the power which they appear to have exercised, and whether they have exercised a sound discretion by making this interlocutor; by which they have in fact done no prejudice to the appellant; for they have merely directed the cause to go back to the Lord Ordinary, to be discussed before him, not pronouncing on the merits of the case, but giving to the Lord Ordinary an opportunity of considering that, which he shews by his interlocutor of the 26th of November ought to be further considered, whether the grounds stated in the Court of Session were not sufficient to satisfy them in pronouncing the interlocutors they have pronounced. It appears to me that they, having the power, (which I think, from the reasons I have stated, they had), sufficient grounds existed in this case for their pronouncing this interlocutor, and for remitting the matter to the consideration of the very learned Ordinary. Under these circumstances, it does appear to me your Lordships ought to affirm this interlocutor; and I cannot help thinking this is, under the circumstances of the case, a very unnecessary appeal. No injustice is done to this appellant, and there is no ground for her questioning the regularity of this proceeding. And thinking there is no ground for questioning the regularity of these proceedings—and seeing, as I do, no injustice to the appellant in what was done, even if it had been irregular,—though undoubtedly, if she had any thing to complain of, she had a right to come before your Lordships to complain of that irregularity,—I must move your Lordships to affirm this interlocutor, with L. 50 costs. June 8. 1825.

Authority quoted.—Keith *v.* Grinton, July 11. 1804, (12,021.)

J. BUTT—J. RICHARDSON,—Solicitors.

J. T. and A. DOUGLAS and Company, Appellants. No. 36.

JAMES GLASSFORD, Esq. Respondent.

Entail—Implied Revocation.—A party having entailed an estate to himself 'in liferent, 'and to Henry, my eldest son now in life, in fee, and the heirs-male of his body,' whom failing, a series of substitutes, under prohibitory, irritant, and resolutive clauses, by the two latter of which he declared, that 'in case the said Henry, or any 'of the heirs of taillie,' shall do so and so, and particularly contract debt, 'then, 'and in every such case, not only shall all and every one of such acts and deeds be 'null and void, but also each and every heir or person contravening shall forfeit;' and having reserved a power to alter, and a few days thereafter executed a trust-deed in favour of Henry and others for payment of debts, so as to relieve the entailed estate, and granted power to them to borrow money, so as to carry on certain mercantile concerns in which he was engaged;—Held, (affirming the judgment of the Court of Session), 1. That Henry was included under the resolutive clause; and, 2. That the trust-deed did not revoke the prohibition in the entail against contracting debt.

June 10. 1825.

1st Division.
Lord Alloway.

THE late John Glassford, merchant in Glasgow, who was partner in several extensive mercantile concerns, acquired the estate of Dougalston by purchase, and other landed properties in Scotland of considerable value. He was married, and had several children; and being desirous to entail the estate of Dougalston, and to set aside his other subjects for payment of his debts, and provisions to his children, he executed a deed of entail on the 6th of August 1783, and, on the 15th, a trust-disposition and deed of settlement. By the entail, he disponed the estate of Dougalston 'to myself in liferent, and to Henry 'Glassford, my eldest son now in life, in fee, and the heirs-male 'of his body; whom failing, to my other heirs of taillie and pro-'vision after named and described; in the order of substitution 'underwritten.' After a clause of substitution, by which he conveyed the estate 'to myself in liferent, and to the said Henry 'Glassford, my son, in fee, and the heirs-male of his body, 'whom failing, to James Glassford, his second son,' and then to his daughters, he introduced the following prohibitory, irritant, and resolutive clauses:—'That it shall not be lawful to, nor in 'the power of the said Henry Glassford, or any of the heirs of 'taillie and provision substituted to him, as before-written, to 'alter, innovate, or change, or to do or grant any act or deed, 'which may have any effect, directly or indirectly, to alter, in-'novate, or change this present taillie, and the order of succes-'sion hereby established or to be established, by any nomination 'or other writ relative hereunto, which I may hereafter make 'and execute, or any part thereof; nor to sell, wadset, or dispone 'the said lands and others, or any part or portion thereof; nor 'to grant rights of annuity or annualrent payable forth of the 'said lands and others, or any security upon the same, or any 'part thereof, redeemable or irredeemable; nor to contract 'debts,' &c. 'And provided also, as it is hereby expressly 'provided and declared, that in case the said Henry Glass-'ford, or any of the heirs of taillie and provision substituted 'to him as before-written, shall fail or neglect to observe and 'fulfil any one or more of the conditions before specified, or shall 'do or act contrary to, or contravene any one or more of the 'limitations and prohibitions before-written, then, and in every 'such case, not only shall all and every one of such acts and 'deeds, with all that shall happen or be competent to follow 'thereupon, or upon the failure or neglect to observe and fulfil 'any of the foresaid conditions or provisions, be, as they hereby 'are declared to be, funditus void and null, and of no force,

