[HEARD *2nd*—JUDGMENT *5th July*, 1850.]

THE RIGHT HON. JOHN STUART WORTLEY MCKENZIE LORD WHARNCLIFFE, *Appellant.*

DAVID NAIRNE, ESQ., of Drumkilbo, *Respondent.*

Taillie.—Particular structure of the irritant clause of an entail, as to which the expressions "such debts, facts, and deeds," done in the contrary of the premises, were held to apply to sale, which was an act effectually struck at by the prohibitory clause; but, as to which, the irritancy thus effectual, if the clause had stopped there, was held to be rendered ineffectual by these words which followed: "in so far as the same might infer any actions, personal or real, "against the next heir of taillie, or the land and others foresaid."

Ibid.—An Entail to be effectual must contain, not a partial or qualified, but an absolute declaration of nullity of the Acts prohibited.—*Semble.*

THE question raised by this appeal was the right of the Respondent, the heir of entail in possession of the lands of Drumkilbo, to sell these lands, notwithstanding the fetters of the entail. This question was raised in the Court below by suspension, at the instance of the Appellant against the Respondent, as of a threatened charge for payment of 38,000*l.*, the price of the lands, upon a sale which had taken place between them, and by an action of declarator by the Respondent, directed against the Appellant and the substitute heirs of entail, to have it declared generally "that the Pursuer has full and undoubted right and power to "sell and alienate the several lands and others contained in the "foresaid disposition and deed of entail, in any way he may "think proper, for a price or other onerous consideration, and "to grant and execute all dispositions, conveyances, deeds, and "writings whatsoever, which may be requisite or necessary for "effectually conveying the whole, or any part or parts of the

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" said lands and others which may be so sold and alienated; " and that, upon selling and alienating the whole, or any part " or parts of the said several lands and others, the Pursuer has " the sole and exclusive right to the price or prices, or other " consideration; that the same are the Pursuer's absolute pro- " perty; and that the Pursuer does not lie under any obligation " to invest, employ, or lay out the same, or any part thereof " in the purchase, or on the security, of any other lands or estate " or otherwise, for the benefit of the Defenders, or either of " them; and that they have no right or title to interfere with " or control the Pursuer in the use or disposal of the said price " or prices, or other consideration, in any manner of way; and " also that the Defenders, or either of them, have no claim or " demand of any description against the Pursuer, or against his " heirs or representatives, in the event of his death, for or in " respect of the sales or alienations which may be made, or dis- " positions or other writings which may be granted or executed " by the Pursuer, or for or in respect of the Pursuer using or " disposing at his pleasure of the said price or prices, or other " consideration;" and more particularly that the sale to the Appellant was valid and effectual.

The deed of entail under which this question arose, was a disposition and entail which had been executed in 1705 by John Lord Balmerino, in favour of Alexander Nairne and others, and which contained the following prohibitory, irritant, and resolutive clauses :—" And sicklike providing, likeas it is hereby " specially provided and declared, that it shall not be lawfull to " the said Alexander Nairne or the other heirs of taillie above " mentioned, who shall succeed to the said lands and others " above mentioned, by virtue of this present right, to sell, " anallie, dispone, dilapidate, nor put away, the lands, teinds, " and others, above exprest, or any part thereof, either heritably " and irredeemably, or under reversion, nor to grant infeftments " of annualrent, or yearly duties furth thereof, nor to contract

" debts or sums of monie, wherewith the samen may be bur-
" thened, exceeding a yearly free rent of the said lands and
" estate, or to do any other fact and deed whereby the said lands
" and others foresaid may be apprised or adjudged from them,
" or anyways burthened in prejudice of the subsequent heirs of
" taillie, or their foresaids, or shall suffer any apprising or
" adjudication to be led of the said lands to run for the space of
" five years, without redemption thereof; nor shall it be leisom
" nor lawful to them to break, alter, or infringe this present
" right or taillie, in the course of succession above-mentioned:
" And if he, or any of the forenamed persons, heirs of taillie,
" shall contraveen and do in the contrary, *or* (*sic. in orig.*)
" any point of the premises, then not only all such debts, facts,
" and deeds, are, *per verba de præsenti*, declared to be *ipso facto*
" void and null without declarators, in so far as the samen might
" infer any actions, personal or real, against the next heir of
" taillie, or the lands and others foresaid: But also the persons
" substitutes, or heirs of taillie foresaid, contraveening, or who
" shall contraveen, any of the conditions and provisions above
" mentioned, and the heirs-male of their bodys, shall forefault,
" amit, and tyne, their right of succession to the lands and
" others above mentioned, and all rights or infeftments in
" their persons shall immediately thereafter expire and become
" extinct, void and null."

