(10*th June*, 1842.)

EUPHEMIA KERR, *Appellant.*

WILLIAM KEITH, Trustee on the sequestrated estate of Archibald Cochran, and ALEXANDER COCHRAN and his Curator Bonis, *Respondents.*

Tailzie.—Real and Personal.—Legacies bequeathed by an entailer, held not to have been given in terms which made them burdens on the entailed lands, for which the lands could be adjudged, but so only as to make them payable by the heirs of entail, as they should successively come into possession of the lands.

Bankrupt.— Sequestration.— Competition. — Found, that the trustee with completed titles under a sequestration of an heir of entail's estates, had right to the rents preferably to a legatee, the payment of whose legacy was by the entailer made a condition of the heir's holding the lands.

Appeal. — Found, that appeal against an interlocutor, which finally disposed of an action as regarded one of several parties, could competently be brought when the whole case was brought up, though at that time more than two years had expired from the date of the interlocutor affecting the single party.

ON the 3d August, 1809, Cochran executed an entail of his lands of Ashkirk, in the county of Roxburgh, by a deed whereby, on this narrative, "considering that I have settled my lands and "estates, lying in the county of Edinburgh, under entail, devised "to myself in liferent, and to my only son, Archibald Cochran, in "fee, and the heirs and substitutes therein named, and that for "certain grave and proper considerations, I have resolved to "settle my lands and estate of Ashkirk, after described, in "manner, and under the conditions and limitations after written,"

he disponed the lands to his only son, Archibald Cochran, and the heirs whatsoever of his body, and a series of substitutes, which, in the outset, embraced his daughters and their children, " but with and under the conditions," &c. " after written." One of these conditions was in these terms: — " As also, that it " shall not be lawful to, nor in the power of, the said Archibald " Cochran, my son, nor any of the heirs or substitutes aforesaid, " succeeding to the said lands and estate, to sell, alienate, " impignorate, or dispone the same, or any part or portion " thereof, either irredeemably or under reversion; nor to grant " infeftments of annualrent, mortgages, nor any other right or " security whatever, redeemable or irredeemable; nor to contract " debts; nor suffer, or allow, the superior's duties, or any other " burdens legally chargeable on the premises, to run on unsatis- " fied; nor to do any other act or deed, civil or criminal, " treasonable or otherwise, whereby the same, or any part " thereof, may, or can, be apprised, adjudged, evicted, or " forfeited; nor to vary or alter this present tailzie, or order of " succession, in any shape or manner; nor to do any other act " or deed, of whatever nature, whereby the same might be any- " ways affected, frustrated, or infringed, contrary to the true " meaning, purport, and intendment hereof."

On the same day Cochran executed another deed of entail, of lands in the county of Edinburgh, in favour of his son Archibald, and the heirs whatsoever of his body, and a series of substitutes, embracing, as in the other deed, his daughters and their children, but in an order different from that prescribed by the first deed. The recital of the deed was in these terms: — " Considering that " I have settled my lands and estate of Ashkirk, lying in the " county of Roxburgh, under entail, devised to myself in liferent, " and Archibald Cochran, my only son, in fee, and the heirs and " substitutes therein mentioned; and that, for certain grave and " proper considerations, I have resolved to settle my lands and

" estate after described, in manner, and under the conditions and " limitations after written." The deed contained a condition in the same terms with that which has been quoted from the other deed.

On the same day Cochran executed a deed of settlement, which contained this recital: — " I, Archibald Cochran, Esquire " of Ashkirk, whereas I have settled and devised my estate of " Ashkirk, in the shire of Roxburgh, and certain other lands " and estate, lying in the county of Edinburgh and Haddington, " upon Archibald Cochran, my only son, in fee, and the heirs of " his body; whom failing, the other heirs and substitutes, in the " order, and under the limitations of entail, specified in two " separate deeds, duly executed by me, of the date of these pre- " sents; and whereas I have, by three separate settlements, dis- " poned certain subjects in Musselburgh, therein mentioned, to " each of my daughters, Euphan and Jean, and to Marion, my " youngest daughter, since deceased, and their issue as therein " mentioned, and to which reference is hereby made; and " whereas I formerly advanced and paid certain sums of money, " as the patrimonies of my daughters, Margaret Cochran, on " occasion of her marriage with Mr William Kerr; of my " daughter Euphan, on her marriage with Mr John Johnston; " and of my daughter Jean, on her marriage with Mr Thomas " Brown: And having it now in contemplation, (in consequence " of the decease of Marion, my youngest daughter,) to make " certain additional provisions on my grandchildren, by Mrs " Kerr, and on my two surviving daughters, Euphan and Jean; " and considering, farther, that it is my meaning and intention, " that the said Archibald Cochran, my only son, if he survives " me, shall be my residuary legatee, after discharging my debts, " legacies, and provisions, have therefore resolved to make a final " settlement of my affairs, in manner underwritten; but with " reference to, and in confirmation of, my settlement before " mentioned, and with reference, and pursuant to that resolution."

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The maker then disponed to his son, and the heirs whatsoever of his body; whom failing, to the said Euphan and Jean Cochran, equally between them, and the longest liver, in liferent allenarly; whom failing, to the children of his daughters, according to an order differing from that in either of the other deeds, his lands of Gilston and Overbrotherstones, "As also all and sundry "lands, tenements, and other heritages, presently belonging to "me, or that shall happen to belong to me at the time of my "death, other than those now settled under the aforesaid two "dispositions of entail, and the three separate dispositions, in "favour of my said daughters before referred to; as also, all "and sundry debts and sums of money, real and personal, and "however due or secured;" and his whole personal estate at his decease, "Declaring, that these presents are granted, with and "under this condition and provision, that it shall not be lawful, "nor in the power of the said Archibald Cochran, my son, nor "of the heirs of his body, nor of any of the heirs and substitutes "before mentioned, succeeding to the aforesaid lands and estate "of Gilston and Overbrotherstones, in virtue hereof, to sell, "alienate, or dispose of the same, or any part or portion thereof, "gratuitously, nor, in that manner, to alter the order or course "of succession, hereby prescribed, in regard to that estate; and "also with and under the burden of the payment of all my just "and lawful debts, and funeral charges; and also, with and "under the burden of the payment of the following additional "provisions to my grandchildren, by Mrs Kerr, and my said "children, Euphemia and Jean, viz., to Robert, William, "Euphemia, and Jean Kerr, my grandchildren, by my said "daughter Margaret, now deceased, to each of these four the "sum of L.400 sterling of principal money, and to Archibald "Kerr, also my grandchild, by my said daughter Margaret, the "sum of L.500 of principal money, and that at the first term of "Whitsunday or Martinmas that shall occur at the distance of

" twelve months from the first of these terms after my death, as " an additional provision or patrimony to each of them, over and " above what they may be entitled to by their mother's contract " of marriage, from their father's estate."

A subsequent clause of this settlement was expressed in these terms: — " And in order to render this present settlement the " more effectual, and in confirmation also of my tailzies, and " other settlements aforesaid, I do hereby nominate and appoint " the said Archibald Cochran, my son, and the heirs of his " body; whom failing, the other heirs and substitutes before " mentioned, in the order aforesaid, to be the sole executors of " this my last will and settlement, with full power to take pos- " session, confirm, and administrate, according to law, and in " terms hereof; but with and under the burden of the payment " of my debts, provisions, legacies, and others before and after " mentioned, and under the qualities and conditions thereto " annexed: And whereas, by contract of marriage entered into " betwixt the said Archibald Cochran, my son, with my concur- " rence, and Mrs Elizabeth Sommerville, his late wife, now " deceased, of date the 11th day of March, 1802 years, I " became bound to provide and secure the sum of L.6000 ster- " ling to the said Archibald and Elizabeth, in joint fee and life- " rent; but in security only to her of the life annuity thereby " assured to her, in the event of her surviving him, and to the " issue of the marriage, in fee, under the regulations therein " specified; and, *inter alia*, if there should be but one child, a " daughter, procreated thereof, the said provision should be, and " is thereby restricted to L.4000 sterling, payable at such times, " and in such proportions as the father should deem proper, and " appoint; but in default of such appointment, to be payable in " manner stipulated by the said contract, to which reference is " hereby made: And whereas, by the predecease of the said " Elizabeth Sommerville, leaving only one child of said marriage,

