[3*rd May*, 1849.]

JOHN MURRAY, ESQ., Advocate, and Others, *Appellants*.

ROBERT GRAHAM, ESQ., of Balgowan and Lynedoch, *Respondent*.

Entail.—Form of prohibitory and irritant clause under which the irritancy was held to fence only the latter part of the prohibitory clause.

THE Respondent was heir in possession of the lands of Balgowan and Lynedoch, under an entail executed by Thomas Græme in the year 1726, which contained the following prohibitory irritant and resolutive clauses: "And in like manner "it is hereby Expressly provided and Declared And be it so "Provided and Declared by the Resignation and infeftments to "follow hereupon That it shall not be lawfull to the said John "and Thomas Græmes my Son and Grandson nor to any of "the persons succeeding in the trust-right nor to the said "heirs of tailzie in fee to Dispone alienat Wadsett or burden "the said lands and others above written or any part of the "same, Nor to Contract debts Commit Treason, or to alter "Innovat or infringe the Course of Succession before specifyed "by any fact or deed civill or criminall Ommission or Com-"mission whereby the said lands and estate may be adjudged "forfeited evicted or any ways Lessened or impaired Declare-"ing all such facts and deeds Ommissions and Commissions to "to be void and null And moreover It is hereby Expressly "Provided Conditioned and Ordained That if the said John "and Thomas Græmes my son and grandson or any of the "persons succeeding in y^e^ trust-right or any of the heirs of "tailzie in fie shall alter infringe or innovat the order and

MURRAY *v.* GRAHAM.—3rd May, 1849.

"Course of Succession prescribed and appointed by the pre-
"sent tailzie or Contraveen and violat any of y^e^ provisions
"and Conditions before mentioned, The Contraveener Shall
"*ipso facto* lose tyne and amitt all tittle and right to the Lands
"& others above specifyed with all benifite and advantage that
"he or they might claim by vertue of thir presents and the
"Course of Succession before mentioned, And the same shall
"fall appertain and accresce to the next member or heir of
"tailzie, whether descending of the Contraveener's body or
"not, to whom it shall be leisume and free to establish his
"or her right and tittle and to enter to y^e^ possession of the
"lands and others above rehearsed by Service adjudication or
"Declarator or any other manner of way agreeable to the laws
"of the kingdome."

The Respondent, by contract of sale on the 9th and 11th days of January, 1845, sold the lands of Lynedoch to Simpson, for 135,000*l.*, and of Balgowan to Thomson, for 42,000*l.* These parties, with the view of ascertaining whether the Respondent could give them a good title, respectively brought a suspension as of a threatened charge for the price of their purchases. The Respondent, in consequence, brought an action against the substitute heirs of entail, setting forth in the summons his title to the lands under the entail, and concluding for a declaration of his rights in the following terms: "That the Pursuer has
"full and undoubted right and power to sell the several lands
"and other heritages before mentioned, to which he has suc-
"ceeded and has now right, as aforesaid, and also to alienate
"and dispone the said land and others, and to grant, execute,
"and deliver all dispositions, conveyances, deeds, procuratories
"of resignation, precepts of sasine, and other writings what-
"soever, which may be requisite and necessary for effectually
"conveying to the purchasers, and their heirs or assignees, the
"lands and others sold to them as aforesaid; or at least that
"the contracts of sale of the said lands and others entered into

" by the Pursuer, are valid and effectual to the purchasers " thereof, and they are entitled to adjudge the said lands and " others in implement of the said contracts of sale; and speci- " ally, without prejudice to the said generality, that the Pursuer " has full and undoubted right and power to sell the foresaid " lands and others to the said James Simpson and William " Thomson respectively, in terms of the contracts of sale " entered into with them respectively as aforesaid, and under " the exceptions and reservations therein specified; and also to " alienate and dispone the said lands and others to them " respectively; and to implement and fulfil the whole obliga- " tions incumbent on him by the said contracts of sale in " favour of the said James Simpson and William Thomson " respectively; or, at least, that the said James Simpson and " William Thomson are entitled to adjudge the said lands and " others respectively sold to them, in implement of the said " contracts of sale; and that the Pursuer, and his heirs, execu- " tors, or assignees (excluding his heirs of taillie and provision), " have the sole and the exclusive right to the prices of the said " lands and others, and have power to grant valid and sufficient " discharges for the same, and that the Pursuer and his fore- " saids do not lie under any obligation to invest, employ, or lay " out the said prices, or any part thereof, in the purchase, or on " the security, of any other lands or heritages, or otherwise, for " the benefit of the defenders, or any of them; but that the " Pursuer and his foresaids, excluding as aforesaid, have full " power to use and dispose of the said prices as their absolute " property at pleasure; and that the said defenders have no " right or title to interfere with or control the Pursuer in the " use and disposal of the said prices, or any part thereof, in any " manner of way; and also, that no claim or demand of any " description is competent to the said defenders, or any of " them, against the Pursuer, or his heirs or representatives, for " or in respect of his selling, alienating, or disponing the said

