[Heard, 4*th April*, — Judgment, 18*th August*, 1843.]

HARRY LEITH LUMSDEN, *Appellant.*

HENRY LUMSDEN, and others, *Respondents.*

Tailzie. — Where an entail prohibits sales, and irritates all "deeds "made or granted" in contravention, it will be effectual not only against sales, to be completed by deed executed, but also verbal sales, to be followed by *rei interventus*, and enforced by adjudication in implement.

Ibid. — Irritant clause *held* not to be enumerative, but general, and sufficiently comprehensive to embrace all the acts prohibited.

Ibid. — If a word be used in one part of an entail, where it is capable only of one meaning which will support the entail, it must receive that meaning, though it should occur in another part, in another meaning, which, if given effect to as to the first part, would destroy the entail.

HARRY LUMSDEN, in 1794, executed an entail of his lands of Auchindoir, which contained prohibitions against altering the order of succession, selling, or contracting debt. These prohibitions were expressed in these terms: — "with and under the "limitations and restrictions after mentioned, namely, with and "under this limitation and restriction, that it shall noways be "lawful to, nor in the power of, any of my said heirs of tailzie, "or substitutes before written, to innovate, alter, or infringe "this present tailzie, or the order of succession hereby esta- "blished, or to be established by any nomination or other "writing to be made by me, or to do or grant any other act "or deed that may infer any alteration, innovation, or change "of the same, directly or indirectly. But with this exception "always, that in case any apparent or presumptive heir or sub-

" stitute, who might at any time succeed to the said lands and " estates, in virtue of the above destination, shall by law be " incapable of succeeding to the same, by reason of forfeiture " or attainder, or other legal incapacity which may exclude any " such apparent or presumptive heir or substitute, or the heirs " of their bodies, from taking, holding, and enjoying for their " own use and benefit, my said lands and estates, in virtue of " the substitution before written, then, and in that case, it shall " be lawful to any heir of tailzie who shall be in the right of " the said lands for the time, as oft as such case shall happen " in all time to come, so far to alter the destination above writ- " ten, as to exclude such incapable person or persons from the " right of succeeding to the foresaid lands and estates, notwith- " standing the foresaid restriction; and for that end, to grant " such deed or deeds for excluding the foresaid incapable person " or persons as shall be competent, in the same manner as an " unlimited proprieter might do. Provided, nevertheless, that " with respect to the said whole heirs of tailzie, the prohibition " to alter the course of succession shall have their full force and " effect; and with and under this restriction and limitation also, " that it shall not be lawful to, nor in the power of, the said " heirs of entail, or any of them, to sell, dispone, alienate, " burden, dilapidate, or put away, the lands and others above " written, or any part thereof, either irredeemably or under " reversion, or to contract debts, grant bonds, or any other " writs, deeds, or securities, or to do any other act, civil or " criminal, either prior or posterior to their succession to the " lands and others hereby disponed, that shall be the ground of " any adjudication, eviction, or forfeiture of the foresaid lands " and others, or any part thereof, or anyways to affect or burden " the same; nor shall the said lands and estate, or any part " thereof, be affected by, or subject to, any terces or courtesies " to the wives and husbands, or provisions to the younger chil-

" dren, of the heirs and substitutes above written, or any of them."

These prohibitions were fenced by the following irritant and resolutive clauses: — " And with and under these irritancies " following, as it is hereby expressly provided and declared, " That if the said heirs of entail, or any of them, shall contra- " vene any of the conditions, provisions, limitations, or restric- " tions herein contained, either by failing or neglecting to fulfil " and perform the said conditions and provisions, and every " one of them, or by acting contrary to the said limitations and " restrictions, or any of them, then, and in any of these cases, " the person so contravening, by failing or omitting to imple- " ment the said conditions and provisions, or acting contrary to " the said limitations and restrictions, or any of them, shall, for " him or herself alone, not only forfeit, omit, and loose all " right, title, and interest to the foresaid lands, in the same " manner as if the contravener were naturally dead, and " the rights thereof shall devolve upon the next heir of tailzie, " though descended of the contravener's body, to whom it shall " be lawful, whether major or minor at the time, to pursue " declarators of irritancy, and to make up titles to the said " lands and estates, by serving heir to the person last infeft " therein before the contravener, or to the contravener himself " or herself, without being anyways liable for any of the debts " and deeds of the said contravener, or to make up titles by " declarator or adjudication, or any other way by law compe- " tent; and all the debts and deeds of the said heirs of tailzie, or " any of them, contracted, made, or granted, as well before as " after their succession, to the said lands and others, in contra- " vention of this present entail, and the conditions, provisions, " limitations, and restrictions, herein contained, and all adjudi- " cations, or other legal execution and diligence, that shall " happen to be obtained or used upon the same, shall also not

" only be void and null, with all that shall or may follow there-
" upon, in so far as they might anyways effect the said lands
" and estates: but likewise the heirs of entail respectively, upon
" whose debts or deeds such adjudications have proceeded, or
" who shall have contravened the conditions, provisions, limita-
" tions, or restrictions herein contained, in any other way, shall,
" *ipso facto*, loose and forfeit their right and title to the said
" lands and estates, and the same shall devolve to the next heir
" of entail, in like manner as if the contravener were naturally
" dead, and that freed and disburdened of all the debts and
" deeds of such contravener, and of all adjudications and other
" diligences deduced thereon."

