sent, for whom I so justly entertain the highest respect. It coincides also with that of a noble and learned person now near me, (Lord Rosslyn*) to whom I am much indebted for his assistance in enabling me to discharge the duty that I owe to my country."

It was ordered and adjudged that the case be remitted back to the Court of Session in Scotland, to review the interlocutors complained of with respect to the interest of the town of Dumbarton to insist in the present action, and to proceed at the same time to consider and pronounce upon the title and interest of the superior heritors, and also generally to review that part of the several interlocutors which relates to the right of fishing claimed by Sir James Colquhoun, and more especially, as far as these interlocutors connect the right of fishing, as claimed by him, with his having or not having, a right of cruive fishing.†

For the Appellant, *Ro. Dundas, W. Grant, William Robertson.*

For the Respondents, *W. Adam, J. Campbell.*

[M. 15539.]

MRS. ANN BRUCE of Arnot, and THOMAS BRUCE, Esq., her Husband, } *Appellants;*

JAMES BRUCE of Tillycoultry, and CHARLES SELKRIG, Accountant in Edinburgh, } *Respondents.*

House of Lords, 18th June 1801.

ENTAIL—DEFECTIVE RESOLUTIVE CLAUSE.— The entail of Tillycoultry contained prohibitions against selling the estate, or contracting debt, or breaking or innovating the tailzie in any way. This was followed by an irritant clause, declaring that *all which deeds* shall be null and void. Then followed this resolutive clause declaring that the said heirs of tailzie who might "contravene the said

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* Lord Loughborough, on resigning the seals, was elevated in the peerage by the title of Earl of Rosslyn.

† Under this remit the Court of Session found, (6th July 1804, Mor 14284,) that the town of Dumbarton had an interest to insist in the action; and also sustained the title of the other heritors. They also found, that the mode of fishing by means of stented nets and stobs, stretching across the mouth of the river, adopted by the appellant, was illegal.

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" clauses irritant, *or any of them*, adding a special enumeration of these, without enumerating sales: Held that the resolutive clause in this entail was not sufficient to protect against the sale of the estate. Affirmed in the House of Lords.

The question in this case was, whether, under the entail of the estate of Tillicoultry, the estate was sufficiently protected against sales, by the prohibitive, irritant, and resolutive clauses therein.

The family estate of Kinross, being encumbered by debt, was sold by act of parliament, and the balance of the price, after paying the debts, ordered to be laid out in the purchase of other lands, to be vested in the same series of heirs, and under the same prohibitions and irritant and resolutive clauses as were contained in the entail of the estate of Kinross (1683). With the balance of the price the estate of Tillycoultry was purchased: and the disposition or deed of tailzie contained precisely the same prohibitory, irritant and resolutive clauses, as were contained in the entail of Kinross. These were as follow: Prohibiting the heirs of tailzie, " or any of them, to sell, annailzie, dispone, dilapidate, or " put away the aforesaid lands and estate, nor any part or " portion thereof, nor to break, innovate, nor infringe this " present tailzie, nor contract or ontake debts, nor to do any " other fact nor deed, civil or criminal, whereby the said " lands and estate may be anywise apprised, adjudged, " evicted, or forfeited from them, or anywise affected in " prejudice and defraud of the subsequent heirs of tailzie " above mentioned, successive according to the order and " substitution above written; neither shall it be leisome nor " lawful to the said James Bruce, or the other heirs of tail- " zie and provision foresaid, to suffer and permit the said " lands and estate, or any part thereof, to be evicted, ad- " judged, apprised, or any otherwise evicted, for any debts " or deeds contracted or done by them." Then follows the

Irritant clause.

irritant clause, " *all which deeds* shall not only be declared " void and null *ipso facto* by way of exception or reply,

Resolutive clause.

" without declaration, or in so far as the same may burden " and affect the foresaid estate; *but also it is hereby provid-* " *ed and declared*, that the said James Bruce, and the other " heirs of tailzie who shall contravene, and incur the said " clauses irritant, or any of them, either by not assuming the " name and arms of Bruce, &c., or who shall break or inno- " vate the said tailzie, or contract debts, or commit any " other fact or deed, whereby the said tailzied lands and

" estate may be anywise evicted or affected in manner fore-
" said, or who shall suffer and permit the said lands and
" estate, or any part thereof, to be evicted, adjudged, or
" apprised, or anywise affected for the debts or deeds con-
" tracted or done by them before their succession, or by any
" of their predecessors, whom they shall represent, that
" then, and in any of the said cases, the person or persons
" so contravening as said is, shall forefault, amit, and tyne
" their right of succession of the aforesaid lands and estate,
" and all infeftment or pretended rights thereof in their
" persons shall, from thenceforth, become extinct, void, and
" null *ipso facto.*"

The respondent, James Bruce, succeeded to the estate, as heir of entail, and was infeft in 1796, under the provisions and conditions, and irritant and resolutive clauses contained in the entail; but thereafter, finding himself embarrassed, he sold part of the estate of Tillycoultry, conceiving that he had power to do so, because the resolutive clause in the entail did not protect against sales. The purchaser brought a suspension of a charge for the price; and the respondent, on his part, brought a declarator, the conclusions of which sought it to be declared that he " had undoubted right to
" make the said sale, and to execute the foresaid disposi-
" tions, and that he was not prevented from so doing by the
" foresaid deed of entail, or by any of the titles upon which
" he possesses the foresaid lands; and that the said disposi-
" tion executed by him, with consent foresaid, is an effectual
" disposition to all intents and purposes."