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'strength, or effect whatever, in the same manner as if no such 'failure or neglect had ever happened, and as if no such acts or 'deeds had ever been done or granted; but also, each and every heir 'or person so contravening, or acting contrary to the said limita-'tions and prohibitions, or any of them, or failing or neglecting 'to fulfil the said conditions and provisions, or any of them, 'shall, for him or herself alone, immediately on such contraven-'tion, failure, or neglect, forfeit, amit, and lose all right and title 'which he or she previously had, or has, or can claim or pretend 'to the said lands and others, or any part thereof, and the same 'shall eo ipso and immediately devolve upon and belong to the 'next heir of taillie existing at the time who shall prosecute and 'declare such irritancy, albeit descended of the failzier or con-'travener's own body.'

The irritant and resolutive clauses thus ran into each other, the latter commencing at the words, 'then, and in every such case.' In almost all the other clauses, Henry Glassford was introduced nominatim, the words being, 'that the said Henry Glassford, and 'the whole other heirs of taillie and provision,' shall be obliged to do so and so. In the conclusion of the deed, Mr Glassford reserved to himself 'full power and liberty, at any time in my 'life, and even on deathbed, to cancel, revoke, burden, qualify, 'explain, or in any respect to alter, innovate, or change these 'presents, or any part thereof, at my pleasure.'

The trust-deed proceeded, inter alia, on the narrative, 'that I did, on the 6th of 'August 1783, execute a deed of taillie, settling 'my lands and estate of Dougalston, and others therein mentioned, 'on the said Henry Glassford, my son, and other heirs of taillie 'and provision substituted to him;' and therefore he disponed in favour of his son Henry, and certain other persons in trust, his whole other estates, heritable and moveable, but that 'under the 'exception of the said lands and estate of Dougalston, and others 'specifically described in the deed of taillie.' Among other subjects conveyed to them, were 'his shares and concerns in trades and 'manufactures,' with the exception of those in two companies, which he on the same day assigned to his son Henry. Power was given to the trustees to name factors 'to ingather, collect, 'recover, and turn into cash, the moveable and personal estates 'and subjects herein disponed;' and they were appointed thence to pay his whole debts, 'so as to relieve my taillied lands and 'estate, and other subjects specially destinated, thereof;' and to make payment to his other children of certain provisions 'at and 'against the expiration of one year, or two years at farthest,

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'after my decease:' recommending to his children to postpone, if necessary, insisting for payment of the principal sum of their said provision 'till the expiration of one or two years after my 'decease, in order my said trustees may have time to recover the 'same from the said trust-funds.' 'And, lastly, my said dispo- 'nees upon trust shall be bound and obliged to account for; and 'convey the residue and remainder of the premises and proceeds 'thereof, to and in favour of the said Henry Glassford my son; and 'failing him, to and in favour of the heir of taillie having right 'at the time to my lands and estate of Dougalston and others 'contained in the said deed of taillie.' Then followed this clause, of which the part included within parentheses was written on the margin:—'And for the better enabling the said trust- 'disponees to execute this trust, I hereby specially empower 'them, or their quorum, (if they judge it expedient, and to pre- 'vent loss by the premature winding up of any concerns wherein 'I am interested, and where the shares of deceasing partners do 'not fall to be paid out according to the preceding balance, to 'concur with the other partners in continuing the said concerns, 'and borrowing money or other measures necessary for that pur- 'pose, until the said concerns be properly winded up for the 'behoof of all concerned).' 'And further, I hereby specially em- 'power them, or their quorum, to compromise or submit to 'arbitration all disputed claims,' &c. He then declared, that the provisions thereby made, and the conveyance by the deed of entail, should be in full satisfaction to his children of all claims against him, legal or conventional.*

On the 27th of August of the same year (1783) Mr Glassford died; at which time his son Henry was in minority. The entail was recorded on the 15th November thereafter, under which titles were made up in favour of Henry; and the trustees accepted and entered into the possession and management of the trust estate. They found it expedient to continue several of the concerns in which Mr Glassford had been engaged, and to borrow money for that purpose, for which they granted their personal obligations. In 1790 they executed a commission and factory in favour of Henry, for the management of the trust estate; and accordingly he thenceforth took the whole charge of it. He embarked as a private individual in extensive mercantile specu-