Of the same date with the entail, the maker executed a trust-deed, by which he directed certain moneys to be invested in the purchase of land to be entailed in the same terms. These purchases were accordingly affected, and relative entails were executed in 1808 and 1812.

In 1839, the appellant, the heir of entail in possession, brought an action against the substitute heirs of entail, setting forth the different deeds of entail, and concluding to have it found, that he had a right to sell and alienate the several lands for a price or onerous consideration, and to execute all conveyances and deeds necessary for effectually conveying the same, or for enabling the purchaser to attach the lands by adjudication, or otherwise; and that upon the sale or alienation, he should have the sole right to the price or other consideration, and power to grant a valid discharge for the same to the purchaser: that the price or other consideration, would become his absolute property; and that he would have free power to dispose of the same at pleasure; and would not lie under any obligation to invest the same in the purchase, or on the security of any other lands, or otherwise, for the benefit of the defenders, or any of them, and that they had no right to interfere with, or control him, in the dis-

posal of the price or other consideration, in any manner of way; and also, that the defenders would have no claim against him, or against his heirs and representatives, in the event of his death, for or in respect of his so doing in any of the above particulars.

The defence pleaded to this action, was, that the entail of Auchindoir was a strict and complete entail, according to the law of Scotland; that the irritancies were directed against *all* acts of alienation by sale or otherwise, and the pursuer was therefore effectually barred from selling the estates, or any part of them, even for an onerous consideration.

The Record was closed upon the summons and defences.

The Lord Ordinary then ordered cases, which he directed to be boxed, and reported to the Inner House.

Upon advising these papers, the Court assoilzied the defenders.

The appeal was taken against this interlocutor.

Pemberton Leigh, Penney and Gordon, for appellant. — The judgment here is understood to have proceeded on the authority chiefly of two cases decided in the Court below, *Ballencrieff and Finzean*, both of which have not been appealed, and were decided prior to the judgments of this House, reversing those of the Court below, in a class of cases in which the Court below had introduced an over liberal mode of construing entails.

The appellant asks to have it declared, that he is entitled to sell the lands, notwithstanding the fetters of the entail, as not being effectual against that act. To be effectual, the prohibitory, resolutive, and irritant clauses must all concur; but it will be observed, that there is no irritancy of sales, unless they are embraced by the word "deeds." In order to see whether they can be embraced by that word, it is necessary to see in

what signification it is used in the prohibitory and resolutive clauses, and in the irritant clause itself. In the prohibitory clauses, "deeds" first occurs in the prohibition against altering the order of succession, and there it is used in its general as well as technical sense. In the prohibition against selling, "deeds" does not occur at all. In the prohibition against contracting debt, it does occur, but is there plainly used in a strictly technical sense, as applicable to legal instruments, being governed by the verb, "to contract:" this is shewn more distinctly by the use of the verb "to do," in the posterior and alternative part of the sentence.

In the resolutive clause, which is broad enough in its terms to embrace all the prohibitions, "deeds" does not occur. But in the irritant clause, it does again, as a nominative, along with "debts," to the verbs "contracted," "made," and "granted." As used here, it is obviously in a technical sense; "contracted" is only applicable to debts, and both "made" and "granted" can, according to the idiom of the language, only be used with the word "deeds," as denoting the making or granting of a legal instrument. If speaking of any act done or committed, you cannot say that such an act was "made" or "granted."

Then, in the additional resolutive clause which follows the irritant, "deeds" is again used in the same sense in which it is in the irritant clause, and, as applying to the particular deeds there mentioned, for it is the debts and deeds upon which "*such*" adjudications (being those mentioned in the irritant clause) have proceeded; and then the clause goes on to speak of contraventions "in any other way," suggesting, that "debts and deeds contracted, made, or granted," did not embrace every mode of contravention specified in the prohibitory clause.

"Deeds," then, is not used in a single unvarying sense. In one part,—the prohibition against altering the order of succession, — it is used in its ordinary grammatical sense, to express an act

done; but in all the other instances it is used in a strictly technical specific sense, to express a legal instrument; and on all the principles which have been applied to the construction of entails, which are always in favour of liberty, and against restraint, "deeds," in the irritant clause, can receive only its specific technical meaning, as applying to legal instruments.

[*Lord Campbell.* — You say, that if a word is found in the prohibitory clause, having a specific sense, and if it is also found in the irritant clause, it should receive there a specific sense, though it might bear a generic one.]

