[21 *February*, 1845.]

THE RIGHT HONBLE. HENRY DAVID EARL OF BUCHAN, *Appellant.*

THE HONBLE. DAVID STUART ERSKINE, *Respondent.*

Tailzie—Resolutive Clause.—A clause in an entail immediately following the prohibitions, and declaring that if any of the heirs should, "in any time coming, failzie herein, or do any thing contrair to this "my destination and provision," the person "swa failzeing and "doing on the contrair hereof," should lose his right, *held* effectual to resolve any act done contrary to the prohibitions of the entail.

Ibid.—Irritant Clause.—A clause declaring "all dispositions and other "deeds done contrair to the said provision and destination," to be null, *held* effectual to irritate acts done in contravention of the general prohibitions.

Ibid.—A general reference in the procuratory of resignation and precept of sasine of a bond of tailzie, to "the reservations, reversion, pro- "visions, and conditions above mentioned," *held* to be a sufficient compliance with the Act 1685, without the necessity for a repetition of the fetters of the entail.

SIR JAMES STUART, by deed bearing date the 4th of November, 1664, executed a bond obliging himself, his heirs, &c., to execute an entail of his lands of Strathbrock. This bond contained the following prohibitions: "And it shall noways be "leisum nor lawfull to any of the heirs of tailzie and provision "above specified, (except only the saids William Stewart my son, "and the heirs-male lawfully to be procreat of his own bodie, "and the heirs-male lawfully procreat or to be procreat of my "own bodie,) to sell, dispone, or wadsett the lands, barronie, and "others above-written, or any part thereof, or any annual-rents "or yearly duties to be uplifted furth of the samen, or to sett "tacks thereof for longer space than their own lifetimes, or to "contract debt for which the samen may be apprysed or adjudged, "or to do any other fact or deed in prejudice of the said tailzie, "and of the persons above-named and their forsaids."

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These prohibitions were fenced by the following clauses:—
"And if my saids daughters and their heirs, or any others the
"heirs of tailzie and provision above specified, (except the said
"William Stewart my son, and the heirs-male lawfully to be
"procreat of his own, and the saids heirs male lawfully procreat
"or to be procreat of my own body,) shall in any time comeing
"failzie herein, or do any thing contrair to this my destination
"and appointment, then, and in that case, the person or persons
"swa failzieing and doing in the contrair hereof, and the heirs of
"their bodies, shall amitt and lose their right and haill benefite
"of this present bond of provision and infeftments following
"hereon, and of the haill lands, barronie, and others above-
"written, and the samen shall in all time thereafter pertain,
"belong, and accress to the next person for the time who be
"vertue of the said tailzie and provision would have succeeded
"to the said lands and estate, failzieing the said persons, contra-
"veeners, and the heirs of their bodies; and all *dispositions* and
"*other deeds* whatsomever, made or done contrair to the said
"provision and destination, with all that shall follow yron, shall
"be *ipso facto* voyd and null, without any declarator, and shall
"nowayes affect nor burden the saids lands, barronie, and oyrs
"above written, or any part thereof, as if the samen had never
"been done, with, under, and upon the whilks reservations,
"reversion, provisions, and conditions respectively above men-
"tioned, I have made and granted thir presents and no other-
"wayes."

The bond then contained a procuratory for resignation, which began where the clauses above quoted left off, and set out in these terms: "And with, under, and upon the same "reservations, reversion, provisions, and conditions, I have made, "constitute, and ordained." It then contained the usual terms of a procuratory for giving infeftment to the series of heirs named; and continued thus: "With, under, and upon the re-"servations, reversion, provisions, and conditions above-men-

"tioned, and no otherwayes, which are holden as repeated in this "present procuratorie, and are appointed to be contained and "sett down in the instruments of resignation, and in the charters "and infeftments to follow hereupon." The bond also contained a precept of seisin, directing infeftment to be given, "with, "under, and upon the reservations, reversion, provisions, and "conditions rexive above mentioned, which are all holden as "repeated herein, and are appointed to be contained and sett "doun in the instrument of sasine to follow hereon."

The appellant being considerably in debt, brought an action against the substitute heirs of entail, to have it declared that he had all the rights of a proprietor in fee simple; 1st, Because the bond of tailzie did not contain any irritant clause voiding sales, conveyances, tacks by the heirs, or real diligence upon debts contracted by them. 2nd, Because the bond did not contain any clause resolving the rights of heirs selling, or alienating, or in any way affecting the lands. 3rd, Because the fetters of the entail were not repeated, either in the procuratory of resignation or the precept of seisin.

The respondent, the son of the appellant, and the first heir entitled to take after him under the entail, appeared and put in defences to the action. Mutual cases for the parties were ordered. On advising these, the Lord Ordinary did not himself pronounce any interlocutor; but reported the case to the Inner House, accompanied by the following Note:

"This question is taken to report as it is prepared for judg-"ment by elaborate cases on both sides, which are printed, and "ready for the consideration of the Court; and both parties ex-"pressed a desire to obtain a judgment with as little delay as "possible.

