LORD PRESIDENT—In order to give effect to the argument of the reclaimer, we should have to restrict the right of this lady to a liferent. There is no middle course; it is either a fee or a liferent. And it would be very strange that this lady should be sole residuary legatee, and yet be restricted to a liferent, when there is no trust constituted by the testator. The thing is impracticable to work out. The bequest is to Charlotte Murray direct, and executors are named. If this lady had been of full age, the executors would have been bound, so soon as the residue was realised, to pay it over. That was their duty, and there is nothing in the will to restrain them. So long, no doubt, as this lady was under age, there were provisions for guardianship, but she is now long past that age. All conditions of that sort have flown off, and all that remains as a condition of her right is the clause of return. In these circumstances, the law is plain that the residuary legatee is fiar of the residue.

Agents for Mrs Stephen and husband—Hamilton & Kinnear, W.S.

Agents for Charlotte Murray—Wilson, Burn, & Gloag, W.S.

Friday, January 31.

HOWDEN (ROCHEID'S TRUSTEE) *v.* ROCHEID AND OTHERS.

Entail—1685, *c.* 22—*Prohibitory, irritant, and resolutive clauses—Facts and deeds done—Bankrupt.* Objections to validity of deed of entail, stated by trustee on sequestrated estate of former heir in possession, deceased, founded (1) on alleged defect in the resolutive clause, by reason of its not containing the words *restrictions and limitations;* and (2) on the alleged omission in the irritant clause of words nullifying written instruments made in contravention of the prohibitions of the entail, *repelled.*

Entail—Pro Indiviso *Right—Contraction of Debts.* Objections (1) that the subjects entailed were originally a *pro indiviso* right; and (2) that the prohibitory clause was defective in regard to the contraction of debt, *repelled* by Lord Ordinary on the authority of *Stewart* v. *Nicolson*, and *Arbuthnott*, and his judgment acquiesced in.

These were conjoined actions of declarator and declarator and adjudication at the instance of James Howden, C.A., trustee on the sequestrated estate of James Rocheid of Inverleith, in the county of Mid-Lothian, against Charles Henry Alexander Frederick Camillo Everhard James John Rocheid, heir of entail in possession of Inverleith and Darnchester, and the other heirs called in the deed of entail—the principal conclusion of the action being, to have it found and declared that the disposition and deed of entail of the said lands, executed in 1749 by Mrs Elizabeth Rocheid, "was not, during the possession of the bankrupt, the said James Rocheid, of the subjects contained therein, and is not now a valid and effectual tailzie in terms of the Act of the Parliament of Scotland, passed in the year 1685, chapter 22, entituled 'Act concerning Tailzies,' in regard to the prohibitions against alienation and contraction of debt, and alteration of the order of succession, but was, and is, invalid and ineffectual under the said Act in regard to all or some of the said prohibitions; or, at least, that under the said Act the said subjects were not held by the said James Rocheid under the fetters of a strict entail, but were fee-simple in his person, liable to his debts and deeds, and have been transferred to the pursuer as trustee foresaid, and now stand vested in him by force of the said sequestration, and act and warrant of confirmation in his favour freed from all limitations or entail fetters, for behoof of the creditors of the said James Rocheid."

The prohibitory clause provided that "it shall not be lawfull to nor in the power of the said Alexander Kinloch and the heirs whatsomever of his body, or of any other of the heirs succeeding to the said lands and estate above disponed, to alter, innovate, or change this present tailzie and settlement or yet the order of succession hereby prescribed, nor to do any other deed that may import or inferr any alteration, innovation, or change of the same directly nor indirectly; nor to sell, annalzie, or dispone either irredeemably or under reversion; nor yet to wadsett or burden with infeftments of annualrent or any other servitude or burden my lands and estate above written or any part thereof; nor to sett tacks nor rentalls of the same for any longer space than nineteen years or for the setter's lifetime and always without diminution of the rentall except where such diminution happens of necessity as when a sufficient tenant cannot be found to pay the whole rent, in which case the same is to be sett by publick roup to the highest offerer; nor yet to contract debts upon the said estate, nor even to committ treason (as God forbid); nor to do any other fact or deed of omission or commission, civil or criminal, directly or indirectly, in any sort whereby the said lands and estate hereby disponed or any part thereof may be affected, apprised, adjudged forfeited become escheat confiscat or any manner of way evicted from the said Alexander Kinloch and the heirs whatsomever of his body, or from the other heirs before specified succeeding to the said lands and others foresaid, or this present settlement and tailzie, or the succession to the said estate prejudged, hurt, or changed."