Precisely. We say, that where a word occurs in an entail admitting of two meanings, that construction of it must be adopted which goes rather to cut down, than to support the entail. That is a doctrine which received effect in Speed *v.* Speed, 15 *D and B*, 618; and Lang *v.* Lang, 1 *M'L. and Rob.* 893; and in Dick *v.* Drysdale, 14th January, 1812.

But, independently of this, the construction of the irritant clause shews, that "deeds" was intended to be used there in a specific technical sense. The clause is not like the resolutive, general in its terms, so as to embrace "deeds" in any meaning in which it is used, but, on the contrary, it is enumerative, and confined to specific prohibitions; it begins with "debts," which is a specific prohibition, and joins to it "deeds," and as to both, qualifies them by the verbs "contracted, made, or granted." It is not, therefore, *all* deeds that are irritated, but only deeds "made or granted." Indeed, judging from the juxtaposition of "deeds" with "debts," and the qualifications of them both by the verbs alluded to, the irritancy seems to confine itself to debts, and to deeds (that is, legal instruments) made in relation to debts, and not to be broad enough to embrace even deeds (that is, legal instruments) made in relation to other matters. It was so found in Barclay *v.* Adam, 1 *Sh. App. Ca.* 24, and in Lang *v.* Lang, 1 *M'L. and Rob.* 893.

Farther, the irritancy is confined to such deeds as may be the ground of adjudication, for the clause goes on to irritate "all "adjudications, or other legal execution and diligence that shall "happen to be obtained or used upon the same." And not only so, but it is confined to deeds which may be the ground not of adjudication generally, but of adjudication having the character of execution or diligence, for the words are "adjudication or *other* execution."

If the irritant clause, then, is not general, but enumerative, its enumeration must be sufficiently comprehensive to embrace all the acts prohibited, and that even although the clause may set out with expressions which, if it had been confined to them, would have embraced every act prohibited. Barclay *v.* Adam, 1 *Sh. App.* 24; Dick *v.* Drysdale; Horne *v.* Rennie, 1 *Sh. and M'L.* 142.

Assuming the irritant clause to be broad enough to embrace all written instruments whatever, will it embrace *the act* of selling the lands? It is directed only against "debts contracted" and "deeds made or granted," — not "deeds made or granted and "*acts done*," as in most entails. This is plainly not sufficient to embrace in terms the act of selling. In Duffus's Trustees *v.* Dunbar, 4 *B. and Murr.* 523, "contracting debt" was prohibited; but inasmuch as only the written instruments by which the debt might be constituted, was irritated, it was held that the entail would not bar the act of contracting debt.

It is said, however, that a sale cannot be completed without deeds being made or granted, and that the irritancy is broad enough to embrace such. Admitting the observation as to the completion of sales to be true, entails are *strictissimi juris*, and the act operating the contravention must itself be irritated; it will not do to omit the act, and irritate the consequences of the act — to irritate the deeds necessary to complete a sale, and

omit the sale itself. That was settled in Lang *v.* Lang, 1 *M'L. and Rob.* 871; there sales were prohibited, and "deeds" in contravention were irritated, yet it was held, that sales were not irritated, though in that case, as in this, it might have been argued, that sales could not be completed without deeds being executed.

It is not true, however, that a sale cannot be completed without a deed; it is perfectly competent to make a valid sale by verbal contract followed by *rei interventus.* The purchaser could enforce performance of such a sale by adjudication in implement, and obtain infeftment and possession by charter and sasine from the superior, without a single deed being executed by the heir selling. In this view, supposing it competent to overlook an act, and irritate its consequences only, there would not necessarily be any consequential deed to irritate.

[*Lord Campbell.* — Could the Court decree the party to execute a disposition in implement, where the entail would forfeit his right if he executed it?]

Certainly not. But he might be passed over. The Court need not decree any disposition to be executed, but, by force of its own decree, give the lands to the purchaser.

[*Lord Chancellor.* — Advert to the conclusion of the summons.]

We ask more than we are entitled to, certainly; but that will not prevent us obtaining what we are entitled to.

[*Lord Campbell.* — What do you ask?]

Only the first conclusion.

But if a deed were necessary to complete a sale, and it were competent to overlook the sale itself, and irritate such deeds only, as already observed, this has not been done, for the irritant clause is confined to deeds upon which "adjudication" or *other* legal execution and "diligence" may follow. Adjudication in implement of a sale, is not execution, but a judgment.

LUMSDEN *v.* LUMSDEN. — 18th August, 1843.

Mr Solicitor General— Sandford and Moir, for the Respondents.