In December, 1705, a Crown Charter was *expede* in favour of the first disponee in the entail upon the procuratory contained in it. Infeftment was taken upon this charter, and duly recorded. Titles were made up in the persons of several successive heirs until the succession opened to the Respondent, who likewise made up his title by a charter bearing express reference to the original entail.

The process of suspension and action of declarator having been conjoined, the Lord Ordinary (Cuninghame) did not himself pronounce any interlocutor, but ordered the parties

to prepare and box cases, and with these he made great avizandum to the Court. The Court (1st division) directed the cases to be laid before the Judges of the other division and the Lord Ordinary. These Judges, including Lord Cuninghame, but excepting Lord Ivory, who declined to take any part, were unanimously of opinion that the entail was invalid, and thereafter, the Lords of the first division, with the exception of the Lord President, concurring in that opinion, they, on the 20th of July, 1849, pronounced the following interlocutor, which was the subject of the appeal:—"Find, that the entail of Drumkilbo "is defective in the irritant clause, and is, consequently, not "sufficient to prevent à sale of the estate: therefore in the "suspension, repel the reasons of suspension, and find the letters "orderly proceeded, and in the declarator, repel the defences "and decern against the Defender in terms of the conclusions of "the libel and decern."

Along with the interlocutor, making great avizandum to the Court, the Lord Ordinary issued the following note, which contains such a neat summary of the cases bearing upon the present, as to make it unnecessary to go further into the subject in this report:—"It is objected to the entail in question (of "Drumkilbo, in Forfarshire), that it is exceptionable in the "*irritant* clause, which is quoted at length in the narrative of "both revised cases. Two objections are stated and enlarged "on relative to that clause.

"1. It is argued that the 'debts, facts, and deeds,' *irritated* "by this entail, must have the limited construction adopted in "the cases of Blair-Adam (1 *Shaw, Appeal Cases*, p. 24); and "of Lang (1 *Dunlop*, p. 98, and *M'Lean and Robinson*, p. 871); "and of Ulbster (26th February, 1841)—in all of which pre-"cedents, irritancies of 'facts and deeds,' or of 'debts and "'deeds,' were held to apply only to a limited class of facts "and deeds, specified in the immediately preceding conclusion "of the prohibitory clause, and not to sales set forth in an

" earlier part of it: and that the present question is distin-
" guished from the cases of Finzean (2 *Dunlop*, 1162), Knight
" (5 *Dunlop*, 221), and of Leith Hay (5 *Dunlop*, 347), in which
" a general declaration, that 'all debts, deeds, or acts, done in
" ' contravention of the premises, shall be null,' was held to
" apply to the whole branches of prohibition, including sales,
" and all other alienations.

" Some of these cases may appear to turn on narrow and
" nice distinctions; and, in general, the validity of every entail
" must depend on a critical examination of its own terms. The
" irritancy in the present instance is thus expressed:—' And if
" ' he or any of the forenamed persons, heirs of taillie, shall
" ' contraveen, or do on the contrary, *in any point of the pre-*
" ' *mises*, then not only all such debts, facts, and deeds, are,
" ' *per verba de præsenti*, declared to be *ipso facto* void and
" ' null without declarators, *in so far* as the samen might *infer*
" ' any *actions*, personal or real, against the next heir of tailzie,
" ' or the lands and others foresaid.'

" When that clause is contrasted with those in the cases of
" Adam, affirmed in the House of Lords, and of Knight and
" Leith Hay before referred to, which deserve to be attentively
" re-perused, and, perhaps, placed in *juxtaposition* with the
" present in an Appendix, the Lord Ordinary leaves it to the
" Court to determine whether the irritancy here can admit of a
" construction less stringent than those sustained in the last
" instances cited.

" 2. The other exception taken to the irritant clause is, that
" it is of a *limited* and *qualified* nature, and does not validly
" render null all acts and deeds *absolutely*, but only 'in so far
" ' as the same may *infer* any *actions*, personal or real, against
" ' the next heir of tailzie.' Such a clause, it is argued, does
" not apply to a sale upon a conveyance with procuratory and
" precept, which requires no action, *personal* or *real*, to make it
" effectual.

