[Heard 19*th July*. Judgment, 5*th September*, 1844.]

WILLIAM ADAM, Trustee on the sequestrated estate of ARCHIBALD FARQUHARSON, ESQ., of Finzean, *Appellant*.

FRANCIS FARQUHARSON, Physician, in Edinburgh, *Respondent*.

Tailzie.—Terms of irritant and resolutive clauses held sufficiently expressed to embrace all the prohibitions in the prohibitory clause.

Ibid.—A prohibition "to burden the said lands in whole or in part, "with debts contracted," &c., held to import a prohibition to contract debt, satisfying the words of the statute.

ON the 27th of September, 1784, Francis Farquharson conveyed his lands and barony of Finzean, to trustees upon trust, to perform certain purposes, and thereafter to convey to a series of heirs, to be named in a relative deed of nomination and entail, under the conditions of such deed.

On the same day he executed the relative deed of nomination and entail. That deed contained the following clauses among others:—

"And with and under this restriction and limitation also, that "it shall not be in the power of the said William Farquharson, "or any other of the heirs of taillie and provision above written, "to sell, alienate, impignorate, and dispone the said lands, and "estate, or any part thereof, either irredeemably or under rever- "sion, or to burden the same, in whole or in part, with debts by "them contracted, or with any sums of money, infeftments of "annual rents, or any other servitude or burden whatsomever, "excepting only as is hereinafter exprest; nor shall it be in the

" power of him, or any of the saids heirs, to do or commit any act,
" civil or criminal, or grant any deed, directly or indirectly, in
" any sort whereby the said lands and estate, or any part thereof,
" may be affected, adjudged, forefaulted, become escheat, or be
" confiscated, or yet any other manner of way evicted from the
" saids heirs of taillie, or whereby this present nomination, or
" other writ that may be granted by me, or the order of succession,
" may be anyways prejudged, changed, hurt, or frustrate. And
" with this further restriction and limitation, that it shall not be
" in the power of the said William Farquharson, or any of the
" above heirs of taillie, to sett tacks or rentals of the said lands
" and estate, or any parts thereof, for longer space than nineteen
" years, or for the lifetime of the tacksman, and one life more,
" when sett at the former rental, allowing in that case, either the
" same, or any succeeding heir, if at the time he have any issue
" in life who may succeed to the estate, to add the continuance
" of a new life to every tack as oft as any of the two former lives
" shall faill. But that none of the said heirs shall have power to
" sett any tacks with a diminution of the former rent, except in
" case of necessity, and then to be sett only for three years, at the
" best rent can be got, without taking any grassum. And that
" none of the heirs shall *in lecto*, set tacks of any part of the saids
" lands, nor shall, even in *liege poustie*, grant any tack of the
" manour-place of Finzean, gardens, parks, and inclosures thereof,
" for any longer space than the granter's own lifetime. And with
" and under this restriction and limitation also, as it is hereby ex-
" pressly conditioned and provided, that the said lands and estate
" shall be noways affected or burdened with, or subjected or liable
" to be adjudged, or any other way evicted, either in whole or in
" part, for or by the debts and deeds legal or voluntary, contracted
" or granted by the said William Farquharson, or any other of
" the said heirs of taillie, substitute to him as above, whether
" before or after their succession to, or obtaining possession of,
" the said lands and estate, nor with, for, or by the crimes of

