the absolute power of disposing of the estate?

For the appellants:—The Solicitor General, (*Sir Robert Gifford*), and *Mr. J. A. Murray*.

For the respondents:—*Mr. Wetherell*, and *Mr. Charles Warren*.

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In the course of the argument, the *Lord Chancellor*, upon the citation of authorities from the civil law, recognised as the law of Scotland by Stair in his *Institutes*, (*ante*, p. 342.) *De Transactione et Metu litis*, observed, that according to all law, and upon principle, where there is fairly a doubt as to the rights of parties, and an agreement without fraud, it is binding; that in case of doubt as to legitimacy, as in *Cann v. Cann**, an agreement between claimants to divide the property would be valid. It might indeed, in the case under appeal, be a question, whether the parties dealt with equal knowledge of the subject.

The case of *Gordon v. Gordon* † (he said) stood on a different ground, because there was a suppression of a material fact by one of the parties; viz. the private marriage of the father, which the defendant knew, and called a mere ceremony. But the force of the argument in that case was, that the fact, whatever its character might have been, should have been communicated at the time of the agreement. Such communication was held to be essen-

* 1 P. W. 723.

† The bill prayed that articles of agreement executed by the plaintiff in favour of his younger brother, the defendant, *J. G.* who disputed the legitimacy of the plaintiff, might be cancelled on the ground of fraud. The original hearing was at the Rolls on the 17th December 1816, when an issue was directed upon the question of legitimacy. The re-hearing was at the Rolls on the 9th December 1817. This case will probably be further noticed in the Appendix to the present volume. There is a report (1 Swanston, 166.) of a collateral point decided in the case, but it is not otherwise reported.

tial to the fairness and validity of the transaction between brothers, on a question of rights depending upon legitimacy *.

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This case was argued in the year 1819; and, having stood over from time to time for consideration, was affirmed in the year 1820, with no other remark beyond those made upon the hearing of the appeal, than that the *Lord Chancellor* had considered the case frequently, and with anxious attention, and upon the whole could not advise the House to reverse the judgment in the court below.

Judgment affirmed.

19 July, 1820.

* Upon the subject of transactions of compromise, see in addition to the authorities above cited, *Frank v. Frank*, 1 Cases in Chanc. 85; *Stapilton v. Stapilton*, 1 Atk. 2; *Pullen v. Ready*, 2 Atk. 590; *Cory v. Cory*, 1 Vesey, sen. 19; *Penn v. Lord Baltimore*, Id. 443; *Taylour v. Rochford*, 2 Vesey, sen. 284; *Stockley v. Stockley*, 1 Ves. & Bea. 23.
