[6*th August* 1840.]

WILLIAM CUNNINGHAM C. GRAHAM of Gartmore and Finlaystone, THE SCOTTISH UNION INSURANCE COMPANY, and ALEXANDER HAMILTON, W. S., Common Agent for the Creditors of the said W. C. C. GRAHAM, Appellants.[1] (No. 17.)

[*Pemberton — Sandford.*]

ROBERT CUNNINGHAM BONTINE of Ardoch, and his Son and Daughter, and their Administrator at Law, Respondents.

[*Attorney General (Campbell) — Tinney — Spiers.*]

Entail — Investiture — Irritancy.—Two separate deeds of entail executed as procuratories of resignation by the same party were inserted in one charter, the clauses verbatim the same in each entail not being repeated, the charter at the same time setting forth the fact that there were two separate entails: Held (affirming the judgment of the Court of Session) that although ex figurâ verborum the construction of the charter might raise the inference that a contravention of the one entail would induce a forfeiture of both estates, the charter must be construed applicando singula singulis, and that therefore an heir of entail possessing under the charter so framed and under a subsequent charter of resignation expede by him, and framed in similar terms, had not possessed adversely to the original entail, but was subject to the fetters thereof.

A. in 1767 executed an entail of his estates in the form of a procuratory of resignation comprehending, inter alia, the lands of C. & D. The lands of C. were held of a subject superior. The dominium directum of the lands of D. had been previously in the possession of A.'s family, the dominium utile was conveyed to A.'s father in 1708 by dis-

[1] Fac. Coll., 12th June 1835, 2d March 1837; and 15 D., B., & M.

position from the then owner; no infeftment was taken thereon till 1757, when A., as heir of his father, executed the precept, and was infeft, and in 1765 A. granted a charter of confirmation to himself. The other lands comprehended in the entail were held of the Crown. A. died without having executed the procuratory, and was succeeded by his son, who, after executing the procuratory, obtained a Crown charter in 1779, comprehending inter alia the lands of D., but died without being infeft. On his death B., the grandson of A., took infeftment on the Crown charter so obtained. In 1814 B. obtained a precept of clare constat from the superior of C., was infeft, and disponed the lands of C. In 1815 B. obtained a decree reducing A.'s infeftment on the disposition of 1708, and disponed the lands of D. In an action against B., by the next substitute, to have it found that in consequence of the fee-simple titles made up to the lands of C. and D., and of his having alienated them, the whole remaining entailed estate devolved to him from the date of citation: Held (affirming the judgment of the Court of Session), 1st., that B. was subject to the entail in regard to the lands of C.; 2d., that the dominium utile of D. had been consolidated with the superiority, and that, with regard to the lands of D. also, B. was subject to the entail; and therefore that the pursuer of the action was entitled to decree in terms of the libel.

Both Divisions.

Lord Ordinary Corehouse.

NICOL GRAHAM held the estate of Gartmore and others of the Crown; he also held the lands of Gartinstarry in virtue of an infeftment on a charter of resignation and confirmation in favour of himself and his heirs, from the superior, the Duke of Montrose. He likewise was proprietor of the lands of Garchell. The dominium directum of these lands had been long in the Gartmore family, and in 1708 the dominium utile was conveyed by Mary Hodge to Robert Graham, then of Gartmore, by a disposition containing procuratory of resignation, and precept of sasine. Robert Graham

entered into and continued in possession till his death, without executing either procuratory or precept.

In 1756 Nicol Graham was served heir male of line and provision in general to Robert Graham his father; in 1757 he was infeft on the above-mentioned precept, and in 1765 he executed a charter of confirmation of the disposition by Mary Hodge, and his infeftment thereon, in favour of himself.

In 1767 Nicol Graham executed a strict entail of his estates, in the form of a procuratory of resignation, in favour of himself in liferent, and William Graham his eldest lawful son, and the heirs male of his body in fee, which failing, Robert Graham (father of the appellant), his second son, and the heirs male of his body, which failing, certain other substitutes. The deed was recorded in the register of tailzies the following year. In this deed were included the lands of Garchell, as well as the lands of Gartinstarry.

This entail, besides the usual irritant clauses against alienation, &c., contained likewise the following clause:

" Providing also, that the said William Graham, and " the haill other heirs of tailzie above mentioned, shall " bruick, enjoy, and possess the said tailzied lands and " estate by virtue of this present right and tailzie, " and infeftments to follow hereon, or any other " right that I have in my person to the foresaid lands " and others above written, and by no other right " and title whatsoever; and the said William Graham, " and the haill other heirs of tailzie above specified, " shall be obliged timeously to obtain themselves " entered, infeft, and seized in the said lands and " estate, and not to suffer the same to lie in non- " entry; and also to cause insert in the instruments of " resignation, charters, and infeftments to follow hereon,

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" and in the haill procuratories and instruments of " resignation, charters, services, retours, precepts of " sasine, and instrument of sasine, and haill other con- " veyances of the said lands and estates, all the pro- " visions, declarations, and irritancies of the present " tailzie."

The resolutive clause declares, that " the person or " persons so contravening or failing to fulfil the above- " written conditions and provisions, or any one of them, " shall, for themselves, ipso facto, amit, lose, and for- " fault their rights and interest in the said lands and " estate, and the same shall become void and extinct; " and it shall be lawful to the next heir of tailzie, who " should succeed if the contravener was naturally dead, " albeit descended of the contravener's own body, to " purge, and obtain declarators upon the contravention " or failing to fulfil any of the provisions or conditions, " or to obtain adjudications of the foresaid lands and " estate."

In 1774 Nicol Graham executed another deed of entail of the lands of Wester Culbowie and others, in favour of himself in liferent, and of his wife, Lady Margaret Graham in liferent, and the said William Graham, his eldest son, and the heirs male of his body, whom failing, the said Robert Graham, his second son, and the same series of heirs as in the other entail. This latter deed was not recorded.

William Graham, the entailer's eldest son, having predeceased him without issue, the succession opened, on the death of Nicol Graham, to the said Robert Graham, his second son, who in 1775 expede a general service as heir male of tailzie and provision to his brother the said William Graham under the entail 1767, and in 1776 he also expede a general service under

the entail 1774, as heir male of tailzie and provision to his father Nicol Graham. This difference in the services was accounted for by the respondent, by alleging that William Graham predeceased the execution of the entail 1774. A charter was then obtained from the Crown, comprehending the lands contained in both entails, with certain immaterial omissions, and omitting the heirs who had predeceased, and their descendants, and containing all the clauses in each deed, with this exception, that in so far as they were indentically the same in each they were not repeated. The charter disponed first the lands in the entail 1767, and then those in the entail 1774, and distinctly explained that these lands were contained in two separate deeds of entail, and correctly mentioned the different warrants of resignation. In 1778 Robert Graham was duly infeft on this charter. In 1779 Robert Graham executed a procuratory of resignation of the lands in the charter 1776 in terms thereof, on which he obtained a new Crown charter, but died without being infeft upon it. On Robert's death the appellant, W. C. C. Graham, served heir male of tailzie and provision, and took infeftment on the precept in the charter 1779, in 1799.

With regard to the lands of Gartinstarry, which do not appear to have been included in the charter 1779 and infeftment thereon, the appellant W. C. C. Graham, in 1814, obtained from the then superior of these lands a precept of clare constat, as heir of provision of Nicol Graham, his grandfather, in virtue of which he was infeft the same year. He then granted a heritable bond over these lands, and afterwards sold them.

The lands of Garchell, &c. were in 1815 conveyed to a trustee, who brought a reduction of Nicol Graham's infeftment in 1757, above mentioned, against the appel-

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lant, W. C. C. Graham, on the ground that the retour of his service was not exhibited to the baillie, and not noticed in the infeft, and decree of reduction was pronounced the same year. The appellant W. C. C. Graham then expede a general service as nearest and lawful heir male of provision to Nicol Graham, and took infeftment in 1816 on the disposition by Mary Hodge in 1708, and at the same period the trustee was infeft on W. C. C. Graham's disposition to him. These lands were then sold to different parties, and for the greater part of them parts of the lands which were feudalized under the entail (the lands of Mendowie, Coalrigrean, Drum of Armanual, and others) were excambed in terms of 10 G. 3. c. 51. The superiority of these lands were alleged to have been disentailed under the authority of the act of 20 G. 2. c. 50.

In these circumstances the respondent, who is the eldest son of the defender, brought the present reduction, for himself and as administrator for his minor children.

The summons, after stating that the defender had made up titles in fee simple to the lands of Garchell and Gartinstarry, in contravention to the entail of 1767, in which they were included, and after narrating the sales of these lands, concludes, that it should be found and declared, that the defender did, in contravention of the said tailzie, make up titles in his person to these lands of Gartinstarry and Garchell, without inserting the provisions, &c. of the entail in the rights and conveyances expeded in his person; and that the defender did sell the above lands, or contract debts, or grant dispositions in security of the said debts, contrary to and in direct contravention of the said tailzie.