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" omission or commission, or acts civil or criminal, committed and " done, or to be committed and done by them prior or posterior " to their succession. And sicklike, with and under the follow- " ing irritancies, viz. It is hereby expressly provided and de- " clared, that in case the said William Farquharson, or any " other of the heirs of taillie, substitute to him as above, shall con- " traveene any of the before-written conditions, provisions, limi- " tations, and restrictions. That is, shall fail or neglect to obey " and perform the haill conditions and provisions above sett down, " or any of them, or any other after conditions and restrictions " that may be added by me. That then, and in that case, the " person or persons so contraveening by failing to obey the said " conditions, or by acting contrary to the above limitations and " restrictions, or any of them, shall for himself or herself only, " (excepting in the case of commission of high treason,) *ipso facto*, " amitt, lose, and forfeit, all right, title, and interest, which he or " she hath to my said lands and estate, and the same shall become " void and extinct, and my said lands and estate shall devolve, " accresce, and belong, to the next heir of taillie appointed to " succeed, albeit descended of the contraveener's body, in the " same manner as if the contraveener was naturally dead. But " if the said William Farquharson, or any of the above heirs of " taillie, shall commit high treason, then such person shall forfeit " and lose all right and title to my estate, not only for him or " herself, but for the haill descendants of their bodies, and my " said lands and estate shall devolve upon the next heir called to " the succession after him or her who committed high treason, " and their whole descendants in the same manner as if he, she, and " their descendants, were all naturally dead. And upon every con- " travention which may happen by or through any of the saids " heirs of taillie, their failing to obey and perform all and each of " the before-mentioned conditions, or acting contrary to all or any " of the restrictions above written, it is hereby expressly provided " and declared, that not only my saids lands and estate shall not

" be burdened or lyable to the debts, deeds, crimes, and acts of " the heirs of taillie so contravening, but also all debts, deeds, or " acts contracted, granted, done, or committed, contrary to the " above conditions and restrictions, or to the true intent and " meaning of these presents, shall be absolutely void and null, and " of no force, strength, or effect, and ineffectual and unavailable " against the other heirs of taillie; and who, as well as the saids " lands and estate, shall not be burdened therewith, but free " therefrom, in the same manner as if such debts and deeds had " never been contracted, granted, or done, or such acts, omissions, " or commissions, had never been done, or happened. And it " shall be free and lawfull to every heir, though minor at the " time, who shall have a title, by and through any contravention " or irritancy incurred by a former, to sue and obtain declarators " upon the contravention, and of the irritancy of the contravener's " right, or to serve heir to the person who dyed last vest and " seized in the said lands and estate preceding the contraveener, " and thereby, or by adjudication, or any other legal or formal " method, to establish in his person, the right and title of and to " the saids lands and estate, and that without being subjected or " lyable to the debts or deeds of the person or persons contra- " veening, or irritating their right, and without regard to any " alteration made, or intended acts done, or deeds granted by the " contraveener, contrary to the conditions and restrictions before " written, or others that may be appointed by me. But all " the heirs of taillie succeeding upon any contravention, and heirs " succeeding to them, shall always be subject and lyable to the " same conditions, restrictions, and irritancies, throughout the " whole course of succession for ever."

On the 3rd and 19th April, 1790, the trustees conveyed the lands to the heir then entitled, in terms of the deeds of 1784, and under the particular conditions contained in the latter of these deeds.

In 1796, Archibald Farquharson became the heir entitled to

succeed, and made up his titles under the deeds which have been mentioned.

In 1831, the real and personal estates of Archibald Farquharson were sequestrated under the 54 Geo. III. cap. 137, and vested in the appellant as trustee.

In 1839, the appellant brought an action against Archibald Farquharson and the other heirs of entail, concluding to have it declared, "That the lands were not, by both or either of the aforesaid "deeds of 1784, and 1790, validly entailed; and that, by the said "deeds, or any clauses, prohibitory, irritant, or resolutive, therein "contained, the said Archibald Farquharson, now of Finzean, "and the other heirs called to the succession, were not validly "restricted, restrained or prohibited from altering the said pre-"tended entail, or altering the order of succession, or from selling, "alienating, burdening with debts, and letting or otherwise dis-"posing at pleasure of the said lands and estate, as fully, freely "and absolutely, as any proprietor of lands in fee-simple may or "can do by the law of Scotland: And that the said lands were "subject and liable to and for the debts and deeds of the said "Archibald Farquharson, and that the pursuer, as trustee fore-"said, and his successors, have full and undoubted right and "power, and a valid and unchallengeable title to sell, alienate "and dispone, and to grant tacks or leases, or otherwise to dispose "of the several lands, teinds and others, in the aforesaid dispo-"sitions, and other writs described, and to make, execute and "deliver all contracts, dispositions, conveyances, tacks, deeds and "other writings, requisite for effectually conveying, letting or "otherwise disposing of the whole or any part or parts of the said "lands and heritages, to purchasers, feuars, tenants or others, and "that as fully and freely as if none of the deeds or writings herein "mentioned or referred to, contained any restrictions, limitations "or prohibitions, to the effect before set forth," with consequential conclusions as to the validity of deeds to be executed by the appellant and his application of the price of any sale of the lands which he might effect.