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"The terms of the irritant clause thus noticed are certainly "peculiar, and do not appear *in ipsissimis verbis* in any other "case the Lord Ordinary has been able to find. At the same "time, in later times, certain cases have been tried, on clauses "of nearly similar import, which deserve to be kept in view in "the present question, in order to preserve uniformity of "decision in the construction of deeds of this class. In par-"ticular, in the case of Munro of Foulis, in 1826, (4 *Shaw*, "467), it was found, both by this Court and the House of Lords, "that 'a declaration that debts and deeds shall be null and "'void, *so far as they affect the estate*, is sufficient, without "'declaring that they shall be null and void as against the "'contraveener.' See also the cases of Mackenzie and of "Nisbet, in 1823 (2 *Shaw*, pp. 331 and 381), as well as the "Dryburgh entail, quoted in the papers.

"The Court will judge how far the objection is ruled by these "cases, or is maintainable on any other ground."

Mr. Wortley and *Mr. Anderson* for the Appellant.

Mr. Bethell and *Mr. Handyside* for the Respondent.

LORD BROUGHAM.—My Lords, this case, which is of considerable importance in respect of the value of the property, and the amount of the purchase money (38,000*l.*), is also of some, though, all things considered, not perhaps of very great, importance, with respect to the points of law made, was fully heard before your Lordships; and able arguments were offered by the learned Counsel for both the parties.

It appears that two points were made in the Court below, upon which there was some difference of opinion among the learned Judges. Both these points refer to the sufficiency of the irritancy to guard the prohibition against selling, it being admitted on all hands that the prohibitory clause "to sell,

"anallie, dispone, dilapidate, nor put away the lands, &c," is perfectly sufficient to prevent sale. The prohibition goes on: "or to do any other fact and deed whereby the said lands and "others foresaid may be apprised or adjudged from them, or "anyways burthened, in prejudice of the subsequent heirs of "tailzie, or their foresaids, or shall suffer any apprising or "adjudication to be led of the said lands to run for the space of "five years, without redemption thereof; nor shall it be lawful "to them to break, alter, or infringe the present right or taillie "in the course of succession." Next comes the irritant clause, upon which the two points were raised: "And if he or any of "the forenamed persons, heirs of taillie, shall contraveen and do "in the contrary, or any point of the premises," then "all such "debts, facts, and deeds shall be null and void" (on which words one point is raised) "in so far as the same might infer actions "personal or real against the next heir or the lands" (on which words the second point is raised). There is, lastly, a resolution or forfeiture, and a devolution in consequence, on which nothing turns.

1. These words, "shall contraveen and do in the contrary, "or" (which is manifestly a clerical error: it should be "*in*") "in any point of the premises," would be quite sufficient, if there followed no restrictions or limitation of the generality. For it was not necessary (as no Scotch lawyer need be reminded) that there should be any particular form of irritancy adopted. If you have prohibited sale and alienation, contracting debts, encumbering, or altering the order of succession, you may, without naming any of those particulars, provided you do not restrain the generality, irritate, and resolve, by a reference to the preceding prohibitions, and this would be as effectual to prevent sale, contracting of debts, and altering the order of succession, as if those very words had been repeated in the irritant and resolutive clauses.

Now here the words "are or shall contraveen and do in the

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" contrary in any point of the premises" (which includes sale undeniably); and had it stopped there, and the declaration of nullity only been added, this would have been sufficient. But the question is, and the first question, whether that is not limited and restrained by what follows? " Then all *such debts*, " *facts, and deeds, &c.*" That is to say, such things as are contracted and done by the contravener shall be irritated. Now I am inclined to think, and the learned Judges below give us reason to believe that they too thought (my Lord Moncrieff does not give a positive opinion upon this; but the others for the most part appear to hold, I think rightly, that), taking the whole together, " all *such* debts, facts, and deeds" being declared to be void as against the contravener who shall act " in the con- " trary in any point of the premises," we are thus referred back to the prohibition, and we find it include among other things all sales in express words; and therefore sales would be declared void, unless something followed to restrain or limit the denunciation of nullity. The second question is, whether or not some restriction does follow; and this is the material point.

2. If the instrument had stopped at the words, " are declared " to be null," I think that would be sufficient to declare a nullity absolutely. But it goes on: " are declared to be null in so far " as the same might infer any actions personal or real against " the next heir of taillie, or the lands and others foresaid." Then comes the resolution which depends upon the irritancy.