The summons then proceeds:—"And the several acts "of contravention therein specified, or any one of them,

" being established to the satisfaction of the said Lords,
" it ought and should be found and declared by decree
" foresaid, that the said W. C. C. Graham, defender,
" has thereby incurred an irritancy of, and amitted,
" lost, and forfeited all right, title, and interest in the
" said whole entailed lands and estates above described,
" contained in the said deed of tailzie, and every part
" thereof, and that his right, title, and interest in and
" to the said whole lands and estates and every part
" thereof are now and shall in all time coming be void
" and extinct; and it ought and should be found and
" declared by decree foresaid, that the said whole lands,
" teinds, and others above described, with the rents,
" maills, and duties of the same falling due from and
" after the date of citation to follow hereon, have fallen,
" devolved, and accresced and do now belong to the
" said R. C. Bontine, pursuer, as the next heir ap-
" pointed to succeed by the said deed of entail, and
" that free and disburdened of the foresaid dispositions
" and infeftments thereon, and of all and every other
" act done and deed granted by the said defender in
" relation to the said several lands and others in con-
" travention of the said tailzie, in the same manner and
" as fully and freely in all respects as if the said defen-
" der had never been in the possession of the said lands
" and estates; reserving entire to the pursuers all right
" of action competent to them and the other heirs of
" entail against the defender, for the loss and damage
" which they have sustained or may sustain by and
" through the foresaid sales, and other acts done and
" deeds granted by the defender in contravention of the
" foresaid tailzie; as also reserving all right of chal-
" lenge competent to the pursuers and other heirs of
" entail, for reducing and setting aside the conveyances

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" and other rights to the said lands and others granted " by the defender to the purchasers or disponees, and " all heritable securities granted over the said lands or " any part thereof by the defender to creditors or " others."

In this action Mr. Graham alone was called, but the trustees for his creditors, who are appellants, also sisted themselves.

In defence the following plea, inter alia, was raised out of the construction of the charter as above stated, viz. that the two entails of separate and distinct estates being amalgamated in the charter 1776, the charter in truth conveys the estates of Gartmore and Culbowie as one single estate, to which the irritant and resolutive clauses are made to apply indiscriminately, and a contravention upon any part of either estate operates a forfeiture of the whole of both. The investiture under the charter 1776 is, therefore, not an investiture under both or either of the procuratories, but forms a totally different entail from both or either, varying from them essentially in the provisions of entail and in their application. The estates have thus been possessed upon a title adverse to both entails since the date of the said investiture.

The Lord Ordinary (24th January 1833), after closing the record, reported cases, with which he made avizandum to the Court, adding the subjoined note [1], explanatory of this and the other pleas.

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[1] " *Note.*—Some of the points raised in this case do not seem to be at- " tended with difficulty. The entail 1767 being an irrevocable deed, in " so far as the interest of William Graham was concerned, the granter " having reserved his own life rent, and the deed itself having been re- " corded by him in the register of tailzies, it must be held as having " been delivered, and therefore the service of Robert Graham to his brother " William was an effectual and proper mode of completing his title; and

The Lords of the First Division, after considering the cases, appointed the same (2d July 1833) to be laid before the other judges for their opinions upon the following questions, as settled by the counsel for the parties:—

Questions for Consulted Judges.

Whether the titles completed by Robert Graham, the father of the defender, W. C. C. Graham, by the Crown charter in 1776, and the sasine following thereon, were framed in conformity to the deeds of entail executed by Nicol Graham in 1767 and 1774? Or, whether the

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" the defender, having connected himself with this entail by service to his " father, is bound by its conditions.

" With regard to prescription; as the pursuer was the next substitute " to the defender, and entitled by his contravention to take the estate, it " is thought that, agreeably to the principle adopted by the House of " Lords in the Bargany case, the minority of the pursuer must be deducted " in counting the years of prescription.

" There were two entails,—one of Gartmore and the other of Culbowie, " &c., which, mutatis mutandis, were identical in every important clause, " and they were both duly recorded.[1] Robert Graham, in expeding a " charter upon these entails, did not keep the conditions of the one sepa- " rate from those of the other, but combined them, as if there had been " but one estate and one entail; and this charter was not recorded in the " register of tailzies. Hence, ex figurâ verborum, a contravention of " the entail of Gartmore would, under the charter, forfeit not only that " estate, but the estate of Culbowie also; and, in like manner, a contra- " vention of the entail of Culbowie would forfeit the estate of Gartmore. " In an ordinary deed these conditions would be construed applicando " singula singulis, agreeably to the obvious meaning of the granter; a " rule arising out of the usual forms of expression, and generally adopted " with regard to every species of writing. But whether this rule obtains " in the case of an entail is more doubtful, as that instrument is construed " with a strictness and rigour unknown in every other case. If the ordi- " nary licence is not to be allowed, the entail in the charter of 1776 is " different from those executed in 1767 and 1774; and as the entail in " the charter enters the register of sasines only, while the two entails " are recorded in the register of tailzies only, the estates are not pro- " tected against the diligence of the defender's creditors, some of whom " are parties to this action. As the point is new, and the interest at " stake considerable, the Lord Ordinary has thought it right to report " the cause."

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[1] The entail of Culbowie was not recorded in the register of tailzies at the time the action was brought.

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entail contained in the said charter and sasine is the same with or different from both or either of the entails contained in both or either of the said deeds of entail of 1767 and 1774; and if different, what is the legal effect and consequence of such difference? And whether by the titles so completed by the said Robert Graham, and by those completed by his son, W. C. C. Graham, the lands contained in the entail 1767, (which entail had been previously recorded in the register of tailzies,) are effectually secured against the debts and deeds of the said W. C. C. Graham; and whether the said entail is binding and effectual against him in questions with the substitute heirs of tailzie.

The consulted judges having expressed a wish that the case should be argued vivâ voce before the whole Court, a very full argument accordingly took place in the course of the summer session 1834; and the following opinions were then returned by the consulted judges:—

Opinions of Consulted Judges.

Opinions of Lord Justice Clerk, Glenlee, Meadowbank, Medwyn, and Corehouse.

The first question on which the opinions of the consulted judges are required is, whether the titles completed by Robert Graham by the Crown charter 1776 and the sasine following thereon were framed in conformity with the deeds of entail 1767 and 1774; or whether the entail contained in the charter and sasine is the same with or different from both or either of the entails contained in both or either of those deeds?

The defenders have specified various particulars, in which they say that the entail in the charter and sasine is different from the entails in the deeds. In our opinion, the pursuers have, with one exception, satis-

factorily accounted for all those differences, and have shown that either necessarily, or in strict conformity with the correct principles and usual practice of conveyancing, they took place in the preparation of the investiture. Thus, although there are lands contained in the deeds of entail which do not appear in the investiture, the lands so omitted were held of a subject superior, and were, therefore, necessarily excluded from a charter granted by the Crown. Thus, also, certain substitutions in the entails do not occur in the charter; but as those substitutions were extinct or inoperative before the charter was expeded, they were omitted with perfect propriety, and agreeably to ordinary practice.

But the exception to which we allude, and upon which the defenders seem now exclusively to rely, relates to the structure of the irritant and resolutive clauses in the investiture. In framing the charter 1776, the entails 1767 and 1774, instead of being kept separate, as they ought to have been, were combined, so that, if the charter with the sasine upon it is alone considered, a contravention of the provisions in the entail of Gartmore would apparently infer a forfeiture, not only of that estate, but of the estate of Culbowie also; and, vice versâ, a contravention of the entail of Culbowie would apparently infer a forfeiture of the estate of Gartmore. To that extent it is clear that the entail, as it stands in the investiture, is not in form absolutely identical with the entails in the deeds 1767 and 1774; and this the pursuers do not dispute.

We come, therefore, to the second point to which our attention is directed, namely, what is the legal effect and consequence of this difference? Which, reversing the order suggested, we think may best be considered, 1st, as in a question between the pursuers

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and W. C. C. Graham, that is, between the substitute heirs and the heir in possession; and 2dly, between the pursuers and the other defenders, who appear in the character of third parties or creditors.

In a question between the substitute heirs and the heir in possession, it will be observed, that the estates contained in the two deeds of entail are conveyed separately in the charter, and it is declared that they are conveyed under the conditions and provisions and under the irritant and resolutive clauses in two deeds of tailzie; that Robert Graham and the other heirs of tailzie shall enjoy and possess the estates by virtue of the said two deeds of tailzie; that he shall insert the conditions of the said tailzies in the charters and infeftments which are to follow on these tailzies; that no acts of contravention shall prejudice the heirs destined to succeed by the deeds of tailzie, and so forth, keeping both deeds constantly in view; and in the clause of quæquidem the progress of the separate estates contained in each tailzie is set forth, and both tailzies are specially described by the respective dates of their execution and of their registration in the books of session. In answering this first question, which arises between the substitutes and the heir in possession alone, and in which, therefore, the provisions of the act 1685 do not enter into the case, it is necessary to consider upon what principle the charter 1776 is to be construed. We conceive that the special references in that charter to the two entails, under which it is declared that the two estates shall be held and enjoyed, are sufficient authority for taking into view both those entails, for the purpose of ascertaining its import. If that be granted, it makes way for the rule quod singula singulis sunt applicanda, for materials are given

upon which that rule can operate. We do not mean to say, that in every case an investiture may be construed by reference either to prior investitures or to the warrants on which it proceeds; but when in the investiture to be construed express reference is made to those warrants, as explaining or authorizing the rights which it confers, we think that this is a legitimate mode of construction. Nor is this opinion at variance with the recent decisions in Hope Vere's case [1], because there the destination in the old entail 1708 could not possibly be reconciled with the destination in the new entail 1733, and it was manifest that those who framed the latter laboured under the mistake that the two destinations were the same. If they had been informed of their mistake, there was no reason to conclude that they would have been induced to depart from the new destination. That destination, therefore, which neither required nor admitted of construction was necessarily adopted, though its author, the Countess of Hopetoun, was in error either as to its effect, or as to the effect of the preceding entail to which she referred; but whether as to the one or the other did not appear. Here the case is reversed: whenever the rule singula singulis is admitted, the charter 1776 is not only not irreconcileable with the entails upon which it proceeds, but is in exact conformity with them.