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The appellant pleaded in support of this action,—

" I. The deeds libelled contain no irritant clause applicable " to the prohibitions against selling, alienating, and disponing.

" II. Neither do any of the deeds libelled contain a resolutive " clause applicable to the restrictions and limitations contained in " the prohibitory clause."

The defenders, in answer, pleaded,—

" I. The irritant and resolutive clauses of the entail are effec- " tually applied to the prohibitive clauses; and generally the " whole fetters of the entail have been validly imposed.

" II. The titles called for in this reduction coustitute a valid " and effectual tailzied investiture of the estate, in terms of the " statute, and are not liable to be set aside on any ground " whatever."

The record was closed upon the summons, defences, minute, and pleas in law; and upon advising these papers and hearing parties, the Lord Ordinary (*Cuninghame*) pronounced the following Interlocutor, on the 20th March, 1840: " Finds that " Archibald Farquharson, esquire, the principal debtor, possesses " the estates upon deeds of tailzie, containing complete and " effectual prohibitions, in terms of the Act 1685, against alien- " ating the estate, contracting debt thereon, and altering the " order of succession: Finds that the said deeds of tailzie also " contain resolutive and irritant clauses in the most comprehen- " sive terms, sufficient to render the said prohibitions effectual, " in terms of the statute; therefore repels the reasons of reduc- " tion, sustains the defences, and assoilzies the defender from " this action and decerns."

The appellant reclaimed against this Interlocutor, and on the 18th June, 1840, the first division of the Court pronounced the following Interlocutor: " Having advised this case, and heard " counsel for the parties, adhere to the Interlocutor reclaimed " against, refuse the desire of the reclaiming note."

The appeal was against these Interlocutors.

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Mr. Kelly, *Mr. Anderson*, and *Mr. Hector*, for the Appellant.—I. The irritant clause here is not a general one, but merely enumerative, and the acts enumerated are, "debts, deeds, or acts "contracted, granted, done, or committed, contrary to the above "conditions and restrictions." After declaring that the acts in contravention shall be void, as against the other heirs of tailzie, the clause goes on to say that neither the heirs nor the lands shall be "burdened" therewith. None of these expressions in terms apply either to sale or alienation, and so far as they can have effect by reference to the prohibitory clause, "acts and deeds" are by such reference satisfied by those acts and deeds there mentioned, in connection with doing or granting any deed which may infer forfeiture or any thing whereby the order of succession might be changed or frustrated; but in that part of the prohibitory clause which relates to sale and alienation, the words "acts and deeds" never once occur; and while the irritant clause follows almost verbatim the terms used in that part of the prohibitory clause which relates to forfeiture, it is expressed in terms quite different from, and makes no reference to, that part which relates to sales and alienation. The construction contended for, moreover, is favoured by the expressions in the irritant clause, as to neither the heirs nor the lands being "burdened" by the act done in contravention, one which, upon no construction, can be made applicable to sale or alienation. Acts and deeds, no doubt, are flexible terms, and might be used in such a general sense as to include all acts of contravention, but the prohibitory clause gives the rule for their interpretation, and as in that clause they are used in a limited sense, to signify something different from selling or alienating, they cannot in the irritant clause receive a more general and extended signification, so as to embrace these acts. The authorities referred to in support of this branch of the argument were Sinclair *v.* Sinclair, *Mor.* 15,382; Bruce *v.* Bruce, *Mor.* 15,539; Campbell *v.* Wightman, *Mor.* 15,505; Dick *v.* Drysdale, 16 *F. C.* 460; Henderson

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v. Henderson, 19 *F. C.* 29; Barclay *v.* Adam, *Hume*, 877; Speid *v.* Speid, 15 *D. B.* & *M.* 618; Rennie *v.* Horne, 3 *Sh.* & *M'L.* 142; Lang *v.* Lang, 1 *M'L.* & *Rob.* 871; Thomson *v.* Milne, 1 *D. B.* & *M.*, 2nd series, 592.