* It was stated by the respondent, that both the deed of entail and the trust-disposition were revised by Sir Ilay Campbell, Mr Rolland, and Mr Blair, who were then at the Bar.

lations, entirely unconnected with the trust estate, which, it was not disputed, was quite sufficient to pay all the claims against it. In the course of his business as a merchant, he became indebted to the appellants, Douglas and Company, merchants in Glasgow, in L. 14,083. 18s. 7d., for which he granted bills, and in 1819 he died insolvent. He was succeeded by his only brother, Mr James Glassford, who made up titles to the estate of Dougalston, in virtue of the entail, cum beneficio inventarii. Thereafter the appellants brought an action before the Court of Session against the respondent, in which, after setting forth that 'Henry Glassford, Esq. of Dougalston, now de-'ceased, was justly addebted, resting and owing to the pursuers, 'the principal sum of L. 14,083. 18s. 7d.' conform to bills on which they libelled, that he stood heritably infeft, at the time of his death, in the estate of Dougalston, to which the respondent had made up titles, they concluded, that 'therefore the said 'James Glassford, as heir served and retoured to the said 'Henry Glassford, or as otherwise representing his said bro-'ther on one or other of the passive titles known in law, 'ought and should be decerned and ordained, by decree and 'sentence of the Lords of our Council and Session, to make pay-'ment to the pursuers of the aforesaid principal sum, &c.; at 'least it ought and should be found and declared, by decree and 'sentence in manner foresaid, that the lands and others before 'described, wherein the said Henry Glassford stood infeft and 'seized at the period of his death, were affectable by the dili-'gence of the law for payment of his just and lawful debts; and 'it being so found and declared, the said pursuers ought to have 'decreet and sentence of our said Lords against the said James 'Glassford, defender, secundum vires inventarii, to the effect 'that they may have process of adjudication and others of the 'law competent directed and led at their instance against the 'said lands and estate before described, and others, in which the 'said Henry Glassford died infeft, or which belonged to him, for 'payment and satisfaction to them of the aforesaid principal 'sums and interest thereof, as aforesaid.' To this action the respondent gave in these defences:—'The late Mr Henry 'Glassford took and held the estate of Dougalston only under a 'strict entail, with clauses prohibitory, irritant, and resolutive, 'particularly applicable to the contraction of debt. The de-'fender succeeded and made up titles to the said estate under 'the said entail only, and is not in any other way the heir, nor 'in any way the representative, of Mr Henry Glassford. Neither

June 10. 1825. 'the estate of Dougalston nor the defender, therefore, is liable for the debts of Mr Henry Glassford. Wherefore the present action is groundless; and the defender ought to be assoilzied with expenses.' Lord Alloway ordered the appellants to give in a general condescendence of the grounds of their action; on advising which, with memorials, he reported the case upon informations. On the part of the appellants these propositions were maintained:—1st, That the entail was ineffectual to protect the estate against Henry Glassford's debts, because the resolutive clause was directed against 'each and every heir or person,' which could not include him, seeing that he was the institute. 2d, That although there was a prohibition in the entail against contracting debt, yet this had been recalled by the power conferred on the trustees, of which Henry Glassford was one, to borrow money and contract debt. And, 3d, That the debts in question arose out of, and were traceable to the trading companies in which the entailer, Mr Glassford, had been concerned, and which his trustees were authorized to continue, and therefore must be regarded as entailer's debts, for which the estate was attachable.—On the other hand, the respondent contended, 1st, That the resolutive clause was effectually directed against Henry Glassford. 2d, That so far from the trust-deed being intended as a revocation of the entail, it was made for the very purpose of supporting and giving effect to it. And, 3d, That although the allegation that the debts sued for were entailer's debts was relevant, yet it was not competent under the present summons, in which they were stated to be the private debts of Henry Glassford, and in point of fact this statement was not true. The Court, on the 22d January 1823, 'sustained the defences, assoilzied the defender from the whole conclusions of the libel, and decerned, but found no expenses due;' and to this judgment they adhered, on advising a petition, with answers, on the 14th November thereafter.*

Douglas and Company appealed.

