[13*th March* 1838.]

ARCHIBALD HILL RENNIE, Esq., Appellant.—*Sir William Follett—A. M'Neill.*

DONALD HORNE, Esq., Respondent.—*Burge—Maconochie.*

Entail—Sale.—Held (reversing the judgment of the Court of Session), that where there was a prohibition in an entail against sales, and in the irritant and resolutive clauses there was a general declaration followed by a particular enumeration of the acts struck at, without specifying sales, the entail was not effectual to prevent a sale of the estate.

Question, Whether it be a fatal objection to an entail, that the prohibitory, irritant, and resolutive clauses in an entail are not recited in the procuratory of resignation and precept of sasine, as well as in the body of the deed itself?

2D DIVISION.
Lord Jeffrey.

IN the year 1780, the Reverend Archibald Rennie, minister of the gospel at Muckhart, executed a deed of entail of the lands of Balliliesk, in favour of himself in liferent, and, after his decease, to "Archibald Hill, "only lawful son procreat betwixt Charles Hill, sur-"geon, at Manse of Muckhart, my nephew, and "Katharine Kelty, his spouse, in fee, and the heirs "whatsoever of his body;" whom failing, a series of substitutes. "With this condition always, that the said "Archibald Hill, and the other heirs aforesaid, suc-"ceeding to the lands and others foresaid in virtue "hereof, shall be holden and obliged to assume, use,

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" and bear the sirname of Rennie in all time here-
" after; and in case the succession of the said lands
" and estate shall at any time hereafter devolve upon
" heirs female, then and in that case the said heirs
" female, and the heirs descending of their bodies, shall
" be obliged to assume and constantly use and bear
" the sirname of Rennie; and if the heir female be
" unmarried at the time of her succession, she shall be
" obliged to marry a gentleman of the sirname of
" Rennie, at least one who shall assume and constantly
" use and bear the sirname of Rennie; and if married
" at the time to a husband of any other sirname, that
" immediately thereafter her said husband shall be
" holden and obliged to assume and constantly use and
" bear the sirname of Rennie aforesaid; and with this
" condition also, that the said Archibald Hill, and the
" other heirs of tailzie and provision aforesaid, shall
" likewise be obliged to possess and enjoy the lands
" and estate before mentioned, by virtue of this present
" settlement only, and by no other title whatsoever,
" and to insert verbatim the order and course of suc-
" cession, and hail conditions and declarations hereafter
" contained in the charters and infeftments to follow
" hereupon, and in all the subsequent conveyances,
" charters, retours, and infeftments of the foresaid lands
" and estate: And with this limitation and restriction,
" that it shall not be lawful to nor in the power of the
" said Archibald Hill, nor any others of the heirs of
" tailzie aforesaid, to alter, innovate, or infringe this
" present tailzie, and the order and course of succes-
" sion before mentioned, or to sell, alienate, or burden
" the lands and others above disponed, or any part
" thereof, or contract debts, or grant bond, or any

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" other right or security whatsoever which may any-
" ways burden or affect the said lands and estate, or
" do any other fact or deed, civil or criminal, directly
" or indirectly, whereby the said estate, or any part
" thereof, may be adjudged, confiscated, forfeited, or
" any ways evicted, in prejudice of the succeeding heirs
" of tailzie; and with this limitation also, that it shall
" not be in the power of the said Archibald Hill, or
" the other heirs of tailzie aforesaid, to set tacks of
" the said estate, or any part thereof, for longer space
" than nineteen years, nor the park in which the prin-
" cipal house and office-houses stand, nor the park lying
" immediately on the west side thereof, neither the said
" principal house and offices, longer than the lifetime
" of the setter, without any diminution of the rental,
" except in the case of evident necessity, in which case
" the said tacks are to be set by public roup, after
" intimation thereof three several Sundays preceding
" the roup at the parish church where the lands lie;
" and in case the said Archibald Hill, or any of the
" heirs of tailzie before mentioned, shall contravene or
" fail in performing any part of the premises, particu-
" larly by neglecting to assume, use, and bear the
" sirname of Rennie, or by possessing the foresaid
" estate in virtue of any other title than the present
" tailzie, or by omitting to engross in the whole rights,
" charters, retours, and infeftments, the order of suc-
" cession, and whole conditions, provisions, and declar-
" ations herein contained, or by altering the order and
" course of succession above set down, or if they or
" any of them shall contract debt, or do any deed
" whereby the said estate or any part thereof may be
" burdened, evicted, confiscated, or forfeited, or shall

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" set tacks otherways than as before directed, or shall " contravene or fail in any part of the premises, then " not only all such acts and deeds of contravention, " and debts so to be contracted, shall be and are hereby " declared void and null to all intents and purposes, " in so far as the same may affect, burden, evict, or " forfeit the said lands and estate, but also the con- " travener, for himself or herself only, shall ipso facto " amit, loose, and forfeit all right, title, and interest in " or to the said lands and estate, and the same shall " become void and extinct, and the said estate shall " devolve, accresce, and belong to the next heir of tailzie " appointed to succeed, although descended of the con- " travener's body, in the same manner as if the con- " travener were naturally dead, and to establish his or " her right in any legal way, free from all debts and " deeds of the contravener; and with this condition " also, that the said Archibald Hill, and the other heirs " of tailzie aforesaid, shall timeously satisfy and pay " the feu and other duties payable forth of the said " estate, and all other real and public burdens affecting " the same, and shall obtain themselves timeously " entered, infeft, and seised therein, and shall not suffer " any legal diligence to pass against the said estate, for " the feu or non-entry duties or any other duties or " legal or public burdens affecting the same, or for any " debts or obligations that may be owing by me or " my predecessors, or any other person whatsoever; " and in case he or she fail so to do, they shall forfeit " and amit all right and title to the said estate, and " the same shall devolve to the next heir of tailzie, as " if the contravener was naturally dead; and with this " condition and limitation also, that in case the said

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" Archibald Hill, or any of the other heirs of tailzie " before mentioned, shall be convicted or attainted of " high treason, then and in that case they shall ipso " facto forfeit and amit all right and title to the said " estate, and the same shall immediately thereafter de- " volve upon and appertain and belong to the next " heir of tailzie capable to take and enjoy the said " estate, in the same manner as if the person so con- " victed or attainted had been naturally dead at or " before committing such treason."