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If, instead of the present action, a declarator of irritancy had been brought against the defender W. C. C. Graham to forfeit Culbowie, on the ground that he had contravened the entail of Gartmore, we do not think that he could have been precluded by the form of his investiture from showing that he had violated no con-

[1] 2 Sh. & M'L. 817.

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dition of the entail, under which that very investiture provided that he should exclusively possess and enjoy that estate: and so, vice versâ, if a contravention as to Culbowie were pleaded as a forfeiture of Gartmore. But if a plea, which necessarily infers that the entails are still in force, would have been available in his favour in that action, it must be so against him in this action, in which he maintains that the same entails are extinguished.

The question assumes a different shape when it occurs with third parties, and when the provisions of the act 1685 come into operation. A purchaser or creditor is entitled to look for the conditions and fetters of an entail, either in the register of tailzies, or in the record of sasines exclusively. He is not bound to compare the one with the other, nor can he be referred to any deed not part of the registered entail or recorded sasine to explain either of them. In his case, therefore, it may be plausibly argued that there is no place for the rule singula singulis, because the recorded investiture contains nothing to show that the conditions and fetters of each of the deeds of entail are not identical with the conditions and fetters of the entail set forth in that investiture, and if they are not the same, that he is entitled to hold that the entails are not duly recorded in the register of sasines.

We are of opinion that this argument is not conclusive. The object of the act 1685 plainly is that all the conditions and fetters of entails, by which purchasers or creditors can be endangered, should be disclosed by means of two records, on either of which they may rely for information. But while they are secured that no restriction can exist unless it be so recorded, they are not secured, nor are they entitled to infer, that every

restriction which is recorded must therefore be operative. On consulting the register of tailzies, the irritant and resolutive clauses in a deed may appear impregnable, while a defect in the record of sasines may render them utterly ineffectual; and so, on the contrary, a defect in the register of tailzies may defeat the most accurately recorded investiture. And as all the restrictions in a tailzie may thus become inoperative, so may any one restriction in whole or in part. This can be of no prejudice to third parties; they are certiorated fully of all dangers to which they can be exposed, but they are not informed whether or to what extent those dangers may be avoided. Thus, if part of an estate, which is placed under an entail, be sold by the entailer, or evicted from him before the entail is recorded, the register will show all the prohibitions and irritancies as if they affected that subject, although it has been withdrawn from their operation. On that principle in one case the Court refused to allow a tenement to be omitted in recording an entail, which the entailer had disposed of before his death. In similar circumstances the heir, in making up his titles, may safely omit that tenement withdrawn from the entail, and that omission will not affect the validity of the entail as to the remainder of the estate. Thus also, if an entailer, under a reserved power to alter, were, by a subsequent deed, to relax the fetters, by granting permission to feu, or lease, or burden, or the like, an omission to insert that subsequent deed in the register of tailzies or in the investiture would not render the entail, in so far as it was unaltered, ineffectual against purchasers or creditors, on the ground that the provisions of the act 1685 had not been complied with; or, suppose a permission to the same effect were inserted in the entail itself, as

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an exception to the prohibitory clause, and that exception was omitted in the record by the negligence of the transcriber, it clearly could not be maintained that the record was inoperative quoad ultra, and the whole estate laid open to the diligence of creditors. It follows, therefore, that if all existing conditions and fetters appear in both records, the appearance in either record of others which do not exist is immaterial. We think that this is not only the sound construction of the statute, but that it admits of no other construction; for while it is indispensable that each record shall show how far the fetters it exhibits may bind, it is impossible that either of them can show how far those fetters may not bind. To ascertain this, other sources of information must be resorted to.

Let the statute, so construed, be applied to the present case. On the one hand, it is admitted that the entail 1767 is recorded in the register of tailzies with perfect accuracy; and, on the other hand, it is incontestible that the record of sasines exhibits every prohibition and fetter in that entail, by which the estate can be affected to the prejudice of purchasers or creditors. The only objection to the record of sasines is that the forfeitures under both entails inserted in a combined form are more extensive in appearance than they are in reality; an objection which, on the grounds now stated, we consider of no validity. Thus it appears that when the heir in possession pleads prescription on the entail 1776 against the entails 1767 and 1774, the pursuers can show that, by a rule of construction legitimate in that question, the import of the former is identical with that of the latter; and when the creditors plead that the fetters of the entail 1767 do not enter the investiture in terms of the statute 1685, it is a good

answer that the provisions of that statute are fully complied with.

The entail 1774 was not recorded, and in consequence of that neglect the estate was sold. But this circumstance does not in any respect affect the argument in so far as the entail 1767 is concerned.

We are of opinion, therefore, that by the titles completed by Robert Graham and his son W. C. C. Graham, the lands contained in the entail 1767 are effectually secured against the debts and deeds of the said W. C. C. Graham, and that the said entail is binding and effectual against him in questions with the subsequent heirs of entail.

Addition by Lord Moncreiff.

This case has appeared to me to be attended with very considerable difficulty. But after giving all the attention in my power to the argument in the papers and from the bar, and considering deliberately the views taken in the above opinion, I am inclined to concur in it, being on the whole satisfied that the investitures completed under the charter 1776 are consistent with the strictest application of the rule of the statute 1685. I only think it necessary to add, that I could not have come to this result on some of the grounds of law maintained by the pursuers, and that it is only on the principle of giving the strictest construction to the deeds framed in execution of the statute that I now do so.

Addition by Lords Fullerton and Jeffrey.

We concur in the conclusion arrived at in the preceding opinion, viz. that under the titles completed by Robert Graham and his son William Cunninghame Cunninghame Graham, the lands contained in the entail 1767 did and still do remain subject to the fetters of

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that entail; and we also concur in the greater part of the reasoning by which that conclusion is supported. The entail 1767 contains all the prohibitions and restrictions necessary for the protection of the estate against the acts and deeds of the heirs in possession. To render such conditions effectual against third parties, it is necessary that they should appear in the titles by which the heirs possess; it being provided by the act 1685, "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 seasine." In regard to creditors, then, the only question here is, whether the irritant and resolutive clauses of the entail 1767 can be held to be "insert" in the charter and infeftment of 1776?

For the reasons assigned in the preceding opinion, and even upon the view there taken, viz. that the resolutive clause, as expressed in the charter, embraces certain other lands in addition to those contained in the entail 1767, and may therefore have a more extensive operation, we think that the question ought to be answered in the affirmative.

But, further, we must be permitted to question whether that view be correct, and whether there is any necessity for resorting in the present case to those grounds of decision. It rather appears to us that the resolutive clause in the charter, the only clause which raises any difficulty, has not, according to the legitimate construction of the charter itself, any more extensive meaning in regard to the lands of Gartmore than the original entail 1767.

The entailer, Nicol Graham, executed two procuratories of resignation, each forming a deed of entail. The first, that of 1767, included various lands which shall be

termed the lands of Gartmore; and the other, that of 1774, contained the lands which may be designed the lands of Wester Culbowie. Robert Graham, the entailer's second son, executed both procuratories, and expede the Crown charter 1776, obviously for the purpose of making up titles under those entails to both sets of lands in so far as they held of the Crown. Accordingly, the charter distinguishes the two estates and the two entails with the greatest precision. There is a separate dispositive clause, first of the lands of Gartmore, &c., and, secondly, of the lands of Wester Culbowie, Broich, Broichmiln, &c.; and these dispositive clauses bear to be granted "cum et sub particu-" laribus reservationibus, provisionibus, declarationibus, " exceptionibus, et clausulis irritantibus et resolutivis " postea express., et non aliter, in duabus syngraphis " talliæ postea mentionat. content." &c.

By the expression "postea mentionat" reference is clearly made to the quæquidem clause, which is also a double clause, distinguishing the entail of 1767:— " Quæquidem integræ terræ, baroniæ, molendina, " terræ molendinariæ, decimæ, aliaq. predict. (ante-" dict. terris de Wester Culbowie, Broich, et molendino " de Broich, decimisq. ejusd. exceptis) contentæ fuere " in syngrapha talliæ per dict. Nicolaum Graham " execut., de data secundo die Martii, anno millesimo " septingentesimo sexagesimo septimo." Here the first entail 1767 is described as containing all the lands in the charter, with the exception of Wester Culbowie; and then follows the other part of the quæquidem:— " Et quæquidem prædict. terræ de Wester Culbowie, " Broich, et Broichmiln, cum decimis, partibus, privi-" legiis, et pertinen. perprius hæreditarie pertinuerunt," &c.; "et (inter alia) in alia syngrapha talliæ contentæ

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" fuere per dict. Nicolaum Graham execut. duodecimo " die Decembris anno millesimo septingentesimo sep- " tuagesimo quarto." And the clause concludes with a statement of the resignation of both sets of lands, but still accurately distinguishing between the two different entails, as the sources from which the fetters in regard to each estate are respectively derived:—" Quæ integræ " terræ, baroniæ, molendina, decimæ, aliaq. prædict. " per virtutem dict. duarum procuratoriarum resigna- " tionis in duabus respectivis syngraphis talliæ supra- " mentionat. content. et duorum generalium servitiorum " dict. Roberti Graham," &c. " legitime resignatæ et " redditæ fuerunt in manibus dict. Jacobi Montgo- " mery," &c. " cum et sub conditionibus, provisionibus, " reservationibus, potestatibus, declarationibus, clausulis " irritantibus et resolutivis supra expressis in duabus " talliæ syngraphis supra recitatis contentis," &c.