LORD CAMPBELL. — My Lords, the pursuer in this case contends, that although the entail contains a sufficient prohibitory clause against selling, and every other mode of alienation, the irritant clause is defective in as far as selling is concerned, and that he is entitled to execute deeds of sales, or at any rate that he may enter into verbal contracts of sale, which, being followed by *rei interventus*, or part performance, may effectually be carried into execution, and, therefore, that there should be a declaration in his favour as to this limited right.

My Lords, I am of opinion, that the defenders were properly assoilzied from all the conclusions of the summons.

It has been said, that in pronouncing the interlocutor appealed from, the Judges of the Court of Session, from an obstinate attachment to entails, have disregarded the decisions of this high Court of appeal upon the subject, and the expressed opinions of noble and learned Lords, in recommending those decisions to the House. After a careful reference to all the authorities referred to, I have arrived at the conviction, that the interlocutor is in entire accordance with your Lordships' prior decisions, and with all the dicta relied upon, such dicta being taken in connection with the cases in which they are found, and in the sense in which they were evidently delivered.

There is no doubt, that by the law of Scotland, entails are *strictissimi juris*, that the prohibitory, irritant, and resolutive clauses must be complete and perfect in themselves, and that they cannot be supported by implication or probability, or mere general intention, not distinctly expressed. But the law of Scotland does allow entails, if the entailer, by language taken in its grammatical, natural, and usual sense, prohibits the institute and heirs from altering the succession, from alienating, and from

burdening the estate with debt, declares all acts and deeds in contravention of the prohibitions void, and provides, that the contravener forfeiting his right, the next heir-substitute shall succeed. This meaning must be clearly and unequivocally expressed, but for that purpose, no *voces signatæ*, no *verba solennia*, are required, and any language is sufficient which does not admit of doubt or ambiguity.

I think the doctrine contended for by the appellant, and very unnecessarily denied by the respondents, is sound, that "if an expression in an entail admits of two meanings, both equally technical, grammatical, and intelligible, *that* construction must be adopted which destroys the entail, rather than that which supports it." But the two meanings of the expression must be equally technical, grammatical, and intelligible, in the place where it occurs, and taken with the context. If, where the expression is found, it can only fairly have one meaning ascribed to it, which will support the entail, it shall have this effect, although, found elsewhere, and in a different collocation, it may be susceptible of another meaning, by which the entail would be destroyed. In respect of the perpetuities created by entails being considered odious by the law, we are entitled to apply to them strict rules of construction, but we have no right to pervert or defeat the distinctly expressed intention of the entailer. The right of entailing which was given by the legislature, if thought pernicious, must be taken away by the legislature. Attempts by Judges indirectly to repeal it, would probably only prolong its duration, and increase its mischiefs.

In the present case, there being an ample prohibitory clause against selling, or any other mode of alienation, the entailer declares, that all the debts and deeds of the said heirs of tailzie, or any of them, contracted, made, or granted, in contravention of the entail, and the conditions, provisions, limitations, and restrictions, therein contained, and all adjudications, or other

legal execution and diligence, that shall happen to be obtained, or used upon the same, shall be void and null, with all that shall or may follow thereupon, in so far as they might in anyways affect the said lands. Does not this apply to make sales void ?

In construing this clause, I differ from the Lord President and Lord Gillies, in so far as they seeem to have thought that the word "*deeds*" might be taken in what is called its vernacular sense, in which it is nearly synonymous with acts. The *deeds* here spoken of were to be "*made or granted*," terms only applicable to written instruments; but although the clause contains no express irritancy of acts without writing, I think it applies to deeds of sale, and that, irritating them, it is sufficient. An attempt has been made to confine it to deeds on which adjudications, or other legal diligence, shall happen, affecting the lands entailed; but the entailer expressly declares, that all deeds made or granted in contravention of the entail, and the conditions and restrictions therein contained, shall be void; and there can be no doubt, that a deed of sale would be in contravention of the entail, and the conditions and restrictions therein contained, whereby selling is expressly prohibited.

But we are strongly pressed by a new objection which was not taken in the Court below, which is, for the first time, started in the appellant's case laid upon the table of this House, although, if well founded, it would not only be fatal to this entail, but to many others which have been challenged on different grounds in the Court of Session, and at your Lordships' bar,—that though the irritant clause strikes at deeds or writings, containing any contract of sale, or conveyance to a purchaser, it is insufficient if it does not irritate verbal agreements to sell, which may be followed by *rei interventus*, or part performance; and that there ought to be a declaration that the pursuer is entitled to alienate in this manner.

LUMSDEN *v.* LUMSDEN. — 18th August, 1843.

Although the objection was not taken below, and we have not the advantage of the opinion of the learned Judges of the Court of Session upon it, yet, as it arises upon the record, and, if well founded, could not be removed by any additional allegation or proof, I think we cannot now prevent the appellant from urging it. If your Lordships thought it entitled to much weight, you would probably remit the case for the opinion of the Scotch Judges before giving effect to it. But I clearly think that it was not brought forward sooner from the well founded conviction that it is entitled to no weight whatever.