There then followed provisions as to a nearer heir coming into existence,—as to jointures to widows, &c., a power to revoke,—and a reservation of the granter's life-rent, after which there was a procuratory of resignation in these terms: " I hereby make, constitute, and " appoint each of you, conjointly and severally, my " lawful procurators, with full power to them and each " of them for me, and in my name, to resign, surrender, " overgive, and deliver, like as I hereby resign, sur- " render, overgive, and deliver all and whole the lands " and others particularly before described, and here " holden as repeated brevitatis causâ, in the hands of " my immediate lawful superiors thereof, in favours " and for new infeftments of the same, to be made " and given to myself in life-rent, and to the said " Archibald Hill in fee, and the heirs whatsoever of his " said body;" whom failing, the other heirs enumerated in the dispositive clause, (whose names were repeated); " but always with and under the conditions, " provisions, restrictions, declarations, and reservations " before-mentioned, acts, instruments, and documents, " one or more, needful in the premises, to ask and take, " and generally every other thing to do which I might

" do myself, or which to the office of procuratory in
" such cases is known to belong; all which I promise
" to hold firm and stable."

The precept of sasine was in these terms: " Attour,
" I hereby desire and require you
" and each of you, conjunctly and severally, my
" bailies in that part, specially constituted, that upon
" sight hereof ye pass to the ground of the foresaid
" lands, and there give and deliver heritable state and
" sasine, with actual, real, and corporal possession, of all
" and whole the lands and others particularly before
" described, and here holden as repeated brevitatis
" causa, to myself in life-rent, and to the said Archibald
" Hill and the other heirs of tailzie before mentioned
" in fee, to be holden in manner aforesaid, but always
" with and under the conditions, provisions, restric-
" tions, declarations, and reservations particularly be-
" fore described, by delivering to myself and the said
" Archibald Hill, or our attorneys, bearers hereof, of
" earth and stone of the ground of the said lands, and
" a handful of grass and corn for the said teinds, and
" all other symbols necessary; and this in no ways ye
" leave undone; the which to do I commit to you and
" each of you, conjunctly and severally, my full power,
" by this my precept of sasine, direct to you for that
" effect."

Mr. Rennie, the entailer, died in 1786, without having taken infeftment on this deed, but his eldest son, the institute, on succeeding took infeftment, and the investiture was confirmed by the superiors, and the entail was recorded in the register of taillies on the 28th of July 1786. The institute having died, the appellant, his eldest son, entered with the superiors by precept of

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clare constat, and took infeftment. Thereafter, on the footing that the entail was not effectual to prevent a sale, he offered the lands for sale, and they were purchased by the respondent at the price of 9,500*l.* The respondent being threatened with a charge for payment of the price, and conceiving that the entail prohibited sales, presented a bill of suspension, which was passed.

Thereafter, the appellant raised an action of declarator against the heirs of entail, setting forth the terms of the entail, "and that the said irritant and resolu- "tive clauses contain a specific enumeration of the acts "and deeds of the heirs of entail, to which they are "declared to apply; that they are not declared to "apply to sales or alienations of the said lands, teinds, "and others, or to any part thereof, by the heirs of "entail succeeding to the said lands, teinds, and "others; and it is therefore lawful to and in the "power of the pursuer to sell the said lands, teinds, "and others, and to alienate the same, for onerous "considerations, and to do otherwise as after men- "tioned." He therefore concluded that "it ought and "should be found and declared by decree of the Lords "of our Council and Session, that the pursuer is not "restrained by the said disposition and deed of tailzie "from selling or alienating the said lands, teinds, and "others contained therein, and above described, and "granting and executing all deeds necessary for effec- "tuating the same, and that he has therefore right and "power to sell the said lands, teinds, and others, or any "part thereof, or to alienate the same, in whole or in "part, for onerous considerations, and to grant all deeds, "dispositions, and other writings whatsoever necessary "for effectually conveying the whole or any part or parts

" of the said lands, teinds, and others, which he may so " sell or alienate; and further, it ought and should " be found and declared, by decree foresaid, that upon " the lands and others above described being so sold " and alienated they shall no longer be affected or " liable to the other conditions and provisions contained " in the said deed of entail, which shall no longer bind " or affect the said lands and others."

The heirs of entail gave in defences, maintaining that the entail was so constructed as effectually to exclude the power of sale, and that the appellant having completed titles upon this entail, in which the whole conditions and provisions of the deed are incorporated, could not validly dispone the estate to the prejudice of the substitute heirs of entail.

Lord Jeffrey, on the 23d Feb. 1836, pronounced this interlocutor: " The Lord Ordinary having resumed " consideration of the debate, with the closed record " and whole process, in respect that the prohibition " against selling, contained in the entail under which " the lands of Balliliesk are held by the charger, is not " properly fenced or secured by the irritant and reso- " lutive clauses thereof, Finds that the minute of sale " of the said lands, entered into between the said " charger and the suspender, was a lawful transaction, " and such as may and ought to be enforced at the " instance of either of the parties; and, therefore, " repels the reasons of suspension, finds the letters and " charge orderly proceeded, and decerns; but finds no " expenses due.

" *Note.*—There is a shade of distinction between " this case and that of Tillicoultry, 15th Jan. 1799

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" (Mor. 15,539), inasmuch as the defective enumera-
" tion in the resolutive clause begins in that case with
" the words, 'either by not assuming the name and
" 'arms,' &c.; and in this case with the words, 'par-
" 'ticularly by neglecting to assume the name,' &c.
" But they coincide in that cardinal defect on which
" the Lord Ordinary has always understood the case
" of Tillicoultry to have proceeded, and the law to
" have been settled ever since the affirmance of the
" judgment in the House of Lords, viz., the total
" omission of any express reference to the prohibition
against selling, in an irritant and resolutive clause,
" framed on the principle of distinctly reciting and
" enumerating the several prohibitions, and not on
" that of a general reference to them, as detailed in a
" preceding part of the deed.