In the debate, he further maintained that the limitations of the entail were not to be extended by implication or construction, beyond the plain meaning of the words; and that though an entail contained the strongest prohibitory clauses against selling or contracting debts, with irritancies of all acts of contravention, yet that those prohibitions and irritancies would have no effect against the purchasers for valuable considerations, or *bona fide* creditors, unless they were accompanied with apt and corresponding resolutive clauses, directed expressly against sales—that such was not the case here, and that the terms, " *all such deeds*" or " acts," could not be construed to mean sales. It was answered, that the deed of entail in question, contained such prohibitory, irritant, and resolutive clauses as the statute required. The resolutive clause was, *de facto*, conceived in terms and words sufficiently accurate and effectual to resolve and an-

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nul the right of the heir in possession who might attempt to sell; and this being the case, and the act of parliament not having prescribed any particular form of words in which these clauses were to be expressed; all that was necessary was, that these be intelligible, and apply to all the acts prohibited. In this case, the terms "all which deeds" and "acts and deeds," used in the resolutive and irritant clauses, were sufficiently broad to comprehend and fence the prohibition against sales.

Upon the report of Lord Craig, the Court pronounced
June 26, 1798. this interlocutor, "sustains the defences, assoilzies the de-
"fenders, and decern."

On reclaiming petition, the Court pronounced this inter-
Jan. 14, 1799. locutor: "The Lords having advised the petition, and ad-
"ditional petition, with the answers thereto, in respect the
"resolutive clause in the entail does not apply to a sale of
"the estate, alter the interlocutor reclaimed against, and
"find the disposition libelled on valid and effectual to the
"purchaser, and find the letters orderly proceeded, and de-
"cern and declare accordingly."

Against this interlocutor the present appeal was brought.

Pleaded for the Appellants.—The act of Parliament, which requires that entails should contain clauses, *prohibitory*, *irritant*, and *resolutive*, prescribes no certain form of words in which the resolutive clause should be conceived. All that is necessary is, that the resolutive clause be so expressed, that, upon a rational construction of it, its obvious meaning may be found to apply to the prohibition against sales. In the entail in question, the prohibitory clause minutely specifies various acts which are prohibited, namely, selling, alienating, disponing, dilapidating, or putting away the foresaid lands and estates, or any part or portion thereof. The irritant clause, conceived in general terms, is admitted by the respondent to refer to every act of contravention prohibited by the preceding prohibitory clause. The subsequent resolutive clause "provides and declares that the said "James Bruce, and the other heirs of tailzie who shall con-
"travene and incur the said clauses irritant, or any of them,
"that then, and in any of the said cases, the person or per-
"sons so contravening, as said is, shall forefault, amit, or
"tyne the right of succession of the foresaid lands, and all
"infeftments, or pretended rights thereof, in their persons,
"shall from henceforth become extinct, void and null, *ipso*
"*facto.*" The reference in this resolutive clause to the ir-

ritant clause, couples it with the clause prohibitive, and makes the whole complete. That the entailer has, from an over anxiety, encumbered this resolutive clause with the enumeration of some of the prohibited clauses is undoubted; but this was unnecessary, and must be viewed as mere redundancy, and ought to be held as *pro non scriptis;* for, without these words, the entailer's intention is clear and explicit, that the right of the heir of entail should be resolved, and cease and determine, on his contravening any of the matters specified in the prohibitory clause.

Pleaded for the Respondents.—The limitations of an entail are not to be extended by reference or implication beyond what is expressed in the entail itself. This being the rule of law applicable to the construction of such deeds, it follows that this principle must operate, whether the question be one with the heir, or, as in this case, one with third parties. Where, therefore, there are limitations or prohibitions against selling and contracting debt, in order to make these effectual against creditors or purchasers, it is necessary that there be a resolutive clause expressly mentioning sales, and contracting debt, as a voidance of the right of the heir so selling or contracting debt; and unless the irritant and resolutive clauses bear a special reference to sales and contracting of debt, as mentioned in the prohibitory clause, the entail will not, in terms of act 1685, protect the estate from either the one or the other. In the present case, there is no sufficient resolutive or irritant clause, which points against sales; and no terms which, by force of construction, can be held to apply to such. And, as all entails must be strictly interpreted, and no restriction is to be imposed by implication, and as apt irritant and resolutive clauses have not been used in terms of the statute, the estate is not protected against sales.