The frame of the summons would, in this case, be a sufficient answer; for although a pursuer may be entitled to a judgment for a part of the prayer of his conclusion, when he cannot support the whole, there is no rejection of those parts of the prayer, allowed in this mode of arguing to be untenable, which would leave a sensible residue to be made the foundation of an interlocutor in his favour. He cannot claim a declarator that he has full power to sell the lands, for this must mean by deed of sale, in the usual manner in which the transaction is conducted between buyer and seller.

But independently of this technical answer, I am of opinion, upon the merits, that he could not have framed the summons so as to be entitled to a declarator that he could alienate by a verbal contract of sale, to be followed by *rei interventus*. Where an entail contains a prohibition against selling or alienating, with an irritancy of all deeds of sale or alienation, and a resolution of the right of the contravening heir, I apprehend that this new fangled mode of alienation, by a verbal contract and *rei interventus*, could not be made effectual. Where a vendor is seized, in *fee-simple*, and agrees, by word of mouth, to sell, there is no doubt, that after *rei interventus*, the Court would decree a specific performance, and would order him to execute the proper deeds to make a good title to the purchaser. But no authority has

been cited to us to shew that such a decree would be pronounced against an heir of entail, who, by executing deeds, would incur a forfeiture; or that, in such a case, the Court, without the intervention of any deed by the heir, would pronounce a judgment to enable the purchaser to obtain infeftment from the superior of whom the lands are holden.

From information I have obtained, on which I can place implicit reliance as to the mode of proceeding for a specific performance in Scotland, I find that an unlimited proprietor, who, after *rei interventus*, refuses to convey, in terms of a verbal bargain, is first of all decreed to convey, and upon being charged upon such decree, may be subjected, as a contumacious debtor, to a process of adjudication in implement, under which the purchaser may obtain an entry with the superior without any deed of conveyance executed by the seller. But all this proceeds on the radical assumption that he was legally and equitably bound and entitled to make such a conveyance, and it is only, in the first place, to enforce the performance of this clear duty, that the original decree is issued, and process is afterwards allowed to obviate the effects of his obstinate non-performance. But when the contracting party has no legal right, or legal power, to execute the conveyance, for the wilful and unjust withholding of which alone the law interferes, there can be no call for such interference, and neither the decree nor the adjudication can be demanded. The only remedy of the purchaser would be damages, *loco facti imprestabilis*.

But when the fact is legally imprestable by reason of the deed of entail, I apprehend that this might be pleaded by the substitute-heirs, as well as by the seller, if, conniving with the purchaser, he were to decline to take the objection, the substitute-heirs having an interest to be protected, and the ground of contumacious refusal to perform a legal obligation being, in truth, more completely taken away in such a case, than in a question with the party actually contracting.

LUMSDEN *v.* LUMSDEN. — 18th August, 1843.

If it were necessary to go farther, I am inclined to think, that, as in the case supposed, of a verbal bargain with *rei interventus*, the entailed estate can only be reached by adjudication in implement, the obligation so to be implemented would, according to the law of Scotland, be held and dealt with as a *debt*, and consequently the transaction would fall under the irritancy of debts leading to eviction.

But it is enough to say, that in the absence of all precedent and authority to support the argument of the appellant, I come to the conclusion, that this is a mode of alienation by an heir of entail — forbidden to sell with an irritancy of deeds of sale — wholly unknown to the law of Scotland, and which the law of Scotland would not recognize.

If the objection were to succeed, it might unfetter a great part of the entailed land in Scotland, for I apprehend, that the introduction of the word "acts" into the irritant clause would not cure it, a verbal contract to sell the estate, to be followed by *rei interventus*, not being an act more than a deed within the meaning of the fettering clauses.

But I am of opinion that we are not at liberty to get rid of entails by any such devices or subtleties.

The real question, therefore, is, whether there is any prior decision of this House, to shew that the irritant clause in the present entail does not sufficiently strike at deeds of sale, although it clearly does, according to its grammatical, natural, and usual meaning?

I will shortly examine the decisions relied upon by the appellant, which it is supposed that the Judges, in pronouncing this interlocutor, have disregarded.

In the Tillycoultry case, Bruce *v.* Bruce, *Mor.* 15539, the irritant clause, in generally referring to the prohibitions by the words "all which deeds," &c., was considered sufficient, and the decision proceeded on a defect in the resolutive clause, which was limited to a contravention, "either by not assuming the name

" and arms of Bruce of Kinross, or heirs-female not marrying " a gentleman of the same name," &c. Here the material prohibitions which are necessary to constitute a valid entail, were, according to the grammatical, natural, and usual use of the language employed, excluded from the resolutive clause.