Now I am of opinion that this addition restrains the preceding generality—restrains the words declaring nullity of sale. The words "*in so far as*" impose on the clause a restriction or limitation: they confine the declaration of nullity to such debts, deeds, and facts as may infer actions against the heir or lands, and prevent the declaration from being an effectual fettering clause to prevent sale. For, first, I incline to agree with those who hold that the Entail Act requires an absolute declaration of nullity, and is not satisfied by a partial or qualified declaration.

But, secondly, there can be no doubt that the irritancy in question only strikes at such sales as infer an action; whereas a sale may be so effected as to be complete, and enable the purchaser to perfect his title without any suit whatever. Therefore I must hold that the irritancy is ineffectual.

The learned Judges differed in opinion upon the second point—that which is most material. Possibly there was some difference upon the first; certainly there was upon the second. A most respectable and most respected authority, the Lord President—followed at one stage of the cause by another to whose opinion we all have the greatest deference, my Lord Jeffrey—considered that there was sufficient in the fettering or fencing clauses to tie up the heir of tailzie, and to prevent sale, the other Judges holding a different opinion.

Now, upon what chiefly do the opinions of the minority rest; and especially that of the Lord President, who all along held the entail valid, and with whom Lord Jeffrey, after hesitation, ultimately agreed? The main grounds of that opinion were the case of *Jordanstone*, and the case of *Raimes*, which is auxiliary to it. There is a very judicious course taken on page 17 of the Appellant's case; and I wish it were followed more frequently when there is a reference from the case at bar to former cases, for the purpose of comparing different instruments together. I mean the printing them in opposite columns, and in close juxtaposition with each other; so that the eye may at once fix itself upon the minute particulars of the clauses, passing at once from the case at bar to the cases with which it is sought to be likened on the one hand, or contrasted on the other. The *Jordanstone case* and the *Raimes case* are printed in this manner; and it is pretty clear to me (as I threw out during the argument) that this is fatal to the contention which would raise a similarity between the present case and those two. For the Jordanstone case is: "And if the said George Cockburn, Knight, or one or "other of the said heirs of tailzie, shall contravene or do in

" the contrary, in any part of the premises, then not only *shall* " *all such deeds and debts be void and null of themselves*" (not in so far as they may infer an action, but only) " and no ways " binding or obligatory to infer any action or execution personal " or real against the next heirs of tailzie, or the lands and " others foresaid, &c." It does not say, that in case he shall contravene, " then all such debts and deeds shall be null and " void in so far as they infer any action or execution." That would have been like the present case. But it is no such thing. It is: " that such debts and deeds shall be *null and void of them-* " *selves*, and noways binding or obligatory to infer any action"—a totally different clause. The words added may even seem to enlarge—certainly they do not restrict the preceding portion of the denouncement.

Then the Raimes case is: " all which debts, facts, and deeds " are by these presents declared *to be void and null, ipso facto,* " without declarator, as far as concerns or as the same may " burden or *affect my said taillied estate*"—not " in so far as it " goes to infer an action," but " as it affects my taillied estate." Nothing can be more different than the case at bar and that case. These two cases, therefore, are inapplicable to the present; and the same may be said of the others that were cited, Murray *v.* Murray, and the Dryburgh case or the case of Erskine. Those also fall within the description, not so much of the *Jordanstone case*, as of the *Raimes case*, because the nullity is in those cases declared of all facts and deeds which affect the land. The case of Knight is equally distinguishable; for there the deeds are declared to be " null and void of themselves."

My Lord Moncrieff's opinion was very decided and unhesitating; nor can any opinion be received which is more entitled to our respectful consideration. His Lordship did not deem it necessary to enter into the argument at this late period of our judicial history, and when the law of entail has been so often and so fully considered. I am therefore sanctioned by his high

authority in expressing my opinion without hesitation, and in respectfully declining to share the doubts of some of the other Judges. The clause is so framed, that whatever might have been the intention of its maker, it does not reach one class of sales; and to that class of sales belongs the very sale in question.

My Lords, I threw out, in the course of the argument, that I do not go along with a most learned and able Judge, Lord Fullerton, in regarding this as peculiarly a case of critical nicety—a case of verbal criticism. Every case of this sort must be a case of verbal criticism. The question is always whether the words import the thing which it is alleged on the one hand, and denied on the other, that they are intended to import. I have no hesitation in advising your Lordships to affirm the interlocutor appealed from.

It is Ordered and Adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutor therein complained of, be, and the same is hereby affirmed.

RICHARDSON, CONNELL and LOCH.