" lands and others, or granting dispositions of the same, or on " account of the foresaid contracts of sale, or either of them, or " any adjudication or other proceeding that may follow there- " upon, or otherwise, or for or in respect of the pursuer or his " foresaids using and disposing of the whole prices of the said " lands and others at pleasure."

The two suspensions and the action of declarator were conjoined, and the Appellants and Respondents having argued the question raised, in cases to the Lord Ordinary (Simpson and Thomson, being willing purchasers, took no part, except to watch the proceedings), his Lordship, on the 12th June, 1846, pronounced the following interlocutor, to which he added the subjoined note: "The Lord Ordinary, having considered the " revised cases for the parties, in the conjoined processes of " suspension and declarator, and whole proceedings, Finds that " the irritant clause in the entails of Balgowan and Lynedoch " is confined and restricted in its application to the prohibitions " against contracting debt, committing treason, and altering, " innovating, or infringing the course of succession specified in " the said entails, and does not apply to the prohibition against " disponing or alienating the entailed lands, or strike at deeds " of alienation or sale thereof; and therefore, in the declarator, " finds, ordains, and decerns in terms of the conclusions there- " of; and in the suspensions, repels the reason of suspension, " and decerns, and finds no expenses due."

The Appellants reclaimed, and the Court (1st division) ordered additional cases to be prepared and laid before the Judges of the other division and the permanent Lords Ordinary, for their opinion. These cases were accordingly prepared and laid before the Judges, who, by a majority of seven to two, concurred, in the result, in holding that the interlocutor of the Lord Ordinary should be adhered to, although several of them differed from the others in the way by which they arrived at this conclusion.

MURRAY *v.* GRAHAM.—3rd May, 1849.

In conformity with the opinions of the consulted Judges, the Court, although equally divided in opinion, pronounced the following interlocutor on the 21st of January, 1848:—"The "Lords, having resumed consideration of the Reclaiming "Notes, Nos. 26 and 27 of process, and whole proceedings, "and having taken into consideration the Additional Revised "Cases, together with the Opinions of the Consulted Judges, "In respect of the opinions of the majority of the Judges of "the whole Court,—Refuse the prayer of the said Reclaiming "Notes, and adhere to the interlocutor of the Lord Ordinary "reclaimed against."

An appeal against the interlocutor of the Lord Ordinary and this interlocutor of the Court was taken by the Appellants, and also *pro forma*, by the purchasers.

Sir F. Kelly and *Mr. Bethel* (with whom was *Mr. Anderson*) were heard for the Appellants, to argue upon the constructon of the fettering clauses in the entail, and in the course of their argument relied upon a variety of previous decisions upon entails; but, inasmuch as this case will be a precedent only where clauses in precisely the same terms shall occur, and will be of little value in any other case; it is unnecessary to give the arguments of counsel or the authorities cited by them.

The Lord Advocate and *Mr. Rolt* were heard for the Repondents; and

Mr. Wortley appeared for the purchasers, but was not called on.

LORD CHANCELLOR.—My Lords, we are informed that these proceedings affect an estate of great magnitude. The case is therefore of great importance to the parties. The question raised received the most minute attention from the Court below, as it has done in this House. It has been very ably and deliberately argued here. And from what we see of the opinions of the learned Judges in the Court below, the conclusion that

they came to could not have been arrived at without very deliberate consideration. But after going through the whole case, and giving it my best attention, and after examining the opinions of the Judges in the Court below, and attending to the arguments at the bar, I do not think it necessary to take further time for its consideration.