The irritant and resolutive clause provided "that if the said Alexander Kinloch or the heirs whatsomever descending of his body or the other heirs before specified and the descendants of their bodies succeeding to the said lands and estate hereby disponed, shall contraveen or fail to fulfil and obey and perform the several conditions and provisions above exprest, or any one of them, or shall act contrair to the said restrictions and limitations, or any of them; that then and in these or any of these cases not only such facts, deeds, debts, omissions, and commissions, done, contracted, neglected, or committed contrary hereto, with all that may follow thereupon shall be in themselves void, null, of no avail, force, strength, or effect, as if the same had never been done, contracted, neglected, or committed, in so far as concerns the lands and estate above written, which nor no part thereof shall be anyways affected, burdened, or hurt therewith in prejudice of the said Alexander Kinloch, and the heirs descending of his body, or any other of the heirs above specified, appointed to succeed by virtue of thir presents; but also the person or persons so contraveening or ffailzieing to fulfill the before written conditions and provisions, or any of them, shall for themselves only *ipso facto* amitt, lose, and tine their right and interest in my said lands and estate, and the samen shall become void and extinct, and the said lands and estate shall devolve upon and belong to the next heir of tailzie

who would succeed if the contraveener were naturally dead, albeit descending of the contraveener's own body; and it shall be lawful to such next heir to pursue and obtain declarators upon the contravention or ffailzieing to observe and fulfil any of the said provisions or conditions or obtain adjudications of my said lands and estate, or to obtain themselves served retoured infeft and seased therein as heir to the person who died last vest and seased in the same before the contraveener had right, or to use any other method which may be legall or formall at the time for establishing the right to the lands hereby disponed in their person, and that without respect to any alteration, innovation, or change made or to be made by the contraveener, and without the burden of any debts, deeds, omissions, or commissions of the said contraveener whatsomever which anyways in law may import or be interpret to import a contravention of the said clauses or one or other of them contained in this present tailzie, and the person so succeeding and all his or her subsequent heirs of tailzie shall be lyable to the same clauses, conditions, provisions, and irritancies."

The pursuers pleaded *inter alia*—2. "The subjects or right described in the deed of tailzie, and continued in the whole subsequent titles, being a mere *pro indiviso* right, there is no valid tailzie.

"3. The prohibitions and clauses irritant and resolutive of the deed of tailzie not being applicable, at least to the extent of a *pro indiviso* half thereof, to the specific lands allocated under the decrees of division to the deceased James Rocheid, and belonging to him at the time of his death, there was no valid tailzie of said lands, and the same were possessed by him in fee-simple, and were, and are, subject to his debts and deeds.

"4. As the deed of tailzie does not contain the statutory prohibition against contraction of debt, or any irritant or resolutive clause applicable to such a prohibition, the subjects or right described in the entail are open to the diligence of the creditors of the bankrupt.

"5. The prohibition in the tailzie against selling, alienating, or disponing is ineffectual, because it is not directed against the subjects or right intended to be entailed.

"6. The resolutive clause of the deed of tailzie is inoperative and invalid, because the heir taking upon a contravention by sale or alienation, cannot make up a title without representing the contravener.

"7. The irritant and resolutive clauses of the deed of tailzie not being insert in the instrument of resignation following thereon, and that instrument being a part of the investiture, the provisions of the tailzie are invalid and ineffectual."

The Lord Ordinary (Mure) repelled the defences, so far as stated against the pursuer's title to sue, and also a defence of *res judicata:* found that the entail was a valid and effectual entail under the provisions of the Act 1685, c. 22, sustained the defences on the merits, and assoilzied the defenders. On the merits of the case, his Lordship said, in a note—"On the merits of the action, the discussion before the Lord Ordinary related mainly to the objection to the irritant and resolutive clauses of the entail, which run very much into one another, based on the omission of the words 'or shall act contrair to the said restrictions and limitations' from the resolutive branch of the clause, and which is a point not free from difficulty; because, reading the clause by itself, it is so worded as to be calculated to lead to the inference that the words 'conditions and provisions' were used by the entailer in a different sense from the words 'restrictions and limitations,' and that, while the former were used as applicable only to things directed to be done, the latter were alone used with reference to things prohibited. But when the entail is examined as a whole, the Lord Ordinary does not think that the words 'conditions and provisions' can be held to be there used in such a limited sense. For neither in the prohibitory clause, nor indeed throughout the entail, are the expressions 'restrictions and limitations' to be met with except in the irritant clause, while in the prohibitory clause itself the three cardinal prohibitions against sale, contraction of debt, and alteration of the order of succession, are introduced as provisions: and as the expression 'conditions and provisions' are sufficient to cover the ordinary limitations and restrictions of an entail, and are, moreover, the only words used in the statute 1685 as descriptive of the statutory prohibitions, the Lord Ordinary has come to be of opinion that the resolutive clause, in the present case, is not open to objection, and that very much on the same grounds as those embodied in the judgment of the late Lord Anderson in the case of *Todd's Trustees* v. *Rocheid,* founded on by the defender, but which, as it was not proved to have been instituted for behoof of the general body of Mr Rocheid's creditors, cannot, it is thought, constitute a *res judicata* against the present action.