" a daughter, namely, Miss Robina Cochran, she will eventually " be entitled to the fee of the said restricted provision, in case " she should prefer the same to the more ample provision and " rights of succession which may eventually open to her, and " which, if accepted of by her, will preclude her claims, under the " said contract: And whereas the estate and funds, real and " personal, hereby settled by me on my said son, in fee-simple, " may be nearly adequate to the special burdens with which the " same stand charged, as well as the foresaid restricted provi- " sion, therefore my said son, by accepting hereof, or my entailed " estates, in terms of the settlements thereof, and the heirs suc- " ceeding to him therein, stand pledged and engaged, as afore- " said, to satisfy and procure discharges and extinctions of every " debt and obligation, provision and bequest of every description, " created or contracted by, or incumbent on me, and that in " such habile, proper, and effectual manner, as that the same " shall hereafter cease to exist, or afford action or execution " against my entailed estates: And whereas I deem it expe- " dient, for the purposes after mentioned, that after my decease, " a sum, not exceeding L.500 per annum, shall be set apart " from the rents and revenues of the estate of Ashkirk, and " stocked out at interest until a capital shall, by progressive " accumulation, be raised therefrom, to the amount of L.6000, " the capital originally assured to him, under the aforesaid con- " tract of marriage, subject to the regulations therein mentioned; " and I, accordingly, direct and enjoin the same to be so done, " at the sight of the trustees after mentioned, namely, William " Kerr, John Johnston, and Thomas Brown, my sons-in-law, or " the survivors or survivor of them, who are hereby authorized " and empowered to demand and recover such sum annually, " not exceeding that before specified, from the rents of the said " estate of Ashkirk, as they shall deem necessary, until the " aforesaid capital shall be raised therefrom, or by anticipation

" by larger advances, to that end and purpose, being voluntarily " made by the said Archibald Cochran, my son, or the heirs " succeeding to him; and to see the same laid out on proper " securities, these being always taken and devised to him in life- " rent, and also to him and his heirs and assignees in fee; but " in trust, for the purposes in the different events after specified, " viz., First, In the event of the said Robina Cochran, his " daughter, being excluded from the succession to the said " entailed estates of Ashkirk and Musselburgh, by an heir-male " of his body, for payment to her of the aforesaid restricted pro- " vision of L.4000 sterling, in terms of her mother's contract of " marriage, the surplus or remainder of the said capital being, " in such case, at his absolute disposal: But in the event of her " succeeding to the said entailed estates, in default of heirs-male " of his body, then, and in such case, she shall have no claim to " that provision, but that the same shall, together with the sur- " plus of the said L.6000 sterling, belong to, and be at the ab- " solute disposal of, her father, and she shall, accordingly, be " bound to make up titles under her mother's contract to the " said special provision, and convey the same to him and his " disponees, as a debt affecting the aforesaid fund, but not the " entailed estate."

By two subsequent codicils Cochran gave additional provisions to his grandchildren; the first of them containing a bequest of L.100, and the second of L.200, to his granddaughter, Euphan Kerr. The form in which these bequests were given by the first codicil was thus: — " I hereby oblige my heir to pay the follow- " ing sums;" and by the second, " hereby binds the heir suc- " ceeding to him to pay," &c.

The maker of these various deeds died in April, 1812, leaving them unrevoked, and funds covered by the general disposition more than sufficient for payment of his debts and legacies. His son Archibald entered into possession of his whole real and per-

sonal estates, and continued in the enjoyment of them until 1821. In that year Archibald became bankrupt, without having paid the legacies bequeathed by his father to the appellant. His estates were sequestrated under the bankrupt act, and by disposition, dated in January, 1822, he conveyed his whole sequestrated estate to Paterson, the trustee under the sequestration, by a disposition which conveyed "all and sundry the lands and "heritages after mentioned, which are contained in a deed of "entail executed by the deceased Archibald Cochran, sometime "of Ashkirk, my father, dated the 3d day of August, 1809, "and recorded in the register of tailzies, at Edinburgh, the "23d day of May, 1812, viz. All and whole," &c. "together "with all right, title, interest, property, or possession which I "have, or can pretend, to the several lands and other heritages "before described, or to any part or portion thereof, in time "coming: But declaring always, as it is hereby expressly pro-"vided and declared, that these presents are granted to the said "David Paterson, and his foresaids, solely for the purpose of "enabling him and them to uplift the rents, mails and duties, "kains, customs, and casualties of the said lands and others, "which are held by me, under the foresaid deed of entail, during "all the days and years of my natural life, and for the purpose "of giving him and them the right of working, carrying off, "selling and disposing of the coal and other minerals within the "said lands, cutting and selling the timber growing thereon, "and of granting leases of the said lands and heritages, but "without taking grassums, and of exercising every other act of "property thereon, as fully and freely in every respect as I, or "any other heir of entail of the said estate, could do, but no "farther; and shall noways authorize or entitle him or them to "sell or dispose of the said lands and heritages, or any part "thereof, or to contract debt thereupon, or to do any other act "or deed contrary to the terms and conditions of the said deed

" of entail and titles under which I possess or have possessed the " said lands and heritages."

Shortly after the bankruptcy the appellant brought an action of constitution of her three several provisions of L.400, L.100, and L.200, with interest from Whitsunday 1814, and, in July, 1827, she obtained decree in terms of her libel, which was qualified by a finding, " that the pursuer, on receiving payment of the said " principal sums and interest, or a dividend thereon from the " sequestrated estate of the said Archibald Cochran, was bound " to assign the same, or such part thereof as should be paid, to " the person paying the same; such assignation, in the event of " a partial payment only, not interfering with the pursuer's right " to recover from the entailed estate of the said Archibald " Cochran, or otherwise, payment of any balance of principal " and interest which should remain unpaid." Under this decree she was ranked upon the bankrupt's estate, and drew a dividend of L.119, 3s. 1d., or 2s. 6d. per pound.

In 1832 the appellant brought an action against Archibald Cochran, and the respondent Keith, who had succeeded Paterson as trustee on his estate, setting forth what has been detailed, and concluding, that it should be declared, " that the foresaid " provisions bequeathed to, and settled upon, the pursuer, with " the legal interest of the same, all as fixed and ascertained by " the foresaid decree of constitution, under deduction always " of the said dividends, or other sums received in part payment " and satisfaction of the same, form a burden on the said fee of " the entailed estates, and rents and proceeds of the same, or at " least the said entailed estates, and the rents and proceeds of " the same, are liable for the pursuer's provisions, as aforesaid; " and that the pursuer, in payment and security of her said " provisions and legal interest thereof, is entitled to institute and " follow forth, against the fee of the said entailed estates, and the " rents, profits, and duties of the same, all manner of real dili-

" gence, competent by law against real property, for payment or " security of debt; and in particular, that the pursuer is entitled " to lead adjudication against the said entailed estates, for the " said provisions, principal, interest, and penalty, under deduc- " tion aforesaid: Or, at least, it ought and should be found and " declared, by decree foresaid, that the said Archibald Cochran, " and the said substitute heirs of entail, in their order, as they " may successively succeed to, and take possession of, the said " entailed estates, are bound and obliged, as the condition of " holding the said entailed estates, and drawing the rents and " proceeds of the same, for and according to their respective " rights and interests, to satisfy and pay the foresaid provisions, " bequeathed to, and settled upon, the pursuer, with the legal " interest of the same, as fixed and ascertained by the foresaid " decree of constitution, under deduction always as aforesaid; " and it ought farther to be found and declared, that the said " William Keith, as trustee on the sequestrated estate of the said " Archibald Cochran, and the creditors whom he represents, are " not entitled to take any benefit or advantage from, or to draw " in payment of their debts, any part of the proceeds of the said " entailed estates, without making payment of the said provisions " bequeathed to, and settled upon, the pursuer, with legal interest " as aforesaid: And the same being so found and declared, the " said Archibald Cochran, and the said William Keith, ought " and should be decerned and ordained, to rank and prefer the " pursuer, *primo loco*, upon the rents and proceeds that have been " already drawn, or that hereafter may be drawn, from the said " entailed estates, until such time as her said provisions, and legal " interest of the same, fixed and ascertained as aforesaid, shall be " fully paid and discharged." The substitute heirs of entail were called as defenders to this action.

Separate defences were put in for the respondents. Keith, in his defences, pleaded: —

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"I. The pursuer stands in no better situation than an ordi-
"dinary creditor of the bankrupt, and neither at common law,
"nor by the conception of the various deeds of settlement exe-
"cuted by Mr Cochran, senior, is entitled to adjudge the en-
"tailed estates, or in any way, direct or indirect, to maintain, to
"any extent, a preference out of the rents and proceeds thereof.

"II. The heirs of entail are not bound to make payment of
"the provisions and legacies left by Mr Cochran, as a condition
"of their right to the rents and proceeds of the entailed estates.