Appellants.—I. It is settled law, that it is essential, to protect an estate against creditors or purchasers, that the entail must contain a prohibitory clause, an irritant clause, and a resolutive

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* 2. Shaw and Dunlop, No. 476. and Fac. Coll. where the opinions of the Judges will be found.

clause; all and each of them directed in express words, both against the particular acts intended to be prohibited, and against the fiar in possession. It is also settled law, that entails are strictissimi juris, and that no defect or omission can be supplied by implication. Accordingly it was decided, in the case of Duntreath, and several previous ones, that although the fetters were directed against the heirs of taillie, yet they could not be applied to the institute or disponee; and, on the same principle, it was found in the case of Steel, that the words, 'the whole 'heirs and members of taillie,' did not embrace the institute. Now, in the present case, it is plain, that although Henry Glassford was undoubtedly the institute, yet he was regarded by the entailer as forming one of the class of the heirs of entail. Accordingly, with very few exceptions, all the clauses refer 'to the 'said Henry Glassford, and the whole *other* heirs of taillie.' No doubt the words of the prohibitory and irritant clauses are sufficiently applied to him, but they have just the effect to shew the more strongly that the resolutive is not so. In the former the words are, 'the said Henry Glassford, or any of the heirs of tail-'lie and provision substituted to him;' but in the resolutive clause the declaration is, that 'each and every heir or person 'so contravening,' &c. shall forfeit, without any mention of Henry Glassford. These words, however, have plainly a collective signification, being applicable not to one heir only, but to many heirs, and not to one person, but to many persons. As the words 'every heir' comprehends a multitude, so must of necessity the word *every person*; because the entail does not speak of any other multitude, except the multitude of heirs. It is evident, therefore, that the word 'person' is here used as synonymous with heir, and consequently the case is brought directly under the authority of that of Steel, where the expression was 'heirs and members of taillie.' It follows, therefore, that as Henry Glassford was the institute, the resolutive clause has not been effectually directed against him; and if so, there can be no doubt the estate is attachable for his debt.

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II. But, in the second place, the prohibition against contracting debt was recalled by the terms of the trust-deed. It may be true, that the trust was originally executed with the intention of protecting the entailed estate; but that evidently proceeded on the supposition, that it would not be necessary to carry on the mercantile speculations. Accordingly, the provision for doing so, and the power granted to contract debt, was plainly the result of after consideration, as is demonstrated from the circumstance

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of the whole clause being inserted on the margin and not in the body of the deed. By this power, therefore, Mr Glassford substituted the trustees in his place as a partner of these companies, whereby his whole estate and funds became responsible for the consequences. But if so, then it is manifest that he could not consistently keep up the prohibition against Dougalston being liable to be attached for debts, because it of necessity was equally as much responsible for them as any of his other estates. That such could not be his intention was further established by the fact, that he appointed the institute one of his trustees, and consequently vested him with the power of contracting debt.

III. The appellants are ready to establish in the proper mode, that their debts arose out of the trust so constituted by the entailer, although no doubt the obligations for payment of them were granted by Henry Glassford privato nomine. There is nothing in the objection to the form of the summons, because the declaratory conclusions are sufficiently broad to admit the question of the liability of the estate for the debts due to the appellants.

Respondent.—I. It is admitted by the appellants, that the prohibitory and irritant clauses are sufficiently directed against Henry Glassford, but it is said that the resolutive is not so. Now the irritant and resolutive clauses form one continuous and unbroken sentence. Thus the irritant clause commences with providing, 'as it is hereby expressly provided and declared, that 'in case the said Henry Glassford, or any of the heirs of taillie,' shall do so and so, 'then, and in every such case, not only shall 'all and every one of such acts and deeds' be void and null, 'but also each and every heir, or person so contravening,' shall forfeit, &c. There cannot, therefore, be the least doubt that this clause was intended to apply to Henry Glassford, and that in point of fact it did apply to him. The whole of the appellants' argument rests on the unfounded proposition, that a conveyancer is not entitled to make use of pronouns, or general or relative terms, and that, by omitting to do so, and not repeating proper names over and over again, he must of necessity make an ineffectual deed. Throughout the whole of the entail Henry Glassford is placed in contradistinction to the heirs, so that the term 'person' must of necessity have been intended to apply to him, and to no other. The case of Steel was of a most special nature. In the first place, there was no antecedent to which the phrase 'heirs and members' could be applied, except the term 'heirs and substitutes' mentioned in the previous

clauses, which did not include the institute. In the second place, the institute was, in an immediately preceding clause, named in contradistinction to the 'heirs and members,' so that it was impossible to include him under these words. But in the present case Henry Glassford is the only antecedent to which the relative word 'person' can be with any propriety applied; and there is not, as in the case of Steel, any incongruity in doing so. Accordingly, in the case of Syme *v.* Dickson, a judgment was pronounced supporting an entail, where the terms were much more doubtful than in the present, and therefore is a strong authority in favour of the respondent. June 10. 1825.

