[18*th June* 1833.]

No. 26. DAME HELEN MAITLAND GIBSON and Husband, Appellants.—*Attorney General* (*Horne*)—*Lord Advocate* (*Jeffrey*).

A. CHARLES MAITLAND and others, Respondents.—*Tinney—Dr. Lushington.*

Entail—Statute.—An heiress of entail under a canal statute obtained 120*l.* per acre for land used for the canal, and a further sum for her consent to a new line deviating from a former one, and which approached nearer to the mansion house than the original one—Held (affirming the judgment of the Court below) that she was bound to re-invest the sum obtained for such consent, for behoof of the heirs of entail.

2D DIVISION.

Lord Medwyn.

THE estate of Clifton Hall was possessed by the appellant under the fetters of a strict entail executed by her ancestor, Alexander Gibson, in April 1786, and recorded in the register of tailzies in May 1823. By an act of parliament passed in the fifty-seventh year of George III. a corporate body was established, under the name of "The Edinburgh and Glasgow Union Canal "Company," for the purpose of forming a canal from the Lothian Road, near Edinburgh, to join the Forth and Clyde navigation near Falkirk. This company was invested with powers to purchase whatever land was necessary for the navigation, on paying the value

thereof, and indemnifying the proprietors for any damage or inconvenience thereby sustained. The act also provided, that the value of the land used and the damage incurred might be settled by private arrangement between the company and the proprietors; and in case the parties could not agree, it was to be estimated by the verdict of a jury.

The line of the Union Canal, as authorized by the act, passed through the estate of Clifton Hall, but at a considerable distance from the mansion house and pleasure grounds; but before commencing their operations the company discovered that a much more advantageous line lay nearer to the mansion house of Clifton Hall. Accordingly various communications respecting this new line took place between the appellant and the canal company; and by a deed of agreement, dated the 18th October 1818, the company agreed to pay to the appellant 7,000*l.* for her consent to the deviation, besides the value of the ground, and in 1819 the company obtained a second act of parliament to sanction this deviation. The company required rather more than nine acres, which, at 120*l.* per Scots acre, amounted to 1,181*l.* 10*s.* 5*d.* This sum the appellant invested for the benefit of the heirs of entail in terms of the statute, but she refused to apply the 7,000*l.* in a similar way. The respondents, as heirs of entail, therefore brought an action of declarator and payment, concluding that the appellant was bound to re-invest or consign the sum of 7,000*l.*, in terms of the act, under deduction of a fair compensation for the temporary damage sustained during the operations of the canal company. After hearing parties, Lord Medwyn, on the 16th December 1830, pronounced this interlocutor:—" The Lord Ordinary

No. 26.

18th *June* 1833.

MAITLAND GIBSON *v.* MAITLAND and others.

" having resumed consideration of the debate, and " advised the process, Finds, that besides the sum of " 1,181*l.* 10*s.* 5*d.*, the agreed on price of the land occu- " pied by the Union Canal in passing through the estate " of Clifton Hall, the defender must lay out and invest, for " the benefit of the heirs of tailzie of the said estate, so " much of the farther sum of 7,000*l.*, paid by the Union " Canal Company to the defenders, as shall remain after " making a fair compensation for the temporary loss or " damage sustained by them during the progress of " making and completing the works therewith connected; " and appoints the cause to be called, in order to " determine in what manner the amount of said com- " pensation is to be ascertained." " *Note.*—It appears to " the Lord Ordinary, that whatever sum is obtained by " a proprietor possessing under a strict entail from the " commissioners under a canal act, for liberty to pass " through the said estate, must be secured for the " benefit of the heirs of entail, except in so far as it is " to cover temporary damage by loss of crops, destruc- " tion of fences, injury to embellishments, &c.; but " here it is said that the value of the land has been " fixed at 120*l.* per acre, and that, over and above this, " the sum of 7,000*l.* was paid for the consent of the " heir in possession to a deviation in the original line " of the canal, and that this consent might have been " refused, or it might have been given gratuitously, and " therefore that it is jus tertii to the pursuers that what " might have been given has been sold. It is true the " consent might have been withheld, and it might have " been given gratuitously. These would have been " reckoned within the powers of the heir, and in the " bonâ fide exercise of his administration of the estate.