"III. The right vested in the defender, as trustee for the
"whole creditors, to the life interest of the bankrupt in the en-
"tailed estates, is preferable to any right which the pursuer, by
"adjudication or otherwise, can possibly acquire.

"IV. The pursuer must, at all events, assign over to the
"defender, for behoof of the creditors, the security she may, by
"adjudication or otherwise, be entitled to acquire over the
"entailed properties, or the rents and annual proceeds thereof."

Alexander Cochran, the first substitute of entail, in his defences, pleaded:—

"I. The pursuer's provision not being created or declared a
"real burden upon the entailed estate, either by the deed of
"entail itself, or by the general disposition and settlement, it is
"incompetent for the pursuer to have it found and declared that
"she can adjudge the fee of the entailed estate, for payment of
"her said provision.

"II. There is no declaration, either in the deed of entail, or
"in the general disposition and settlement founded on, which
"effectually imposes upon the heirs of entail, by their succeed-
"ing to, and taking possession of the entailed estates, an obliga-
"tion to pay the pursuer's legacy."

After closing the record upon the summons and defences, the Lord Ordinary (M'Kenzie) ordered cases, and upon advising these, he pronounced the following interlocutor upon the 13th

May, 1834: — " Finds, that the three deeds executed by the " late Archibald Cochran, on the 3d August, 1809, refer to, and " are connected with, one another, and must be viewed as con- " stituting one settlement of his estate: Finds, that in the " general disposition, which must be regarded as the last of these " deeds, and as forming the completion of the settlement, " Archibald Cochran expressly declares: — ' Whereas the estate " ' and funds, real and personal, hereby settled by me on my " ' said son, in fee-simple, may be nearly adequate to the special " ' burdens with which the same stand charged, as well as the " ' foresaid restricted provision; therefore, my said son, by " ' accepting hereof, or my entailed estates, in terms of the " ' settlements thereof, and the heirs succeeding to him therein, " ' stand pledged and engaged, as aforesaid, to satisfy and pro- " ' cure discharges and extinctions of every debt and obligation, " ' provision, and bequest, of every description, created or con- " ' tracted by, or incumbent on me; and that in such *habile*, " ' proper, and effectual manner, as that the same shall hereafter " ' cease to exist, or afford action or execution against my " ' entailed estates.' Finds, that this declaration necessarily " implies, that the entailed estates were, by the entailer, intended " to be subject not to his debts only, but to his legacies, and that " the institutes and heirs of entail were bound to pay off these " legacies as well as debts, in order to clear these entailed estates: " Finds, that this declaration is followed by a clause, providing " a special arrangement for payment of part of the debts, out of " the rents of one of these estates; but finds no evidence in the " deeds, that the liability of the entailed estates, or heirs of " entail, was intended to be limited to the effect of this provision: " Finds, that the above declaration cannot be held *pro non* " *scripto*, nor effect be denied to the intention of the maker of " the deeds appearing thereby: Therefore, finds that the entailed " estates are liable to be affected for payment of the legacies

" libelled, in the same way as for payment of the entailer's debts;
" and finds, that the said estates being so liable, the pursuer is
" preferable on the rents of these estates to the defenders, who
" claim only by virtue of assignation to those rents from the heir
" of entail: Finds, decerns, and declares, in terms of the first
" conclusion of the libel: Finds no expenses due to either of
" the parties."

The respondents reclaimed against this interlocutor. The Court (*Second Division*) was equally divided in opinion, and therefore ordered a hearing in presence. Thereafter, on the 10th March, 1835, the Court pronounced this interlocutor:—" Find, that
" the declarations in the general disposition and deeds of entail,
" executed by the late Archibald Cochran on the 3d of August,
" 1809, founded on by the pursuer, do not import as his inten-
" tion, that the estates entailed by him should be liable to the
" payment of the legacies or voluntary provisions bequeathed by
" him, in the same manner as his own onerous debts: Find,
" that, under the settlements in question, the pursuer has no
" right or title to affect the entailed estates for payment of her
" legacies: Find, that in respect of the title completed by infeft-
" ment in the person of the trustee on the sequestrated estate of
" the present heir of entail in possession, she has no preferable
" right to the rents of the estate, to the prejudice of the trustee
" and the personal creditors whom he represents, and that, in
" the sequestration of his estate, she must rank as a personal
" creditor thereon: Therefore, sustain the defences for the
" trustee, and assoilzie him from the whole conclusions of the
" libel: Find no expenses due to any of the parties, and decern:
" And, *quoad ultra*, remit the cause to the Lord Ordinary, to
" proceed farther therein as to his Lordship may seem just."
The following were the opinions delivered by the Judges at this advising:—

Lord Justice-Clerk.—" I am glad we allowed the farther

" discussion, which has produced very able pleadings, and has " led us to attend minutely to the deeds, and the conclusions of " the summons. In the first place, it is indispensably necessary " to attend to the shape of the process. Miss Kerr pursues for " her own interest alone, but the claims of many others stand in " exactly the same situation. She raises only the question, how " far her provision can be made effectual against the fee of the " entailed estate, or against Cochran's life-interest in it, or " against the substitutes; and it is to be kept in view, that it is " to this question, whether the provisions are to affect the " entailed estate, that the judgment of the Court must be " limited. We must lay aside all consideration as to the unen- " tailed funds, which are not involved in the question raised by " this summons, which touches only the entailed estate. The " Lord Ordinary has found, ' that the three deeds executed by " ' the late Archibald Cochran, on the 3d August, 1809, refer " ' to, and are connected with, one another, and must be viewed " ' as constituting one settlement of his estate.' As to that " part of the interlocutor, I am clearly of opinion, and it is " admitted, that the whole three deeds must be looked to as " embracing the settlement of the testator, and I have no doubt " that they are to be taken in a combined view, as demonstrat- " ing his will. Then the Lord Ordinary proceeds: ' Finds, " ' that in the general disposition, which must be regarded as " ' the last of these deeds, and as forming the completion of the " ' settlement, Archibald Cochran expressly declares, " Whereas " ' the estate and funds, real and personal, hereby settled by me " ' on my said son in fee-simple, may be nearly adequate to the " ' special burdens with which the same stand charged, as well " ' as the foresaid restricted provision; therefore my said son by " ' accepting hereof, or my entailed estates, in terms of the " ' settlements thereof, and the heirs succeeding to him therein, " ' stand pledged and engaged, as aforesaid, to satisfy and pro-

" ' cure discharges and extinctions of every debt and obligation,
" ' provision and bequest, of every description, created or con-
" ' tracted by, or incumbent on me; and that in such habile,
" ' proper and effectual manner, as that the same shall hereafter
" ' cease to exist, or afford action or execution against my
" ' entailed estates:" Finds, that this declaration necessarily
" ' implies, that the entailed estates were, by the entailer, in-
" ' tended to be subject, not to his debts only, but to his
" ' legacies, and that the institutes and heirs of entail were
" ' bound to pay off these legacies, as well as debts, in order to
" ' clear these entailed estates: Finds, that this declaration is
" ' followed by a clause, providing a special arrangement for
" ' payment of part of the debt out of the rents of one of these
" ' estates; but finds no evidence in the deeds that the liability
" ' of the entailed estates, or heirs of entail, was intended to be
" ' limited to the effect of this provision: Finds, that the above
" ' declaration cannot be held *pro non scripto*, nor effect be
" ' denied to the intention of the maker of the deeds appearing
" ' thereby: Therefore finds, that the entailed estates are liable
" ' to be affected for payment of the legacies libelled, in the
" ' same way as for payment of the entailer's debts: And finds,
" ' that the said estates being so liable, the pursuer is preferable
" ' on the rents of these estates to the defender, who claims only
" ' by virtue of assignation to these rents from the heirs of
" ' entail.' Now, I am free to admit, that when the case first
" came before us, I did think we could not refuse to assent to
" this subsequent part of the interlocutor, then agreeing, as I
" did, with the view taken as to the intention of the maker.
" But looking to the words in the general disposition, and
" looking also to the two deeds of entail, I have now come to
" take a different view of his intention, and I am satisfied it was
" not his intention to make his entailed estates liable for these
" provisions, and that we cannot consider them as in the situa-

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" tion of entailer's debts. He evidently considered that there " would be an ample sufficiency to answer all provisions out of " the unentailed funds, and, so far from there being any thing " indicating the intention, that the fee of the entailed estate was " to be answerable, the reverse is made out. He says, that the " heir shall be bound not only to discharge his debts, but the " whole provisions and bequests, so that they shall in no way " affect his estate; and, fully considering the whole deeds, I am " satisfied that that was the intention of the maker of them. " And therefore it appears to me that the entailed estate is not " liable, even subsidiarily, but that he intended to create merely " a personal obligation to discharge the provisions on his son, " and each heir who should take under the deed. If he had " really meant that the obligations were to be made real, it is " impossible that he should not have expressed it in clear and " habile terms. But suppose it possible to hold that it was his " intention to make the provisions real burdens on his estate, " I am satisfied, by the authorities referred to, that they have " not been made real burdens. It must be done in the clearest " and most explicit terms, in order to have this effect. If these " parties had proceeded immediately against Archibald Cochran, " they might have received their provisions; but they leave him " to manage as he pleased till he dissipated the funds, out of " which the provisions might have been paid. Then, if they are " not made out to be real burdens, there is no ground for sup- " porting the first part of the interlocutor, and I am satisfied " the case of Lord Macdonald was very different from this. " The summons, however, raises farther the question of the " liability of the heirs of entail in their order. That point has " not been decided by the Lord Ordinary, and I would rather " abstain from entering into it, and remit to the Lord Ordinary " to decide, but I cannot agree with the interlocutor pro- " nounced."