II. The entail does not contain any prohibition against contracting debt, all that it does is to prohibit the heirs from "burdening" the lands. [The argument upon this point was the same as in Lindsay *v.* Aboyne, for which see *supra*, p. 285.]

III. The resolutive clause does not apply to the restrictions and limitations in the prohibitory clause. In that clause conditions and provisions are used as distinguished from restrictions and limitations, and are applied to things directed to be done, while restrictions and limitations are applied to things directed not to be done. In the resolutive clause this distinction is kept up by the whole being mentioned in the outset of it as distinct things, and had the use of them been continued throughout, no question could have been raised upon the clause; but after thus enumerating the whole, the operation of the clause is limited to failure in performance of the "conditions and provisions" only, the words which follow, "or any other after conditions and "restrictions that may be added by me," do not alter the effect of this, as they evidently refer not to conditions and restrictions already existing, but to be thereafter made.

[*Lord Brougham.*—Is not a restriction a provision?]

It may be, but not in this entail, where the words are used to mean different things.

The Lord Advocate, *Mr. Stuart*, *Mr. Munro*, *Mr. M'Farlane*, and *Mr. Johnstone*, for respondents, cited *Ersk.* iii. 3, 49; Lumsden *v.* Lumsden, 2 *Bell*, 104; Scott, *Mor.* 3673; Haggart *v.* Agnew, 20 *F. C.* 223; M'Kenzie *v.* M'Kenzie, 2 *S.* & *D.* 331; Nisbett *v.* Moncrieff, 2 *S.* & *D.* 381; Lindsay *v.* Aboyne, 4 *D. B.* & *M.* 843.

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LORD CHANCELLOR.—My Lords, the first question raised in this case was as to the sufficiency of the irritant clause. It was contended that it did not apply to the prohibition against selling or alienating the estate.

The words of that clause are sufficiently extensive to reach every act of contravention. "Upon every contravention not only "the estate shall not be burthened or liable to the debts, deeds, "crimes, and acts of the heirs of entail so contravening, but *also* "all debts, deeds, or acts contracted, granted, done, or committed "contrary to the above conditions and restrictions, shall be abso- "lutely null," &c. The effect of the clause is to annul all deeds granted and all acts done contrary to the conditions and restrictions contained in the deed. The words are quite general, and in construction apply, without exception, to all the conditions and restrictions.

Some reliance was placed in the argument upon the subsequent words, viz. "And of no force, strength, or effect, and "ineffectual and unavailable against the other heirs of taillie, "and who, as well as the said lands and estate, shall not be "burthened therewith, but free therefrom, in the same manner "as if such debts and deeds had never been contracted, granted, "or done, or such acts, commissions, or omissions had never been "done or happened." Although this passage is superfluous, it is not inconsistent with that which precedes it. After declaring an instrument null and void, there is no inconsistency in also declaring it ineffectual against the lands and the heirs of entail.

As to the cases which were cited at the Bar, with respect to the former part of this clause,—I allude particularly to Lang *v.* Lang, and Barclay *v.* Adam,—it is sufficient to observe, that in each of those cases there were words of reference or restriction, which limited the general application of the terms, and on which ground alone these cases were determined. No such words of reference are to be found in this clause. I think, therefore, the irritant clause is sufficient.

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The next objection raised was as to the sufficiency of the resolutive clause, that it does not apply to the restrictions and limitations contained in the prohibitory clause. This objection is founded upon a supposed distinction made by the entailer between the conditions and provisions stated in the deed and the limitations and restrictions which it also mentions. The resolutive clause, it is contended, is confined to the former, and does not therefore prevent the altering the order of succession, or the sale of the estate, or the burthening it with debts.