II. There is no foundation whatever for the appellants' plea on the trust-deed. It rests entirely on the gratuitous assumption, that the clause on the margin was the result of after consideration, and that the practical effect of it was to destroy the entail, for supporting which the trust-deed was executed. The entailer had no such intention, as is demonstrated by the nature and terms of the trust-deed. It is true that Henry Glassford was named a trustee, and that debts were contracted on account of the trust; but all these debts have been paid, and those in question were contracted with Henry Glassford as a private individual.

III. As the action is founded on bills granted by Henry Glassford, and the summons bears that they were due by him alone, it is incompetent to insist for a decree of constitution as against John Glassford. But in point of fact the debts are not due by him, and it was only at a late stage of the cause that the respondents made this assertion.

The House of Lords ordered and adjudged, 'that the appeal 'be dismissed, and the interlocutors complained of affirmed.'

Lord Gifford.—My Lords, There is a case appointed for your Lordships' judgment, in which Messrs John, Thomas, Archibald, and Colin Douglas, are appellants, and James Glassford, Esq. is the respondent. The question in this case, as discussed at your Lordships' Bar, is, whether the appellants, Messrs Douglas, are entitled to attach the estate of Dougalston, of which the respondent stands seized, for certain large debts constituted in their favour by bills or promissory-notes granted by the late Mr Henry Glassford, the immediate predecessor of the respondent? The defence to this action is, that the estate of Dougalston was entailed by Mr John Glassford, the father of Mr Henry Glassford, in such a manner as to prevent its being affected by the debts of Mr Henry Glassford, and to render it strictly an estate of inheritance. The answers to this defence are two:—first, That ad-

June 10. 1825. mitting that the entail in question was in its form sufficient to restrain Mr Henry Glassford from affecting it by debts, yet the effect of that entail was varied by a trust-deed executed by Mr Glassford two days after that deed of entail; and, secondly, That supposing the appellants failed in making out that part of the case, the entail itself was defective so far as it related to Mr Henry Glassford, and therefore they had a right to claim the debts as encumbrances which affected that estate.

My Lords,—It appears that Mr John Glassford engaged in very large commercial transactions in Scotland, and that shortly before his death, being anxious to settle this estate upon his family, and also to make a general arrangement respecting his affairs, he, on the 6th of August 1783, executed the entail in question of the lands of Dougalston. By that entail he disponed this estate to himself in liferent; then to Henry Glassford, his eldest son, and the heirs-male of his body, in tail; to his other heirs of taillie and provision after named and described, in the order of substitution underwritten. My Lords, that entail was guarded, fenced, as it is termed in the law of Scotland, by two clauses necessary in constituting a good entail, namely, irritant and resolutive clauses, with reference to which it will be necessary to state what has occurred upon the subject, and also to state to your Lordships more particularly what the language of those clauses is. It is sufficient in this branch of the case to say, that there was a clause prohibiting Mr Henry Glassford, and the other heirs of taillie, from altering, changing, making, or doing any act or deed which may have any effect, directly or indirectly, to alter, innovate, or change the present taillie; and from selling, wadsetting, or disponing the lands, or any part or portion thereof; and from granting rights of annuity, or yearly rent, payable forth of the lands and others, or any security upon the same, or any part thereof, redeemable; and from contracting debts.

My Lords,—This entail, as I have stated to your Lordships, was executed on the 6th of August 1783; and in the same month, four or five days only having elapsed from the execution of that instrument, Mr Glassford executed another deed, called in these proceedings a trust-deed of settlement. By that deed he recited that he had, on the 6th day of August 1783, executed a deed of taillie, settling his lands and estate of Dougalston, and others therein mentioned, on the said Henry Glassford, his son, and other heirs of taillie and provision substituted to him. He then went on to state, that ‘ therefore, and for ‘ his love and favour to his other children, and for other good causes ‘ him thereunto moving, he has disponed, as he hereby does, and with ‘ and under the exceptions, burdens, and reservations therein after ‘ specified, gives, grants, dispones, and conveys from him, after his de- ‘ cease, to and in favour of the said Henry Glassford, his son, and to ‘ several other merchants and traders, and Thomas Graham and ‘ Archibald Graham, writers, as trustees and fiduciaries, upon the ‘ trust, for the ends, uses, and purposes therein after-written, de- ‘ claring the major number of them accepting and in life, from time to