Lord Glenlee. — " I am entirely of the same opinion."

Lord Medwyn. — " This is a question of intention, and it is a " very important and difficult one, and has been anxiously dis- " cussed. I have never been able to agree with the Lord Ordi- " nary, though, so far, I consider the three deeds are to be taken " together, as forming one general settlement. It is clear that " it was the intention of the maker of these deeds that the pro- " visions should be paid, but it is equally clear, that he intended " them to be paid out of other funds than the entailed estates. " As to the important clause on which the question turns, if it " were intended to impose burdens not imposed by law, it is cer- " tainly most awkwardly expressed. Making a fund out of the " estate to pay the provisions, leads to the expectation that he " was not to lay the burden on the estate; and, accordingly, he " takes the heir bound to discharge the provisions. Even as to the " unentailed property, I doubt if these were made real burdens, " as the provisions are not specified; and I am not satisfied that " this was intended. The summons is drawn with an alternative " conclusion, and the first conclusion contains an alternative, and " for that the Lord Ordinary has decerned. He holds the lands " liable to be affected as for entailer's debts. I do not think the " provisions have any resemblance to entailer's debts, as they " were never binding on the entailer; and I do not think the " parties in whose favour they were granted could have secured " a preference for them by doing diligence within the three " years. No doubt, the heir stands pledged to pay them, but " only personally. They are not constituted a condition of the " grant, nor a burden on the disposition, but only on the heir, " who, besides, is taken bound to get discharges, so as to prevent " their affecting the entailed estate. There is an expressed in- " tention throughout that they were to be paid out of the other " funds. I cannot concur with the Lord Ordinary's view, as to " the construction of the injunction to obtain discharges, that it

" implied that the provisions were to affect the entailed estates,
" and that so the heir is taken bound to discharge them. My
" view was, that this was to prevent the heir from keeping them
" up as debts against the entailed estate. The trustee, no doubt,
" takes the rights of the heir *tantum et tale* as they were held by
" him, but he cannot be affected by the personal obligation of the
" heir; and therefore I am of opinion, that the provisions cannot
" be made to affect the entailed estates, or the interest of the heir."

Lord Meadowbank. — " I have considered this question with
" the most anxious attention, and I regret that I remain of
" opinion with the Lord Ordinary, differing from your Lord-
" ships, that these are burdens effectual against Cochran, or any
" one in his right. I throw out of view altogether the amount
" of the claims, which does not affect the question of law, nor
" did I think how the deed might have been more clear, as I
" just take it as it stands; but the grounds of my opinion are
" these: — First, I must hold that all these deeds are to be con-
" sidered as one, as if every clause in each deed were repeated
" in every one of the three, as that is the only result of constru-
" ing them as one settlement. Secondly, there are no precise
" words necessary to indicate intention, and the Court, by legal
" construction, must gather the intention. This is entirely a
" question of intention, whether Mr Cochran, in executing one
" general settlement, meant, or did not mean, that the parties
" receiving the benefit of the landed estate, whether tailzied or
" not, were to be liable for the provisions. Mr Cochran does
" not favour one line in particular, for he shews a distinct inten-
" tion to provide for all parties descended of his own body, and
" I cannot suppose he meant to limit any of them to the fee of
" the unentailed estates. He indicates the reverse, for he says
" that the fee-simple will only 'nearly' discharge the debts and
" provisions, and yet he grants other provisions in codicils!
" Then, what is it the deeds do? The provision as to the sink-

" ing fund is indicative of an understanding, that the estates " would otherwise be responsible for the whole. Then look at " the clause referred to by the Lord Ordinary. 'Therefore my " 'said son, by accepting hereof, or my entailed estates, in terms " 'of the settlements thereof, and the heirs succeeding to him " 'therein, stand pledged and engaged as aforesaid, to satisfy " 'and procure discharges and extinctions of every debt and " 'obligation, provision, and bequest of every description, created " 'or contracted by, or incumbent on me.' Had it stopped " there, we might not have been able to draw the conclusion of " intention foregone; but then it proceeds thus, 'and that in " 'such habile, proper, and effectual manner, as that the same " 'shall hereafter cease to exist, or afford action or execution " 'against my entailed estates.' I think we have here got his " declaration, that he understood that his provisions and " bequests of every description were put on the same footing with " his debts. Then, was it incompetent for him to do so? I can " see no incompetency; and as I think all that was necessary " was to express intention, and that he has done so, I am for " adhering."

Lord Glenlee. — " No doubt, if the clause in the general " settlement is to affect the Ashkirk deed, we must apply it; " but even as to clauses occurring in the same deed, a difficult " question often arises, whether one clause is to affect matters " treated of in another part of it. There is no declaration, " *totidem verbis*, that the provisions were to be on a footing with " the debts. This is said to be implied, but I do not see from " what such implication follows. I would rather imply the con- " trary, and that the entailed estate was not to be liable to be " adjudged for them. The first thing to be attended to is, what " is consistent with common sense, as likely to be his intention. " Now, it is clear that he considered that he had left nearly " sufficient funds; and to make sure of Robina's provision, he

" made a separate provision for it. Her provision, however, " was a proper debt affecting the estate. In this situation, was " it a natural thing for him to suppose it likely that there would " be a deficiency in the other funds? He evidently did not ex- " pect this, and his impressions turned out true in fact, as he had " ample funds. But this was natural to him to suppose, that " unless he took the heirs bound to discharge the debts, &c. " they might make away with the funds, and that then these " would come against each heir succeeding: and, therefore, he " took the heir bound to obtain discharges. If, however, the " other construction be adopted, it would entirely defeat any in- " tention he could have had in inserting the clause; and, there- " fore, on the whole, there seems to me no warrant to imply that " he put the provisions on the footing of his own debts, but that " they are mere personal debts of the heir."

The cause then returned to the Lord Ordinary, (now Moncrieff,) who, on the 19th December, 1835, pronounced the following interlocutor, adding the subjoined note.—" The Lord Ordinary " having considered the record, as closed on the summons and " defences, and the interlocutor of the Court, and having heard " parties' procurators on the remaining point in the cause, " Finds and declares, that Archibald Cochran, and all the heirs " of entail substituted to him by the deeds of entail of the estates " of Ashkirk, and other lands, in their order, as they may suc- " cessively succeed to, and obtain possession of, the entailed " estates, are bound and obliged, as a condition of their holding " the said entailed estates, and drawing and enjoying the rents " and proceeds thereof, according to their respective rights and " interests, or as an obligation consequent thereupon, to satisfy " and pay the provisions or bequests made and granted by " Archibald Cochran the entailer, by his general settlements, to " and in favour of the pursuer, with the lawful interest due " thereon, in so far as the same may not have been satisfied and

" paid before the succession of such heir, and decerns accord-
" ingly: But reserves all questions as to the effect and appli-
" cation of this finding and decerniture, in regard to any
" individual heir-substitute who may succeed to the said estates,
" when the right of succession may open to him or her: Finds
" no expenses due to any of the parties."

" *Note.* — The Lord Ordinary can see no question remaining to be
" determined upon this record, but the abstract question involved in
" the demand of a declaratory finding and decree, that, by the legal
" construction of the entailer's settlements, an obligation is laid on all
" the heirs of entail successively, to pay the pursuer's provisions, in
" so far as they may not have been paid before the succession of any
" heir; and to that only he has directed his attention.