Combining, then, the descriptions of the entails in the quæquidem with the close of the dispositive clause expressly referring to those descriptions, the two sets of lands bear, ex facie of the dispositive clause, to be disponed under the provisions and restrictions and clauses irritant and resolutive after expressed, contained in two deeds of entail, the one, dated 1767, of the lands of Gartmore, and the other, dated in 1774, of the lands of Wester Culbowie. The charter then enumerates in detail the prohibitions and restrictions; and it is of some importance to observe, that in the clause immediately preceding that which raises the present question there is a clear reference to both entails. It is there provided that Robert Graham and the other heirs shall possess the entailed estate " virtute dict. duarum syngrapharum " talliæ et infeofamentorum desuper consecutorum," &c., and shall be bound to insert in the instruments of resig-

nation and infeftments, &c. "totas provisiones, decla- "rationes, et irritantias dict. talliarum." Then follows the combined irritant and resolutive clause, which declares that if the said Robert Graham and the other heirs shall fail to assume the name and arms prescribed, or shall fail to perform the other provisions and conditions, then and in any of those cases not only shall all the acts and deeds of omission, commission, &c. be void and of no effect against the said lands, and no part of the same shall be affected or burdened by those acts, &c. "in prejudicio hæredum talliæ et provisionis supra "specificat. destinat. succedere virtute dict. talliæ syn- "grapharum, cum et sub provisionibus supra specificat., "sed etiam persona vel personæ ita contravenien. vel "deficien. implere conditiones et provisiones supra- "script. vel quamlibet earundem pro seipsis ipso facto "amittent, perdent, et forisfacient eorum jura et inter- "esse in dict. terrar. et statum," &c.

Considering the form and general tenor of this charter, it appears to us, that in reading this clause, as well as the other clauses in the deed, the construction applicando singula singulis is not only legitimate, but is the only construction which can be reasonably admitted. When, as in the present case, a charter conveys two separate parcels of lands, each described as contained in a separate entail and under the clauses irritant and resolutive in those two entails, and proceeds to enumerate the special clauses irritant and resolutive, it seems to follow that each provision and restriction in regard to each parcel of lands respectively is referable to the entail in which each parcel is contained. Thus, although the prohibitory clause against selling or contracting debt is in this charter generally expressed, and without distinguishing in terms the lands of Gartmore from the

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lands of Culbowie, for the obvious reason that the clause is the same in both entails, the meaning of the clause is as unambiguous as if it had been expressly declared that the prohibition in regard to the lands of Gartmore is referable to the entail of Gartmore, and the prohibition in regard to Culbowie to that of Culbowie. There is still less doubt as to the construction of the clause binding the heirs to hold the entailed lands and estate in virtue of the two deeds of entail; as it can hardly be contended that it imports a provision, not that each estate is to be held by each entail respectively, but that each estate is to be held by both entails. Such being clearly, then, the true reading of the preceding clauses, we humbly conceive that we are offering no violence to the terms of the deed, when, in the immediately succeeding passage, being the combined irritant and resolutive clause, we follow the same course, and hold, applicando singula singulis, that the clause does not import more than that contained in the original entails, viz. a forfeiture of Gartmore in the event of a contravention of the entail of that estate, and a forfeiture of Culbowie in the event of the contravention of the entail of Culbowie. Neither are we aware of countenancing, by the adoption of this construction, any relaxation of those rules by which the rights of third parties are understood to be protected; for although the law unquestionably is, that fetters or restrictions shall not be raised by implications unwarranted by the express terms of the deed, it never has been held, that in construing a clause admitting by bare possibility of two meanings that which is favourable to the heir and the creditors must necessarily be adopted, although in itself the most inconsistent with the context and general structure of the deed. But the case is attended with still less diffi-

culty when the true nature of the point in dispute is kept distinctly in view. The whole question arises on the resolutive clause in the charter,—a clause which, though of great importance in relation to the rights of third parties, operates only through the medium of its effect against the heir in possession who contravenes. But again, the only question of construction on this clause is, whether it imposes the penalty of a limited forfeiture on a limited contravention, agreeably to each entail respectively, or declares a forfeiture of the whole lands contained in both entails in the event of a contravention of only one? The former is truly the lenient construction, operating against the extension of fetters; and the question is not that which has usually occurred, whether a strict construction shall be enforced in favour of freedom from fetters, but whether a strict, or rather, as it appears to us, a strained, interpretation shall be adopted, in order to extend the fetters beyond what the natural reading of the deed would authorize?

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Upon these grounds, and in addition to the opinion already expressed on the subsistence of the entail 1767, we are of opinion that the titles made up by Robert Graham, by the Crown charter 1776, involve no disconformity to the deeds of entail executed by Nicol Graham in 1767 and 1774.

The First Division (12th June 1835) pronounced the following interlocutor:—"The Lords, on the report "of Lord Corehouse, and having advised the cases for "the parties and whole process, and heard counsel, "find, in terms of the opinions of the consulted judges, "that the titles completed by Robert Graham, the "father of the defender, by the Crown charter in 1776, "and the sasine following thereon, were framed in con-

Interlocutor of Court, 12th June 1835.

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" formity to the deeds of entail executed by Nicol Gra-
" ham in 1767 and 1774; and that the entail contained
" in the said charter and sasine is the same with each
" of these entails, and that by the titles completed by
" the said Robert Graham and those completed by the
" defender the lands contained in the entail 1767 are
" effectually secured against the debts and deeds of the
" said defender; and that the said entail is binding and
" effectual against him in questions with the substitute
" heirs of tailzie; and decern. Quoad ultra, remit to
" the Lord Ordinary to hear parties on the remaining
" points of the cause."

The cause was remitted to the Lord Ordinary. Appearance was then made for the first time by the Scottish Union Insurance Company, who lodged a minute, stating that the defender, on 9th August 1819, had infeft the Hope Insurance Company in part of the entailed estate of Gartmore in security of an annuity during his life of 1,311*l.* 10*s.* 10*d.* by a bond of annuity, which declared " that these presents, and infeftments to
" follow thereon, are meant and warranted to have effect
" no further than is compatible with the said deed of
" entail;" that the Hope Insurance Company had sold this annuity to the Scottish Union Company, who had been since infeft; that they had obtained, on 10th July 1828, decree of adjudication against the defender (appellant) Graham and the lands of Gartmore and others, and therefore craving to be sisted as heritable creditors in these lands.

The Scottish Union Company were accordingly sisted as defenders, and adopted the record already closed.

Lord Ordinary's Interlocutor, 3d Feb. 1836.

The Lord Ordinary thereafter (3d February 1836) pronounced the following interlocutor, adding a note thereto as subjoined:—" The Lord Ordinary, having

" heard counsel for the parties, and having afterwards " resumed consideration of the record, productions, and " whole process, repels the objection to the title of the " pursuers to insist in the present action: finds that the " defender, William Cunningham Cunningham Gra- " ham, has incurred the irritancies set forth in the " summons, by alienating or putting away the lands of " Gartinstarry, with the pertinents thereof, the lands " of Garchell, comprehending the Offerance of Cashley " and others, or a part of the said lands, and also the " lands of Mendowie, Coalrigrean, Drum of Armanual, " and others, all portions of the estate contained in the " entail executed by Nicol Graham, Esq., of Gartmore, " mentioned in the record; and therefore declares and " decerns in terms of the libel: finds the pursuers en- " titled to expenses of process, and remits to the auditor " to tax the account thereof and to report." [1]

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[1] " *Note.*—The interlocutor of the Court, dated 12th June 1835, hav- " ing finally disposed of various points of the cause, the defenders now " plead,

" 1. That the pursuers have no title to insist, because the provisions of " the tailzie not being inserted in the rights and conveyances under which " Mr. W. C. C. Graham enjoys the estate, the irritancy incurred by this " omission extends vi statuti to the pursuers, his descendants.

" 2. That the defender, Mr. C. Graham, did not commit an act of " irritancy by disposing of the lands of Gartinstarry, and the dominium " utile of the lands of Garchell, and the Offerance of Cashley, because " they did not fall under the entail; and if the lands of Garchell had " fallen under the entail, that the irritancy has been purged.

" 3. That the conclusions of the action cannot affect the creditors of " Mr. C. Graham who have sisted themselves in the action as defenders, " their debts being made real incumbrances on the estate before his con- " travention has been declared, and these incumbrances being restricted to " his life interest in the estate.

" With regard to the first defence, when an entail declares that the " contravener shall forfeit for himself only, and not for the heirs of his " body, the Lord Ordinary considers it to be perfectly clear that neither " a contravention of the prohibitions of the entail, nor of the injunction " in the statute to insert all its provisions in the subsequent rights and " conveyances of the estate, can operate further than against the contra- " vener himself. The statute 1685 is inaccurately expressed, and it has

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" always been strictly construed against the fetters of entails. Thus it " enacts, that all the conditions of an entail duly recorded shall be effec- " tual, not only against the contravener and his heirs, but against his " creditors; and on that ground Mackenzie and other writers have held " that unless heirs are expressly exempted, irritancies apply to them. But " the reverse was decided in the case of Simpson, and the law has been " so settled ever since. On the same principle, although the statute " declares that the omission to insert the provisions in subsequent rights " and conveyances shall import a contravention by the person who omits, " and his heirs, this obviously signifies a contravention of the same extent " and effect with any other contravention of that entail, operating against " heirs, if the entail expressly forfeits heirs, but not otherwise; and this " is plainly the opinion of Mr. Erskine, as he places the one species of " contravention and the other on exactly the same footing. The legis- " lature could have had no object in inflicting a penalty in either case " severer than the entailer himself had thought proper to do.