" The case of Porterfield (14th January 1812, Fac.
" Coll.) is less precisely in point, though in two respects
" it is even stronger than the present; 1st, because the
" defective enumeration occurs there in a second or sup-
" plementary joint irritant and resolutive clause, following
" immediately upon certain special provisions, (including
" that as to leases, as to which was there no question,)
" and evidently intended mainly to secure their efficacy;
" and, 2d, because the enumeration itself is not, so far
" as it goes, in the full or precise terms of the original
" prohibitions (as is the case here), but is to a certain
" extent in the nature of a general reference, though
" containing the names of several of the acts that had
" been prohibited; leases, however, not being of the
" number. The authority of the case of Tillicoultry was
" held, however, very clearly to extend to such a case."

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Against this interlocutor the respondent Horne presented a reclaiming note to the Second Division, and the action of declarator having come into Court, the Lord Ordinary made great avizandum with it; and thereupon the Court conjoined the actions, and appointed the question to be argued on Cases. On advising them, their Lordships, on 17th January 1837, pronounced this interlocutor: "The Lords, having "heard counsel, and advised the cause, alter the inter-"locutor of the Lord Ordinary submitted to review; "sustain the reasons of suspension, and decern; but "find no expenses due to either party."[1]

Rennie appealed.

Appellant.—Entails are subject to the most rigorous construction. Restrictions are not to be extended by analogy, whether as regards the person or the matter prohibited. Nothing is to be conceded to presumption, however strong, or implication, however clear. General words are to receive effect in their narrowest, not in their largest meaning. The law will not, as in the interpretation of other and more favoured instruments, lend itself, by straining construction, to aid the views of a granter of a deed. On the contrary, to make the intention of an entailer effectual, he must express himself in words so clear and explicit, so unequivocal in their meaning and import, as to leave no choice, and force the reception of that which is odious to the law, as being contrary to the natural rights and reasonable enjoyment of property, and adverse to the best interests

[1] 15 D., B., & M., p. 376.

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of society. This is illustrated by many decisions. In the case of Erskine v. Balfour Hay, 14th February 1758, the fetters were laid upon heirs of tailzie and provision, and it was obvious that the granter of the deed did not intend to put the institute in any favoured situation, or to leave him an unlimited proprietor, while he imposed fetters on the substitutes. In imposing the fetters, however, he used the words "heirs "of entail," and that expression was held not to include the institute, because, in strict legal sense, the heir was not an institute, but a disponee. So in the case of Duntreath, (Edmonstone v. Edmonstone, 24th November 1796,) no one could reasonably doubt the entailer's intention. In more than one clause of the deed he used the strong expression "Archibald "Edmonstone and the other heirs of tailzie," which gave as strong an implication as words could furnish, that the entailer looked upon the institute as an heir, designating the whole members of the entail by the terms, "Archibald Edmonstone, and the other heirs "of tailzie;" but the restraining clauses did not apply directly to the institute. Their Lordships of the Court of Session held, that "in respect it ap-"peared, from several clauses in the entail executed "by the pursuer's father, that the pursuer is compre-"hended under the description and designation of heir "of entail, he is thereby subjected to the limitations "and restrictions of the said entail." But this House, on the 16th April 1770, overruled this erroneous principle, and expressly declared, "that the appellant, "being fiar or disponee, and not an heir of tailzie, "ought not, by implication from other parts of the "entail, to be construed within the prohibitory, irri-

" tant, and resolutive clauses, laid only upon heirs of " tailzie." Upon the principle so established, the subsequent cases of Gordon v. Lindsay, 8th July 1777; Menzies v. Menzies, 25th June 1785; Wellwood v. Wellwood, 23d February 1791; Miller v. Cathcart, 12th February 1799; and Steele v. Steele, 12th May 1814, and affirmed 24th June 1817, were all decided: and Lord Eldon, in giving judgment in that latter case, observed, "After it has been so often decided that " the institute or disponee cannot be fettered by im- " plication, that principle having been once solemnly " settled, it ought not now to be got rid of by nice " thin and shadowy distinctions."

All these cases establish the general principle, that unless the technical and legal form of expression be applied, no attention can be paid to the intention of the entailer, however apparent it may be. An entailer may, no doubt, make the irritant and resolutive clauses applicable to all the acts prohibited in the restrictive clause, by a general declaration, that if the heir of entail in possession shall contravene any of the prohibitions, he shall forfeit the estate; and that the act so done shall be ipso facto void and null; or he may enumerate the various acts prohibited, and apply the irritant and resolutive clauses to each of the acts so prohibited; or he may adopt a third form of applying one of the irritant and resolutive clauses generally to the acts prohibited, and applying the other to each of them individually. But in either of these last cases, if the entailer should omit one of the prohibitions in the enumeration of the specific acts, the effect of the doctrine of strict interpretation is undoubted, that the pro-

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hibition omitted is not one binding upon the heir in possession. Thus, if there is a prohibition to alter the succession, to sell, or to contract debt, but the irritant and resolutive clauses proceed upon the principle of reciting the different prohibitions, and, while they declare that any deed altering the succession, or any debt contracted, shall be null and void, and infer a forfeiture of the contravener's rights, omit words specifically applicable to sale, the entail will be defective so far as the sale of the lands is concerned, even although it is plain that the intention of the entailer was to prevent the alienation of his estate by sale or otherwise.

The first case decided upon this point was that of Tillicoultry.[1] By the deed of entail in that case the heirs were prohibited from selling, disponing, or dilapidating the estate, and from contracting debt, or doing any act or deed, civil or criminal, by which the estate might be adjudged, evicted, or forfeited. Then there was a general irritant clause, in the following terms: "All which deeds are not only declared void "and null, ipso facto, by way of exception or reply, "without declarator, or in so far as the same may "burden and affect the foresaid estate." The resolutive clause was in these terms: "But also it is "hereby provided and declared, that the said James "Bruce, and the other heirs of tailzie, who shall con-"travene and incur the said clauses irritant, or any of "them, either by not assuming the name and arms of "Bruce of Kinross, or by the said heirs female, they "being unmarried, and not marrying a gentleman of

[1] Bruce v. Bruce, 15 Jan. 1799, 15539.