" The Court have decided that the provisions cannot be made the
" grounds of adjudication against the entailed estate. The Lord
" Ordinary takes that judgment, and the principles of it, as conclusive
" against the first point in this declarator. But the question as to
" the personal liability of all the heirs in their order, is left distinctly
" and expressly open. Neither is there the slightest inconsistency
" between the finding that the entailed estate cannot be affected, and
" the supposition that all the heirs may be successively liable. An
" example of this may be seen in this very deed of entail, where it is
" declared, with regard to the provisions for wives and children,
" that the fee of the estate shall not be affected for them; but at the
" same time, that one-third of the free rents, 'and the persons of
" 'the heirs or substitutes in fee or liferent,' &c. and all other
" estates belonging to them, shall be liable to execution for such
" provisions. And a question precisely of this nature occurred in the
" case of Erskine *v.* the Earl of Mar, July 7, 1829, 7 *S.* and *D.* 844.

" The question, then, is, whether, upon a sound construction of the
" settlements of Archibald Cochran, an obligation was laid on all the
" heirs of entail to pay the provisions made by those settlements in
" favour of the pursuer, and other persons similarly situated? It is
" a clear principle, which was fully recognized by the Court in
" deciding the other question, that all the deeds of settlement made

" by the entailer must be considered together. Archibald Cochran " had the unlimited command of all his property. He executed the " three material deeds, — the deed of entail of Ashkirk, &c., the " entail of the lands in the county of Edinburgh, and the general " settlement, on the same day, the 3d August, 1809. These deeds " bear express reference to one another; at least the general settle- " ment proceeds upon the express narrative of the entail executed " at the same time, and bears the most pointed reference to it in " many points. The entail, from the nature of such deeds, is made " in a perfectly simple form, by disponing and obliging the granter to " resign the lands for new infeftment to himself in liferent, and his " son in fee, and to the heirs of entail meant to be called, under all " the usual conditions of a strict entail, and with reserved powers to " the heirs. But the entailer reserves to himself full power to alter " or revoke the settlement, or to sell, alienate, or burden, &c. at his own " pleasure. But though the entail is thus simple in form, there can " be no doubt in point of law, that it was perfectly competent for the " entailer, by any deed expressive of his will, and more especially by " a deed made at the same time, to lay upon all or any of the heirs " of entail, called as his gratuitous donees, and that either primarily " or subsidiarily, any obligations which he might think fit to impose; " and that he could do this while the fee of the entailed estate was " preserved entire, is equally clear.

" Archibald Cochran had other valuable estates and property, and " he designed to provide for the payment of his own debts, and for " the comfort of the younger members of his family. With this " view, he executed the general deed of settlement, by which he " conveys that property to his son; whom failing, to the other per- " sons mentioned, under the burden of payment of his debts, and " under the burden also of the provisions therein expressed, which " were afterwards increased by the two codicils of later dates. It " may be taken to be quite clear, as matter of intention, that the " testator meant that these provisions should, in the first instance, be " paid from the property conveyed by this general settlement, and " by the party who might obtain possession thereof. By the judg- " ment of the Court, it must be taken as settled also, that he intended

" to preserve the fee of the estate untouched; and by some words " which occur in the important clause on page six, it may be assumed " that he believed the separate property to be nearly sufficient for " answering all those burdens.

" But the testator may be presumed to have foreseen that the " provisions might not be paid by his immediate heir taking the " whole property. By many accidents, the unentailed estate and " effects might not at his death be sufficient, or even nearly sufficient. " He might suffer losses, or he might have miscalculated the value of " such property, as many other testators have done. His immediate " heir might be of an improvident character, and the effects in his " own hands might be spent or carried off by his own creditors, " before his near relations, naturally more abstinent, could render " their debts effectual; and he might die at an early period, leaving " his affairs in embarrassment, and the other members of the family " exposed to the utmost difficulty, or placed in an impossibility of " recovering their provisions from his estate. However fixed, there- " fore, the testator's intention and belief might be, that the provisions " should be paid by his first heir, and that out of the separate funds " conveyed, nothing can be more probable or rational than that he " should not intend to leave his other children to depend absolutely " on that probability, or that he should provide that the obligation " for their provisions should attach to all the heirs of entail succes- " sively. The question is, whether he has expressed his intention to " this effect or not.

" This depends mainly on the clause on page six of the " general settlement. The clause is preceded by the mention of a " particular provision and a restriction of it. But, notwithstand- " ing this, it is plainly substantive and declaratory as to all the pro- " visions. It is out of all question for any Court to hold so pointed a " clause *pro non scripto*. It must receive effect according to the true " meaning expressed in it, as well as the Court can find that mean- " ing. And though there may be some confusion in the form of it, " the Lord Ordinary is of opinion that it does explicitly declare the " testator's understanding and intention, that every heir of entail " accepting of the entailed estate, whether succeeding to any other

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" property or not, should be bound to satisfy every debt, obligation,
" provision, or bequest created or contracted by the testator, or in-
" cumbent on him, so that the same should cease to exist. It is
" introduced by a declaration that whereas the fee-simple of the
" estate given to his son might be 'nearly adequate' to the special
" burdens, &c. as well as the restricted provision immediately before
" alluded to; therefore, &c. Now, it is justly argued that this ex-
" pression, 'nearly adequate,' necessarily implies that the testator
" had it in his mind that they might not be quite adequate. But if
" he was looking at that possibility, the conclusion is inevitable, if
" there are words following of sufficient force, that the very thing he
" intended by the clause was to declare a general and ultimate
" liability of all the heirs of entail, so as to secure the full payment
" of the provisions in all events, and if he intended this generally, it
" will be very difficult to limit the obligation.

" Upon that narrative what does he declare? 'Therefore, my said
" 'son, by accepting hereof, or my entailed estates, in terms of the
" 'settlement thereof, and the heirs succeeding to him therein, stand
" 'pledged and engaged, as aforesaid, to satisfy and procure dis-
" 'charges and extinctions of every debt, and obligation, provision,
" 'and bequest of every description, created or contracted by, or in-
" 'cumbent on me, and that in such habile, proper, and effectual
" 'manner, as that the same shall hereafter cease to exist, or afford
" 'action and execution against my entailed estates.' From the last
" words an implication was deduced, that he meant his entailed
" estates to be liable. But the Court have held that such an impli-
" cation is not warranted, or is not sufficient, there being no direct
" declaration that the entailed estates should be liable to be attached
" for the provisions, or for any thing but debts which by law affected
" them. But this is not the state of the question as to the liability
" of the heirs of entail. As to them, there is a direct declaration of
" an obligation imposed; and the Lord Ordinary cannot construe the
" clause otherwise than that they were all to be liable generally, by
" their acceptance of the entailed estate, for the provisions and
" bequests as well as for debts. It is plainly said, that the testator's
" son, either by 'accepting hereof,' or by accepting of my 'entailed

" 'estates in terms of the settlements thereof,' shall be so liable, — " the obligation being created by either fact. Then the words are " added, 'and the heirs succeeding to him therein,' plainly designat- " ing the heirs succeeding to him in the entailed estate. And the " clause bears, that all these heirs 'stand pledged and engaged, as " 'aforesaid, to satisfy,' &c. The defender insists much on the words " 'as aforesaid,' as if they so qualified the clause as to make it import " no more than a repetition of the obligation previously laid on the " disponees of the general settlement. But this will not do. Why " introduce the entailed estate — the settlement of the entailed estate " — 'the heirs succeeding to him (A. Cochrane) therein?' There " must have been a definite meaning in this. They are declared to " stand pledged and engaged; and this cannot be extinguished by " the words 'as aforesaid.' The Lord Ordinary reads these words " very differently. In so far as they may have been meant to have " any particular force, this seems to be the import: 'In the same " 'manner as I have already declared, that the disponees in this settle- " 'ment, by accepting thereof, shall be subject to the burdens, so I " 'now declare that my son, either by accepting it, or by accepting " 'the entailed estate, and also all the heirs succeeding to him, shall " 'stand pledged and engaged,' &c. It is the declaration of what the " testator meant and understood to be the engagements of all his " heirs, whether under one deed or under another.

" This is the view which the Lord Ordinary takes of the clause, " and he sees nothing in any part of the deed which can take away " what appears to him to be the only construction of which the clause " will admit, giving effect to every word of it. The testator probably " thought that the burden would be very light, which may be the " meaning of the narrative. But that will not alter the legal effect " of the obligation expressly created. The Lord Ordinary will only " farther observe, that, though the case of Macdonald, May 29, 1832, " may not be precisely of the same kind, the judgment which laid the " provisions on the succeeding heirs of entail, without relief against " the executors of the first heir, is, in his opinion, much stronger " than any thing that is called for in the present case.