"The other objections raised by the pursuer to the entail, with the exception (1) of that founded on the fact that the subjects entailed were originally a *pro indiviso* right, and (2) that taken to the prohibitory clause as defective in regard to the contraction of debt, were not insisted on before the Lord Ordinary. And although these two objections were not given up it was not disputed that they were ruled by previous decisions in this Court. The Lord Ordinary has repelled the first of them in respect of the decision in the case of *Stewart* v. *Nicolson,* Dec. 2, 1859, and the other upon the authority of the case of *Arbuthnott,* 27th May 1865."

The pursuer reclaimed.

Solicitor-General (Millar) and Fraser for reclaimer, cited Duff on Feudal Conveyancing, section 260; *Graham,* 10 D. 399, 433, affd. 6 Bell's App., 447; Roxburgh and Lochbuie Entail, Sandford, p. 264; *Howden* v. *Fleming,* 3 Macph. 754, affd. 4 Macph. 41; *Lumsden,* 2 Bell's App. 115; *Ogilvie* v. *Airlie,* 2 Macq. 270; *Buchan* v. *Erskine,* 4 Bell's App. 38; *Hay* v. *Hay,* 13 D. 947; *Steel* v. *Speid,* 15 S. 618.

Lord Advocate (Gordon) and John Marshall for respondent, cited *Jamieson,* 15 D. 336; *Maxwell,* 22 D. 1341; *Maxwell,* 14 D. 537; *Howden* v. *Fleming, ut supra; Murray,* 2 Bell's App. 100, 121; *Buchan* v. *Erskine,* 4 Bell's App. 43.

At advising—

Lord President—In this case the Lord Ordinary has repelled the defences in so far as they are pleaded against the pursuer's right and title to insist in the present action, and also the defence of *res judicata.* The defender has not reclaimed against that part of the interlocutor, and we are therefore not called on to consider it. There is another very important question on which we have had no argument, although it is necessarily raised by this reclaiming note. I mean the subject of the second and third pleas [*reads*]. The Lord Ordinary

s of opinion that these pleas are overruled by the case of *Stewart* v. *Nicolson*, 22 D. 72, and the pursuer appears to be of the same opinion, for he has not insisted on them. I am anxious that this should be quite understood, for I have not formed any opinion on the very important question raised by these pleas, and which seems to me to be a question of very great difficulty. The judgment in the case of *Nicolson* was not unanimous, and the Court as at present constituted has had no opportunity of considering that judgment. But we must take the case as presented by the parties, the pursuer admitting that he was bound by the case of *Nicolson*. The next objection to the entail was that the prohibitory clause is defective in not effectually prohibiting the contraction of debt. That also the Lord Ordinary held to be decided by the authority of *Arbuthnott* (3 Macph. 835), and I entirely agree with the Lord Ordinary that the judgment there is fairly applicable here; and indeed there is little doubt of the matter on the merits. Another objection to the prohibitory clause was, as I understand, not stated to the Lord Ordinary, but was argued to us, that the words are not effectual to prohibit sale, but the objection seems to me so untenable that I s all not waste time by dealing with it. The clause is as good in that respect as in any entail I have seen. But there is an objection to the irritant and resolutive clause. The resolutive clause is said to be deficient because it does not apply to all the cases contemplated by the irritant clause, or to all the prohibitions in the prohibitory clause. The ground of this objection is, that the irritant clause declares that "if any heir shall contravene, or fail to fulfil and obey and perform the several conditions and provisions above expressed, or any one of them, or shall act contrair to the said restrictions and limitations or any of them, then and in these or any of these cases not only such facts, deeds, debts, omissions, and commissions done, contracted, neglected, or committed contrary hereto, with all that may follow thereupon, shall be in themselves null," &c.; whereas the resolutive clause is thus expressed—"But also the person or persons so contravening or failing to fulfil the before-written conditions and provisions, or any of them, shall for themselves only, *ipso facto*, amit, lose, and tine their right and interest in my said lands," &c. It is contended that there are certain cardinal prohibitions which are not effectually covered by the words *conditions and provisions*, and can only be covered by the words *restrictions and limitations*, according to the true construction of these words as occurring in this deed of entail. It is hardly necessary to say that it is only in consequence of the contrast there is between this and the other clause that the objection has any plausibility. But it is essential that it should be shown that, according to the phraseology of this entail, there are certain prohibitions which are called conditions and provisions, and others which are called restrictions and limitations, so that the entailer cannot be allowed, by using one term only, to cover the whole. But how does this stand in fact? Have we any means of defining what are the precise meanings the entailer attached to these different terms, conditions, provisions, restrictions, and limitations? In so far as the word *restrictions* is concerned, it occurs only once beyond this place in the irritant clause, and that is in the part of the deed which refers to the fetters to be inserted in all the titles, where this expression is used, hall cause insert in the instruments of resignation, . . . and haill other conveyances of my said lands and estate, all the provisions, conditions, declarations, restrictions, and irritances contained in the present tailzie." The word *limitations* does not occur in any other part of the entail. There is only one other part of the deed in which there is anything like a multiplication of words naturally of the same meaning such as here, which is in the end of the resolutive clause, where it is said that a person succeeding on forfeiture by contravention "shall be liable to the same clauses, conditions, provisions, and irritancies." It is only necessary to add that the expression *restrictions and limitations* occurs nowhere but in the irritant clause. Keeping these observations in view, it seems impossible to sustain this objection. The whole words seem to me to be convertible terms, and to mean the same thing; and, therefore, whether the entailer uses both or only one expression, the effect is the same. I therefore think the Lord Ordinary's judgment is sound, and I have greater confidence in arriving at that conclusion for this reason, that in a previous judgment in the same case, Lord Colonsay took the same view.