"The question relates to the validity of the entail of the "estate of *Strathbrock*, which has been for some time an inheri-"tance in the family of the noble pursuer; and it is one of the "many cases now raised on exceptions taken to the phraseology

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" and efficacy of the statutory clauses. These are objected to on " grounds which the Lord Ordinary has not been able to satisfy " himself can be sustained, without giving a greater effect to a " verbal and hypercritical construction than the Court has ever " yet admitted in any preceding cause.

" The entail is said to be defective in the *resolutive* and *irri-* " *tant* clauses, each of which, therefore, requires to be carefully " examined.

" 1. The *resolutive* clause follows the prohibitory, and it is a " fundamental point of the case, deserving notice, that the *pro-* " *hibitory* clauses are *admitted* to be complete, embracing the " three heads of prohibition authorised by the Act 1685.

" It is next important to remark, that the resolutive and " irritant clauses, in point of collocation in the present deed, " *immediately follow the prohibitions;* after an enunciation of the " prohibitions, the resolutive clause proceeds thus:—'And if my " 'said daughters and their heirs, or any other the heirs of tailzie, " '&c. &c., shall in any time coming *failzie herein*, or do any " 'thing contrary to this my destination and appointment, then " 'and in that case the person or persons swa failzieing, and " '*doing on the contrary hereof*, shall amit and lose their right,' " &c., &c.

" And the irritant clause declares, that 'all *dispositions and* " '*other deeds* whatsomever made or done contrair to the said " 'provision and destination, with all that shall follow thereon, " 'shall be *ipso facto* void and null.'

" With regard to the first of these clauses (the resolutive), " the Lord Ordinary is of opinion that it must be held as a " *general* and not as an *enumerative* clause. It bears a reference " to the whole of the preceding part of the deed; and the pro- " vision as to any of the heirs 'who shall *failzie herein*,' seems " alike comprehensive and unqualified, as well as the declaration " that 'the persons swa failzieing and doing *in the contrary* " '*hereof* shall amit and lose the right,' &c.

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" This provision hardly admits of any other construction than
" this, that if any heir 'shall failzie herein, by acting contrary
" 'to any part of the preceding deed,' or if they shall fail 'to
" 'observe the conditions and limitations imposed on them,' they
" should amit and lose their right, &c., &c. These exegetical
" words, it is well known, are used in many tailzies. But when
" the clause is directed in short and unqualified terms against all
" who '*failzie herein*,' it is equally effectual, as it applies to all
" failures of whatever kind they may be, contrary to any con-
" ditions of the tailzie.

" No doubt the resolutive clause also contains the alternative
" words applicable not only to the heirs who shall 'failzie
" 'herein,' but also who 'shall do any thing contrary to this *my*
" '*destination* and *appointment*,' but it is not thought that these
" words can be held, on any fair construction, as qualifying the
" general term which precedes it. The reference to '*my desti-*
" '*nation and appointment*' cannot be viewed as applying to the
" clause of destination only, as, even in the strictest construction,
" the word 'appointment,' which is also used, is a peculiar and
" generic term, referring to the constitution or appointment of
" heirs *under all the preceding provisions and conditions of the*
" *settlement*. Suppose it had been declared, that the heirs who
" shall do any thing contrair 'to my *settlement* hereby made,'
" should forfeit their right, &c., that provision would certainly
" have been sufficiently explicit to embrace the whole of the
" preceding clauses of the deed; but the Lord Ordinary has not
" been able to satisfy himself that the term '*appointment*' is not
" as effectual and comprehensive as '*settlement*.' More especially
" ought that construction to be adopted when the preceding
" words are taken into view, which apply, without exception or
" limitation, to all '*who shall failzie herein*.'

" 2. The objection to the *irritant* clause is different, but it
" depends much on the right construction which is due to the
" resolutive clause. The irritant follows the resolutive clause,

" and it provides, that 'all dispositions and other deeds what-
" 'somever, made or done contrair to the said *provision* and
" '*destination*, with all that shall follow thereon, shall be *ipso*
" '*facto* void and null,' &c., &c.

" The objection to this clause seems to be founded on the
" plea which was sustained against an entail in the case of
" Speid (21st February, 1837), in which an irritant clause,
" directed against all who should 'act and do in the contrary of
" 'the *provision* above set forth,' (thus using the term in the
" *singular* number), was held void for uncertainty, as it was not
" made perfectly clear to *which* of the foregoing provisions it
" applied.