It does not appear to me that there is any real difficulty in the interpretation of this clause. It begins by declaring that "in case any of the heirs of tailzie shall contravene any of the "before-written conditions, provisions, limitations, or restric-"tions,"—and then proceeds thus, "that is, shall fail or neglect "to obey and perform the haill conditions and provisions above "set down, or any of them." It is clear that the word "pro-"visions," which is general enough to include limitations and restrictions, was here intended to include them, for otherwise this part of the clause would be inconsistent with the former, which could not have been the intention of the framer of the deed.

The clause then goes on thus, "or any other after restrictions "that may be added by me," which is quite consistent with what precedes it; and the clause terminates in these words, "That "the person so contravening, by failing to obey the said con-"ditions, or by acting contrary to the above limitations and "restrictions, or any of them, shall forfeit the estate," which applies in construction to all that goes before, to all the conditions, limitations, and restrictions before-mentioned.

It is suggested that the "above limitations and restrictions" mean the limitations and restrictions which might thereafter be added; but there is no ground for thus confining the application of these terms; I am satisfied, therefore, as to the sufficiency of the resolutive clause.

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But the most important point remains to be considered. It is said, that there is no prohibition against the contracting debts by the heirs of entail. The words are these, "that it shall not "be in the power of the said William Farquharson, or any "other of the heirs of tailzie, or provision, to burthen the said "lands and estate, in whole or in part, with debts by them "contracted, or with any sums of money, infeftments of annual "rents, or any other burthen whatsoever, excepting only as "thereinafter expressed." The objection is this:—The prohibition is merely against burthening the estate, or any part of it, with debts, which imports, it is said, by the obvious meaning of the terms, a direct charge upon the estate, or upon some part of it, and it is widely different from a mere prohibition to contract debts, and the rule is, that entails are to be construed strictly. Debts, if contracted, may be paid out of other funds, out of the income of the estate, or if not paid may never be enforced or attempted to be enforced against the estate. If then the heir of entail is left at liberty, by the terms of the prohibitions, to contract debts, it follows that the creditor may adjudge the estate for the amount of the debt; for all the legal consequences, as far as third persons are concerned, must follow from what the heir of entail is permitted to do.

The question is undoubtedly one of some nicety, and different opinions seem to have been entertained with respect to it. But the weight of authority is strongly in favour of the sufficiency of the prohibition. When this case was before the Lord Ordinary no objection was taken to the prohibitory clause. That learned Judge thus expressed himself: "In the first place, it is manifest "and admitted on all hands, that the prohibitory clauses of the "deed of nomination are complete in all the branches of prohi-"bition required by the Act of 1685. As this was fully con-"sidered on both sides of the Bar, no further comment is neces-"sary, except to keep in view that the prohibitions are full, "minute, and specific as they ought to be."

So also when the case came upon review before the Judges of the First Division, no objection was raised as to the sufficiency of the prohibition. This, however, does not preclude the appellant from insisting upon the defect upon the appeal to your Lordships.

In considering this objection it must be observed, that the Act of 1685, which empowers the entailer to impose conditions on the heirs of entail, whereby it shall not be lawful for them (among other things) to contract debts, does not stop at those words, but proceeds thus, "whereby the lands may be apprized, "adjudged," &c. The condition, therefore, that may be imposed is not simply that the heir shall not contract debts, but that he shall not contract debts "whereby the estate may be adjudged," &c.; and it has been decided that the word *may* in this clause is to be read as *shall*. See the Gala case, *Kaimes*, 34; *Dictionary*, 3673, 1738, 15,500; *Erskine*, 3, 8. 30. The prohibition, therefore, is to contract debts, whereby the estate shall be adjudged, or, as Lord Jeffrey states, in the Aboyne case, shall be actually adjudged or attempted to be adjudged.

A prohibition to contract debts without any qualification would prevent the heir of entail from engaging in any of the ordinary affairs of life, and even contracting for necessaries. The meaning obviously is to contract debts, followed by such consequences as I have stated, that is, to contract debts that shall affect the estate, that shall become a burthen upon the estate, or, in other words, to burthen the estate with debts. This was the construction put upon the Act in the Gala case, as far back as the year 1722, and is, I think, the correct and proper construction.