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'time, to be a quorum, all and sundry his lands, and other heritable 'and real estates,' and so on; 'with powers for each trustee, at and im- 'mediately after his decease, to enter on the premises, and to levy, 'receive, recover, and possess themselves of all and every part of the 'premises, and to do every thing in the same manner, and as effectually, 'to all intents and purposes, as he could do if in life.' Then he went on to declare, that that deed was granted 'with and under the excep- 'tions, burdens, conditions, and reservations, and for the ends, uses, 'and purposes herein after specified, namely, that there shall be 'excepted, as I hereby except from these general dispositions and 'conveyances, the said lands and estate of Dougalston, and others 'specially described in the said taillie, and all other lands and heri- 'tages and subjects, heritable and moveable, real and personal, which 'have been and shall be particularly destinated and disponed by me 'to any other persons or series of heirs; and that the uses, purposes, 'and intent of my granting these presents, are in order that my said 'disponees in trust, or their quorum aforesaid, may and shall have 'right, in consequence of the herein before-written dispositions, as I 'hereby specially empower and authorize them, to ingather, collect, 'receive, recover, and turn into cash the moveable and personal estates 'and subjects herein disponed.' And then he went on to declare the trusts upon which this property was vested in those trustees. They were, 'in the first place, in payment and performance of all my just 'and lawful debts and engagements any way prestable and incumbent 'upon me at the time of my decease, so as to relieve my taillied lands 'and estates, and other subjects specially destinated, thereof; and 'which debts my said trustees may pay without putting the claimant 'to the trouble and charges of any formal constitution, unless, if they 'think proper, they may exact the summary affidavits of all or any of 'the claimants of open accounts, without prejudice to the trustees in- 'sisting for full legal constitutions in any cases where they judge it 'expedient; and also in payment of my funeral expenses, and the 'expenses they may disburse in the management of the said trust 'funds, which they shall be entitled to retain and be paid out of the 'same, as such expense shall be ascertained by the account of the 'disbursers.' Then, in the second place, in payment of certain pro- visions which he makes for his other children. And then he says, lastly, 'The disponees in trust shall be bound and obliged to account 'for and convey the residue and remainder of the premises, and pro- 'ceeds thereof, to and in favour of the said Henry Glassford, his son, 'and failing him, to and in favour of the heir of taillie having right at 'the time to his lands and estate of Dougalston, and others, contained 'in the said deed of entail.'

Then, my Lords, there is a clause, which has been much comment- ed upon in the discussion of this case. 'And for the better enabling 'the said trust-disponees to execute this trust, I hereby specially em- 'power them, or their quorum, if they judge it expedient, and to pre-

June 10. 1825. ‘ vent loss by the premature winding up of any concerns wherein I am ‘ interested, and where the shares of deceasing partners do not fall to ‘ be paid out according to the preceding balance, to concur with the ‘ other partners in continuing the said concerns, or borrowing money, ‘ or other measures necessary for that purpose, until the said concerns ‘ be properly winded up for the behoof of all concerned. And fur- ‘ ther, I hereby specially empower the said trustees, or their quorum, ‘ to compromise or submit to arbitration all disputed claims, both for ‘ and against my estate, and even to compound or take part for the ‘ whole of any debts owing, or claims competent to me, that may ‘ prove bad or doubtful, and also to name one of their own number, ‘ or any other proper persons, to be cashiers and factors for them on ‘ the premises, and to allow such factors a reasonable gratification for ‘ trouble; and I request the said disponees upon trust to accept the ‘ said office, and for their encouragement declare, that they shall not ‘ be liable for omissions, nor obliged to do any other diligence than to ‘ them shall seem proper.’

My Lords,—A very few days after the execution of these two instruments Mr Glassford died, leaving his son, Mr Henry Glassford, at that time in minority. His concerns were carried on by the trustees; and in the month of January 1790, Mr Henry Glassford having at that time attained twenty-one, and executed a deed of factory, as it is called, by which those trustees, on the narrative that they had ‘ settled ‘ the accounts of James Gordon and Henry Riddell, the former com- ‘ missioners, at Whitsunday 1788, and that the said Henry Glassford, ‘ who is heir and residuary successor of his father, did, at or soon after ‘ that term, with our consent, enter upon the management of the re- ‘ maining trust funds as commissioner for us; and the said former com- ‘ missioners did then pay over to him the balance of cash in their ‘ hands; all conformable to the said sederunt-book, and to the journal ‘ and ledger kept for the said trust-estate, and abstract made there- ‘ from, which are all severally docqueted and signed by us, and the ‘ discharge and ratification granted by the said Henry Glassford and ‘ the said trustees to the said commissioner, to which books and writ- ‘ ings reference is hereby had. But whereas a commission in habile ‘ form to the said Henry Glassford, in place of the former commis- ‘ sion, hath not been hitherto executed, which it is requisite should ‘ be done; therefore the said trustees, in virtue of the powers com- ‘ mitted to them in the said trust-deed, nominate, constitute, and ap- ‘ point the said Henry Glassford to be commissioner for us in the ‘ management of the said trust-estate, and for fulfilling the purposes ‘ of the trust; hereby committing to him, and vesting him with full ‘ power, warrant, and commission, to collect, buy, receive, and turn ‘ into cash the remaining moveable and personal subjects conveyed to ‘ us by the said disposition, and the rents and proceeds of the remain- ‘ ing heritages, and to grant receipts, discharges, and all other writ- ‘ ings necessary in the premises,—to pay off the debts that may still be