" the said name, or who shall assume, bear, and carry " the said name and arms, or, being married, they " and their heirs of the said marriages not bearing " and carrying the said name and arms as aforesaid, " or by the said heirs their not accepting the benefit " of this present tailzie within year and day after the " death of the immediate preceding heir to whom they " may succeed in manner respective foresaid, or who " shall break or innovate the said tailzie, or contract " debts, or commit any other fact or deed, whereby " the said lands and estate may be anywise evicted or " affected in manner foresaid, or who shall suffer or " permit the said lands or estate, or any part thereof, " to be evicted, adjudged, or apprised, or anyways for " any debts or deeds contracted or done by them " before their succession, or by any of their prede- " cessors whom they shall represent, and wherein they " shall be made liable, or anyways representing them; " that then and in any of the said cases, the person or " persons so contravening as said is, shall forfault, " amit, and tyne their right of succession of the afore- " said lands and estate, and all infeftments or pre- " tended rights thereof in their persons shall from " thenceforth become extinct, void, and null, ipso facto, " by way of exception or reply, without declarator, as " said is, and the same shall devolve, fall, and belong " to the next and immediate heir of tailzie in being " for the time, who is ordained to succeed to the fore- " said lands and estate, by virtue of the tailzie and " substitution foresaid."

If the resolutive clause had stopped with the general reference to all the acts prohibited, and to which the

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previous irritant clause had applied, it would have been quite sufficient; but it proceeded to enumerate the various acts, and the word "selling" was omitted. This raised the question, whether the general terms used in the first section of the clause could be controlled by the enumeration of the particulars, and whether the omission of the word "selling" was sufficient to have rendered the deed of entail inoperative against a sale by the heir, and the Court held that it had that effect, and consequently that a sale by the heir was effectual, and this decision was affirmed by this House on appeal.

This was confirmed by the decision in the cases of Bonnington[1]; of Monzie, where the resolutive clause

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[1] Scott Moncrieff v. Cunningham. This case is not reported, but the following statement of it was given by the appellant.

By the entail of Bonnington, the heir was obliged to assume the name and arms of Cunningham; and this was fortified by a separate irritant and resolutive clause, applicable solely to that condition or prohibition.

Then follows the general prohibitory clause, in these terms: "That "it shall be noways leisome nor lawful to the said Alexander Cunning-"hame my son, nor the heirs of his body, and failzeing thereof, to my "said daughters, nor the heirs of their bodies, nor to any other of the "subsequent heirs of tailzie and provision succeeding in the aforesaid "lands and estate, by virtue of the aforesaid taillie and substitution, or "any of them, to sell, analzie, dispone, dilapidate, or put away, the "foresaid lands or estate, or any part or portion thereof, nor to innovate "or infringe this present tailzie and order of succession hereby made by "me, nor to contract debts, nor to do any other fact or deed, civil or "criminal, of omission or commission, whereby the said lands and estate "may be anyways apprised, adjudged, evicted, or forfaulted frae them, "or any otherwise affected, in prejudice or defraud of the subsequent "heirs of tailzie and provision foresaid successive, according to the order "and substitution above mentioned."

The irritant clause was quite general, and applied to every act of contravention whatever. It was as follows: "Whilks haill debts or "deeds sua to be contracted or done, or omitted be them, in prejudice "or defraud, as said is, are not only thereby declared void and null, ipso "facto, be way of exception or reply, without any necessity of decla-

enumerated particulars, but left out the words of alienation; Breadalbane v. Campbell, 1812, not reported; of Prestonfield[1]; and of Morehead v. Morehead.[2]

2. But, independently of the above objection, the entail is ineffectual, in respect the irritant and resolutive clauses are not included nor referred to in the procuratory of resignation or precept of sasine contained in the deed of entail.

The statute declares, that "such tailzies shall only

"rator to follow thereupon, in sua far as the samen may burden and "affect the said estate."

The resolutive clause, however, was formed in a different manner, omitting altogether the prohibition against selling. It was as follows:—"But it "is also hereby provided and declared, that the said heirs of tailzie, who "shall contravene and incur the said clauses irritant, or any of them, "either by not bearing, assuming, using, and carrying the said name "and arms of Cunningham, or by the said heirs female, their not marrying a gentleman of the name, or who shall assume the name and bear "and carry the said sirname and arms in manner respective foresaid, or "who shall break or innovate said tailzie, or contract debt, or commit "any other fact or deed of omission or commission, whereby the said "lands and estate may be evicted, or anyways affected, in manner foresaid, that then and in any of the said cases the said person or persons "sua contravening shall forfeit, amit, and tyne their right and succession "of the foresaid lands and estate; and all infeftments and pretended "rights thereof in their persons shall from thenceforth become extinct, "void, and null, ipso facto, by way of exception or reply, without declarator, as said is; and it shall be lawful to the next and immediate heir "of tailzie in being for the time, who is appointed to succeed to the "foresaid lands and estate by virtue of the tailzie and substitution foresaid, either to be served heir in special therein to those who died last "infeft before the contravener, and thereupon to be retoured and infeft, "or otherwise to pursue for declarators, adjudications, or other legal "sentences," &c.

The proprietor of the estate of Bonnington, conceiving that he was entitled to sell the estate, entered into a minute of sale for that purpose, and the Court decided that the entail was not effectual, and sustained the sale. The House of Lords affirmed the judgment.

[1] Dick v. Drysdale, 14th Jan. 1812, Fac. Coll.

[2] Morehead v. Morehead, 31st March 1835, Shaw and M'Lean's Rep. vol. i. p. 29.