My Lords, some cases have been referred to by the counsel for the Appellant; but it is very well known that in the construction of deeds of entail cases upon other deeds of entail are of no authority, unless identically the same words are found in the same clauses. That rule is so well ascertained and so well understood by your Lordships, as to make any authority unnecessary to assist your judgment.

The statute has laid down certain rules by which a party creating an entail must abide before he can have the benefit of the provisions of the Act. He must prohibit the acts that he means to prevent, and he must void those acts; and he must also declare that the commission of those acts shall be a forfeiture. Now there is no doubt that in the present case the party making the deed prohibited alienation. Nobody disputes that. But then the question is, whether he has included the acts of alienation in the irritant clause. That is the whole question upon which the matter depends. Now the language in the irritant clause of the deed is this: "declaring all such facts "and deeds omissions and commissions to be void and null." And what are those "facts and deeds" which any future heir is declared to be incapable of? When we look to the immediately preceding clause we find that the language is, "Nor to contract "debts, commit treason, or to alter, innovate, or infringe the "course of succession before specified by any fact or deed, civil "or criminal, omission or commission, whereby the said lands and "estate may be adjudged, forfeited, evicted, or anyways lessened "or impaired;" and he declares that all such facts and deeds shall be null and void. Applying the ordinary course of construction

to this, can anybody doubt that, when he declared such facts and deeds to be null and void, he meant those facts and deeds of omission and commission which are to be found in the immediately preceding sentence? Upon that matter there does not seem to have been any manner of doubt in the Court below, nor in the mind of the learned person who prepared these papers; for the first reason given in the appeal is, "Because the deeds "of entail of Balgowan and Lynedoch contain sufficient prohi- "bitions against selling the estates; and these prohibitions are "duly fenced with proper irritant and resolutive clauses" assuming that the irritant clause does refer to the facts and deeds of omission and commission, the prohibition of which is to be found in the sentence immediately preceding; and they endeavour to get out of the difficulty they are in by showing that in the preceding sentence there is a description of all the different prohibitions. Now, my Lords, on considering these words over and over again, it appears to me to be perfectly plain that, according to the ordinary use of the terms, they do not apply to alienation. The irritancy might be presumed; but in all cases of this sort we cannot presume it. The intention must be expressed. It must be declared in the express terms of words. You cannot look at the intention *aliunde* and apply to it words to carry out that intention. He says, "he shall not do any act "or deed whereby the lands may be evicted, lessened, or im- "paired." They say that the whole object of that was to prohibit alienation, but it is not possible to attach such a meaning to the words. I think that a sufficient answer has been given to that argument, and that these latter words cannot be applied to the prohibition against alienation.

My Lords, the words "or" and "nor" have been referred to; but this was a matter on which I think the parties did not rely with any great confidence. But it is quite clear to me that it was not the intention to use the word "nor" as here placed in precisely the same sense as the word "or" before; for what

does he do? He declares that "it shall not be lawful to dis-"pone, alienate, wadset, or burden the said lands." He says, "or burden the said lands." There you have the word "or" used; and having described matters which he wished to prohibit, and which he considered *ejusdem generis*, he comes to a new prohibition, not going on in the same sentence, "Nor to con-"tract debt." There he takes up the word "nor." The word "nor" is a renewal of the prohibition: "He shall not do these "things, nor shall he do so and so." It is obvious something is to be inferred from changing the word "or," which is used immediately before, into the word "nor;" but the real ground upon which I dispose of this case is not upon the use of the words "or" and "nor," but upon the true sense and intention to be inferred from the whole prohibition, and that these latter words "facts or deeds" apply to the last antecedent; viz., altering the course of succession by any fact or deed. It appears to me that, although there is a distinct prohibition against alienation, the words in the irritant clause "facts and deeds, omissions and "commissions," although they are the same words as are found in the prohibitory clause, do not apply to alienation; and consequently the judgment of the Court below appears to me to be correct.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend in the view he takes of this case, nor have I entertained any doubt from the beginning, or from the moment when I became master of the argument and the words in the deed of entail upon which that argument was raised; and I was induced by my noble and learned friend near me to agree to hear the Respondent's counsel, after the Appellant's counsel had exhausted all their ingenuity and learning in persuading us to differ from the Court below—not from entertaining any doubt that the Appellant's counsel had failed in their contention, but because there was a difference of opinion

among the Judges in the Court below, which required that this Court, with due respect for the dissentient Judges in that Court, should hear all that could be said on both sides, and also because it was a case of very considerable importance in point of value, upon the decision now to be given depending a title in the hands of the proposed purchaser—not an unwilling purchaser—to an estate of the value of 200,000*l.*