" The counsel of the defender urged very anxiously on the Lord

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" Ordinary an argument to shew that the pursuer was barred from " insisting in this action, in consequence of her not having duly pro- " ceeded against the unentailed estate, and discussed the estate of " Archibald Cochran; and it was confidently stated that the provisions " constituted real burdens on the entailed estate, and that this was " even admitted by the trustee in his defences in this cause. The " Lord Ordinary has not neglected that argument; but he thinks " that there is no such question before him, and that, so far as there " are data on which he could judge, it is not sound, to the effect " which must be maintained, 1*st*, There is no such plea in this record, " the pleas stated in the defences being confined to the construction " of the deeds of settlement. 2*d*, The Lord Ordinary does not find " that the Court decided on any such ground, when they found the " estate not liable. 3*d*, The conclusion of the summons is merely " declaratory, and is not at all affected by such a plea, which must " first assume that the obligation was laid on all the heirs of entail. " The effect of this otherwise is not within this declarator. 4*th*, So " far as the Lord Ordinary can judge, it rather appears that the pur- " suer did claim a preference in the ranking with Archibald's credi- " tors, and that the claim was disallowed by a judgment of the Court. " But the point not being raised in the record, and the facts not being " distinctly brought out, he may be mistaken in this. But 5*th*, If he " were to judge of a question not raised, and which cannot be decided, " he should be inclined to think, as at present advised, that the pro- " visions were not made real burdens on the unentailed estates, and " that what is supposed to be an admission of it is not an admission " of any such thing. The estates were indeed conveyed under the " burden of the debts and provisions, and the precept of sasine is also " under the burden of them. But the question of real burden depends " on other considerations. The trustee's plea is upon *mora* simply. " Yet even he does not state either this, or the other point in the " pleas subjoined in his defences. The reverse of the assumed " admission seems to be stated in his minute."

On the 9th February, 1836, the Court adhered to the Lord Ordinary's interlocutor.

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The appeal was against the interlocutor of the Lord Ordinary of 13th May, 1834, in so far as it did not find expenses due, and against the interlocutor of the Court, 10th March, 1835; and also against the interlocutors of the Lord Ordinary, and the Court, of 19th December, 1835, and 9th February, 1836, in so far as they did not find the appellant entitled to expenses.

Mr Stuart, and Mr Anderson, for the appellant.—I. It is fixed, as the law of this case, that the three several deeds of 3d August, 1809, are to be read as one. The debt sued for is not struck at by any of the deeds, but, on the contrary, is one which the entailer has himself created. It is not necessary to resort to the deeds for a right to adjudge the lands for payment of debts, the law gives that right, unless the deeds expressly take it away. The deeds, no doubt, prohibit the heirs from contracting debts, but their liability for this debt is made one of the conditions of their title; and the title of heirs of entail is one of *plenum dominium*, exposed to all the liabilities which the law imposes, unless in so far as it is limited *ex facie* of the title, and upon the strictest construction of its terms; so entailed lands have been held to be adjudgeable on a personal bond, because executed under powers given by the entail, Crawford *v.* Hotchkis, 11th March, 1809, 15 *F. C.* 258; Jardine *v.* Lockhart, 11 *S.* and *D.* 720; M'Donald *v.* M'Donald, 10 *S.* and *D.* 584; Porterfield *v.* Howden, 1 *Sh.* and *M'L.* 739; Wilson *v.* Elliot, 12 *F. C.* 975. Here the debt is created by the entailer himself, against the heirs, and is put by him on the same footing with his own ordinary debts, and nothing is done by him to take away the ordinary remedies of law. When he did intend these remedies to be taken away, he so expressed himself, as in the case of provisions to wives and younger children, in regard to which, by both the deeds of entail, he expressly declares, that they shall not be the foundation of execution. Whereas, in the general disposition, he

contemplates the possibility of the debt in question forming the ground of execution against the lands, and imposes on the heirs of entail a personal obligation to prevent such a consequence.

II. The debt of the appellant being created by the entailer, she has a preferable right for payment of it over the creditors of the institute, who, through Keith their trustee, possess under a conveyance from the institute. The appellant, if entitled to adjudge on the arguments already used, would be entitled to do so, and to obtain possession, by process of maills and duties, to the exclusion of the creditors of the institute, whose debts are prohibited by the entails, and who could only compete *inter se* upon the rents accruing during the life of their debtor. If so, she should obtain the same preference in the ranking without the necessity of adopting these proceedings. This has been recognized in the case of inhibition, where the creditor has not been required to perfect his preferable diligence by adjudication, but has been allowed to rank as if it had been completed, Monro *v.* Gordon, *Mor.* App. Inhib. No. 1; 2 *Bell's Com.* 147; M'Lure, *Mor.* App. Compet. No. 3.

III. Archibald Cochran, if insolvent, would clearly have possessed under the burden of the provisions, and Keith is but his assignee, *qui utitur jure auctoris;* he must therefore give effect to the condition by which his author's right was qualified. The fee is not divested out of Archibald by his conveyance to Keith, though followed by infeftment. All the effect of that conveyance is merely to assign the rents during Archibald's life, with his powers as heir of entail.

IV. Keith has no interest to object that the appellant has not obtained adjudication, as the effect of such a diligence, if sued out, would be to void his author's right.

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Mr Solicitor General and Mr Milne for the respondent Alex. Cochran.— Mr Pemberton and Mr Gordon for the respondent, Keith.— I. In order to constitute a debt a real burden upon lands, and subject them to adjudication for its payment, it is not enough that the disponee or heirs are taken bound to pay. The lands themselves must expressly be burdened, Stewart *v.* Home, *Mor.* 4649; Allan *v.* Cameron, *Mor.* 10265; Martin *v.* Paterson, *Mor.* Per. and Real, app. No. 5; M'Intyre *v.* Masterton, 2 *S.* and *D.* 664. The two entails do not even make mention of the appellant's legacy, or of the general settlement in which it is contained. The general settlement alone specifies the legacy, and not as a burden on the lands, and if it had done so, it would not, as a separate deed, have been effectual for that purpose. Chalmers *v.* Creditors of Redcastle, 27th January, 1791, 1 *Bell. Com.* 588; Tailors of Aberdeen *v.* Coutts, 2 *Rob.* 296.

II. Assuming that the deed does not, in terms, make the legacy a real burden on the lands, but imposes its payment as a condition of holding them, that will not advance the appellant's argument, still the condition must be so expressed as to impose something more than a personal obligation; it must be made distinctly and explicitly a burden following the lands, and entering the infeftment: but there is no declaration that the land shall be held under the condition of paying the legacy; any notion of liability is derived merely by implication from the terms of the personal obligation.

III. The entailer's intention was rather that the legacy should not be a real burden. Those obligations which are to be real burdens, are distinctly specified; this legacy is not of the number, neither are the provisions to wives and younger children; but as they are not, they are inserted in the fee-simple conveyance of Gilston and Over Brotherstones, which, with the maker's move-

able estate, are conveyed as a fund for their payment, and these parts of his property are relieved of Robina Cochran's provision in order to make sure of their sufficiency, so "as that the same " shall hereafter cease to exist or afford action or execution " against my entailed estates." Any implication of an admission by this, that these were debts or provisions capable of being the foundation of such execution, is applicable to Robina Crawford's provision, which was of this nature, as being onerous in its origin. Classing the debts and legacies together in the clause, did not alter the nature of each, so as to make them identical in their effects, and even if the sentence quoted had reference to gratuitous provisions, it would be contrary to all the principles of construction that these words intended to guard against, should have the effect given to them of creating, a real burden. Baugh *v.* Murray, 12 *S.* and *D.* 279.

IV. The effect of the adjudication under the sequestration, and of the disposition by Archibald Cochran in favour of the respondent, Keith, followed by infeftment, is to vest in him a title to Archibald's life-interest, preferable to that of any mere personal creditor; 2 *Bell. Com.* 191; Nairne *v.* Gray, 15th Feb. 1810, 15 F. C. 588; Grahame *v.* Hunter, 7 *S.* and *D.* 13; Graham *v.* Alison, 9 *S.* and *D.* 130. Any effect which the personal condition imposed upon the bankrupt of paying off the legacy, might have as against him individually, could not affect the feudal title made up by the respondent. Miller *v.* Wright, 14 *S.* and *D.* 1087; Mansfield *v.* Walker's trustees, 11 *S.* and *D.* 813.

V. Assuming that the appellant's legacy is a real burden, entitling her to adjudge the fee of the lands for its payment, still there is nothing in the entails irritating the heirs' right in case of such an adjudication being led, and as he is, to the extent of his

own life interest, in the same condition in regard to it as a fee-simple proprietor, even if the appellant were to lead an adjudication of the fee of the lands, Archibald Cochran's life interest would necessarily be excluded from the effect of such adjudication, by the prior and so preferable adjudication and disposition in favour of the respondent, and in that way she would only be entitled to rank *pari passu* on such life interest with the other creditors, which she has been already allowed to do.

