[HEARD 28*th February*—JUDGMENT 25*th March*, 1850.]

JAMES DEWAR BURDEN, of Feddal, *Appellant.*

ANNE CLEGHORN MITCHELL BURDEN, and GEORGE S. M. BURDEN, her husband, *Respondents.*

8 Bkm 90

Tailzie.—Terms of entail held to be sufficient to protect the lands against the contraction of real burdens upon them.

Ibid.—Terms of irritant and resolutive clause held not to be enumerative of acts prohibited and to be general enough to comprehend all of them.

THE Appellant had been the husband of Anne Graham Burden, who was heiress in tail in possession of the lands of Feddal. During the subsistence of the marriage, various accounts of law expenses had been incurred to Cullen, W.S., upon the joint employment of the Appellant and his wife, in regard to obligations which had been granted by her with reference to her estate of Feddal. After her death, the Respondent, Mrs. Burden, her daughter, took up the succession, and entered to possession of the estate of Feddal, as heir under the entail. Thereafter Cullen brought an action for payment of the law expenses which had been incurred to him. This action was directed against the Appellant, as having concurred in the employment, and against the Respondent, as representing her mother, and liable for her debts.

The Appellant then brought an action against the Respondent and her husband, for relief of his liability under Cullen's action, upon the ground that the debt to that gentleman was the proper debt of the Appellant's wife, for which the Respondent was

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liable, inasmuch as she had succeeded to her mother as heir of the lands of Feddal, and as the entail under which her mother possessed these lands did not contain any sufficient fetter against the contraction of debt, they were liable for the mother's debts.

The fetters of the entail under which this question was raised were thus expressed. The entail contained a proviso that the heirs succeeding under it should assume and bear the name and arms of Burns of Feddal, which was fenced with an irritant and resolutive clause, appropriate to it exclusively. It then proceeded thus:—"And sicklike it is hereby specially provided "and declared, and be it so provided and declared by the infeft- "ments to follow hereupon, that it shall not be leisom to, nor "in the power of any of my said daughters, or the heirs of their "bodies succeeding to me in my said lands and estate, to violate "or alter the order and course of succession appointed by this "present tailzie and disposition, nor to sell, annalzie, wadsett, "dispone, or impignorate the said lands and teinds, or to con- "tract debts yrupon, or do any other deed for disposing upon, "or affecting the said lands and estate, except in so far as they "are empowered in manner after mentioned, so that it is "expressly provided and declared that if any of my said "daughters and their heirs succeeding to me, shall contraveen "or fail in performance of any of the provisions and conditions "@ written, or alter the order of succession above sett down, "or dispose upon, and affect the said lands and teinds, whereby "they may be evicted or adjudged from them, all such facts, "deeds, and debts are not only declared to be null, and of no "avail, force, strength, or effect, so far as concerns my said "lands and teinds, which shall no ways be affected or burdened "therewith in prejudice of the other heirs appointed to succeed "thereto, but also the person or persons so contraveening, shall "for themselves only amit and lose their right and interest in "my said lands and estate, in the same manner as if the con- "traveener were naturally dead, and the same shall *ipso facto*

"fall and pertain to the next heir entitled to succeed, albeit "descended of the contraveener's body, and that by way of "service and retour, declarator, or other habile method agree-"able to law as accords: As also, it is hereby provided and "declared that the said Anna Burden my daughter, and her "heirs, which failing, the said Elizabeth and her heirs suc-"ceeding in virtue hereof, shall have power and faculty to "contract and take on as much debts, and to grant bonds, "heritable and moveable, therefore, as will satisfy and pay the "haill debts I shall be resting at the time of my death, with "the burden whereof these presents are granted and to be "accepted of, and no otherwise."

The Respondent pleaded in defence, that she did not represent her mother, and that even if the entail were defective, her mother had not exercised any power which it might be supposed to give her, for disposal of it in payment of her debts.