After hearing counsel,

THE LORD CHANCELLOR ELDON said,—

"MY Lords,

"Though it may be unnecessary to trouble you with my observations in this case, as, in my opinion, the judgment ought to be affirmed, I deem it expedient, however, to state the grounds which weigh with my mind, in proposing the judgment which I mean to offer to the House.

"The single question which has been agitated, arises upon the effect of the prohibitive, irritant, and resolutive clauses of an entail, and whether *these* prevented the estate from being disposed of? In fact,

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the estate has been sold; but it was the purpose of the action to establish the validity of the sale.—(Here his Lordship read the prohibitory, irritant, and resolutive clauses of the entail.)—The prohibitive clause is here undoubtedly broad enough. No argument has been raised on the irritant clause. The whole rests upon the resolutive clause. I must say, that under such a settlement, containing such clauses, no person, other than a Scotch lawyer, could have any idea that the estate was not sufficiently tied up from a sale. The parties interested were certainly of this opinion themselves at one period, when they applied to the Legislature for an act of Parliament relative to this entailed estate.

"It is now contended, from the authority of reported cases, that selling the estate is not a breach of the resolutive clause. It is truly said, that a prohibitive clause by itself will not do; that an irritant clause will not do; and that, if the resolutive clause be not broad enough, we cannot go to the intent and meaning of the parties.

"What reason induced the Court to go so far as they have done in those decided cases, I am at a loss to know. The whole class of cases which I allude to, appear to me to be founded in some politic notions of the judges, that the law of the land was of a mischievous tendency, and that, by their judicial proceedings, they ought to meet what they deemed the bad policy of the law.

"I own, that the judgments given in the cases of Duntreath, and other cases relative to entails, appear to me to shock every principle of common sense. In this country also, a mode was devised by the judges, of getting rid of entails by petitions, recoveries, &c. It would have been more principled and wholesome, if the judges in both countries had applied to the Legislature, when they deemed the law required amendment, than thus to have repealed it by judgments in Courts. It is too late now to enter into those cases; the security of much landed property must necessarily lead your Lordships to act on the principles recognised by the Courts, and repeatedly adjudged in your Lordships' House.

"The question at present before your Lordships distinctly comes to this point; Is this entail so conceived, that the right of the heir shall immediately resolve on his selling the estate? Looking at the deed, no person can say that he does not, in his conscience, believe that a sale was intended to be excluded in the resolutive clause; but the purpose has been rendered of no effect, by cramming the clause with a long string of unnecessary words, and entering into a detail, where every thing meant was not specially mentioned.

"If the resolutive clause had stopped in its enumeration, after the words, "Contravene and incur the said clauses, irritant, or any of them," there would have been no doubt in the present case. But it goes on to specify, by doing any of the following acts, relative to the name, arms, marrying certain persons, or not accepting the benefit

of the entail; it then changes the phrase, or "who shall break or innovate," &c.; or do any act or deed by which the estate may be evicted or affected, &c.

"It may seem odd to make it a question, Whether selling an estate be an act by which it is evicted or affected; yet, in terms of the decided cases, which I have alluded to, and even according to the grammatical construction of the present instrument, the question must be answered in the negative. The prohibitive clause here treats the words, *breaking* the entail, and affecting the estates as different and distinct from selling and disponing it. When these words, break and affect, occur again in the resolutive clause, we must take them in the same way as in the prohibitive clause.

"But the matter does not rest here. According to the decided cases, you cannot express or include a sale by these words. We are therefore reduced to this, that while we have a full conviction in our mind, that the granter of the deed meant to prevent a sale, yet we cannot act upon this; because the Court of Session has, with your consent, perhaps with your Lordships' directions, decided many cases another way. And the security of real estates in Scotland would be cut down, if you were now to refuse to adopt the doctrine, that a resolutive clause is not good on such general words.

"Therefore, when I move your Lordships to affirm the interlocutors complained of, I shall give my vote as *not content*, protesting that, as a judge, I never could have concurred in the former decisions originally when they were pronounced.

It was accordingly

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellants, *R. Dundas, W. Grant.*
For Respondents, *W. Adam, John Clerk, Wm. Clark.*

COLIN MACDONALD of Boisdale, . . *Appellant;*

RANALD GEORGE MACDONALD of Clanranald, Esq., and his Tutors and Curators, and his Tenant in Kilphedar, . . . } *Respondents.*

House of Lords, 22d June 1801.

SERVITUDE OF SEA-WARE—IMMEMORIAL USAGE—PRESCRIPTIVE TITLE.—An action of declarator having been raised, to have it found that the appellant had acquired a servitude of taking sea-ware from a neighbouring farm, the lands of which extended to the sea shore, on which the sea-ware was cast, and being claimed