If it be objected that where the entail is complete, the estate cannot be actually adjudged, the obvious answer is, that in like manner none of the prohibited acts can actually operate to affect the estate, for they are in such cases made void against the estate, and against the heirs of entail. The acts therefore must be taken

to be such acts as would charge or burthen the estate, were it not for the prohibition. I think, therefore, to contract debts by which the estate may, that is, shall be adjudged, is to burthen the estate with the debts, and within the strict interpretation of the prohibition.

Reliance was placed in the argument upon the form of some ancient deeds of entail, and upon the precedents in different treatises on conveyancing. But in the Aboyne case this observation was met by reference to many instances of entails corresponding in substance with the present, containing merely a prohibition against burthening the estate with debts, and precedents to the same effect are to be found in different collections.

Several decisions were cited in support of this construction. The first is Haggart *v.* Vans Agnew. The prohibition in that case was substantially in the same terms as the present. The heirs of entail were forbidden to burthen the estate, in whole or in part, with debts, sums of money, &c., or to commit or grant any act or deed, civil or criminal, whereby the said estates, or any part thereof, might be affected, apprized, adjudged, &c. The Court was unanimously of opinion that the clause was sufficient to protect the estate from the personal creditors of Vans Agnew. *Faculty Collections*, December, 1820.

In the case of Mackenzie *v.* Mackenzie, the prohibition was against contracting debts on the lands. The Lord Ordinary in that case found, "That the deed of entail was sufficient to protect " the estate against being affected, burthened or adjudged by the " debts in question." The Court adopted the same view. The words were not precisely the same as in the present case; but there seems to be no substantial distinction between "contracting " debts thereon," and "burthening the same with debts."

In the subsequent case of Nisbett *v.* Moncrieff, the prohibition was expressed precisely as in the present entail, and the Court held it to be sufficient.

The pursuer, in his argument, relies upon Lord Moncrieff's

opinion, expressed as Lord Ordinary in the Carleton case, but the Court did not adopt that opinion; it became unnecessary to consider it; and that learned Judge himself, afterwards, in the Aboyne case, drew a distinction between the vague words in the Carleton entail, and those which were then under consideration.

It is true that none of these decisions were reviewed in this House; and though the Court below might consider itself bound by them, they have not the same effect here. But upon a question of this nature, where the point has been repeatedly decided, and which decisions may and probably have been acted upon in framing instruments of this nature, your Lordships would not feel justified, unless in a case free from all reasonable doubt, in reversing such a series of decisions. And though the Aboyne case, as well as the present, is now under appeal, the consideration that the consulted Judges concurred in opinion upon this point with the Judges of the First Division, cannot fail to have influence with your Lordships.

Independently, however, of this weight of authority, I am of opinion that the prohibition in this case is sufficient.

LORD BROUGHAM.—My Lords, I entirely concur with my noble and learned friend, but I shall trouble your Lordships with my argument, because the case is of importance. These cases of Adam *v.* Farquharson, and Blaikie *v.* Farquharson, which are in truth one, raise the question upon the efficacy of an entail executed in 1790, of the estate of Finzean, by the trustees of Francis Farquharson, who created the trust in 1784, and appointed a destination of heirs by a deed of nomination of the same date. A reduction of the entail so executed by the trustees, was brought by the trustees on the sequestrated estate of the late Archibald Farquharson, heir of entail in possession, on the ground that the trustees of 1784 had, in 1790, exceeded their powers, and that the entail so made by them was reducible. But this ground was abandoned, and may be considered as never having been in controversy either below or

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here. A declaratory conclusion, however, was joined with the petitory conclusion for reduction, to have the heir of entail in possession declared tenant in fee simple, on the ground of the clauses irritant and resolutive not having been valid to prohibit alienation, sale, and altering the order of succession. Afterwards an objection was in a separate action taken to the validity of the prohibitory clauses, this having been omitted in the original suit.