So in the Bonnington case, Scott and Moncrieff *v.* Cunningham, 3 *Sh.* and *M'L.*, 156, the resolutive clause was held to be defective, because it proceeded upon the principle of specific enumeration of acts to work a forfeiture, not of a general reference to the acts that had been prohibited; and selling, which had been prohibited, was omitted in the enumeration. Dick *v.* Drysdale (*Fac. Col.*, 14th January, 1812) was much relied upon as a decision of the Court of Session, in which the word " deeds," in the irritant clause, was held not to apply to leases; but this was upon the express ground, that from the epithets by which it was qualified, the entailer had restricted the meaning to feudal delinquencies only, and therefore, that it did not apply to leases.

In the Blair-Adam case, Barclay *v.* Adam, 1 *Sh.* and *M'L.*, 24, which came before this House, the irritant clause was held defective, because the meaning of the word " deeds" in it was limited by the word " which" referring to a particular class of deeds before described, from which deeds of sale and alienation were excluded, and, therefore, according to the grammatical, natural, and usual meaning of the language employed, deeds of sale and alienation were not struck at.

In Horne *v.* Rennie, (3 *Sh.* and *M'L.* 142,) the irritant clause contained the general words, " as shall contravene and fail in any part of the premises;" but the clause is framed on the principle of specific enumeration of the acts of contravention which are to be irritated, and is therefore plainly distinguishable from this irritant clause, which generally refers to the acts prohibited. Lord Jeffrey's interlocutor in that case, which was

reversed by the Second Division of the Court of Session, was affirmed by this House; and it would have been strange if there had not been a clear distinction between it and the present, in which the same most acute, and learned, and cautious Judge, held, as Lord Ordinary, that the irritant clause, by reason of its generality, is sufficient. Lord Cottenham, then Lord Chancellor, there says, "It comes to this question, whether there has been an attempt to enumerate the particular acts prohibited?" intimating an opinion, that if there be no such attempt, and there be general words, which, according to their grammatical, natural, and usual meaning, will include the act prohibited, the irritant clause is sufficient. In this irritant clause there is no such attempt at enumeration.

But we have been most strongly pressed with the case of Lang *v.* Lang, and with certain dicta of a noble and learned Lord, when that case was decided. Now, I concur in the decision, and the observations which accompanied it. There, in addition to a fatal objection to the prohibition against altering the order of succession, the irritant clause was clearly defective; for immediately after a prohibition against any deed, whereby the lands might be adjudged or evicted, it declares, that "all "*such deeds* shall be void and null," namely, deeds whereby the lands might be adjudged or evicted, without any irritancy of deeds to alter the order of succession, or to sell, or alienate.

Then as to the dicta. To prop up the new objection as to a verbal contract of sale with *rei interventus*, reliance is placed on an observation of Lord Brougham, that "the irritancy must be "levelled at the act of altering the order of succession; it is not "sufficient that it be levelled at it as a consequence and implica-"tion from the act of sale, it must comprehend distinctly an act "which shall touch or affect the order of succession." What does this amount to? That an irritancy of an act of sale does not, by implication, amount to an irritancy of an act to alter the suc-

cession, though, by an act of sale, the order of succession will be disturbed. But how does this shew that an irritancy of deeds of sale does not amount to an irritancy of selling, when a deed of sale is not merely an incident or consequence of selling, but the necessary and essential means by which the sale is to be effected?

The appellant again relies upon the observation of the same noble and learned Lord. "I take it to be clear, that if there be "two constructions open, one of which makes this clause against "altering the succession a substantive, and the other only an "auxiliary clause, one of which makes it a complete and sepa- "rate fetter, and the other makes it not a complete and separate "fetter — you are bound, by the principles of the Scotch law "of entail, to prefer that construction which is in favour of the "freedom of the heir." I entirely accede to this doctrine; but before the appellant can take advantage of it, he must shew that there are two constructions of the irritant clause open, which are equally consistent with the grammatical, natural, and usual meaning of the language employed, and that one of these leaves him free; but this he cannot do, without shewing that the execution of a deed of sale would not be a contravention of a prohibition against selling.

Lord Brougham, in giving an opinion against the sufficiency of the irritant clause in Lang *v.* Lang, expressly assigns as his reason, the introduction of the word "such," which limited the deeds irritated to the particular class of deeds which had been just before described, but suggested, that if the clause had been as here, without any such restriction, it would have been sufficient.

The Hoddam case (Sharp *v.* Sharp, 1 *Sh.* and *M'L.* 622) was likewise frequently referred to on behalf of the appellant; but really it has no application, for there an omission in a deed of entail having occurred from a clerical mistake, this House merely

refused to fill up the blank, by inserting words which would support the entail, when, according to the grammatical construction, other words might as well have been introduced, which would have rendered it invalid.