The only other objection is on the irritant clause, and this requires a good deal of attention. The irritant clause starts with this introduction, "that if any heir shall contravene or fail to fulfil the several conditions and provisions above expressed, or any one of them, or shall act contrair to the said restrictions and limitations, or any of them, then and in these or any of these cases, not only such facts, deeds, debts, omissions, and commissions, done, contracted, neglected, or committed contrary hereto, with all that may follow thereupon," &c. It is said that there are no words here nullifying written instruments made in contravention of the prohibitions of the entail, but only what fall under debts contracted, and therefore the prohibition is not fenced with an irritant clause. This depends on the interpretation of the words *facts and deeds done*. It is obvious that if we added to the word *done* the word *made* or *granted*, there would be no room for the objection. But it is said that while deeds *done or granted*, or *done or made*, would have cured the defect, in this deed as it stands the only facts and deeds which are irritated are facts and deeds of the nature of acts committed, and not of instruments executed. This is an important question, and it would be still more important if it were new; but it is one of those questions of construction which has occurred often, where it has been held that the words we are dealing with are liable to different interpretations, according to the company in which they are found. *Deeds done* may, in certain instruments and certain places, mean only acts committed, but it is just as clear that in other deeds and places they may mean written instruments executed, or may mean both. There is nothing in the words themselves that necessarily limits them to mere acts committed. Taking the clause by itself, it seems to be the natural meaning of the clause that any kind of deed, whether act or written instrument, that is done by the heir of entail in contravention, is to be declared null. And when we consider whether there are any antecedents to this expression to limit its application, we find none. There is one case which I think it right to mention, because it is so very nearly in point as almost to be conclusive, the case of *Lockkart*, 20th May 1841. (His Lordship then referred to that case, more especially for the opinion of Lord Moncreiff.) I am for adhering to the Lord Ordinary's interlocutor.

The other judges concurred.

Agents for Pursuer—Scott, Moncrieff, & Dalgety, W.S.

Agents for Defender—J. & F. Anderson, W.S.

Friday, January 31.

SECOND DIVISION.

M'CUBBIN'S EXECUTORS *v.* TAIT.

Donation—Deposit-receipt—Fraud—Facility and Circumvention. An old man having deposited in bank two sums of money, one in name of himself and his housekeeper, payable to either or the survivor of them, and the other in name of himself, for behoof of his housekeeper; and he having delivered to her both deposit-receipts, and allowed the money to remain so deposited until his death, *held*, in a question with his executors, that a donation of both sums of money had been effectually constituted; and a challenge of the donation, on allegations of fraud and facility and circumvention, held, after proof, not to be maintainable.