" It seems equally clear that the lands of Garchell and those of Gar- " tinstarry were both effectually entailed. With regard to Garchell, the " dominium directum of these lands had been in the family of Gartmore " for a long period. In the year 1708 Robert Graham of Gartmore " acquired the dominium utile, and both it and the dominium directum " were possessed by him and his successors for a period of more than " forty years before the entail was executed by his descendant Nicol " Graham. According to a fundamental and most expedient principle " in our law of conveyancing, a consolidation of the superiority and pro- " perty was thus effected, and it is thought that they were not afterwards " separated by an unmeaning act of the entailer, who, long after prescrip- " tion had run, took infeftment on the precept in the disposition by which " the property had been conveyed to him. But whether they were again " separated or not, it was manifestly the intention of the entailer to " include them both in his entail. Indeed, the precept seems to have " been executed in majorem cautelam for that very purpose; and accord- " ingly the dispositive words in the bond of tailzie apply equally to both. " With regard to the lands of Gartinstarry, which hold of a subject " superior, it is admitted that they are expressly entailed; but as there is " a clause providing that the heir shall possess by virtue of the entail, or " by any other right in the entailer's person, it is argued that the defen- " der having completed his titles, not by executing the procuratory in the " entail, but on a precept of clare constat from the superior under the " previous fee-simple investiture, he was at liberty to possess on that right " independently of the entail. It is thought that the clause founded on " imports only, that no heir should pass by the entailer and make up a " title to the exclusion of the entail, but by possessing on rights which " were in the entailer's person, that he should subject himself to the obli- " gations in the bond.

" The defenders plead that the irritancy as to the lands of Garchell, " &c. was purged; because, after being sold by the defender Mr. C. " Graham, they were again acquired by virtue of certain excambions under

ordered cases, and afterwards (2d February 1837) ap-

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" 10th Geo. 3. It is enough to say that part of them was not recovered " by these excambions, and farther, and what is still more material, it is " impossible to purge one irritancy by committing a second irritancy, for " the lands excambed under the statute were themselves part of the en- " tailed estate.

" The defence upon which Mr. C. Graham's creditors mainly rest is, " that although an irritancy be declared against him, it will not affect " their debts made real upon the entailed estate by conveyances, heritable " bonds, or adjudications on which infeftments have followed, before a " decree of declarator of irritancy has passed against him, these incum- " brances being restricted to his life interest in the estate. A principle " at one time obtained in our law, that the deed of a proprietor infeft must " affect, ex necessitate juris, the fee of his estate, to obviate which in the " case of entails irritant and resolutive clauses were devised, by which " the fee was held to be forfeited in the person of the contravener by " virtue of the irritant clause before the right which he had granted was " annulled by the resolutive clause. According to this presumption or " fiction, every deed of the contravener after his contravention, though " not prohibited, or even although permitted by the entail, ought to have " been avoided, on the maxim resoluto jure dantis resolvitur jus acci- " pientis. But the fiction itself was absurd, as has been often demon- " strated, and if followed out to all its consequences would have been " unjust and mischievous. Accordingly, for more than a century it has " been settled law, that every deed of the heir in possession, permitted " or not prohibited by the entail, is valid though done after a contraven- " tion, but before decree of irritancy; for example, provisions to wives " and children, leases for an ordinary term of endurance, feus under a " permissive clause, and the like. But it never was pretended that an " act of contravention could be effectual because it was committed before " a previous contravention had been declared. The question, therefore, " in the present case is reduced to this: are the debts which have been " made real on the estate of Gartmore by the infeftments of the creditors " or their trustee contraventions of the entail, or not? The creditors " maintain the negative, on the ground that their infeftments are not " absolute, but defeasible on the death of Mr. C. Graham, and they refer " to the case of Nairn v. Gray.[1] But the entail of Gartmore prohibits " all incumbrances, without distinction as to the period of endurance by " the ordinary clause against the contraction of debt. In equity, indeed, " it has been held that if an incumbrance, though prohibited, does not " encroach on the rights of the next substitutes, they have no interest, " and therefore no title to challenge it, and on that ground a trust-deed, " an adjudication, or heritable bond has been thought valid, provided its " endurance is commensurate with the right of the heir in possession. " But it is obvious that the right of the heir in possession does not neces- " sarily subsist during his life; it terminates not only by his death, but " by a decree of irritancy. There is no equity, therefore, in holding, nor

[1] 15th Feb. 1810, Fac. Col.

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pointed the whole papers to be laid before the other

" has it ever been held, that any incumbrance not defeasible on either of " these events is not a contravention, and therefore every substitute has " both interest and title to challenge it if not so restricted. The case of " Nairn seems to have been misunderstood; it was not a declarator of " irritancy. The question occurred in a competition of creditors, and " resolved into this: whether a heritable bond granted by Mr. Gray, the " heir of entail in possession of the estate of Carse, to Mr. Fletcher, and " afterwards assigned to Sir William Nairn, was or was not a real security? " The bond declared that it should not be held to affect the lands for a " longer period than the granter's lifetime, and that it should not be " ' interpreted or extended to infer any infringement upon or the incur- " ' ring of any of the irritancies contained in the said deed of entail, or " ' any derogation therefrom in any manner of way whatever.' In vir- " tue of that clause, therefore, Sir William Nairn's infeftment was clearly " defeasible, not only on the death of the heir, but when his right to the " estate terminated by a decree of irritancy or otherwise. But the per- " sonal creditors maintained, that as the security was declared by this " clause to be such as did not infer an irritancy, and as every real security " was prohibited, therefore the infeftment was not a real security. The " Court overruled that plea, on the principle already explained, that while " the heir's right subsisted no substitute was entitled to challenge a " security, even although it were real and falling under the words of " the prohibition, because it could not at that time operate to his pre- " judice.

" In the present case the trust deed granted by Mr. C. Graham in " favour of his creditors, some of whom appear in this action, contains a " clause exactly similar to that which occurred in the heritable bond in " the case of Nairn, declaring that the infeftment should not prejudice " the heir of entail succeeding to Mr. C. Graham in the estate, nor affect " his right to the lands, nor the rents falling due after his death, nor be " further binding on him in regard to the said lands and rents than is " consistent with the entail. It does not appear whether all the other " securities contain clauses to the same effect. If they do, they are in " terminis void when an irritancy is declared. If they do not, they are " incumbrances prejudicial to the rights of the substitutes, and therefore " contraventions which can have no support in equity. It may be added, " that the law then laid down, that a substitute has no title to challenge " a contravention unless it be prejudicial to his interest, though very ex- " pedient in practice, may be questioned on principle. There may be " various conditions in an entail, such as that the heir shall bear the name " and arms of the family, shall reside in the kingdom, and the like, " which a substitute has no interest to enforce, except that they were the " injunctions of the entailer, and on their being violated that his own " right to the estate has opened. Be this as it may, it is clear that " equity can never interpose to support the right of creditors holding real " securities expressly prohibited after the right of the heir who granted " them has been extinguished."

judges, with a view to a hearing before the whole court.

The Lord Ordinary, when the cause came to be heard, made the subjoined explanation to the court.[1]

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[1] *Lord Corehouse.*—" I think some misunderstanding exists as to the " import and effect of my interlocutor, and that it has been construed in " a sense which I never meant it to bear, and which I do not conceive it " can bear; but if it can, it should be altered and qualified. The action " is a declarator of irritancy, directed solely against the heir in possession, " concluding to have certain acts of contravention declared against him, " and his right to the estate declared to be forfeited. Such an action is " often combined with a reduction improbation, setting aside convey- " ances to purchasers or securities granted in favour of creditors. But " this action contains no such conclusion, and on the contrary, the sum- " mons, in express terms, 'reserves all right of challenge competent to the " 'pursuers for reducing and setting aside' such conveyances. By neces- " sary implication, the right of creditors and purchasers was also reserved " to state their defences against such challenge, when it should be " brought. Under this action, though the contravention by the heir was " declared, and his right to the estate forfeited, it does not follow the " rights of creditors must be set aside. They may have various de- " fences. The entail may have been defectively recorded; the pursuer may " be barred, personali exceptione, from challenging their rights, though " not from setting aside the right of the heir in possession, or there may " be other defences. It is therefore an erroneous assumption, as it " appears to me, that a decree in terms of this libel, which expressly " reserved the rights of creditors for future challenge, should be held to " have the effect of sweeping away the rights granted to these creditors, " or declaring them to have been malâ fide possessors since the date of " citation in this action. No such decision has yet been pronounced. " The judgment under review is no such decision; and supposing that a " reduction improbation is still to be brought for rescinding their secu- " rities, it may perhaps be found that their bona fides did not cease " until citation, or even until decree in that action. The question of " their bona fides, as well as their other defences, is not disposed of, and " as it seems to me cannot, by the frame of the summons, be disposed of " in the present action. These misapprehensions of the creditors appear " to rest on the circumstance, that the summons concludes for declarator " that the lands, with all their rents, have devolved on the pursuer " R. C. Bontine, from the date of citation in this action, disburdened of " every act and deed of the heir in possession, as fully and freely as if he " never had enjoyed possession. Now, although these conclusions are in " the summons, according to the ordinary style of such a summons, and " although I pronounced decree in terms of the summons, it is necessary " to consider who is the party, and the only party, against whom decree

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Judgment of Court, 2d Mar. 1837.