I have thought it right to enter into the authorities so much in detail, from having reason to apprehend, that a notion has gone forth, that there is a difference between the Judges of the Court of Session and this House respecting the law of entail, and that there is an expectation, that here, any objection to entails will be supported for the purpose of upsetting them. The recent decisions of your Lordships against particular deeds of entail, which have been brought before you, are, in my opinion, in entire conformity to the principles which have always guided the decisions of the House upon this subject, and have in no degree trenched upon the doctrine, that entails, with prohibitory, irritant, and resolutive clauses, aptly expressed, are to be supported. I would finally observe, that I see no ground for the insinuation, that the Judges of the Court of Session at present shew a disinclination to abide by the principles laid down by this House, in judging of the validity of entails; and I am clearly of opinion, that in deciding in favour of the validity of the present entail, they have entirely conformed to the decisions of this House, and the opinions expressed by the noble and learned Lords who advised the House when those decisions were pronounced.

I must therefore humbly move your Lordships, that the interlocutor appealed from be affirmed with costs.

Lord Brougham. — My Lords, I entirely concur with my noble and learned friend in the opinion he has expressed, and I know that it is also the opinion of my noble and learned friend who has left the house on public business, (*The Lord Chancellor.*) My Lords, an observation that was made, and a good deal pressed upon us at the bar — once and again urged upon your

attention — was, that the Court below had of late shewn a very great disposition to hanker after certain doctrines which have been rejected and repudiated in this House, and had not shewn a becoming and fitting conformity in their course of decisions, with the principles upon which this House had proceeded in dealing with questions of Scotch law of real property, and particularly the entail law.

The urging of that observation once and again at the bar, naturally led me, as it was my duty, and it has led my noble and learned friend to a very accurate examination of the grounds upon which it was supposed to rest; and upon looking at those decisions of the Scotch Courts, and the opinions expressed by the learned Judges, so far as we have any note of them, which is not in every instance very ample or very minute, I was completely led to come to the conclusion which my noble and learned friend has arrived at, upon an examination both of what has been said and decided below, and of what has been decided and said here, that there was no foundation at all for the remark — which I rejoice to find.

My Lords, when the opinion of a court, as embodied in its decisions, is dealt with, in examining how far it shall be followed in any subsequent case that comes before the court, or when the dictum of a judge, or of the judges of a court in any case, is dealt with, with a similar view and for a like purpose, common justice, and fairness, and candour, towards the court or the individual judge, and common sense and right understanding of the duty of persons called upon to apply the case or the dictum, teaches the propriety of taking both the one and the other in their connection with the case before the court, and with the facts upon which the individual judge is delivering himself; and still more does common fairness and common sense require, that these dicta and decisions must be taken all together. The whole matter said, and the whole matter determined, must be taken,

and you must not snatch at particular portions, and then form conclusions from them. That would be a course of the greatest unfairness, and also lead to the greatest error.

Now, if you take the opinions that were delivered by my noble and learned friend near me, and myself, which have been relied upon — if you take them all together, I will take upon myself to say, that nothing can be more accurate than the statements of my noble and learned friend, who has most fully and accurately, by going into the cases in detail, shewn, that there is no discrepancy whatever between those decisions, or those dicta, where they are merely dicta in the course of the argument, whereupon the decision was moved, and either the Scotch law of entail rightly understood, or the recent decisions of the Court of Session.

In Lang *v.* Lang, for instance, the word "such" is the very pivot, the cardinal point upon which the case turned; it is the hinge of the case, it is the word of reference, which of necessity qualifies the word "deeds," or "acts," by referring to what preceded, by shewing that it was not all acts or all deeds, but *such* deeds, namely, deeds antecedent. So, with regard to the word "which" in another case, I think it is in the Blair-Adam case, in which the construction is confined to leases, it clearly appears, that that word "which" was a word of reference altogether, and of limited construction. Other instances might be given, — for instance the case of *leases* was shewn clearly to be excepted in one case, because the prohibition had been levelled against that which was feudal, and did not apply to any thing which was not of that nature.

My Lords, reference has been made to the Hoddam case. I marvel on what ground, for I think they might as well have referred to Shelley's case, or to any other case in the law, as to the Hoddam case, (Sharpe *v.* Sharpe,) and for this obvious reason, as my noble and learned friend has pointed out: that

case was very well considered; it was twice argued, first before the Lord Chief Justice of the King's Bench, who sat by himself, and afterwards before myself, and I gave the judgment very elaborately. It was a nearly unanimous decision in the Court below upon a question of feudal law; it was thoroughly considered. That it was an omission, no one could doubt. It was an omission of a line in copying the instrument; just as we had a case here of Langston *v.* Langston, upon an English marriage settlement, in which there had been an omission of a line — they had omitted "first son," and included every other son. The first son had been tied up in the first line. Then we came to the second, third, fourth, and every other son, and there was no doubt that the first was intended to be included. But if it had been without the general words, the omission in Langston *v.* Langston would have been fatal, there can be no doubt. It was argued in the Hoddam case, that there could be no doubt of the intention of the party. There is never any doubt. No man means to make a bad entail, an entail with insufficient and inoperative fetters; every body knows what his intention is. But the intention is not sufficient; he must carry it into effect; he must execute his intention, and execute it validly. How that case of Sharpe *v.* Sharpe can have the slightest effect upon the present, or any connection with it, I am at a loss to know.