" But since he has not done so, can he acquire a " pecuniary benefit in virtue of the character of pro- " prietor of the estate, without communicating it to the " heirs of entail? The consent which he has given " was as an heir of entail, and as being one of a series " of heirs equally, though successively, interested in the " estate; and in consenting to the alienation of part of " it, he cannot stipulate for himself any advantage over " the succeeding heirs: any other rule would give too " much room for improper bartering of the rights of " the future heirs. Besides, the contract in the present " case distinctly states in the narrative, that the new " line 'would injure, in a considerable degree, the privacy " of the said manor place and pleasure ground thereto " adjoining;' and yet the heir in possession claims " right to put into her own pocket the sum which has " been paid for permanently injuring the privacy, and, " of course, the comfort, of this as a residence for all " the subsequent heirs."

To this interlocutor the Court adhered on the 15th February 1831*, whereupon the present appeal was brought.

Appellants.—The respondents, as heirs substitute of entail, have no right or interest beyond seeing that a fair equivalent is obtained for the land occupied by the canal, and that such equivalent is settled and secured for their behoof; and, in particular, they have no right or interest in the price or consideration which may have been given to the appellants to induce their consent to an alteration of the original line, which could not have

* 9 S. & D., 443.

No. 26.

18th *June* 1833.

MAITLAND
v.
MAITLAND
and others.

been otherwise carried through. The manner of ascertaining the value of the land occupied by the canal, or, in other words, the equivalent to be set aside for the heirs substitute of entail, was authorized by the statute, and unexceptionable in itself, and secured them full and adequate compensation. In any circumstances the respondents, if dissatisfied with the equivalent, as ascertained by the voluntary adjustment, are not entitled to the remedy obtained from the Lord Ordinary, but merely to have it still referred to a jury, whether the consideration stipulated by the agreement as the equivalent for the land was in itself adequate or not, so as to give them restitution against any loss or damage which on that ground they may be able to substantiate.

Respondents.—The balance remaining of the sum of 7,000*l.* agreed to be paid by the canal company to the appellants, after deducting what may be requisite to compensate the temporary loss or damage sustained by the appellant, as the heir in possession of the estate, by the operations of the company, must be held to have been truly given for the land taken possession of by the company, or for permanent damage done to the estate by the canal being carried through it in the line then proposed, and finally adopted; and as such it belongs to the heirs of entail in terms of the seventy-fifth section of the act, and if not falling under the precise words of the act,—still the balance being the price of an advantage or accommodation belonging to the entailed property and not to the heir in possession, must, on general principle, be held as forming part of the entailed estate, and ought to be invested for the benefit of the heirs of entail in terms of the conclusions of the libel.

No. 26.

18*th June* 1833.

MAITLAND GIBSON *v.* MAITLAND and others.

LORD CHANCELLOR.—My Lords, I confess that I never had any doubt upon the subject of this case during any part of the argument, but I thought it our duty to hear the learned counsel for the appellants; and in order to go into the question fully, I advised your Lordships yesterday to hear the case throughout. It did appear, from some matters thrown out on the part of the learned Judges before whom this case was brought,—as mentioned by the Lord Advocate,—that there was some doubt whether or not the question had been raised before their Lordships in the way in which it was argued here, and in the way in which it was argued before the Lord Ordinary, and in which the Lord Ordinary evidently considered it as settled. I myself entirely agree in the judgment which has been pronounced. I think it is not possible now to set it aside, and I think it is too late to take the case to any further inquiry. On this ground I would move your Lordships that the interlocutors be affirmed.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the sum of 200*l.* for their costs in respect of the said appeal.

MONCRIEFF, WEBSTER, & THOMSON—SPOTTISWOODE & ROBERTSON, Solicitors.