Thereafter, counsel having been heard, the following interlocutor was pronounced in presentiâ of the whole judges:—" The Lords of both Divisions and the per-
" manent Lords Ordinary, having heard this cause,
" adhere to the interlocutor of the Lord Ordinary re-
" claimed against, with the exception herein-after men-
" tioned as to the expenses found due, and refuse the
" desire of the reclaiming note; reserving all questions
" with regard to the validity and effect of the heritable
" securities granted to or acquired by the creditors of
" the said W. C. C. Graham, and to all concerned their
" objections as accords: find the pursuers entitled only
" to the expense incurred in discussing the question of
" irritancy, and to that effect alter the Lord Ordinary's
" interlocutor: of new, find expenses due to the pur-

" is pronounced. That is the heir in possession, against whom alone the
" action was raised, and against whom these conclusions, if contravention
" was proved, were well founded, so that decree must have been pro-
" nounced in these terms against him. It is true, that creditors have
" been sisted in this action. They had an interest and title to do so, to
" the limited effect of supporting every defence competent to the heir in
" possession. If they could defend his right, à fortiori they could de-
" fend their own. But they appeared in an action in which his right,
" and the pleas competent to him alone, could be effectually discussed
" and decided; leaving to all other parties to defend their own rights,
" when challenged in an action directed against themselves. It would
" even involve an absurdity, if the judgment under review was inter-
" preted in any other way. The conclusion as to the devolution of the
" lands free of every act and deed of the heir in possession, is of course so
" broad and sweeping, that if it was not to be construed with reference
" to him alone, it would strike not only at every right granted to a cre-
" ditor, but every lease entered into with a tenant, and at all deeds of
" the heir though executed under the permissive powers of the entail.
" It appears to me, therefore, to be clear that the decree under review
" could not possibly receive the general effect ascribed to it by the
" defenders; but if there is any room for doubt on this subject, a reser-
" vation should be inserted in the interlocutor, saving to the creditors,
" who had sisted themselves, their defences in every challenge of their
" rights which may hereafter be brought."—Rep. in 15 D., B., & M., 725.

" suers relative to that branch of the cause, and remit " to the auditor to tax the account of those expenses " and to report."

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The defenders appealed.

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Appellants Argument.

Appellants.—The explanation given of the interlocutor withdraws the most important point which had been raised in the case from consideration. But there are other questions which are of material importance to the appellants, both to Mr. Graham and his creditors, in respect of which the interlocutors should be altered.

The alleged irritancy, said to be incurred by the omission to insert the provisions of the tailzie in the rights and conveyances by which Mr. W. Cunningham Cunningham Graham held the estates, extends, by the direct terms of the act 1685, to the contravener and his heirs; and hence the pursuers, who are his descendants, have neither title nor interest to insist in a declarator, which must exclude them. It is a settled point, that if an irritancy is declared to infer forfeiture not only of the right and title of the contravener, but also of his descendants or his heirs, none of his descendants can pursue a declarator of contravention against him, seeing that their title and interest is necessarily excluded. On the other hand it has been found, and most justly, that in regard to irritancies generally, that is, those which the maker of the entail creates, if he declares only that contravention shall forfeit the right of the contravener, that declaration shall not import that it is to forfeit the right of his heirs. But the very same principle requires that if the contravention is declared to work a forfeiture of the party's right, and of his heirs,

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effect must be given to that direct provision. Accordingly, when the entailer inserts the declaration against heirs as to the particular prohibitions which he introduces, effect is given to it: then how shall the same declaration in the statute not receive the same effect? The Court have found, and have assumed, for the first time, in interpreting this statute, the right of finding, that this provision, directed against a person's heirs, is to be construed directly in their favour.

The service of Robert Graham to William did not effectually take up the procuratory in the deed of entail 1767, and no valid feudal investiture was therefore made up under that deed. The question which involves the validity of this service was considered by the Court in the case of Colquhoun v. Colquhoun, July 1831[1], under the remit from this House. In consequence of William Graham predeceasing the testator, Robert ought to have completed his title as conditional institute in the manner pointed out in the opinion of the consulted Judges in Colquhoun, instead of proceeding, as he did, by service. The deed no doubt appears to have been recorded in the register of tailzies, but such registration, the deed remaining in the grantor's hands, is not, it is apprehended, equivalent to delivery, and cannot be held to be intended to deprive the grantor of the power which he would otherwise have retained over his own deed, especially as that deed contains within itself an express power of revocation.

The charter 1776 was not a renewal of the entail 1767, on which the summons is founded, but was a new investiture, essentially different from that entail, forming a new and separate entail of itself, which was never re-

[1] 5 Wilson & Shaw's Appeal Cases, p. 32.

corded; and hence the lands are not protected against the rights of creditors, nor is the pursuer entitled to enforce the same. The interlocutor of the Court, based upon the opinions of the consulted Judges, consists of two propositions: 1st., that the Crown charter 1767 was framed in conformity to the deeds of entail 1767 and 1774; and 2d., that the entail in that charter is the same with each of these entails. The difficulties of the case, so far from being solved, are avoided by these propositions. A charter may be framed in conformity to two deeds, and yet not be the same as each separately, and so it accordingly happens in this case. The charter 1776 included the lands entailed by the deed 1767 and the lands included in the deed 1774, but the charter 1776 is so framed as to mass the lands together and the entails together, and thus, among other inconsistencies, makes a contravention under the deed 1774 operate a forfeiture of the lands entailed by the deed 1767, and vice versâ. The provisions, in short, are indiscriminately applied to the two sets of lands, as if they had been but one estate and originally included in one entail. From the manner in which the charter 1776 is framed it is only by doing by construction, or rather by implication, what the charter has not done, (namely, applicando singula singulis, with the view and for the purpose of effectuating the supposed intention of the party,) that a contrary result can be arrived at. Consistently, however, with the decisions regulating the interpretation of entails, it is impossible to allow a substitute to adopt such a principle and to carry it through every part of the deed. Ex facie of the deed the intention of Robert Graham appears to have been the very reverse of what

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is assumed; his intention plainly appears to have been to have one estate and one entail. Intention, however, cannot in any case be pleaded against creditors; and how is the intention to be collected in this case? Not by reference to deeds recorded in the register of tailzies, with which alone creditors have to do, but by reference from a recorded deed of entail to another and unrecorded deed of entail, which, as regards the rights of creditors, is a mere dead letter.

The procuratory of resignation executed by Robert Graham in 1779, by which he resigned the whole lands and estate contained in the two deeds of 1769 and 1774 as one estate into the hands of the Crown, as his superior in the lands, and obtained a new charter conveying to him all these lands, proves the intention of Robert Graham to have been, that they should be considered and held as one estate, to which all the irritant and resolutive clauses contained in the procuratory of resignation and the charter should be applied as an unum quid, and that they should be possessed accordingly.

The execution of the procuratory of 1779, by which the estate and lands contained in the two deeds of 1767 and 1774 were resigned into the hands of the Crown, in order that a new infeftment thereof might be granted of them as one estate to and in favour of a different series of heirs from that contained in either of the two entails of 1767 and 1774, (upon which procuratory a new charter was expede in the same year, under which the subsequent titles of and investiture in the property have been made up,) created a new entail, upon which prescription has run; and as that entail was not recorded in the register of entails, the estate was not protected

from the onerous deeds or adjudging creditors of the heir in possession.[1]

The apparent heir of entail in possession has not committed any act of contravention, and therefore he ought to have been assoilzied from the action. The allegation contained in the record is that the appellant, disregarding the entail, made up titles to the lands of Gartinstarry and the lands of Garchell in fee simple, and alienated these lands, which are said to have been validly entailed by the deed of 1767; and that, having thus disobeyed the provisions of the deed, he has forfeited his right to the estate of Gartmore and others comprehended in the entail. The appellant has all along denied that these estates were validly entailed, or competently brought under the fetters of the deed of entail; and therefore admitting the statement as to the mode in which he made up his titles to be correct, and that the acts of alienation were done by him, still no forfeiture of the estate has taken place or can be declared.

In the first place, as to the lands of Gartinstarry, the question is, whether the entail has not prescribed by the appellant being entitled to refer his possession, and that of his predecessors, to the unlimited title which they possessed? This, therefore, is a question of double title; and if the heirs of entail might ascribe their possession to the fee-simple title, then the entail was worked off by the effect of the long prescription. It is a well known principle of law, that where a party has two titles in his person, the one limited and the other unlimited, and can ascribe his possession to the unlimited title, the

[1] Bell on Comp. Title, 236; ibid, 242; 1 Jurid. Sty. 81; Stair, b. iii. tit. 2. s. 8.; Ersk., b. ii. tit. 7. s. 22.; Sandf. Entails, 60; Broomfield v. Paterson, 29th June 1784; see Sess. Papers.