" Without impeaching the authority of Speid's case, (which
" was not an unanimous decision, and was not carried to appeal,)
" it appears to the Lord Ordinary that the very strict rule of
" construction there adopted cannot be extended to any other
" entail where there is any essential difference in the structure
" of the deed from that on which the question arose in Speid's
" case. The Lord Ordinary views the present as an entirely
" different deed. In Speid's case, the irritant clause *followed the*
" *prohibitory*, and *preceded* the resolutive; and certainly when
" there were a great variety of provisions, and when it was
" declared in the next sentence that any who acted contrary to
" the provision above set forth only—there was room for arguing
" that the maker had not pointed out with precision *which* of
" the provisions he intended to irritate.

" But the present is a very different case. Here the irritant
" clause immediately *follows the resolutive*, and, like that clause,
" it is general and not specific. And the argument sustained in
" Speid's case is inapplicable here, because, although the word
" 'provision' is used in the singular number, it refers, from its
" collocation and grammatical construction, to the general pro-
" vision in the resolutive clause immediately preceding, which

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" was a general provision restricting the right of all heirs who
" should 'failzie herein.' In short, the irritant clause just irri-
" tates all the deeds of the heirs whose rights shall fall within
" the forfeiture of the resolutive clause,—and that is sufficiently
" broad to apply to every act and deed at variance with the
" entail.

" Besides, in this particular tailzie, and in the resolutive and
" irritant clauses themselves, the term provision is evidently
" used in a *generic* sense. Thus, in the resolutive clause, the
" deed of tailzie is referred to as 'this present bond of *provision*,'
" and, in the same sentence, it is declared that the estate, in case
" of contravention, shall pertain to 'the next person for the time
" ' who, be vertue of the said tailzie and *provision*, would have
" ' succeeded to the said lands,' &c. Hence, when it is further
" declared in the irritant clause, that 'all dispositions made and
" ' done contrair to the said *provision* and *destination*' shall be
" void and null, it seems clear, from the use of the term in the
" *immediately preceding sentence*, that the maker of the deed
" used the term 'provision' as synonymous with 'tailzie.' This
" is not a matter of remote inference. Any other interpretation
" of the term would, it is thought, be contrary to the plain and
" unmistakeable import of the deed.

" If these views of the leading pleas in this declarator be
" correct, it is unnecessary to enter into the other questions
" discussed in the revised cases. But if the Court shall be of
" opinion that the entail is ineffectual from any defect in the
" resolutive or irritant clauses, then the extent of the heir's
" powers to make gratuitous alienations will fall to be considered.
" As the Lord Ordinary has called the attention of the Court to
" this subject in sundry recent cases, particularly in those of
" Eglinton, Polmaise, and Duthie, it is sufficient to suggest that
" these cases should be kept in view in deciding the present.

" J. C."

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The Inner House ordered the opinions of the other Judges to be taken, and these were delivered in the following terms:

"We agree in the opinion expressed by the Lord Ordinary. "The entail prohibits selling, disponing, contracting debt, '*or to* " '*do any other fact or deed in prejudice of the said tailzie, or of* " '*the persons above named.*' The resolutive clause is imme- " diately connected with the prohibitory clause, and provides, " that if the heirs shall '*failzie herein, or do anything contrair* " '*to this my destination and appointment,*' their right shall be " resolved. This is not ambiguous. It provides for the heirs " either failing in what the deed enjoins, or acting in opposition " to what the granter had appointed by it. The irritant clause " is connected with the resolutive, and declares that '*all disposi-* " '*tions, and other deeds whatsomever, made or done contrair to* " '*the said provision and destination,*' &c., shall be void and " null. The terms here used, 'SAID *provision and destination,*' " are as comprehensive as those of destination and appointment, " and comprehend the whole entail. This case is therefore " materially different from that of Speid (21st February, 1837, " 15 *Shaw*, 618). There the deed contained complex clauses, " which formed distinct and substantive provisions in the entail, " and the irritant clause was so framed that it could only apply " to one of them, but the deed left it altogether uncertain to " which particular provision it applied. Here the deed, although " made before the Act 1685 was passed, has been framed with " greater clearness, and is much in accordance with the language " and enactments of that statute which sanctions tailzies 'with " 'irritant and resolutive clauses, whereby it shall not be lawful " 'to the heirs of tailzie to sell, annailzie, or dispone the saids " 'lands, or any part thereof, or contract debt, or do any other " 'deed whereby the samyn may be apprysed, adjudged, or " 'evicted from the other substitute in the tailzie, or the suc- " 'cession frustrate or interrupted, declaring all such DEEDS to

" ' be in themselves null and void,' &c. The statute was pro-
" bably framed having that or some similar deed in view.

" JOHN A. MURRAY.
" J. CUNINGHAME.
" H. COCKBURN.
" J. W. MONCREIFF.
" A. MACONOCHIE.
" J. H. FORBES.
" F. JEFFREY."