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" be allowed in which the foresaid irritant and resolu-
" tive clauses are insert in the procuratories of
" resignation, precepts, and instruments of sasine."

And Mr. Erskine states [1], as one of the requisites of an effectual deed of entail, that " the irritant clauses be " inserted in the procuratories of resignation, and " precepts and instruments of sasine, which proceed on " the entail."

It is absolutely necessary, therefore, for the efficiency of the entail, that the irritant and resolutive clauses be inserted in the procuratory of resignation and the precept of sasine. This is requisite in point of feudal principle, because if these clauses are not contained in the procuratory of resignation, there is no authority for the superior, upon granting his charter of resignation, to insert these clauses in it; and, on the other hand, if they are not contained in the precept of sasine, and infeftment is taken upon the disposition, there is no authority for their insertion in the instrument of sasine. The words of the statute, however, are express upon the subject, and therefore they must be inserted in the procuratory and precept, whether they would be required according to principle or not.

Accordingly, in practice, the irritant and resolutive clauses are either inserted verbatim, or they are specifically referred to in the procuratory and precept. Where the deed of entail is in the form of a procuratory of resignation, the irritant and resolutive clauses are of course recited at length; but where the procuratory of resignation is contained in a disposition

[1] Erskine, b. ii. tit. 8. sec. 26.

and deed of entail, and these clauses are inserted ad longum in the prior or subsequent part of the deed, still the procuratory of resignation and precept must distinctly and unequivocally refer to them.[1]

It is said that the general words used in the procuratory of resignation are to be considered as including irritant and resolutive clauses. The words are, "that "the lands are to be resigned with and under the "conditions, provisions, restrictions, declarations, and "reservations before mentioned." But the words "conditions and provisions" cannot be held as synonymous with, or as including, irritant and resolutive clauses. The words of the statute are decisive upon this point. It declares, "that it shall be lawful to his "Majesty's subjects to tailzie their lands and estates, "and to substitute heirs in their tailzies, with such "provisions and conditions as they shall think fit." Having thus given the power to entail, with "condi-"tions and provisions," it proceeds, "and to affect the "said tailzies with irritant and resolutive clauses, "whereby," &c.; thus drawing a marked distinction between these clauses and "conditions and pro-"visions."

Then the words, "restrictions, declarations, and "reservations," follow, and complete the enumeration of what is contained in the procuratory of resignation.

The word "restrictions" is another term for prohibitions, and cannot include either an irritancy or a forfeiture. The word "declarations" is equally powerless, and its meaning is shown by the deed of entail to

[1] Juridical Styles, i. p. 227; ibid. 238.

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be inapplicable to the irritant and resolutive clauses, and the last word, "reservations," has reference merely to the power to revoke.

The precept of sasine does not even refer to the conditions of the entail, and no words are employed which can be held applicable to them.

Respondents.—It is fixed, by a multitude of decisions, that there is no requirement of the act 1685, or of the common law, by which it is necessary, in order to the completion of an effectual entail, that the irritant and resolutive clauses should contain a specific enumeration of the acts which are declared null, and by the doing of which the heir's right is to be forfeited. A general reference to the previous prohibitory clause is all that is essential; and if the entail contain a declaration that acts done in contravention of the prohibitions in the former clause, or acts done in contravention of the premises, shall be null, and that the doing of them shall cause a forfeiture of the right of the heir in possession, or any similar or equivalent expression, then the entail will be perfectly valid.

But the ground of objection is, that the clauses contain an enumeration of acts which are declared null, and which are to be followed by the forfeiture of the heir. It is thence inferred that the entailer meant to enumerate all the acts which are to be attended by those results; and that as sale is not specified, it is to be held as not meant to be specified.

The clauses, however, do not profess to enumerate every individual case in which the irritancy and forfeiture shall apply; and the decisions referred

to do not establish any principle under which the present case would fall to be decided against the respondents.

The general reference to the antecedent clause, though accompanied by an anxious enumeration of most of the prohibitions, is so framed as to be altogether independent of the subsequent specification. The expressions used, not only do not abridge or limit the operation of the general reference, but necessarily imply the existence of prohibitions not specified. It is provided that a party shall incur forfeiture by contravening prohibitions generally, and particularly by certain specific acts of contravention. From the very nature and conception of the sentence, therefore, the non-enumerated, as well as the enumerated prohibitions are treated of as being effectual. The entailer says, that the heir of entail who shall contravene or fail in performing any part of the premises, particularly by neglecting to assume the name of Rennie, or by possessing in virtue of another title, &c., shall forfeit. It is quite conceivable that he may have felt more anxiety about one or two acts of contravention, than about others. He may have apprehended more danger to the endurance of the entail from one quarter than from another; though, therefore, sufficiently providing against all, he may very well have selected for especial and particular mention, some of those acts which he least liked, or thought most probable. Any construction which would lead to the result that the mere expression of a special anxiety as to some, should be held as a total abandonment of the other, would not be justified by any received canon of construction.

It is a general maxim of construction, applicable as

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well to deeds of entail as to other deeds, that words and expressions used in such deeds, capable of bearing a meaning, shall have a meaning attached to them, and shall not be discarded or left without any signification being attached to them at all. Now, the general clause subjoined to the particular enumeration would, if the appellant's interpretation were correct, be absolutely devoid of meaning. If there were no other particular acts within the operation of the clause of forfeiture, except those already specified, it was of no use to subjoin "or shall contravene, or fail in any part of the "premises," all the particular modes of contravention. These words could only be intended to include acts not specified in the preceding part of that clause, and if the expression is to have any meaning attached to it at all, it must relate to sales.

It is argued, that the effect of the expression "par-"ticularly" is to be limited to the first particular act specified, and is not to be considered as affecting any of the acts subsequently enumerated, and that the word "or" is disjunctive. But the idea of restricting the use of the word "particularly" to the first of the prohibitions, seems to be irreconcilable with the plain reading of the clause, and the word "or," instead of disjoining the subsequently enumerated cases, plainly conjoins those various cases coming under the particular views of the entailer.