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limited title is held to be worked off. If possession has taken place upon or can be ascribed to an unlimited title existing in the person of an heir of entail for a period of forty years, without the deed of entail having been made the lex feudi by infeftment following upon it, then the fetters of the entail are worked off, and the fee-simple title only remains.[1] Independently of the general doctrine, the right of the heirs under the fee-simple title was expressly preserved by the words of the deed of entail itself; it declares that the heirs of entail shall "bruik and enjoy" the estate in virtue of the deed of entail, "or in virtue of any other right possessed by "the entailer."

In the second place, as to the lands of Garchell, it is admitted by the respondents that the decree reducing Nicol Graham's infeftment was pronounced, but its merits are called in question. That, however, has nothing to do with the present point. The decree, until challenged and set aside, is a good decree, and remains now a valid and unchallenged judgment of the Court, reducing and setting aside the infeftment taken by Nicol Graham in 1758. The result of that judgment was, that the only title to the property which remained was the disposition by Mary Hodge in 1708, unfeudalized. The infeftment of Nicol Graham being set aside, his title and that of the subsequent heirs to the lands was the personal right created by Mary Hodge's disposition in 1758. In this, the legal situation of the titles, Nicol Graham executed the deed of entail of 1767. He had then a feudal and complete title to the superiority, and he possessed the

[1] M'Dougal v. M'Dougal, 10th July 1739, Mor. 10947; Smith v. Bogle and Gray, 30th Jan. 1752, Mor. 10803; Dalzell, 17th Jan. 1810, Fac. Coll.

dominium utile upon his personal right, as heir apparent to his father under the disposition of 1708. Now there is no proposition in the law of Scotland more clear upon feudal principles than this, that where a party possesses the separate estates of superiority and property under different titles, he has separate and distinct estates in his person, which he possesses in the respective characters of superior and vassal. The doctrine of ipso jure consolidation, arising from the mere fact of one party possessing the two estates, which appears to have at one time been supported by some of the more ancient feudalists, has been put an end to by the decisions of a more recent period, upon a mature consideration of the authorities[1]; and the appellants, therefore, admit their surprise at the countenance which this doctrine has received from the opinion of the Lord Ordinary, as expressed in his note. But the Lord Ordinary likewise says, that having been consolidated, they were not afterwards separated "by the unmeaning act" of the entailer in taking infeftment upon the precept contained in Mary Hodge's disposition. The appellants are at a loss to understand what the Lord Ordinary intends by stating this to be an unmeaning act. If the entailer had intended to consolidate the dominium utile with the superiority, he would have executed a procuratory of resignation ad remanentiam in his own hands; but the fact that he took infeftment upon the precept, and afterwards granted a charter of confirmation in his own favour, shows his meaning, and proves the legal intention to keep these estates separate.

It is therefore confidently submitted, upon this part of the case, that the lands of Gartinstarry are not

[1] Bell's Princ., 2d edit., 206; Bell's Compl. Title, 314; Bald v. Buchanan, 8th March 1786, Mor. 15084; Lord Moncreiff in Elibank v. Campbell, 21st Nov. 1833.

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affected by the entail; that the deed of entail did not apply to the dominium utile of the lands of Garchell, that the dominium directum only was entailed; and that, as this is a question of irritancy, there is no room for inquiring into the intention of the entailer, the conditions of the entail having been literally fulfilled.

Appellants Argument.

Respondents Argument.

Respondents. — With regard to the first plea maintained on the other side, which is of a preliminary nature, it is to be observed that it has not been stated that in terms of this particular tailzie a contravener forfeits for his descendants as well as for himself; the argument is founded exclusively on the statute. It could not have been so stated, for not only is there no declaration that any other than the person or persons contravening shall incur a forfeiture, but the entail contains a declaration that "it shall be lawful for the next "heir of tailzie who would succeed if the contravener "were naturally dead, albeit descended of the contra-"vener's own body, to purge and obtain declarators "upon the contravention," &c. The statute 1685 authorizes the lieges to entail their estates, "with such "provisions and conditions as they shall think fit," so that it is optional for the maker of an entail to extend the forfeiture, in cases of contravention, to the descendants of the contravener, or not, just as he may think proper; and accordingly it has been decided that the question whether the irritancy does truly extend to the heirs of the body of the contravener must always depend upon the particular form of words in which the deed is expressed.[1]

[1] Simpson v. Horne, 6th Jan. 1697, Mor. 15358; Creditors of Gordon, 14th Nov. 1749, Mor. 15384.

The only question brought up for judgment is purely and exclusively a question inter hæredes. There is no longer, at least in hoc statu, any dispute between the respondents and third parties. In truth, considering that the only party originally called as a defender was Mr. Graham himself, the heir of entail in possession,—that the sole object of the action was to declare that Mr. Graham had done certain acts in contravention of the entail, in respect of which he individually had "incurred an irritancy of and amitted, "lost, and forfeited all right, title, and interest" under the entail,—and that finally, as regards the effect of such contravention and irritancy upon the rights and interests of creditors and third parties, all challenge was on the very face of the libel expressly reserved for some future stage of proceeding, it is very plain that the present case ought never to have been complicated by the introduction of any such extraneous topic.

The appearance of the creditors in the action would, indeed, not have been permissible at all but for the collateral and indirect interest which they had to see that the defence, competent to their debtor in his own person, was not neglected.

The question being thus reduced to a simple question inter hæredes,—to a question, that is to say, between Mr. Graham, the heir of entail in possession, who is alleged to have contravened the entail, and the respondents, the substitute heirs of entail, who, founding on the express conditions of the entail, are seeking in respect of this contravention to declare an irritancy and forfeiture of Mr. Graham's right, the grounds of defence are clearly untenable.

That defence is in all its branches rested upon the

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assumption that the case falls within the strict operation of the statute of entails, 1685, c. 22. But viewing the question as a question inter hæredes, this is a mistake.

It is very true that an entail, in order to be protected against singular successors and onerous third parties, must be brought literally and in all points within the statutory provisions. It must be recorded in the register of entails. Its conditions and fetters must be engrossed in the infeftment, and that infeftment recorded in the register of sasines. It must be perfect and complete in its clauses, prohibitory, irritant, and resolutive. But as among the heirs themselves this is not necessary. On the contrary, if there be any point fixed in the law, it is that inter hæredes nothing of the kind is required.[1]

But even as against singular successors, the decision in the Stormont case ruled, that where in addition to a prohibitory and resolutive clause the entail was still further fenced by an irritant clause, thus declaring not merely the right of the contravening heir forfeited and resolved, but the right granted to the singular successor also null and void, the entail was to all effects good and operative at common law. In this respect, perhaps, the statute 1685 may be more properly said to have been enacted with a view to fix the law and to clear it from doubt, rather than as having itself originated any new law. But be this as it may, it is plain that neither under the Stormont decision nor the statute was the irritant clause ever held to be essential, except as in the question with singular successors. The irritant clause

[1] Cathcart v. Cathcart, 18th July 1831, 5 W. & S. 345; Ersk., b. iii. tit. 22. ss. 23. 38. 39.; Lord Cringletie in Porterfield case, 5 W. & S. 542.

was introduced to afford the means of re-vindicating what the singular successor would otherwise have been enabled to carry off. But without any irritant clause, though what was conveyed to the singular successor could not be brought back, it was sufficient inter hæredes to forfeit all remaining right in the heir contravening, by the mere force of the entail itself, as embodying the condition of the grant by which he holds.

It is only necessary, therefore, that the entail 1767 be still a subsisting deed, in order to entitle the respondents here to succeed as in a question inter hæredes. In this respect they are precisely in the same predicament as if the investiture 1778 had never existed at all.

If the appellants be right in maintaining that prescription has run upon the investiture 1778, it would in that case follow, holding the investiture 1778 to constitute an adverse entail to that of 1767, that the respondents would be no longer entitled to fall back upon this last-mentioned entail. The objection, however, would not in such a case be, that the entail 1767 was defective as not having been duly completed under the statute, but that it was utterly and for ever extinct as a title of possession at all, and that the new entail, constituted by the investiture 1778, had come in its room, and now entirely superseded it.

But as regards this new ground of objection, it will be observed, that the prescription necessary to carry through the appellants argument has been interrupted by the minority of the respondent. Further, it is difficult to see how Mr. Graham, as the heir of the investiture 1778, can plead prescription upon that investiture,

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for it in græmio refers to and acknowledges the deed 1767 as its own warrant. Moreover, prescription could not possibly have run in Mr. Graham's favour against the entail 1767, seeing that so late even as 1799 he not only claimed to be served, but was actually served as "nearest and lawful heir of tailzie and provision" to his father under that very entail, "cum et sub conditio-"nibus, provisionibus, declarationibus, reservationibus, "clausulis irritantibus et resolutivis inibi specificatis." What effect any deeds that he may have in the mean-time granted, or any debts or obligations that he may have contracted in favour of third parties, may be entitled to in a question with these third parties, is not here the question. Indeed the more effectual these shall be found to be, just so much the more clear and undoubted has been the breach of his obligation and the contravention of the entail on Mr. Graham's own part, and just so much the stronger and more undeniable is the appellant's right, as next substitute heir of entail, to have Mr. Graham's right to all that remains of the estate declared irritated.