Cases and additional cases for the parties were laid before the Judges of the other division of the Court and the Lords Ordinary, for their opinion; and thereafter, in conformity with the opinion of a majority of the consulted Judges, the Court pronounced the following interlocutor, the subject of appeal:—

"The Lords having again considered the mutual revised cases, "and the opinions of the consulted Judges, find, in conformity "with the opinions of the majority of the whole Judges, that "the deed of entail of the estate of Easter Feddal and others, "executed by James Burden in 1739, contains effectual pro-"hibitions against selling and the contracting of debt, duly "fenced with irritant and resolutive clauses in terms of the "Act 1685, c. 22; and that the Defender, Mrs. Mitchell "Burden, by taking up the estate under said deed of entail, has "not incurred any representation to, or liability for the debts of "her father: Find *separatim* that, as the said deed of entail "contains an effectual prohibition against the contracting of "debt, duly fenced with irritant and resolutive clauses in terms

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" of said Act, even a defect in the irritant clause in regard to " sales would not be relevant to subject the Defender, the heir of " entail in possession of said estates, as representing her mother, " in liability for her debts: Therefore assoilzie the Defenders " from the whole conclusions of the libel, but find no expenses " due, and decern."

Mr. Bethell and *Mr. Inglis* for the Appellant.

I. This entail, from the particular terms in which the irritant clause is framed, is confined to debts by real security upon the lands, for the prohibition is against the heirs " contracting debt " thereupon," " or doing any other deed for disponing upon or " affecting" the lands. These words have reference as well to personal as to real debts. If this were doubtful, the doubt is removed by what follows, viz., " except in so far as they are " empowered in manner after mentioned;" and the manner after mentioned is to contract and take on as much debts, " and to grant bonds heritable and moveable therefore," as would pay the entailer's debts. This shows that the difference between real and personal debts was present to the mind of the entailer. But the irritant clause is directed against " dispon- " ing upon or affecting the said lands, whereby they may be " evicted and adjudged;" terms which have reference to the contraction of debt by real security alone; and therefore it does not affect the power to contract personal debts without " disponing upon or affecting the lands."

II. The irritant clause is not directed against sales of the lands, for although it sets out with general words, which if it had stopped with them would have been sufficient to have embraced the whole prohibitions, that against selling among the rest, it goes on to enumerate what it is directed against, thus:—" or alter the order of succession, or dispone upon and " affect the said lands and teinds," omitting all mention of sale, and therefore, by this enumeration of what the general words

were intended to include, shows that sale was not one of these things. It may be said that as the words which precede "or" in the above quotation are sufficient to include all the specific prohibitions, those words which follow it must be viewed as surplusage; but that would be against the received canon of interpretation, that no words are to be rejected as useless if you can find a meaning for them. Now, a meaning may be given to "or," for to express it more at large, it is just "or in other words," as introductory of the explanation which is to follow of the previous general words. If the enumeration which follows "or" had specified *every* previous prohibition, that clearly would have been surplusage, but the omission of one deprives it of that character, and makes it useful as an explanation. In the Tillycoultry case, *Mor.* 15539, it was laid down that if an entailer use general words, and then betake himself to particular words, the deed will not have the benefit of the general expressions; and in Rennie *v.* Rennie, 3 *Sh.* & *M'L.*, 167, an enumeration of particulars following general words, was held to take away the effect of the general expressions, though introduced by the word "particularly." In the present case the entailer has attempted to enumerate what he had specified in the prohibitions; but out of four things so specified, he has referred to the first and last alone. Unless then this be held as an attempt at enumeration, unsuccessful no doubt, the deed is made to speak nonsense, and to say that if four things are done, or the first and the last of them, certain effects shall follow. But to make words useless where they can be useful, is contrary to the received rule of construction of such instruments. If the clause, on the contrary, be held to be enumerative, every word receives effect; and the only objection is, that the enumeration is defective, sales and contraction of personal debt being both omitted. Barclay *v.* Adam, 1 *Sh. App.*, *Ca.* 24; Smith *v.* Duffin, 4 *Co. of Sess.*, *Ca.* 523. If there be no fetter against contracting personal debt, or selling

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for payment of it, the Appellant must prevail, because in that case there would be nothing to prevent adjudication of the lands for payment of the personal debt contracted by the last heir in possession.