With respect to the argument as to the prohibitory clause, I may state in one word only, because I believe it is unnecessary to go into any argument against a doctrine which is a totally new doctrine, for the first time propounded by a most learned and ingenious Judge, with whom, upon this occasion however, I differ *toto cœlo*. That learned Judge says, that no prohibitory clause is necessary—that irritant and resolutive clauses are sufficient. I totally dissent from that; I hold the prohibitory clause to be absolutely necessary; and I believe this to be the very first time that such a doctrine has ever been held in the Parliament House, or as we should say, in Westminster Hall.

The Lord Ordinary, and afterwards the learned Judges of the First Division, sustained the defences in both actions, and held the clauses, both prohibitory, irritant, and resolutive, to be effectual. This interlocutor now stands, after full argument, for judgment before your Lordships.

First, the objection taken to the resolutive clause, is very clearly untenable. It is said, that by the frame of the deed there is a difference established and preserved throughout between these two things, "conditions and provisions," and "restrictions and "limitations," *conditions and provisions* being one of the things, and *restrictions and limitations* being the other; that by the former expression the framer of the instruments intended certain things commanded to be done, such as taking the name and arms, and possessing under the entail; that by the latter expression the framer of the entail intended certain other things for-

bidden to be done, as selling, burthening, and altering the order of succession; that selling, burthening, and altering the order of succession, are only mentioned as restrictions and limitations, and not as provisions or conditions; that the resolutive clause generally refers to conditions and provisions, and says nothing of restrictions or limitations, and therefore the resolutive clause is not levelled (which is just as necessary of course as the other) at anything but the non-compliance with the positive directions, (that is, what they call the positive provisions and conditions,) as to taking the name and arms, and possessing under the entail, but does not strike at the restrictions and limitations, as sale, debt, and changing the order of succession.

There is the most manifest fallacy in this argument. It is dispelled by merely reading the deed. The word "limitations" is expressly employed under the provisions, and those provisions are expressly called limitations. Now, if the argument fails as to limitations, it fails as to both. In the second proviso it is said, "under "the said conditions, *limitations*, provisions, and irritancies *before* "and after mentioned," there being none of what the appellant calls limitations before mentioned, but only the proviso of taking the name and arms. But this is a trifle. What follows is clear, independently of the obvious remark that *condition* is a word neither used to describe things commanded nor things forbidden, and which clearly shows the futility of the notion that each word is to be taken as employed in one sense exclusively.

Another proof of the same looseness of expression occurs in the clause respecting debt. It is stated, as a restriction and limitation, that the land shall not be affected or burthened by any debt which the heirs of entail may contract. Again, in this clause are these words, which at once show how promiscuously the two kinds of expression are used, "and with this restriction "and limitation also, as it is hereby expressly conditioned, and "provided that the lands be not burthened." If the makers of the deed had designed to exclude prospectively all such arguments

as the present, could they have done so much more effectually than by thus using *conditions and provisions* as synonymous with restrictions and limitations?

Next, the resolutive clause is itself called a provision. It begins with these words, "It is expressly *provided* and declared." In truth, provide and provision are words, both in legislative enactments and in the framing of deeds, of the largest extent and import; they cover every thing that can be enacted in a statute, or enumerated in a deed. Then the resolutive clause proceeds to show how indiscriminately and interchangeably the words are employed. It says, "In case they shall contravene any of the "before-written conditions, provisions, limitations, and restric- "tions, that is, shall fail to perform the *haill* conditions and "provisions above set down," (observe *conditions* was not the word used under the head of things commanded, but only provisions,) "or any *other* after conditions and restrictions," not "limi- "tations and restrictions," but "conditions and restrictions that "may be added." Here *restrictions* as well as *conditions* are used by force of the word *other* in the sense of provisions; but it still goes on, "then the person failing to obey the conditions," (leaving out provisions) "or acting contrary to," what? The provisions? No such thing, but acting contrary to the *above limitations and restrictions*, shall forfeit. Surely this is as plain a forfeiture denounced against all who contravene the *restrictions* and *limitations*, as words can make it. It shows both the interchangeable use of these words, "conditions and provisions," and "restrictions and limitations;" and also that in whatever sense they be taken in the irritant part, the leaning of the clause revokes the right of all who contravene restrictions and limitations. There can therefore no doubt at all rest upon the efficacy of the resolutive clause.