Then it is said, that unless a distinction was meant to be applied by the entailer to the specified and non-specified acts, the enumeration of particulars must be held to be futile, and so, in order to make the enumeration of the least use or value, it is necessary to hold that the enumerated cases come within stricter fetters

than the omitted case. It is no doubt true, that the enumeration of those cases does not add to the strictness of the fetters applicable to them; and it may be admitted that, in point of legal efficacy, the fetters attached as completely without as with the specification to those particular cases. It may be very superfluous in an entailer to make assurance doubly sure in regard to particulars, as to which he felt special apprehension or anxiety; but if he has fairly and fully given expression to the declaration of irritancy and forfeiture, as applicable to the prohibitions contained in the former part of the deed generally, the effect cannot be lost by his additional precaution or guardedness.

Neither is the appellant's argument supported by the decisions. The leading case on which he rests is that of Tillicoultry. In that case the irritant clause was sufficient, but the resolutive clause was held not to apply, and did not apply to sales. It professed to contain a full enumeration of the special contraventions which should lead to a forfeiture of the contravener. It described the modes by which the forfeiture was to operate, which was in either of a certain number of ways. By its conception, it was only to those particular specified contraventions that the forfeiture of the contravener's right attached. It was to the heirs who should contravene the clauses irritant, or any of them, in certain special ways, that the penalty attached; and not a word was said of contraventions by any other mode. It was heirs who should contravene, either by not assuming the name and arms, or who should break or innovate the tailzie, or should contract debts, &c., who should forfeit the right to the estate. It was "then, and in any of the said cases," that is, in any of

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the specified cases, not "then, or in any contravention "of the premises," that the person or persons contravening should forfeit their right and title to the succession of the estate. So that the forfeiture was made to depend, by the express form and texture of the clause, on failure or contravention with respect to certain specific acts, and with respect to those acts alone; and it became impossible to extend the clause to any act not specified, without doing violence to the plainest rules of construction.

The case of Bonnington is not distinguishable from the case of Tillicoultry. In that case, as in the other, the general reference is detracted from and limited by a description of those various modes by which the forfeiture of the heir in possession was to be operated. It is just as in the case of Tillicoultry, either by one or other of several enumerated modes; and it is only "then, and in any of the said cases," that the person contravening is to forfeit his right.

The case of Prestonfield is equally inapplicable. The heir in possession had granted a lease exceeding the endurance specified in the deed of entail, and the question was raised as to his power under the deed to grant such lease; and this resolved into another, as to whether the irritant clause struck against the letting of tacks.

This clause was applicable only to dispositions, alienations, securities, debts, deeds, and facts, civil or criminal, contrary to the provisions of the deed. There was no irritancy applicable to leases by name; and it was admitted, that unless the word "deed" should be held to include leases, there was no irritancy which could affect them. The question, therefore,

turned upon the construction of the word "deed," and the meaning to be attached to it in that particular instrument; and the application of it to leases seemed to be excluded by the use of the word in the preceding clause, where it was subjoined to a prohibitory clause containing nothing about leases whatever. Accordingly the case appears to have been decided upon that ground.

2. The second objection is founded upon the clause of the statute 1685, by which it is declared, "that such "tailzies only shall be allowed in which the foresaid "irritant and resolutive clauses are insert in the pro-"curatories of resignation, charters, precepts, and in-"struments of sasine." The appellant does not maintain that a verbatim insertion of these clauses in both procuratory and precept, or in either, is necessary. His argument rests upon the allegation that the "irri-"tant and resolutive clauses are neither included nor "referred to in the procuratory of resignation or pre-"cept of sasine." The style to which he himself refers only contains, in the procuratory of resignation and precept of sasine, a general reference to the clauses. It is as follows: "But with and under the conditions, "provisions, restrictions, limitations, clauses irritant "and resolutive, declaratory," &c. It may be, therefore, assumed to be a sufficient compliance with the statute, that there shall be a general reference in the procuratory or precept to these clauses, where they have been inserted at length in the prior part of the same deed. The object of the provision of the act is to certiorate the public of the existence of fetters as to the disposal or use of property. They must be set forth in the deed of entail, otherwise the register of tailzies would furnish no information as to the nature of the restrictions; they must appear in all renewals of

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the investiture, in order that the public records may not be deceptive. Now, it is impossible that the register of tailzies can fail to give information in the present case; because the whole provisions and conditions on which the estate is to be held are fully set forth in the deed of disposition and tailzie. It is, in like manner, impossible that the record should fail to exhibit the restrictions, because an omission to engross in the various deeds of succession the whole conditions, provisions, &c. is a condition duly fenced. So it is impossible to maintain, in consistency with a fair interpretation of the procuratory and precept, that they do not refer to the clauses irritant and resolutive, for the procuratory of resignation gives power to "surrender," &c., "but always with and under the conditions, pro-"visions, restrictions, declarations, and reservations "before mentioned."

The precept of sasine is precisely the same, and is, therefore, qualified by the same reference.[1]

LORD CHANCELLOR.—My Lords, I feel no doubt with respect to this case, if the rule be, that where a party undertakes to enumerate in the irritant and resolutive clauses those acts which are to infer forfeiture, the prohibition is imperative as regards any act which is not enumerated. The simple question is, whether he has made that undertaking here, and has enumerated the act of selling?

Now, in the Tillicoultry case the party did profess to enumerate: the clause was in these words, "It "is hereby provided and declared that the said James "Bruce, and the other heirs of tailzie, who shall con-"travene and incur the said clauses irritant, or any

[1] The House declined to hear the appellant's counsel in reply.

" of them, either by not assuming—" then it goes on and enumerates all the acts prohibited but one. It was held that having omitted that one, although there were general terms, yet as he had undertaken to enumerate the particulars, and had failed to enumerate the one in question, that that made the clause inoperative, so far as that act was concerned.