III. If the entail be defective, either as to contracting debt or as to sales, it will then be entirely inoperative, for it is only such entails as contain all the fetters mentioned in the statute 1685, or entails framed in the mode allowed by that statute which can receive the benefit of it. Stewart *v.* Fullarton, 4 *Wils. Sh.* 211.

Mr. Wortley and *Mr. Anderson* for the Respondents.

LORD BROUGHAM.—My Lords, This case was heard at great length, and was very ably argued, as indeed all these cases have been, by the learned counsel on either side—and my noble and learned friend, the Lord Chancellor, and myself, who heard the case, entertained very little doubt during the argument, agreeing with the Judges in the Court below. Nevertheless, as there was some difference of opinion among them, especially upon one point, we thought it better to take time to consider.

We have since deliberately considered the case, and I am now to state to your Lordships the result of that deliberation, which is certainly an affirmance of our original impression, and that without considering what it does not appear to me to be necessary to consider, the force and effect of the word "or," which your Lordships may recollect—such of you as were present—was the first point, whether it was to be taken as merely a word of explication connecting what followed with what had gone before, and thereby confining the meaning of what had gone before to what followed, or whether it was to be taken in the common sense of the word, namely, that all acts, by so and so, or so and so, or so and so, were to be taken

as entirely independent the one of the other—the generality continuing unimpaired and unchanged, and the particularity only referring to one or two specified cases of that generality, but leaving the other specified and non-enumerated cases (so to speak) of that generality entirely where they would have stood had there been no specification whatever.

My Lords, I believe a majority of the Judges below were of the former opinion, and against the latter opinion, considering the word "or" to limit the preceding generality to the succeeding specification, and not of the latter opinion, which would have made the succeeding specification immaterial to change, to limit, or impair the force of the preceding generality. Their Lordships took the former rather than the latter view, and considered, as we do, that what follows is sufficient, taking the whole matter together, as one or two of the learned Judges say, *totâ re perspectâ*, to constitute a valid and effectual clause.

Now, my Lords, I have stated this particularly, without reading my noble and learned friend's opinion, which he has entrusted me to deliver to your Lordships, for that indeed is the most important part of it. But I thought it right to break the case myself, by giving my own opinion first, because my noble and learned friend does not so minutely as I have thought it necessary to do, recall to your Lordships' recollection the substance of the interlocutor. He says—"It will not "be necessary for me, in explaining the grounds upon which I "have formed an opinion that the interlocutor appealed from "ought to be affirmed, to enter at any length into the wide "field of discussion which has been occupied in the different "stages of this cause—the points upon which my opinion has "been formed being, in my view, simple, and not attended with "much difficulty.

"The Pursuer insists that the entail does not protect the "estate against diligence by creditors, because; first, the con-

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" tracting of debts upon which the land may be adjudged, " although it may be within the prohibition, is not within the " irritant and resolutive clauses; and secondly, if the prohi- " bitory clauses can be considered as applicable to such debts, " the irritant and resolutive clauses enumerating certain pro- " hibitions, but not noticing such debts, deprive the general " words of the effect which they might otherwise have, upon " the authority of the Tillicoultry and Ballilisk cases.

" That the prohibitory clause applies to the contracting " such debts is, I think, free from doubt. It prohibits con- " tracting debts thereupon, or doing any other deed for disposing " upon or affecting the lands and estate, except in so far as they " are empowered in manner after mentioned, and that power is " to pay certain debts.

" But then it is said, that such prohibited debts are not " specifically within the irritant and resolutive clauses. I think " they are, the terms used being 'or dispose upon or affect the " 'said lands whereby they may be evicted or adjudged from " 'them, all such acts, facts, deeds and debts are declared to be " 'null so far as concerns my said lands, which shall nowise be " 'affected or burthened therewith in prejudice of the other " 'heirs.' The thing spoken of is, amongst other debts, to " affect the lands, and whereby they may be evicted or adjudged " from them. But then it is said that a debt adjudged is " equivalent to a sale, and that sales not being within these " clauses an adjudgment by a creditor is not. This proposition " would be very difficult to be maintained. But it is not " necessary to consider it; for although ordinary sales may not " be included, if an adjudging by a creditor be in any sense a " sale, that particular mode of sale is clearly within all the " clauses, which is all that is requisite.