Secondly, We come now to the irritant clause, which may be admitted not to be so entirely free from ambiguity; and the ambiguity, whatever it is, must be ascribed entirely to the verbosity

and redundancy of the language used. But through the mist thus raised, it is manifest that one meaning, and one only, can be gathered, and that without doing violence to the words used. No other construction can be imposed upon them but one, which makes the nullity be declared of all sales, alienations, and altering the order of succession, as well as all burthenings with debts. Therefore that clause begins very largely indeed, and had the subsequent words been kept on the same large scale, there could have been no doubt whatever about it. "Upon any contraven-" tion, or through the heirs" failing to obey and perform all and each of the before-mentioned conditions, or acting contrary to all or any of the restrictions above written; not only the lands shall not be burthened or liable to the *debts*, *deeds*, *crimes*, or *acts* of the heirs so contravening, (now this would not have been quite enough, but it goes on,) "also all debts, *deeds*, or *acts contracted*, " *granted*, *done*, or *committed* contrary to the above conditions and " restrictions, shall be null and void." Observe there is no reference used here, as in the case of Lang *v.* Lang, and the Overton case, to the other things formerly enumerated. On the contrary, the limb of the clause following the words *but also*, is plainly an extension of the limb of the clause following the words *not only*, and preceding the words *but also*, for that is the meaning of the words. When I say I not only do so and so, but also do so and so, the force of the adverb is to extend by the second, what I have done by the first. First, the clause makes null and void, as to burthening the estate, all debts and deeds of contravention; then it goes further, and extends the nullity to all debts, deeds, and acts, contracted, granted, or done contrary to the above conditions and restrictions. Take this in conjunction with the introductory part of the clause, which, as a kind of preamble, sets forth the subject matter that is about to be dealt with "upon " every contravention, or failing to obey, or *acting contrary* to all " or any of *the above restrictions*." We never can doubt that the irritancy strikes much higher than to debts or acts burthening

the estate, it strikes at all deeds granted, or acts done, contrary to the above conditions and restrictions.

There is nothing in any of the authorities cited which impeaches this conclusion, or which a decree pronounced in conformity with it will in any way impeach. Reliance is placed upon Lang *v.* Lang, but it must be recollected that that case depended upon the reference distinctly made to acts or deeds burthening the estate. Counsel are constantly quoting what I said in Lang *v.* Lang. What I said there, as plain as words could speak it, turned upon the word "such," used in that case; nobody can entertain the least doubt about it, because when you refer to all *such* acts, it is a totally different thing, but here it says, "all acts" whatever, without saying *such*. I shall really abstain from reading that part of my argument.

Thirdly, The prohibitory clause appears quite sufficient. It can never be contended that a prohibition to contract debt on the lands entailed, is not effectual, because it extends not to all contracting of debt. In the Newhall case, Mackenzie *v.* Mackenzie, the heirs of entail were prohibited to sell, wadsett, or impignorate the lands entailed, or to *contract debts thereon*, that is, the lands entailed, and this was held to strike at a diligence against the lands for a personal debt. This case, if disputed as it has been, was followed by the recent decision in the Aboyne case, and your Lordships are in that case disposed, I am quite sure, to deny all weight to the objection. It is to be observed, too, that in Murray *v.* Murray, a similar argument was attempted to be used on the qualifying words which we disposed of yesterday, and which, therefore, I need not further recur to. The interlocutors must, therefore, be affirmed, and with the costs of the appeals.

LORD CAMPBELL.—My Lords, I heard these cases, and I entirely concur in the view taken of them by my two noble and learned friends. I think it would be better, instead of my saying anything upon them at present, that I should reserve my general

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view upon such clauses, till the Aboyne case is called, upon which I have prepared a judgment. (See *supra*, p. 289,)

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

SPOTTISWOODE and ROBERTSON — G. and T. W. WEBSTER, Agents.