" I am on the whole inclined to think that this is a good " entail. The only point, indeed, on which I entertained a " doubt, was whether the irritant clause was sufficiently ex- " pressed to reach the *contraction of debt*. And upon that head, " though my scruple has finally given way, I cannot help still " thinking that the case is a very narrow one.

" Looking, however, to the whole context, and observing— " (1.) That the prohibitory clause classifies, as it were, the ' con- " ' tracting debt,' under the same general category with those " *non-enumerated* cases of contravention, which it describes as " the ' DOING *any* OTHER *fact or* DEED in ' prejudice of the said " ' tailzie;' and (2.) that the resolutive clause strikes at the " contraction of debt (as well as the other matters prohibited) " under such general words as ' failzie herein, or DO *any thing* " ' *contrair* to this my destination and appointment:' or again, " ' failzieing and DOING *in the contrary* hereof;'—I have finally " come, though still not without hesitation, to hold, that the " irritant clause, in declaring that ' all dispositions and other " ' DEEDS *whatsomever made or* DONE *contrair to the said provision* " ' *and destination* shall be void and null, and shall noways *affect* " ' nor *burden* the said lands,' is sufficient to meet the case of " *debt*,—as a ' DEED in prejudice of the said tailzie,' under the " terminology of the *prohibitory* clause:—as a ' *thing* DONE *con-*

" '*trair* to this my destination and appointment,' or 'DONE *in*
" '*the contrair* hereof' under the terminology of the *resolutive*
" clause:—and finally, under the terminology of the *irritant*
" clause itself, as 'a DEED *whatsumever* DONE *contrair to the said*
" '*provision and destination*,' and calculated to '*affect* and *burden*
" 'the lands;'—and that, on the whole matter, the words '*other*
" 'deeds whatsomever,' as they occur in the irritant clause, are
" *not* to be construed in the mere limited sense of deeds *ejusdem*
" *generis* with the '*dispositions*' mentioned in a preceding portion
" of the clause,—that is to say, as deeds in the technical sense of
" *written instruments*, in contradistinction to the more natural
" sense of ACTS or DOINGS of the party.

" The words, 'the said *provision and destination*' as they
" occur in the irritant clause, I hold with Lord Murray to be
" synonymous with the words 'this present *bond of provision*'—
" or 'this my *destination and appointment*'—or 'the said *tailzie*
" '*and provision*'—or simply the said '*tailzie*,'—all of which
" expressions occur in close juxtaposition in this part of the deed;
" and therefore it follows, that the words 'deeds whatsumever
" 'done contrair to the said provision and destination' are not
" to be confined merely to deeds done in alteration or prejudice
" of the destination or order of succession, but embrace *debts* as
" one of the forms of 'deeds done' generally as a contravention
" of the entail.

" I may just add—1. That even were the entail to be held
" defective, as regards the *contraction of debt*, I can see no ground
" whatever for sustaining the conclusions of the libel in any other
" respect. But 2. I have great doubt, whether, in any view of
" the case, the present pursuer would be entitled to succeed in
" this action. The ground of action, as he has laid it in the
" summons, raises a question exclusively *inter hæredes*. It is
" not set forth that any *sale* of the estate has been attempted,
" or that *debt* has been contracted, or that a *gratuitous alienation*
" has been executed, or that anything has been done to affect or

" alter the *order of succession.* The fact may or may not be,
" that some of those things have been done, but the summons
" does not raise the point; and there is here accordingly no
" question with any *third party*, whether as *creditor* or other-
" wise. Now there can be no doubt that the entail, *under the*
" *prohibitory clause alone,* is effectual at all events *inter hæredes.*
" And to borrow the words of Lord Moncreiff's opinion in the
" case of *Aboyne*, (now also before the Consulted Judges,) 'it is
" 'a mistake to say, that if there be an effectual entail *inter*
" '*hæredes*, the Court will try a question concerning the possi-
" 'bility of a valid sale, &c., being made, *where no sale, &c., has*
" '*been attempted.* They have repeatedly refused to do so.'

" J. IVORY."

The Inner House unanimously concurred in these opinions, and pronounced, on 23rd June, 1842, an interlocutor dismissing the action, vide 4 *B. M.* & *D.* The appeal was against this interlocutor.

Mr. Kelly and *Mr. Anderson* for the Appellant.—I. The resolutive clause does not in any way refer to the prohibitions, which is necessary, in order to make it effectual. It is not sufficient that there is a general reference to the general intention of the entailer, as by the words "this my destination and appointment," there must be a specific reference to the prohibitions *qua* such. Destination is a word having a known technical signification applicable to the series or class of heirs called. If this word alone had been in the clause, it might have resolved any act altering the order of succession, but it could not have gone beyond, and that it should have such limited effect is consistent with the structure of the deed, as the prohibition against altering the order of succession immediately precedes the resolutive clause. This construction received countenance in Rowe *v.* Monypenny, 15 *Sh.*, 500, and in Monypenny *v.* Campbell, *Sh.* & *Mc.*, 898. If

the clause with the word "destination" alone would not be effectual, it is not mended by the word "appointment," which is not known to the law, and has no fixed meaning, and would seem, in the present instance, not to be more than an expletive of "destination," as any key to its meaning is to be found in the use of the verb appoint in the other parts of the deed, where it is employed in regard to the course of succession.