This latter observation affords also a conclusive answer to an objection raised upon the ground, that certain portions of the entailed estate have never been habilely brought within the entail by proper feudal investiture. It is said, for instance, as to the lands of Gartinstarry, that prior to 1814 no title was made up to them at all, and that in the interval they were possessed upon apparency alone. But in a question with the appellant this is nothing to the purpose. His obligation to possess them under the entail is admitted. He could not take the other entailed lands, except upon the condition that Gartinstarry and every other subject

which Nicol Graham, the maker of the entail, had included in the original bond of tailzie as integral portions of the estate to be entailed, and which he had accordingly bound himself and his whole heirs, as well of tailzie as of line, to bring within and to possess under the entail, should be dealt with as part of the entailed estate. The appellant, by his acceptance of any part of the entailed lands necessarily represented Nicol Graham in this obligation to entail all the rest; and whether, therefore, the title to a particular subject was or was not feudally completed in his person as heir of tailzie, he equally contravened the provisions of the entail, and equalled forfeited his whole right to the entailed estate, when, in despite of the entail, he completed an adverse and independent title in such a subject as Gartinstarry, as if he had in the first instance made up his title thereto under the entail, and thereafter disposed of it.[1]

The same observation applies in the case of Garchell, supposing that the appellants objection, as regards the dominium utile of these lands, is not met by a sufficient answer upon a totally different ground. The separate answer to which the respondents here refer, and which as to Garchell is altogether conclusive, is, that the dominium utile was effectually consolidated with the dominium directum of these lands by force of a double prescription; the one completed antecedent to the making of the entail, which would necessarily have the effect to include within the entail, even in its original constitution, the entire and consolidated plenum dominium of Garchell, both property and superiority; the other having

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[1] Carmichael, 15th Nov. 1810, Fac. Coll.; Oliphant Murray, 17th Jan. 1811, Fac. Coll.; Smyth, 9th Dec. 1814, Fac. Coll.; and see Campbells, 6th Feb. 1821, Fac. Coll.

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reference to the subsequent possession under the entail, and being of itself, and independently of the first, sufficient to bring the dominium utile within the entailed investiture, by consolidating it with the entailed dominium directum, even though itself not originally included.[1]

The whole law in this matter both as to Garchell and Gartinstarry is laid down in the note to Lord Corehouse's interlocutor of 3d February 1836.

The opinions of the consulted judges contain a complete answer to the objection, that the provisions of tailzie and irritant and resolutive clauses in the subsequent charters are not the same with those which are contained in the deed of tailzie 1767.

Ld. Brougham's Speech.

Lord Brougham.—My Lords, this was an action of declarator, prosecuted by Robert Cunninghame Bontine, Esq., of Ardoch, William Cunninghame Graham Bontine his son, and Charlotte Fitzwilliam Bontine his daughter, and by Robert Cunninghame Bontine as administrator in law for his children, against William Cunninghame Cunninghame Graham, Esq., of Gartmore.

The questions principally made were, in the first instance, whether the entail in the charter and seisin of 1776 is the same with or different from the entails of 1767 and 1774; and as it is admitted that there is some diversity in the fencing clauses, the next question was, how far this diversity affected questions between heirs, and questions of the heir with creditors?

All the Judges, both those of the Second Division and the permanent Lords Ordinary, were agreed, with

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[1] Elibank, 21st Nov. 1833, Fac. Coll.; Middleton, 22d Dec. 1774, Mor. 10,946; Walker, 27th Feb. 1827, Fac. Coll.

only some difference as to the grounds of their opinion, and the Judges of the First Division also unanimously agreed, in the interlocutor of the 12th June 1835, finding that the lands held under the entail of 1767 are effectually secured against William Cunninghame Cunninghame Graham's debts and deeds, and that the entail is binding and effectual against him in questions with the heirs of tailzie.

Upon the foot of this interlocutor the case then went back to the Lord Ordinary, and his interlocutor was pronounced after hearing not only the parties hitherto before the Court, but certain creditors of William Cunninghame Cunninghame Graham, who are now respondents with him here, and who, as appears by a minute of compearance (given in the papers, but without any date), claimed to be made defenders as having obtained real security over the property in question. The security was by assignment from the original grantees of an annuity with a heritable bond, on which they were infeft for the life of the grantor, William Cunninghame Cunninghame Graham. It covered, then, or assumed to cover, his (William Cunninghame Graham's) life interest in the property.

The whole Judges of both Divisions and whole Lords Ordinary affirmed the interlocutor of the Lord Ordinary of the 3d February 1836, upon the argument which was thus raised by the parties, with the exception of some part of the finding as to costs, which they held should be confined to those of discussing the question of irritancy, and not those incurred in the first stage of the cause; and further with the addition of a reservation to be afterwards more particularly mentioned.

The finding, as regards the irritancy, was, that the

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irritancy had been incurred by William Cunninghame Cunninghame Graham in alienating and putting away all the lands which he had alienated and put away (reciting them), all being in the entails of 1767 and 1774; and the decerniture was in terms of the libel. Now the libel sought to have it declared that William Cunninghame Cunninghame Graham had contravened by not engrossing the conditions and clauses in the titles which he made up, and by alienating or contracting debt; and also that his right was forfeited from the date of the citation, to the next substitute, free and disburdened of his acts. It is, however, to be observed, that there is another thing asked, namely, a reservation of all right to the substitutes to reduce and set aside the conveyances and rights granted by William Cunninghame Cunninghame Graham to disponees, and all heritable securities granted over the lands or any part thereof.

The whole question was evidently inter hæredes, and the creditors were in Court only to see that their debtor William Cunninghame Graham really defended his own right; not at all to protect any rights which they might have independent of him and different from his. Whatever interest they had in his maintenance of his own right they were in Court to protect; whatever peculiar grounds were competent to them as third parties, and independent of him, did not come within the scope of this proceeding, and could not be dealt with by any judgment to be given in the suit. It appears, however, that the separate case of "the creditors" was argued before the Lord Ordinary and afterwards before the Court; but a reservation was inserted, in the interlocutor of affirmance, of all questions on the validity or effect of the heritable securities

acquired by the creditors, in order to show more distinctly that the whole question dealt with by the Court and disposed of in the judgment was inter hæredes. Their Lordships appear from the report to have thought this reservation unnecessary, but it must have been inserted to prevent all possibility of cavil.

The questions principally discussed below in the second stage of the cause were these three, besides the one thus reserved; and the matters connected with these alone, as regards this branch of the discussion, are brought here by appeal: — First, whether, the fetters having been omitted by William Cunninghame Cunninghame Graham in making up his title, and an irritancy thus incurred by him, the pursuer is not also deprived of all title by the statutory provision that the party not inserting the fetters in his title forfeits for his heirs as well as for himself? Secondly, whether an irritancy was incurred as to the lands of Gartinstarry and Garchell, said not to be covered by the entail? Thirdly, whether if an irritancy as to one parcel (Garchell) was incurred, it was not purged by an excambion whereby that parcel was re-acquired; but re-acquired by exchanging other lands entailed and not within the scope of the second question? Fourthly, whether the forfeitures extended to the whole life interest of the contravener, so as to defeat the rights of the creditors in whom security over that life interest had been vested by his acts, and made real by infeftment before decree in the declarator of irritancy.

This fourth question (which seems, when viewed in one way, like asking if, where there is a shifting use, its operation during the life estate of the party in whose time the event happens can be defeated by a previous

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assignment of his life estate, but in another light is subject to much more doubt) does not now arise, nor indeed ever did; it has been withdrawn expressly from the cause by the reservations in the third and last interlocutor under appeal.

On the other three questions we have the unanimous opinion of twelve[1] of the learned judges in the Court below against the defenders and appellants. It is therefore the less necessary to enter at length into the detailed examination of the arguments. Respecting the first it may be observed, that the entail contains no clause forfeiting for the heirs of the contravener; on the contrary, it is plainly implied that these heirs may become entitled on a forfeiture being incurred. The next heir of tailzie is spoken of as succeeding in that event, "albeit descended of the contravener's body." It has been decided in an old but leading case, that heirs need not be exempted by express words in order to save them from the forfeiture, and there can be no reasonable doubt that the provisions of the act of 1685 (on the words of which alone this argument for the appellant rests) must be taken with reference to the clauses of the entail itself, clauses which the act gives entailers the power in express terms to affect their property with.

As to the second point, the ipso jure consolidation of the superiority with the dominium utile of the lands of Garchell, by the possession of both for above forty years before the entails of Nicol Graham, seems to be satisfactorily established. Besides, the subsequent possession under these entails was justly regarded as of great

[1] Lord Glenlee was absent at last advising.

importance. On that part of the argument which relates to Gartinstarry in particular it may be observed, that although the intention of an entailer is not to be raised by implication as to the creating of fetters, it may be gathered from necessary intendment respecting the directions as to the title under which the heir is to possess; here the meaning plainly was contrary to the sense sought by the defenders (the appellants) to be put on the words "or any other right that I may have "in my person," these words being manifestly used for the purpose of preventing the heir from avoiding in any way to represent the entailer.

The answer given to the third point enumerated seems decisive, that one act of contravention never can purge the irritancy arising from another.

The unanimous judgment of the Court below ought therefore to be affirmed; and as there seems to have been no good reason why the appeal should be brought after the reservation inserted in the interlocutor, and which left nothing in dispute about which there had been any difference among the learned judges as to the conclusions arrived at, the affirmance should be with costs.

LORD CHANCELLOR.—My Lords, I concur in the opinion expressed by my noble and learned friend; I cannot help thinking that if it had not been for some apprehension that the claims of the creditors had not been protected, this case would not have been brought to your Lordships bar, but it is quite clear that their interests were sufficiently protected.

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Judgment.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors, in so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

DEANS and DUNLOP—SPOTTISWOODE and ROBERTSON, Solicitors.