My Lords, this ought to make your Lordships, in dealing with such a question, anxious to be quite clear in your own view as to the conclusion at which you are minded to arrive. At the same time, if the case is encumbered with no difficulty—if there is nothing in the way of authority, either of text-writers, or of decided cases, to shake the judgment given in the Court below—if indeed the principles laid down by all the authorities, both of text-writers and of decided cases, are agreed upon, as it appears to me substantially they are on both sides of the bar here, and by all the Judges below, however they may have differed in their opinion upon the application of the principles to this case, then the olny question that can arise here is in respect to the application of those principles—universally admitted principles—to this particular case.

Now no man doubts that the question of the validity of an entail depends not only upon the intention of the party making the entail, but upon something beyond that. In one sense it depends upon that intention; that is, unless you can gather from the words which he uses in his instrument, that he intended to fetter succeeding heirs, of course there is no proper entail. On one side, therefore, the intention of the party making the entail is a test, but on the other side it is no test at all; it is an example of what logicians call a unilateral test; for you may discover the intention of the party making the entail ever so much, by the words which are used, and yet the entail shall be invalid, unless those words are such that you cannot give them any other construction; and therefore you must needs hold not

only that the intention existed in the mind of the party using those words, but that he used such words as the law will allow to carry out that intention. That is the rule in cases of entail. Consequently it is totally different from a question as to the words of a contract, or as to the words of a will which are not governed by the principles of the law of entail of real property, because in those cases you gather the intention of the party making the instrument, be it a contract or be it a will, in whatever way you can; and accordingly, both in Scotland and in England, in such cases, in order to get at the general intention of the party, you look to words not only within the particular clause whereupon the difficulty in the construction arises, but you look to other clauses in the instrument for the purpose of learning what the party making it really meant. You gather his intention from those other clauses taken together with the clause upon which the difficulty arises, that clause itself not being explicit and clear; and then, provided he has intended that which the law allows him to intend and to do, you give effect to the intention by your decision. But that is not so in the law of entail; you are not to gather what the intention of the maker of the deed is, from looking at all the instrument, and to say, I have no doubt Mr. so and so meant to entail his estate, and to fetter succeeding heirs. The question is, whether he has validly done that, just as in the English law no man ever meant to make a void entail; no man ever intended, when he professed to entail his estate, to leave a loop-hole through which the party who was meant to be fettered might creep, and get free from those fetters; and no man in this world ever intended to make a void executory devise so as to let in the party he intended to keep out. No man in his senses ever intended that. Yet we all know that a party must do what he intends to do in a certain way, and within certain rules; otherwise his intention goes for nothing; because what he has done is not what the law allowed to be done at all; and as by law it is not allowed

to be done, except in a particular manner, and unless he has conformed to the requisitions of the law, and done it in that manner, though you may be perfectly convinced that he intended to entail his lands, he has not in fact entailed them, and you will not give validity and force to what he has so done. That I believe is the clear rule of law, which is universally admitted. Another rule may be added which is equally admitted on all hands; viz., that there is no general form of words which a man must use by law, in order to make his entail valid. It is not necessary that he should use this or that particular form; but he must use such words as show first of all, that he has prohibited alienation, if the question arises as it does here upon the alienation; secondly, that he has made the prohibition of alienation effectual, by making irritant or void all acts of alienation; and thirdly, that he has resolved the right of the contravener by inflicting a forfeiture upon the person that alienates. All those things must be done in order to make a valid entail; and the question is whether those three things are done here? It is quite clear that the first is done; it is quite clear he has prohibited alienation, and in the most specific and technical terms; but this is (as Lord Moncrieff observes) in other respects a very blundered instrument; and he has not, in my opinion, declared void the alienation. If he had said, "It shall not be lawful for "any of my heirs of tailzie to dispone, alienate, wadsett, or "burden the said lands and others above written, by any fact or "deed," and then he had declared such fact or deed void, that would have been quite sufficient, because alienating might then have been taken to be a "fact or deed" which is declared to be void. But he has not said so. He has gone on to say, after saying that he shall not alienate, "nor to contract debts, commit treason," and therefore read it thus; for if he had used those words a second time, he would have so said, "Nor shall it be "lawful to contract debts, commit treason, or to alter, innovate, "or infringe the course of succession before specified, by any