II. In the irritant clause, which follows the resolutive and begins at the words, "and all dispositions and other deeds," these words regulate and ride over the whole sentence. In their signification they are limited to written instruments, and cannot embrace the contracting of debt or adjudications following upon it. In the next branch of the sentence the irritancy is confined "to the said provision and destination," each in the singular number. The clause is open to the same objection as the resolutive clause, and to this further one, that as there are many provisions in the deed, and no one in particular is referred to, it does not appear which is embraced, and it cannot be held to include the whole provisions of the deed, as it would in that case embrace a direction to the heirs to wear particular arms, and to make the not doing such an act void and null would be an absurdity. Every observation which was made in Speid *v.* Speid, 15 *Sh.* 618, is applicable here.

III. The entail is further void, because the fetters are not inserted either in the procuratory of resignation or the precept of sasine. This is explicitly required by the Statute 1685, and no equivalent can be supplied. If the reference to the fettering clauses in the procuratory and precept will supply the defect of *verbatim* insertion, the statute would be equally complied with by the use of separate deeds. This objection is in the present instance especially forcible, as the entail is in the form not of a disposition, but of a bond, so that the procuratory is what operates the feudal conveyance, and the charter which is expede

upon it, will recite it alone. So that in the register of sasines there will be a reference merely to the clauses, and not the clauses themselves. But further, the reference is to the "reservations, reversion, provisions, and conditions above mentioned;" but none of these terms embrace either the resolutive or the irritant clause, which are not provisions or conditions of the entail, but clauses which fence and make effectual the conditions and provisions.

Lord Cottenham.—My Lords, in this case, without hearing the counsel for the respondent, I entirely agree in the judgment of the Court below, and shall therefore move your Lordships to affirm that judgment.

The question entirely turns upon the words "destination and "appointment" in the part of the deed of entail, which I will read to your Lordships:—"And if my said daughters and their heirs, "or any others, the heirs of tailzie and provision above specified, "(except the said William Stewart, my son, and the heirs male "lawfully to be procreate of his own and the said heirs male "lawfully procreat or to be procreat of my own body,) shall, in "any time coming, failzie herein, or do anything contrair to this "my *destination and appointment*, then and in that case the "person or persons so failzieing and doing in the contrair hereof, "and the heirs of their bodies, shall amitt and lose their right "and haill benefite of this present bond of provision and infeftment "following hereon." I consider that by the words "destination "and appointment," the entailer must have meant what he had before laid down, or "the whole scheme," and that the term "provision" he must have used in the same way, to apply to the whole scheme.

Then, my Lords, that which he provides against is not confined to instruments in writing, but the terms are, "any act or "deed," terms which are quite inconsistent with the author of this instrument meaning to describe written instruments only.

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The words could have no application under any such meaning, comprehending as they do everything which before had been enumerated, whether instruments executed or acts done. Upon those clauses, therefore, with regard to the construction I put upon those words, I think the judgment of the Court below is correct.

Then, another objection of a totally different character arises, from the procuratory of resignation and the precept of sasine. It is said that, by the terms of the Act, they ought to comprise all the clauses which are required to be inserted in the entail itself, the words of the Act being, that it is declared "that such tailzies shall " only be allowed in which the foresaid irritant and resolutive " clauses are insert in the procuratories of resignation, charters, " precepts, and instruments of seasin." Now, it cannot be disputed, after the authorities to be found in the books, that where there is one deed comprising the procuratory and precept, and in that same deed those clauses are to be found, it is sufficient if in each particular deed a reference is made to the other parts of the deed in which the clauses are contained. The terms in which that is laid down, are very clear in that case which has been referred to, the case of the Executors Creditors of Murray Kynnynmound, 5th July, 1744. "Although the Act 1685 declares, that such " tailzies shall only be allowed in which the irritant and resolu- " tive clauses are insert in the procuratories of resignation, " charter, precept and instrument of sasine, yet this has not " been so understood, that where the procuratory of resignation " and precept of sasine are *in eodem corpore*, the several irritant " and resolutive clauses must be repeated in each. For by an " equitable construction, all the clauses in the same deed are un- " derstood to be inserted in every part of the deed; and there- " fore, where the irritant and resolutive clauses are inserted in " the procuratory, it is enough that in the precept thereto sub- " joined they be referred to, for in that case the precept of " sasine is the whole deed.

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Now, that being the general rule, we have here the procuratory of resignation and the precept of sasine as part of an instrument in which those clauses are to be found. That falls exactly within the rule laid down in that case, and no authority has been referred to in which the rule so laid down appears to have been departed from.