Mr Ebenezer Stott Black, writer in Wigtown, was appointed *curator bonis* to John M'Cubbin, sometime draper in Newton-Stewart, on 13th March 1866. Mr M'Cubbin was then possessed of about £3000, which was deposited in bank on deposit-receipts. The defender, who was his housekeeper, was found by the *curator bonis* to be in possession of two deposit-receipts, dated 27th October 1865 and 7th December 1865 respectively, one for a sum of £295, and the other for a sum of £200. These receipts were in the following terms:—

"National Bank of Scotland's Office,
"Newton-Stewart, 27th Oct. 1865.

"Received from Mr John M'Cubbin and Margaret Tait, both Newton-Stewart, two hundred and ninety-five pounds sterling, to their credit in deposit-receipt with the National Bank of Scotland, payable to either or survivor of them.

"By order of the Board of Directors,
"ALEXANDER WAUGH, agent."

"Clydesdale Banking Company,
"Newton-Stewart, 7th Dec. 1865.

"Received from Mr John M'Cubbin, for behoof of Margaret Tait, his housekeeper, N.-Stewart, two hundred pounds sterling, which is placed to his credit with the Clydesdale Banking Company.

"THOMAS KERR, agent."

The *curator bonis*, on 7th August 1866, raised this action against the defender concluding to have her ordained to deliver up to him the said two deposit-receipts, and for declarator that the sums therein contained were the sole and exclusive property of John M'Cubbin. He averred on record:—

"Mr M'Cubbin is now upwards of seventy-eight years of age. He has been for several years labouring under mental and bodily weakness and imbecility, which render him quite incapable of managing his own affairs, or for the transaction of any kind of business. The defender has for several years lived alone with him as his housekeeper. From his mental and bodily condition she has had the entire management of him and of his affairs, and has acquired great influence over him. She has had access to all his repositories, and to all his writings and documents of every sort, and, in particular, to the two deposit-receipts which she now refuses to give up.

"Mr M'Cubbin did not give to the defender the deposit-receipts in question, or either of them, but, having access as aforesaid to his writings and documents, she has wrongfully taken possession thereof, and now refuses to give them up. Mr M'Cubbin did not, by taking the said deposit-receipts in the terms in which they bear to have been granted, place beyond his own control the money therein contained, or any part thereof. He did not thereby give to the defender any vested interest in the said deposit-receipts, or in the money therein contained.

"Mr M'Cubbin was—at the dates when the said deposit-receipts were respectively granted, and has ever since continued—incapable, from mental incapacity, of transacting any kind of business, or of making any donation of the said receipts or of their contents; or otherwise, he was weak and facile in mind and easily imposed upon, and the defender, taking advantage of her position, and the great influence she had acquired over him, did, by fraud and circumvention, or one or other of them, induce him to take the deposit-receipts in question, in the terms in which they respectively bear to be granted, and did induce him to give them to her."

These averments were denied by the defender, who made the following statement:—"The deposit-receipts, dated respectively 27th October and 7th December 1865, were obtained by Mr M'Cubbin for the defender's behoof, and were delivered by him to her while he was in a sound and disposing mind, in consideration of his attachment to and regard for her, which he constantly expressed to all his friends and acquaintances, and in consideration of her having, in compliance with his earnest request, engaged to remain with and take care of and attend to him from the term of Whitsunday 1863 to the time of his death, which the defender did."

Mr M'Cubbin died on 5th September 1866, and thereupon the executors named in his will sisted themselves as pursuers of this action.

The LORD ORDINARY (KINLOCH), after a proof taken under the Evidence Act, pronounced the following interlocutor and note:—

"*Edinburgh, 22d February* 1867.—The Lord Ordinary, having heard parties' procurators, and made avizandum, and considered the process, proof, and productions—Finds it proved, 1*st*, That on 13th March 1865 the late John M'Cubbin deposited the sum of £295 in the National Bank, at their office in Newton-Stewart, on a deposit-receipt bearing the sum to have been received from him and the defender Margaret Tait, and to be payable to either, or the survivor; 2*d*, That on 27th October 1865 this receipt was, by the authority of the said John M'Cubbin and Margaret Tait, renewed by another for the same amount, taken in the same terms; 3*d*, That on 7th December 1865, a sum of £200 was deposited by the said John M'Cubbin in the Clydesdale Bank, at their office in Newton-Stewart, on a deposit-receipt taken by authority of the said John M'Cubbin in name of him, the said John M'Cubbin, for behoof of the defender Margaret Tait: Finds it not proved that at any of the dates when the said deposit-receipts were taken, the said John M'Cubbin was in such a mental condition as to render him incapable of authorising their being taken in the terms which they respectively bear: Further, finds it not proved that the said receipts were taken in the terms borne by them through fraud or circumvention on the part of the said defender; assoilzies the defender from the