My Lords, I quite agree with my noble and learned friend, that it is perfectly certain, that where there are two constructions equal, not where one is more according to the grammatical sense and the right construction, and the other less according to that grammatical sense and the right construction, but where you cannot easily distinguish between the two, you naturally cast the balance upon that side which is against fetters, and in favour of liberty. That was wanting here, and that was the great defect in the case, consequently that principle will not apply.

Then it is also argued, that generally speaking, entails are

strictissimi juris. That is as old as the law of entail; but who ever heard it said, that there is no possibility of making a good and valid entail? Nobody says that. On the contrary, the law says you may make a valid entail, but you must take care to leave no holes in it; you must take care to leave it all fenced; you must have the *habendum* fenced by irritancies and resolutions, as well as prohibitions. If you do so fence it, you may make an entail by the law of Scotland just as strict as by the law of England; aye and a good deal longer; you may make it almost for ever, perpetuities being favoured by the Scotch law. But in order to do that, you must bring yourself within the law, you must comply with the requisitions of the act of 1685, as to framing the deed, and recording it in the register of taillies; taking that act according to the constructions which judicial authorities have put upon it; for, as Lord Eldon well said once and again, if you were to gather the Scotch law of entail only from the entail act, you would find a great deal deficient, which nobody would ever think of, from merely reading that act.

There are no particular technical words necessary to constitute an entail, but such words must be used, as clearly shew the intention executed of the entailer, to prohibit, to irritate, and to resolve; to make the prohibition, to make the act of contravention void and null, and to make the contravener forfeit for what he has done. If that is done sufficiently, either by enumeration of particulars, or by words of general reference, not shewn to be followed by enumeration, which qualifies and particularizes those general words, and takes away from their effect of generality, and which enumeration of particulars, is itself defective, but by a full and complete enumeration, or by general words, which do not make enumeration necessary,—in all, or either of those ways, or in any other way in which, either by distinct, clear, and indubitable reference, (but it must be indubitable reference,) or by particular and direct statement, — in any of those ways and

without any style being required, real property may be entailed.

Now, my Lords, one word more generally, with reference to the manner in which the decisions of this House upon such questions of Scotch Law have been regarded in the Scotch Courts. The Scotch Courts deserve the greatest credit for the fairness and candour, and the self-denial, I may add, which they have shewn in receiving with deference the authority of this House upon such questions, even where they corrected errors which had been fallen into by all the Scotch Courts. There are two ways of receiving that authority. The one is by yielding a mere bare naked obedience — that they must do. But there is another way of receiving that authority — and that they have adopted; they have not satisfied themselves with the first method; they have obeyed cheerfully. I will venture to say, there never was a more complete reversal of a decision of any Scotch Court, than Lord Mansfield's reversal in the famous Duntreath case, and no Scotch lawyer ever objected to that; if he did, I never heard of it; it has been universally, for the best part of a century, adopted as the rule, and I may almost add, the fundamental rule, of the Scotch law, and that was decided by a very eminent Scotchman indeed, but not a Scotch lawyer, for it is a great mistake to suppose that Lord Mansfield ever practised at the Scotch bar; if he did, he practised when he was three years old, because he left Scotland at that age. He practised very much in the Court of appeal here, as Mr Murray, and as Solicitor-General, and yet his decision has uniformly been submitted to as correcting a plain error into which the Scotch Courts had fallen. Lord Eldon has reversed decisions in the same way, and his decisions have been always acquiesced in. Even that which was reckoned the most doubtful, upon the Queensberry leases, has been always cheerfully acquiesced in, and I never heard one word said by any of the Scotch Judges,

— with many of whom I have the happiness to live on terms of intimacy, and to correspond with on subjects of Scotch law — I never heard them complain at all of the reversal of decisions of the Court below in this House; but they have yielded not only obedience, but respectful and cheerful obedience; holding that we have come to a right decision; and except in one case, that of the Queensberry leases, I never heard of any case in which any reluctance has been shewn to adopt our decision.

My Lords, I have thought it my duty to state these circumstances, because a great deal was said in the course of the argument upon this topic, and I hope that it will not be a topic hereafter alluded to. It is rather a painful thing to hear it said, when it is without foundation.

My Lords, I entirely concur in the motion of my noble and learned friend, that your Lordships should affirm this judgment, of course, with costs. My noble and learned friend, Lord Cottenham, was not here during the argument, and the Lord Chancellor entirely concurs in this view of the subject.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed, with costs.

G. and T. W. WEBSTER—JOHNSTON, FARQUHAR, and LEACH, Agents.