My Lords, then an objection of a totally different character has been suggested, namely, that the register of sasines might not, (not that it does not, because of that fact there is no suggestion, but that it might not,) under the provisions of this deed, contain those clauses. The answer to that is that that is not the objection. The objection is not that there has been any omission to do what ought to have been done, and that that will affect therefore the register of sasines. Beyond all doubt, if the provisions of the instrument be attended to, no such omission can possibly be there found, because this direction has a perfectly distinct object, upon the construction of which I shall presently say a word. The words are, "With, under, and upon the reserva-" tions, reversion, provisions, and conditions above mentioned, "and no otherwayes, which are holden as repeated in this present "procuratory, and are appointed to be contained and set down in "the instruments of resignation, and in the charters and infeft-" ments to follow hereupon, acts, instruments, and documents "needful thereupon," and so on. So that there is an express direction that the officer is to prepare those several instruments, for which this deed contains the authority, provided the construction of this clause be such as I think it is, and that they shall contain a recital of those several clauses. Suppose that direction to have been followed, the register of sasines would contain all those clauses.

Then it is said, that the terms here do not include those clauses—that the word "clauses" is not used, and that the words "reservation, reversion, provisions, and conditions," do not comprise them. Now, my Lords, first of all, I think they are quite

large enough to comprise them. If I am right in the construction which before I put upon the word "provisions," it is obvious that it is large enough to comprise them: the words are, "provisions "and conditions," so that this point necessarily follows the result of the opinion which I have before expressed. Therefore, as regards all the points which have been urged as impeaching the judgment of the Court below, I think they are unsustained.

Lord Brougham.—My Lords, I take entirely the same view of this case with my noble and learned friend. There are three objections raised: first, that the resolutive clause is insufficient; secondly, that the irritant clause is insufficient; and thirdly, that there is not a sufficient incorporation of the prohibitory and resolutive and irritant clauses in the precept of sasine to which we are now confined; for we are confined strictly, and that must always be kept in view, to the validity or invalidity of the deed at the time when it was made, namely, in the year 1664. What was to happen afterwards, by accident might have happened the year after, although it did not happen till fourscore years afterwards. The time when it was put upon the record we have nothing to do with: we are upon the validity of this deed at the time when it was made.

Upon the first point, my Lords, I think the words are large enough, both in the irritant and resolutive clauses. The words in the prohibitory clause are, "doing any other fact or deed in "prejudice of the said tailzie, and of the persons above named "and their foresaids;" and the resolutive, "and if my said daugh-"ters and their heirs, or any others the heirs of tailzie and pro-"vision above specified, except," and so forth, "shall in any time "coming failzie herein, or do any thing contrair to this my desti-"nation and appointment, then and in that case the person or per-"sons so failzieing and doing in the contrair hereof," (it is doing as well as failing,) "shall amitt and lose their right," that is to say, their right shall be resolved in favour of the next taker under

the destination. Those words are large enough certainly to cover every matter in question; because it is not only "destination," but it is "destination and appointment." And also, "if any "person shall in any time coming fail herein." Now suppose we put that aside, because "fail herein" may be said to apply rather to non-feasance than mis-feasance,—to not doing an act which he had a direction to do, failing to do a thing which he had directed to be done; and I do not think the case referred to for the respondents mends that. But that is not all. I think that by itself might not be sufficient; but we are here dealing with what follows: "and doing in the contrair hereof." That is as large an expression as can be used of an act of contravention—"the contrair hereof." Of what? The contrair of this prohibition. You do not do in the contrary of something that is not prohibited, but it is, that you do something in the contrary of what has been laid down; that is to say, you violate the preceding prohibition,—the preceding prohibition being valid to effect the object aimed at by it.

My Lords, I need not go into the question upon the difference between the words "made" and "done," because clearly there is something very different in their meaning. A "deed made" may no doubt mean an "instrument made," but a "deed done" is not an "instrument done,"—it is an "act done;" and, therefore, these words, "made and done," apply to acts as well as deeds. So much for the resolutive clause.

The next point is upon the irritant clause, "and all disposi-"tions and other deeds whatsoever made or done," to which the observation I have just made applies. I thought at the moment it had been in the resolutive clause. It is in the irritant clause, "made or done contrair to the said provision and destination, "with all that shall follow hereon." These are very large words. "Provision" is the whole instrument,—it is the whole prohibitions, partly fenced with the resolutive clause; it is the whole of the provisions herein laid down to fetter the successive heirs of

entail, "and all dispositions and other deeds whatsomever made "or done contrair to the said provision and destination." To be sure it is in the singular, but it is "the said provision." It cannot mean any one provision, for it is not pointed out which of the different provisions is meant. But when you give a deed of arrangement of a family estate and its succession, and the fetters under which it shall be demised successively from one heir of entail to another upon his demise or forfeiture; when having given that you afterwards say, "This provision which I have "made," you surely do not mean to single out any one of those provisions which you have made before; but you mean to describe, by reference to what you have done, the whole of your family arrangement, and to prescribe the rules under which the successive heirs shall take the estate in question.