VI. But, moreover, any claim of preference by the appellant, is excluded by her own *mora* and dealing with the bankrupt. By the general disposition, funds were specifically appropriated for payment of her legacy, but instead of obtaining payment, she allowed nine years to elapse, during which the bankrupt squandered these funds. She cannot now be allowed to recur upon the other estates, on the same principle upon which creditors refraining from enforcing payment of their debts where the funds were adequate for the purpose, have not been allowed to draw back from legatees, after a lapse of years, the legacies paid to them. Robertson *v.* Strachan, *Mor.* 8087, *Ersk.* III. 9, 46; Wallace *v.* Grierson, 16th May, 1821, 20 F. C. 343.

A cross appeal was also taken by Alexander Cochran, to the interlocutor of the Lord Ordinary of 19th December, 1835, and the interlocutor of the Court adhering to it on 9th February, 1836.

Mr Solicitor-General and Mr Milne. — I. Legatees are not entitled to payment out of the estate of the testator, of whatever nature it may be; their fund of payment is the moveable estate, and is confined to it, unless the terms of the deed giving the legacy expressly subjects the lands in liability. Here the maker of the deed expressly conveyed both real and personal estate for

payment of the appellant's legacy, and she cannot be entitled to go beyond these, and come upon the heirs of entail. Hill *v.* Hunter's Trustees, 14th May, 1818, 19 F. C. 506.

II. The testator no where mentions the legacy in the deeds of entail, and the only clause in the general settlement which can by possibility be suggested as throwing any liability on the heirs of entail, was evidently introduced not with a view to the legacies, but to the onerous provision of Robina Cochrane, and to give a reason why the general estate was relieved of the burden of it. The legacies are mentioned only by recital, and not substantively, which they would have been had the intention of the clause been to originate any obligation as to them, and every other part of the deed discovers an intention to relieve the heirs of entail, not to burden them with the legacies.

III. The executors and disponees of the fee-simple estate were the parties primarily liable for the appellant's legacy, *Bank.* III. 5, 68 and 69; *Ersk.* III. 8. 24. and III. 8. 52; *Stair*, III. 5. 17; Nasmyth *v.* Hamilton, 2 *Bro. Supp.* 659; Walls *v.* Maxwell, *Mor.* 3561. The heirs of entail were therefore entitled to have them discussed *primo loco*, *Ersk.* III. 3. 61, and III. 8. 53. And if *laches* have taken place in this discussion, the heirs are relieved of their subsidiary liability, Innes *v.* Sinclair, *Mor.* 3567; *Ersk.* III. 9. 46; Robertson *v.* Strachan, *Mor.* 8087; Blair *v.* Anderson, and Colquhoun *v.* Stirling, *Mor.* 3572. For the reasons suggested in the 6th answer to the original appeal, the appellant has been guilty of laches, and has lost all claim against the heirs of entail, supposing such to have at at any time existed.

The respondent Keith also objected to the competency of the appeal, as against him.

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Mr Pemberton and Mr Gordon. — The interlocutor of the Court, on the 10th March, 1835, disposed of every part of the libel in which this respondent had any interest; all that remained to be discussed after that, was the liability of the heirs of entail, in which the respondent had no concern. The time then within which appeal could have been taken as against the respondent, expired on the 10th March, 1837, or the lapse of fourteen days after the meeting of the next ensuing Parliament, but the petition of appeal was not presented until the 18th February, 1839. It is consequently incompetent, and is not saved by the provisions of 48 Geo. III. cap. 151, against appeal of interlocutory judgments; the judgment here was final, not interlocutory, as to this respondent, and the interlocutors referred to by this statute are between the same parties as are interested in the interlocutor which conclusively disposes of the whole cause. An earlier appeal might have interrupted farther procedure in the Court below on the remaining question in the cause, but *sibi imputet* to the appellant, that she joined this question of the liability of the heirs of entail with matters between other parties, who had no interest in it.

Mr Stuart, and Mr Anderson, for the appellant. — The appeal is perfectly competent under the 15th section of 48 Geo. III. cap. 151, which allows appeal against all "or any interlocutor that "may have been pronounced." It is said, that the interlocutor of 10th March, 1835, was final as to the respondent. But a decree is not final until it is extracted, *Bank.* IV. 36, 1 and 3, *Stair*, IV. 46, 4 and 26; and the standing order of 24th March, 1735, as amended by the order of 22d June, 1829, recognizes this as the character of a final decree. Not only was the interlocutor of 10th March, 1835, not extracted, but leave to extract it was never asked, without which it could not have been done, *Bell. Dict.* 522; Rothsay *v.* M'Neil, 17th November, 1789; Lorn *v.* Denny, 20th December, 1796: *Hume*, 14. In truth, the inter-

locutor was not final for the purposes of appeal; that interlocutor only is final which, according to the 48 Geo. III. cap. 151, disposes of the "whole" merits of the cause, whereas the interlocutor of 10th March, 1835, contained a remit upon other parts. Appeal against it, therefore, could not have been taken without the leave of the Court, and the grounds upon which that leave has been refused in other cases, shews, that it would not have been given in this case, Hunter *v.* Dickson, 5 *S.* and *D.* 417; Eglintoun *v.* Walker, 5 *S.* and *D.* 418; Miller *v.* Morrison, 5 *S.* and *D.* 671; but the necessity for such an application is sufficient to shew the character of the interlocutor, and to negative the objection to the competency of the appeal.

LORD CHANCELLOR. — If the legacies had been imposed as a debt, and no more had appeared, that would have been a ground of adjudication; but it appears to me clear, that the testator has taken great pains to use language to shew, that he did not mean the estate to be adjudgeable.

Mr Stuart. — After that expression of your Lordship's opinion, it would not become me to trouble you any farther.

Lord Brougham. — I think the construction is perfectly clear, we all agree in it.

Lord Chancellor. — We have heard the case, and heard it at great length, and read all the papers, and considered them, and we have all come at last to the opinion, that the interlocutors are correct. I have been of that opinion some time.

Lord Brougham. — There is an observation with respect to the Judges changing their opinion.

Lord Chancellor. — I think the Lord Justice Clerk says: On farther consideration, and carefully reading the papers, I have preferred the opinion I have before expressed.

Lord Campbell. — I think the case was very properly disposed of in the Court below.

Lord Brougham. — The only question is, whether there ought to be something added by way of finding, to make it clear that the reservation is effectual. Taking it on the Lord Ordinary's interlocutor, there could be no doubt of that. I think the question being raised on the construction of a Scotch entail, it might be all very well to bring a cross appeal, as there was an appeal upon that; otherwise I think it would have been very wrong to have appealed, having the whole seven Judges on the real question.

Mr Stuart. — I know your Lordships have very frequently altered the opinions of the Judges when they were unanimous.

Lord Brougham. — Not on a mere question of construction.

Lord Chancellor. — The Lord Ordinary "Reserves all questions as to the effect and application of this finding and decerniture in regard to any individual heir-substitute, who may succeed to the said estates when the right of succession may open to him or her."

Mr Stuart. — The only other question is as to the trustee. Your Lordships observe the assoilzieing the trustee was by the interlocutor of Lord Moncrieff, which has been adhered to.

Lord Brougham. — Your objection was, that there was a doubt whether the reservation precluded any payment by the heir himself.

Mr Stuart. — We apprehend it was the intention of the Court to declare that by the true construction of the instrument, the heirs are bound?

Lord Brougham. — Yes.

Mr Stuart. — But to reserve the application of that principle till the case arises?

Lord Chancellor. — Yes.

Mr Pemberton. — Supposing the Court to be of opinion, that upon the true construction of the instrument, Archibald Cochran, and all the heirs of entail, were subject to this, the proper form would be to declare, that the heir was bound and obliged.

Mr Stuart. — The finding constitutes the obligation.

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Mr Pemberton. — What I understand your Lordships to intend to express is, That according to the effect of the true construction of this instrument, the liability was imposed upon all the heirs of entail, as they should successively succeed to the estate, to discharge those debts; but what defence each separate heir of entail might have upon the ground of laches, and of not prosecuting the claim against the preceding heirs of entail, or on any other ground arising on the construction of the instrument, was reserved to that party when the case should arise between him and the pursuer.

Lord Brougham. — Does not the interlocutor reserve that?

Mr Pemberton. — I think not, my Lord, it declares an absolute obligation.