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'owing from the said estate, and the provisions to his brothers and 'sisters, in so far as still owing, and in the mean time, till the principal 'provisions be paid, to pay the interest thereof; and in general to 'manage, negociate, and transact our whole ordinary affairs and busi- 'ness as trustees foresaid, as freely and effectually as we ourselves 'could do in our proper person; declaring, that our said commissioner 'shall be obliged, from time to time, as required by us, to make just 'count and reckoning and payment to us, or a quorum of the said 'trustees, for and of his intromissions in consequence of these presents, 'deducting his disbursements and expenses.'

My Lords,—In consequence of this, Mr Henry Glassford took upon himself the sole management of those concerns. He, in the course of the conduct of those concerns, contracted a very large debt to the present appellants, the pursuers in this action. It appears that Mr Henry Glassford, at the time of his death, was indebted to these appellants in the large sum of L. 14,083. 18s. 7d.

Upon the death of Mr Henry Glassford, the appellants, finding that, independently of the entailed estate, his funds were wholly inadequate to the payment of his debts, instituted this action against the present possessor of this entailed estate, Mr James Glassford; and the summons proceeds upon the narrative,—'That Henry Glassford, 'Esq. of Dougalston, now deceased, was justly addebted, resting and 'owing to the pursuers, the principal sum of L. 14,083. 18s. 7d. ster- 'ling, with interest, as after specified; which principal sum is composed 'of the sums of money following, viz. the sum of L. 1500 sterling, con- 'tained in and due by a promissory-note granted by the said Henry 'Glassford to the pursuers, dated the 20th of November 1818, and 'payable six months after date;' and then the summons recites the various bills of exchange and notes given by Mr Henry Glassford for the amount of this debt. The summons then goes on to state, that at the period of his death, which happened about the 19th of May 1819, he stood heritably infeft and seized in all and sundry the lands and estate of Dougalston; that subsequent to the death of Mr Henry Glassford, Mr James Glassford, the present respondent, his brother, had made titles to him as heir of entail to the said lands, and entered into possession and possessed the same, and that they had required of him the payment of those debts; that he had refused to pay the debts libelled, although often desired and required, and that therefore they sought to have him ordained, by the Lords of Council and Session, to make payment to the pursuers of the sum in question.

The defences which were put in to this action for Mr Glassford were,—'That the late Mr Henry Glassford took and held the estate of 'Dougalston only under a strict entail, with clauses prohibitory, 'irritant, and resolutive, particularly applicable to the contraction of 'debt. The defender succeeded and made up titles to the said 'estate under the said entail only, and is not in any other way the 'heir, nor in any way the representative, of Mr Henry Glassford.

June 10. 1825. 'Neither the estate of Dougalston, nor the defender, therefore, is 'liable for the debts of Mr Henry Glassford.'

My Lords,—This case coming on before the Lord Ordinary, he ordered a condescendence and answers, in order to bring out the precise state of the averments of the parties in point of fact. His Lordship afterwards ordered memorials on the whole case; and on advising these, thinking the questions to be of importance, and attended with difficulty, he reported the case to the Court, and ordered informations, without himself pronouncing any judgment.

The case thereupon came on before the First Division of the Court of Session, who, on the 23d of Jannary 1823, pronounced this interlocutor:—'Upon report of the Lord President, in absence of Lord 'Alloway, and having advised the mutual informations given in for 'the parties in this case, the Lords sustain the defences, assoilzie the 'defender from the whole conclusions of the libel, and decern; but 'find no expenses due.'

The case was again brought before the Court of Session for their further consideration; and, on the 14th of November 1823, they pronounced another interlocutor, by which they adhered to the interlocutor reclaimed against, and refused the desire of the petition. From these the present appeal is brought to your Lordships.