Now, my Lords, that case having been so decided and affirmed in this House, the sole question is, Whether that case does not bear upon the principle of the present case? And it comes to this question: whether there has been an attempt to enumerate the particular acts prohibited? Now the prohibition is, that it shall not be lawful, and " in case the said " Archibald Hill or any of the heirs of tailzie before " mentioned shall contravene, or fail in performing any " part of the premises, particularly by neglecting;—" (then it goes over four of the acts prohibited, and there that sentence stops;) " or if they or any of them " shall contract debt or do any deed,—" and so it goes on to the end, but omits the act of selling. How is it possible, according to the common use of language, to say that there has not been in this clause an attempt to enumerate? If there be an attempt to enumerate, and this particular act is omitted, then it is clear, under the authority of the Tillicoultry case, that this act so omitted is not prohibited. Therefore it appears to me that, taking the principle as established in the Tillicoultry case, and applying it to the particular language of this clause, there is no doubt that it falls within the principle of that authority.

LORD BROUGHAM.—My Lords, I entirely concur in what has fallen from my noble and learned friend.

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I consider this case entirely free from all doubt; had it been otherwise, I should have been of opinion that we ought to have heard the reply, and to have taken time to consider it, as we have the misfortune of differing from the Court below. I think this most clear, that, as I stated in the Herbertshire case, if that decision of the Court below were to stand, then the Duntreath case was no longer law; then the Findrassie case was no longer law; then the Randlestone case was no longer law: I might add, also, the Baldastard case (Steele v. Steele). So must I say here, that if this decision shall stand, the Tillicoultry case,—one of the best considered cases, and most contested at the time, in the Scotch law of real property, that is to be found in the books,—is no longer the law of real property in Scotland. It is our bounden duty, therefore, to protect the law of real property in Scotland, established by the concurrent authority of text writers, the decisions of courts, and the uniform reference to it, of practitioners as well as of judges, in their opinions upon subsequent cases, against the great innovation whereby this decision, if suffered to stand, would sweep away that case, with all that has followed thereupon, and all the other cases which have been governed and ruled by the authority, till now undisputed, of that case.

My Lords, the Court below have been divided upon this subject, which certainly comforts one in coming to an opinion in favour of the small minority. It was by the narrowest possible majority of the five Judges, who applied their minds to the case that this erroneous decision was pronounced. My Lord Jeffrey and the Lord Justice Clerk took the same view of it that I do; my Lord Meadowbank and my Lord

Medwyn took the opposite view. Then the balance was cast by Lord Glenlee, a most venerable Judge,—a Judge who has been longer upon the bench than almost any other Judge in that or any other country,—I believe nearly forty years;—a most learned person, and well versed in the law of real property, as well as all the other branches of the law; it is, therefore, with great distrust that I should, in any ordinary case, have differed from Lord Glenlee. But when I come to consider that Lord Glenlee has all along held a peculiar doctrine upon the construction of deeds of entail, and that he appears, by the valuable note of my learned and most respectable kinsman Lord Meadowbank, produced by Mr. Maconochie at the bar to-day, to have been upon the wrong side of the question in the Tillicoultry case; that he has, subsequently, at different times thrown out opinions wholly inconsistent with the Duntreath case; that his Lordship, in the last case that came before us upon this branch of the law, namely, Macgregor v. Macgregor, was found to have laid down doctrines so entirely at variance with the principles now allowed to govern that branch of the law which relates to the construction of deeds of entail in Scotland, that the very counsel who supported the decision given by the minority, and who, therefore, would fain have relied upon Lord Glenlee's very respectable authority in his favour, was forced to give it up, and say that he could not push it so far as Lord Glenlee had pressed it in that case;—I really must say that, in this one instance, perhaps the only one in the whole range of Scottish jurisprudence, I reckon Lord Glenlee's authority a much lower authority, and as interposing a much less insuperable obstacle

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to arriving at a judgment of reversal, than I would in any other case in which it could have been cited. Being of opinion, therefore, that the two cases,—the Tillicoultry case and this decision, cannot stand together, I have to ask how the Judges in the Court below have endeavoured to reconcile them; and it is by the difference of the expression in the one case, and in the other the deed of entail. The Tillicoultry case, proceeds, first, upon a general denunciation of resolutions applicable to all the irritant clauses, which it is admitted were perfectly applicable to all the prohibitions, which, also, it is admitted were perfect; but following out, as it were, that general application, it enumerated the particular prohibitions and irritances in these words: "either by" so and so, "or by" so and so, enumerating the five, and omitting the sixth.

Now, there is this difference in the present case, that there is no general irritancy in this case, but there is a conjunct resolution and irritancy all in one clause to be denounced; and then, instead of saying "either by" so and so, "or by" so and so, it first states generally, and then says particularly "by neg- "lecting to assume," and so forth; or, "if he shall do so," and then a forfeiture.

Now, as I stated during the argument, I am quite unable to see any substantial difference in the distinction which is here taken between the particular and the general. The word "particularly" must have one of two senses in this case; it must either mean, some- what like our videlicet, that is to say, or to wit—scilicet, or videlicet, I enable you to see; or, I enable you to know what the generality immediately foregoing means,—it either means that, or it means

more especially. In the one case it is demonstrative, in the other case it is intensive. Now, suppose it is taken as demonstrative, and to mean a particulariza-tion of what went before, it is clear that it is restric-tive as well as demonstrative, and it confines the preceding generality to that which follows under this specification. Well, if that is the case, there is a total end of the question altogether; therefore it is said that that cannot be the meaning. What then does it mean? It means intensic: I prohibit. Six things I irritate and resolve; that is to say, I declare five of those six things to be null and void in one way, and the whole six things to be null and void in another way. I denounce a forfeiture if five out of the six things are done in one way; in another way I de-nounce a forfeiture if the sixth thing is done. This is the construction contended for upon the respondent's side of the bar, and by the Court below, and upon which alone it can be distinguished from the Tillicoultry case, that he first denounces the resolution as to the whole six things, and then he more particularly follows it up by more intensely and more especially denouncing that as to five of the things. But is there any sense in that? The estate is either forfeited or not forfeited. You cannot forfeit six of those things sub modo and five out of the six things absolutely: you cannot forfeit six of those things half, as it were, but five of those things utterly and altogether, out and out. The thing is either forfeited or not. Then what sense is to be annexed to the kind of forfeiture which that construction of the clause denounces against the sixth thing, and the kind of forfeiture which alone, it is admitted, is denounced? The more especial and more