" The opinion which I have so formed and expressed is " quite sufficient to lead me to the affirming of the interlocutors " appealed from; and I should not say one word upon the

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"Tillicoultry case, were it not that the Lord Justice Clerk "appears to me to have put an erroneous construction upon "what is represented as having been said by me in addressing "the House upon that case, and as explained in Rennie *v.* "Horne. The passage quoted is, that where a party under- "takes to enumerate in the irritant and resolutive clauses those "acts which are to infer forfeiture, the prohibition is inopera- "tive as regards any act which is not enumerated, which can "only mean this, that where the entailer in laying down a law for "his heirs, enumerates certain acts which are to infer forfeiture, "no forfeiture shall attach to an act not enumerated. This "appears to me to be a very plain and unanswerable proposition, "and it leaves the question open upon the construction of "every entail, whether the entailer has undertaken so to enu- "merate those acts which are to infer forfeiture. In the "Tillicoultry case, and Rennie *v.* Horne, I thought such an "intention and undertaking was sufficiently manifest. In the "present case I am clearly of opinion that no such intention or "undertaking can be inferred from the term used. If the "entailer had intended or undertaken to enumerate all the acts "to which the forfeiture should attach, could he possibly have "commenced the sentence by imposing it upon 'contravening, or "'failing in performance of any of the provisions and conditions "'above written, or' then enumerating two of them? A failure "and contravening is intended and expressed without any "reference to the mode in which it may take place, and no "particular act or mode is expressed which might lead to such "failure or contravening. I move your Lordships, therefore, "that the interlocutors appealed from be affirmed.

Now, my Lords, I have already said enough to show that I take entirely the same view with my noble and learned friend, and I have already, in the introductory observations which I made before reading his opinion, given the grounds upon which I join with the Court below, specifying and discri-

minating as they have between the two grounds which have been taken in this case. Your Lordships will observe, that differing from the Pursuer upon the first point, namely, the effect of the enumeration and specification, the learned Judges in the Court below were with the Pursuer upon the second point saying, "Throw that first point entirely out of view, and "there is still enough here by the force of these terms to satisfy "our minds." And it is upon that ground alone that my noble and learned friend, not here present, and myself, have come to the resolution of affirming this decree, and we wish to affirm it upon the same ground as that upon which it was pronounced below, which was upon the second point, and not the first. I agree therefore with my noble and learned friend, always adopting the wise and the convenient course of not adjudging unnecessarily, but only of adjudicating as much as is necessary to support the judgment in saying nothing whatever upon that question which was raised in the abstract, but as to which adjudication is quite unnecessary. My Lords, upon these grounds, and without going further into the case, I move your Lordships that this interlocutor appealed from be affirmed.

Mr. Bethell.—Will your Lordships pardon me for a moment before the question is put, for observing, that in the Court below this case was deemed a matter of so much nicety and difficulty, that they abstained from finding any expenses. It was the decision of six Judges to seven; and they expressed a desire that it should be determined by this House.

Lord Brougham.—I am quite aware of it. It is quite fit that you should mention it. My Lords, I quite agree with the learned Counsel at the Bar, that there is much to be said upon the point of expenses. I really think that we should do wrong if we were to take an opposite course from the Court below; and therefore, I shall not ask your Lordships in this case to give costs; but I say this without at all intending (and this should

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be most carefully guarded against, for it depends here upon the peculiar circumstances of this one individual case of Dewar *v.* Cleghorn), that it should be supposed that wherever there is any division in the Court below, there are to be no costs given here. That is never to be considered at all. It is not upon that ground alone that we do not give costs, but it is *totâ re perspectâ*, as the learned Judges say, under all the peculiar circumstances of a very peculiar case.

It is Ordered and Adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutor therein complained of, be, and the same is hereby affirmed.

THOMAS DEANS—DUNLOP and HOPE.