I forgot to make an observation upon the word "appoint-"ment," which comes, I believe, in the first clause, the resolutive clause, and is not in the irritant clause. That word "ap-"pointment" appears to me to be an exceedingly general word, and to enlarge the sense of the preceding word "destination." It is clearly something different from "destination;" for it says, shall "do anything contrair to this my destination and appoint-"ment." If I merely name a person to a particular function of any sort, whether to succeed to an estate or to take property of any kind, if I name him simply without more, then I should say that was a nomination,—it might be called synonymously an appointment. But if I have taken care to name that particular party, and I say that he shall succeed in this respect and no other, he shall enjoy the estate in this respect and no other, he shall take it subject to these fetters and not more freely or absolutely; then if I refer afterwards to what I have done in respect to that by the word "appointment," by the bare literal force of the term, (and it would be a violent construction to give any other sense to it,) it is clear that my intention is not merely to name him, which would be a destination; but, even if it had

been appointment alone without "destination" preceding, the inference would have been, that I intended his nomination to be, in a limited way, subject to those fetters and restrictions contained in the deed. But that is aided, as one of the learned Judges in the Court below, Lord Mackenzie, said, by the preceding word "destination," though I think that the word "appointment" standing by itself would have implied that the whole was given to him *in modo et forma* in which it was expressed. That supports the construction of the resolutive clause put by the Court below; and I have already dealt with the irritant clause, which comes rather unusually after the resolutive clause. We have the words, "dispositions and other deeds whatsomever made or done "contrair to the said provision and destination." That is the whole of the preceding scheme, the successive enjoyments of the estate.

Now, my Lords, with respect to what follows, with respect to the insertion in the precept, we are to assume, when we come to this point, that the two former points have been decided in favour of the judgment of the Court below and against the appellant; and that implies that the word "destination" has the sense imputed to it, and that the word "provision" has the sense imputed to it. We find in the same instrument the Scotch word "provision," (the same identical word used after the words "reservation and reversion,") and therefore that would be sufficient to import it into the former part, and then there is added the word "conditions." The word "condition" is wanting in the irritant, as well as in the resolutive clause. Then it is "these "provisions and conditions" respectively, (that includes them all "above mentioned,") a most general reference, "which are "holden as repeated herein, and are appointed to be contained "and set down;" and if this direction is followed, they must appear, and they must be so set down. We have nothing to do with what is done afterwards. We are now upon the force and effect of the words of the clause in the deed itself at the time it

was made. For these reasons I entirely agree with my noble and learned friend; nor should I have said so much, he having exhausted the subject, had it not been that this case below has been given, so far as regards the opinion of the learned Judges, somewhat meagrely. One can hardly discover much of the argument, except what is said to have fallen from Lord Mackenzie; and, generally speaking, there is less light thrown upon the specific grounds upon which the judgment was rested below than might have been expected in a case of this kind, it being a case of very considerable importance.

Lord Campbell.—My Lords, in this case I agree that the interlocutor appealed against ought to be affirmed; and although the Judges were unanimous, if my opinion had been that they had made a mistake, it would have been my duty to have said so. Your Lordships have, in repeated instances, reversed the unanimous judgments of the Scotch Judges; and you have, in several instances, acted against the unanimous opinion of the English Judges; but your Lordships are always very much pleased when you are able conscientiously to agree with the opinions of those venerable sages who are appointed to administer justice in one part of the united kingdom or the other.

Now, my Lords, with regard to this case, it seems to me that there is a fallacy, which I have heard again and again at the Bar, and which I myself, when at the Bar, perhaps have resorted to in a very desperate case, which is this, that if there are two senses in which a word may be used, you are to understand that it is used in that sense which is favourable to freedom and not to fetters. My Lords, the fallacy is, that you are not to look to see whether it is possible, under certain circumstances, that a word may have two meanings, but you are to see in what meaning it is used in the deed which you are to construe. If in the deed, in the part of it which is to be construed, the meaning is doubtful, if you cannot tell in which sense

the settler used it, then you are to put that sense upon it which is favourable to freedom, and which is against fetters. But if, looking to the deed itself, it is quite clear in what sense he used it, although, when it appears elsewhere, it may have another sense, you are to put upon it the sense in which he uses it, though that sense may be for fetters and not for freedom. I apprehend, my Lords, that with regard to entails, unless there be some reason to entertain a doubt as to the sense in which expressions are used, you are to give them their fair and grammatical meaning. You are not to look at the general intention of the settler, because in that case you would set up many defective entails, but looking at the particular clause to be construed, if you can give effect to it in the sense in which it is used, putting upon it its natural meaning, you are to give that effect to it.