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intense forfeiture, which is denounced as to five of the things. It is quite clear to say, "If you go to York, "or if you go to Rome, you shall forfeit your estate of "Blackacre," with remainder over to A.; this is intelligible. But is this intelligible? "If you go to York, or if "you go to Rome, you shall forfeit your estate of "Blackacre; but more especially if you go to Rome "you shall incur that forfeiture." Then what becomes of the act of going to York? It is either a forfeiture or it is no forfeiture at all; you cannot say that the intensive use of the word "particularly" makes it more a forfeiture to go to Rome than to go to York; otherwise you reject the first forfeiture altogether.

But it does not depend upon forfeiture; for here, differing from the Tillicoultry case, the framer of the instrument makes one conjunct clause, irritating the act of contravention at the same time that he denounces a forfeiture against the contravener. It is still more absurd than if you take the irritant clause only. Can a thing be half void?—and yet you must take that construction. And then the construction is this: not only you forfeit half if you go to York, and wholly if you go to Rome; but I declare the act,—whatever it is, of altering the order of succession or of selling,—I declare the act of selling to be half void—(to be only to a certain degree null and void,) but the act of altering the order of succession is absolutely, and to all intents and purposes, null and void. That is absolute nonsense. It is neither more nor less than mere nonsense. I am, therefore, clearly of opinion that the judgment cannot stand, that it fails wholly upon the grounds upon which it is rested, and I think

the reference made by Lord Jeffrey puts the case rightly, when he says the Prestonfield case is rather stronger than the present; and it does not appear to have received any particular attention from the Inner House in supporting the interlocutor of the Lord Ordinary.

My Lords, I am exceedingly glad that we are relieved from the necessity of going upon the second branch of the case; not that I see any answer to it, because the words of the entail act are most positive, and this merely is a direction to which it signifies not whether it is complied with or no. The words are most imperative, and for a most salutary and necessary purpose. It is, that all the liege subjects of the King may see upon the face of the record whether they are in safety to lend their money upon the security of the estate, and pay the price out and out. It is for that purpose that the register of taillies is expressly provided by the act, and subsidiary to that registration so provided, it is declared as the necessary act of an entailer that he shall record the irritant and resolutive clauses. If anybody were to see this instrument, without those clauses being specified, if there is no word said about there being such clauses in existence, he would have a right to say, "I am safe in lending "money upon the security of the estate," or to lay out his money in the purchase of the estate, because there is not a word of irritancy in the instrument. But I am satisfied that we are not called upon to say a word, in giving our judgment, or to rest any thing upon that second ground; for this reason, that it does not appear to have attracted the notice of the Court below, since none of the Learned Judges dealt with it

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in their argument. It is said that it was mentioned in the Court below, and a reference to Shaw and Dunlop's cases seems to show that it was; but there is no answer given to it. Consequently, I do not think that it was much relied upon, because the other ground is quite sufficient for reversing the judgment.

I am therefore of opinion that this decision cannot stand; and that, as in the two former cases of Morehead v. Morehead, Steele v. Steele, your Lordships are restoring, and not altering or innovating, or breaking, the Scotch tailzie law, but restoring it to what it was; and that as you then restored the law established in the Findrassie case, the Randlestone case, and, above all, the Duntreath case, to its former purity, which had been broken in upon by those decisions of Steele v. Steele and Morehead v. Morehead in the Court below, I say here, you are restoring the Tillicoultry case; which, as far as I know, never had been altered by any thing done in the Court below till this decision, which I think was given without very great deliberation. I think it bears marks of that, either in the Outer or in the Inner. My reason for saying so is, that there was a total difference in the construction of the first part and the latter part of the clause; it never seems to have struck the Court below that the whole argument about "particularly" fails entirely here. They appear to have considered, both the bar and the bench, that the frame of the clause was such that the word "particularly" rode over the whole of it. But it is not so at all; the word "particularly" is followed by the adverbs "by neglecting, by pos-" sessing, by omitting, by altering," and applies to the first four communications only; but then there is a

sudden break, and change, which throws overboard the word "particularly" altogether. The future subjunctive mood is then substituted for the adverbs; instead of "by doing" so and so, over which the word "particularly" rides, and which it governs, it comes to to be "or if he shall do" so and so; and so without any adverbial expression to connect it with "particularly." This is another indication that the case has not been thoroughly considered.

My Lords, the consequence of this decision will be, that the former judgment, which has not been paid much attention to, will have more attention paid to it hereafter, and the construction of such deeds will be bound by this judgment hereafter; and that the law, will not be set afloat, as it would have been by setting up that which has never been supposed to be the law from the time of the Tillicoultry case, in 1799, till the present time. That case was most fully discussed. I find that Lord Meadowbank, one of the greatest authorities of our day, at first stood alone; but he said, "I have no doubt whatever about this." He took usually a firm and manly view of the subject; but always a very dispassionate view. He spoke very firmly upon the other side; but the Court sustained the defences. None agreed with him but Lord———.

But when it came before the Court again, in the year 1799, upon the answer, the question was, whether the paper should be answered or not? They then agreed to have an answer. When it came, instead of standing alone, he was in the majority—a narrow majority. In the minority stood Lord Glenlee, just as he stands in the majority, however, here, and as he stood in the majority in the case of Macgregor v.

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Macgregor at the time when the Learned Attorney General was compelled to say to the House, that it was impossible to maintain the law as laid down by his Lordship, consistently with the current of authorities upon the rules of construction. I have, therefore, no doubt whatever that this decision must be reversed.

The House of Lords ordered and adjudged, That the said interlocutor complained of in the said appeal be and the same is hereby reversed.

A. DOBIE—SPOTTISWOODE and ROBERTSON, Solicitors.