Lord Chancellor. — I consider it nothing more than the construction of the Lord Ordinary, adopted by the Court.

Mr Pemberton. — If that is so, that is sufficient.

Lord Chancellor. — That is our clear opinion.

Lord Brougham. — I thought your argument was, that the words "reserves all questions as to the effect and application of "the finding and decerniture in regard to any individual heir sub-"stitute who may succeed to the estate," was not applicable to Archibald Cochran, who had succeeded; and that, therefore, that ought to be made clear.

Mr Pemberton. — If your Lordships confine the declaration to that which I understand to be the opinion of the Court, on the construction of the instrument, our case would be open to us.

Lord Chancellor. — What I understand it to mean is, That it finds this to be according to the true construction of the instrument; that is all which is meant.

Lord Brougham. — But reserving the consideration of whatever may have been done as to laches and payment, and so on, as to each individual heir. I really thought Mr Pemberton's objec-

tion had been that the words were not sufficient to govern the case of the heir who had succeeded.

Mr Pemberton. — I do not think they would be, my Lord; but if your Lordships were merely to introduce these words, "accor- " ding to the true construction of the instrument," that would remove all difficulty.

Lord Chancellor — We think it is sufficiently clear already; then I dare say, you will find out a way to take the opinion of the Court.

Mr Stuart. — There is no doubt about that, but my learned friend is trying to save the costs of the cross appeal.

Mr Pemberton. — Indeed, I am not, I have not heard one word about the cross appeal.

Lord Brougham. — We think, that if you had presented no appeal, there ought not to have been a cross appeal. I humbly move your Lordships, that the costs of the original appeal, and the costs of the cross appeal, be given. I see no reason whatever for a distinction.

Mr Stuart. — There is a question about the trustee. This is quite a different question as against the trustee; we are now cut out from the decree as it stands, although Lord Moncrieff, and all the judges set us right as against all the other heirs. Unless your Lordships set that interlocutor right, we have no claim at all against the institute.

Lord Brougham. — We hold your appeal as competent.

Mr Stuart. — Being competent, your Lordships have not yet disposed of the case.

Lord Brougham. — The appeal is against the trustee.

Mr Stuart. — We have brought him here; they said we could not bring him here, but your Lordships think we can. The interlocutor of the 19th of December, 1835, makes the institute, and all the heirs successively liable; we shall go back against the whole series of heirs. The argument of my learned friend, Mr

Gordon, was very ingenious to shew, that the effect of the sequestration was to give him a priority, but I apprehend that can hardly avail with your Lordships.

Lord Brougham. — Will one counsel on a side be here in the morning.

Mr Stuart. — Certainly, if it is your Lordship's desire.

Lord Brougham. — The Lord Chancellor is obliged to go, we cannot dispose of the case now.

Lord Campbell. — Mr Pemberton need not come down on purpose.

Lord Brougham. — We will dispose of it at the sitting of the House to-morrow morning.

Lord Brougham. — We proposed to take an opportunity this morning of disposing of the costs.

Mr Anderson. — There was a remaining point Mr Stuart did not speak to, namely, whether the finding with reference to the trustee could be sustained. That was involved in the first appeal, which your Lordships have held to be competent. By the interlocutor appealed against in the first appeal, the trustee is assoilzied from all the operation of the summons. The first conclusion of the summons was, to have it found that the provisions were a burden upon the entailed estates, or that the estates might be adjudged for payment of them. The second was, that at any rate there was a liability upon the heirs of entail successively, as a condition for taking up the estates. The third was, that the trustee ought to be ordained to rank and prefer the pursuer *primo loco*, upon the rents he had recovered.

Lord Brougham. — So far that fails as against the trustee.

Mr Anderson. — The interlocutor of the Inner House finds, "that the declarations in the general dispositions and deeds "of entail executed by the late Archibald Cochran, on the "3d of August, 1809, founded on by the pursuer, do not im-

" port as his intention, that the estates entailed by him should " be liable to the payment of the legacies or voluntary provisions " bequeathed by him, in the same manner as his own onerous " debts, and that under the settlements in question, the pursuer " has no right or title to affect the entailed estates for payment " of her legacies." Then there is another finding, to which I would just call your Lordship's attention, " that in respect of " the title completed by infeftment, in the person of the trustee " on the sequestrated estate of the present heir of entail in pos- " session, she has no preferable right to the rents of the estate, " to the prejudice of the trustee, and the personal creditors " whom he represents."

Lord Brougham. — That has been found against you here, we have affirmed that.

Mr Anderson. — I understood, my Lord, that my learned friend Mr Stuart, had not come to that finding. I understood your Lordships to have simply found, that the estates were not adjudgeable. But that does not dispose of the question with reference to the rents which the trustee had actually received.

Lord Brougham. — It was understood that we affirmed the interlocutor appealed from, and the only question reserved till this morning, was in consequence of your taking some distinction between the case of the trustee and the other case, in respect of the costs of the appeal.

Mr Anderson. — That was one point, but I also understood there was another with reference to the rents the trustee had received. Because your Lordships see that the trustee represents the heir of entail, and we conceive he ought not to be assoilzied from that conclusion which affects the heir of entail.

Lord Campbell. — Mr Stuart was heard until he brought his observations to a conclusion. Upon that argument the House expressed an opinion, that the interlocutor appealed from should be affirmed, and then the question arose about costs.

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Lord Chancellor. — We had affirmed the interlocutors, and then the question arose about costs, and when we had decided on the question of costs, as far as related to two of the parties, Mr Stuart said there was a difference with respect to the third, namely, the case of Keith, and there the matter rested. I was obliged to go away suddenly.

Lord Brougham. — Keith never appealed.

Mr Anderson. — He was represented. He presented several petitions to have the original appeal dismissed as incompetent, and he ultimately failed in this. There were Cases on the question of competency.

Lord Chancellor. — Did he present a separate petition upon the subject of the competency?

Mr Anderson. — He presented two separate petitions, and kept the case hanging back upon the appeal for two sessions.

Lord Chancellor. — These were petitions presented to the appeal committee?

Mr Anderson. — Certainly they were, my Lord.

Lord Chancellor. — No costs are allowed on such occasions. He has made two defences here, one on the competency, and one upon the merits. He fails upon the competency, but he succeeds upon the main question. Were there cases given in upon the competency?

Mr Gordon. — By the appellants, my Lord.

Mr Anderson. — By both parties. We gave in a separate case upon the competency. There was a separate case by the appellant, because the objection was made after the original case was lodged.

Lord Chancellor. — As far as relates to those points they have failed upon those cases.

Mr Anderson. — And we ought to get the costs upon those cases.

Lord Chancellor. — Nothing more.

Mr Anderson. — And the consequential proceedings. The objection arose by the petition presented to the House, which was referred to the appeal committee, and then it was ordered to be argued along with the merits.

Mr Gordon. — May I be permitted to say, that it was considered a point of great difficulty.

Lord Chancellor, (*to Mr Anderson.*) — You must pay the costs as to that part in which you failed.

Lord Brougham. — The decision on the competency is against the other party, and they must pay the costs taxed by the proper officer, with respect to the question of competency, and that settles the whole question.

Mr Gordon. — It may be difficult to separate the questions.

Lord Chancellor. — The taxing officer will separate them. There will be no difficulty about that.

It is Ordered and Adjudged, that the said original 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 farther ordered, that the appellant in the said original appeal, do pay, or cause to be paid to the said respondents therein, viz. the said Alexander Cochran, and Sir David Milne, his *curator bonis*, and the said William Keith, the costs incurred in respect of the said original appeal, the amount thereof to be certified by the Clerk Assistant: And it is farther ordered and adjudged, that the said cross appeal be, and is hereby dismissed this House, and that the said interlocutors therein complained of, be, and the same are hereby affirmed: And it is also farther ordered, that the appellant in the said cross appeal, do pay, or cause to be paid, to the said respondent therein, the costs incurred in the said cross appeal, the amount thereof to be certified by the Clerk Assistant: And it is also farther ordered, that the said petition to dismiss the original appeal as incompetent, be, and is hereby refused: And that the said respondent, William Keith, do pay, or cause to be paid to the said appellant in the said original appeal, the costs incurred in respect of the case and pro-

ceedings in this House, arising out of the said petition, the amount thereof to be certified by the Clerk Assistant: And it is also farther ordered, that unless the costs certified as aforesaid, shall be paid to the parties respectively entitled to the same, within one calendar month from the day of 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.

JOHNSTON, FARQUHAR & LEACH — SPOTTISWOODE & ROBERTSON — RICHARDSON & CONNELL, Agents.