In this case it is admitted that the prohibitory clause is sufficient. Then it is admitted that if the resolutive clause and the irritant clause have a sufficiently large reference to the prohibitory clause, they also are sufficient. And it is admitted, and very properly, by Mr. Anderson, who is extremely conversant with these subjects, that it is not at all necessary to enumerate in the resolutive clause or the irritant clause, the various things that are limited by the prohibitory clause, and that you are to look to see whether the words in the irritant and resolutive clauses be sufficiently large in their natural and grammatical construction to embrace what is contained in the prohibitory clause. My Lords, in this case then, your Lordships can entertain no doubt, because the resolutive clause is in these words:—"That if "the heir of entail shall at any time coming fail herein, or do "anything contrair to this my destination and appointment, then "and in that case the persons so failing and doing in the contrair "hereof, and the heirs of their bodies, shall amitt and lose their "haill right and benefit in this bond of provision." Now, what is the natural and obvious meaning of the words there, "anything "contrair to *my destination and appointment?*" Why, it is "this

"settlement," "this deed of entail whereby I have disposed of "my estate, the destination of which I have fixed, and the provisions of which I have laid down." The words here are "contrary to my destination and appointment." Now, if it had been contrary to this "deed of entail," I suppose that would have been sufficient. Would not that have been a sufficient reference to the prohibitory clause? Can there be any doubt that he means, when he says, "contrary to my destination and appointment," the appointment which he makes by this deed of entail, namely—all the clauses, provisions, and conditions which are therein contained?

But then the language varies a little when it comes to the irritant clause, and instead of appointment it is "provision and "destination," "and all dispositions and other deeds whatsomever, made or done contrair to the said provision and destination." There again, what does he mean by "provision and "destination?" Does he not mean the settlement of the deed of entail by which he has settled his estate upon the heirs named therein? It was supposed that even if it were so, "disposition "and other deeds whatsomever made or done," was not sufficient. But it is quite clear that there the deeds done means acts done, and comprehends everything which would be an infraction of any part of the prohibitory clause.

My Lords, for this reason it seems to me that, giving the words that are employed in the resolutive clause and the irritant clause each their natural and grammatical meaning, they refer to every thing that is forbidden by the prohibitory clause.

Then, with regard to the third objection, it resolves itself into two branches, because, first, is contended that in the precept of sasine the fettering clauses must *in ipsissimis verbis* be repeated. Now, that certainly is contrary to the course of conveyancing that has prevailed in Scotland for 150 years. It is contrary to an express decision—it would lead to the greatest inconvenience, and it would produce no good whatsoever. There is an obvious

distinction between a reference from one part of the deed to another, and a reference from one deed to another deed, which is not forthcoming, and which there may be no means whatever of consulting.

But when it is said that these fettering clauses should be inserted in the precept of sasine, and in the procuratory of resignation, I say that they are inserted—they are substantially inserted, because there is a direction that they shall be inserted, and it is said that they are to be taken for repeated. And it would be a mere waste of paper and of ink, and of labour, for no purpose whatsoever, to write them over a second time in the same instrument. It would lead most unnecessarily to an aggravation of the evil which we so often have complained of, the unnecessary length of deeds and conveyances of estates.

Then the second objection under this head is, that the words are not sufficient even to direct the insertion of these clauses by way of reference, because it is not as in the Dryburgh case, where I believe the words occur, "that the resolutive and irri-" tant and prohibitory clauses shall be repeated;" those words do not occur. But then the words occur that it shall be, "with, " under, and upon the reservations, reversions, provisions, and " conditions above mentioned, and no otherways, which are " holden as repeated in this present procuratory, and are appointed " to be contained and set down in the instruments of resignation " and in the charters and infeftments to follow hereupon." These fettering clauses must, I think, be understood to be comprehended in the "reservations, reversions, provisions, and conditions above " mentioned." That seems to be a clear direction that those clauses should be inserted in the instrument of sasine, and therefore this objection fails.

Mr. Anderson contended, and most properly contended, as it was his duty to do, by way of objection to this clause of reference, that there might be a due registration of the precept of sasine, altogether suppressing these fettering clauses. It seems to me,

my Lords, that that would not be a due registration—it would be an utter misrepresentation of the precept of sasine, because the precept of sasine is directed to be under the conditions and reservations above mentioned. And if you were to register it as wholly absolute, that would not be a just registration—that would be an utter misrepresentation of the clause which is to be registered. It seems to me, therefore, that that argument, which was put very ingeniously, cannot be supported. Under all these circumstances, my Lords, I agree in the opinion which has been pronounced by my two noble and learned friends, that this judgment must be sustained.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutor or judgment therein complained of, be affirmed with costs.

Deans, Dunlop, and Hope—G. and T. W. Webster, Agents.