" fact or deed;" (there for the first time using those words), " civil or criminal, omission or commission, whereby the said " lands and estate may be adjudged, forfeited, evicted, or any " ways lessened or impaired, declaring all such facts and deeds, " omissions and commissions, to be void and null." Can any one, reading those words, doubt that they are applicable to the last antecedent—" the facts or deeds" then mentioned, for the first time mentioned? " Civil or criminal omission or com- " mission" immediately preceding the declaration of nullity in the irritant clause are, " such facts and deeds." (Here the words " civil and criminal" are unnecessary to be repeated, because if you say such " facts and deeds," those facts and deeds are supposed to include civil or criminal; the words, therefore, in the clause must be taken to mean such " facts or deeds, civil or " criminal.") Then to make it quite clear, if it were not already clear enough, it says, " omission or commission," which are the other words in the clause referred to following after the words " facts or deeds, civil or criminal." What Lord Moncrieff says is perfectly true, that if those words are to be taken as the counsel on the part of the Appellant contend that they ought to be taken, viz., to ride over the whole of the prohibition, and to apply to alienation without those words, " whereby the lands and " estate may be adjudged, forfeited, and evicted," and so forth, no man can doubt that, in point of law, that would be a general and absolute prohibition of alienation, stopping short of those words; and it is quite clear that it was intended by the makers of the deed to be a strict prohibition of alienation. But by including those words, and making them ride over all that goes before, says Lord Moncrieff, you limit the prohibition.

My Lords, I therefore think, without going further into the cases which have been cited to us, that this judgment must stand. I may add, with respect to those cases that have been cited, that it appears to me, Lang *v.* Lang has no material application to the case. It does not decide it either way. This case

stands perfectly clear of it. And as for that of Murray of Cockspow, it has no application to the case, and no argument can be founded upon it either way. The decision in this case unsettles no former case; it breaks in upon no former decision; this case stands precisely as every such case must stand, upon its own broad principles. This instrument is, as Lord Moncrieff says, a very ill-conceived and blundered instrument. It is clear that the intention of the party was to tie up the lands; but it is equally clear that he has failed to do so. And after having heard a most able argument at the bar, we are of opinion that the Court below came to a right decision.

LORD CAMPBELL.—My Lords, upon full consideration I entirely adhere to the rule that I ventured to propose to your Lordships in the cases which have been referred to, that notwithstanding entails are odious or *strictissimi juris*, when you come to construe the irritant or resolutive clauses in these deeds, you will give to the language employed in them its natural and grammatical meaning; and if upon that principle the words are such as not to carry out the purpose of the entail, you must so decide. If, on the other hand, when you come to construe the language employed in the deeds, a valid entail is made, you must uphold the entail. Now, when these principles are applied to this case, I can find nothing in the natural and grammatical meaning of the words employed, that can be construed into a prohibition of alienation. For the reasons that have been so forcibly stated by my noble and learned friends who have preceded me, I am clearly of opinion that the irritant clause cannot be applied to alienation; and, therefore, the entail being without an irritant clause, it is void. As to the cases which have been cited, none of them throw the slightest doubt upon the decision in this case, but they are all consistent with the judgment now pronounced.

MURRAY *v.* GRAHAM.—3rd May, 1849.

It is Ordered and Adjudged by, &c., That the said petition and 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 further Ordered, That the Appellants do pay, or cause to be paid, to the said Respondent, the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk Assistant: And it is also further Ordered, That unless the costs certified, as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be, and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the Bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

SPOTTISWOODE and ROBERTSON—RICHARDSON, CONNELL, and LOCH.