My Lords,—The first question which has been argued at your Lordships' Bar is this:—Admitting, for the sake of this branch of the argument, that the entail itself was complete, and that Mr Henry Glassford was bound by it,—still it is contended, that under the effect and operation of that trust-deed executed by Mr Glassford, the author of the entail, that trust-deed had the effect of altering or revoking the entail to this extent, that inasmuch as it authorized the trustees, and empowered them to continue the mercantile concerns, and to contract debts, and inasmuch as Mr Glassford himself did not entail this estate to free it from debts contracted by himself, the effect and operation of this trust-deed was, that the debts contracted by Mr Henry Glassford, in his character of trustee under that deed, must be considered as affecting the entailed estate, and therefore were to be considered as debts recoverable against the estate in the hands of other persons.

My Lords,—In order to understand and to apply this argument, it is extremely important for your Lordships to attend to the form of this trust-deed. As I have stated in this branch of the argument, it is admitted that the entail may be considered as a complete entail, if it stood alone, so as to prevent the estate being affected by debts; but to discover whether the result is varied by the circumstance of Mr Glassford having executed this general trust-deed and disposition, it is necessary to refer to its provisions. He recites in that trust-deed, that he had entailed this estate of Dougalston on Mr Henry Glassford, and the other heirs of taillie and provision substituted to him; and he excepts from the general dispositions and conveyances the lands and estate of Dougalston and others, specially described in the deed of

taillie. One main object, as it should seem, for this trust was, his being anxious to settle that estate on his family, and to free it from the debts then existing; and in order to effect that, it appears that the great object of this trust-deed was, that those parties realizing the property vested in them by this instrument should, in the first place, pay all his debts and obligations from the estates and funds so conveyed in trust to them: that it was not his intention to impair the deed of taillie, but to relieve his estate at Dougalston by providing for the discharge of every debt which could affect it out of other funds. Then, after payment of those debts, he makes a provision for his children, and if the effects vested in the trustees should be more than sufficient to answer all the purposes of the payment of debts, he directs that the residue and remainder shall be conveyed in favour of Mr Henry Glassford, his son, and, failing him, to and in favour of the heir of taillie having right at the time to his lands and estate of Dougalston and others contained in the deed of taillie. Your Lordships see, therefore, that he has very anxiously excepted from the operation of this trust-deed, as far as he could by law, the estate of Dougalston; he not only anxiously excepted the estate itself from the operation of the trust-deed, but his object has been to free it, as far as he could, by means of immediately subjecting his other property for debts then existing. June 10. 1825.

My Lords,—Mr Glassford having been engaged, as it is stated in these papers, in eleven or twelve very large concerns, he foresaw there might be a difficulty, and that it might be attended with a loss to his family, if those concerns were prematurely and hastily wound up after his death; he therefore, by a special clause, authorized the trustees, if they judged it expedient, and where the shares of deceasing partners did not fall to be paid out according to the preceding balance, to concur with the other partners in continuing said concerns, and borrowing money, or taking other measures necessary for that purpose, until the said concerns should be properly wound up for the behoof of all concerned. By virtue of that power it appears that those concerns were, as I have stated to your Lordships, continued by Mr Henry Glassford, who was the person first entitled under this deed to the estate of Dougalston. In the management of that concern we may assume, therefore, that debts were contracted. Now it is said, that those debts being contracted by Mr Henry Glassford, it must be taken not only in equity and justice, but according to the fair construction of this instrument, that Mr Glassford, the author of the entail, must have intended his whole property should be liable to those debts. My Lords, as far as the creditors of this gentleman were concerned, it appears to me that it is impossible they could (taking pains to inquire into the state of this property) have been at all induced to give credit to Mr Henry Glassford in consequence of this property, because, as I have already stated to your Lordships, that estate of Dougalston was most anxiously excluded and

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excepted from the operation of this trust-deed; and, as I have already stated, the effect of this argument, if it could prevail, of affixing these debts on the estate of Dougalston, would be in direct contradiction and in direct opposition to that which was the intention of Mr John Glassford, the entailer, clearly expressed in the deed; because not only is that property excepted, which would of itself be sufficient without more to prevent the estates being affected by those debts, supposing they were not the debts of Mr John Glassford, to prevent its being affected by any debts contracted by the trustee, Mr Henry Glassford; but, as I have stated to your Lordships, the very object of this trust-deed is, that the person possessing that estate shall have the benefit, as far as he could give it him, of some other property, by paying out of that other property the debts which were at that time a burden on the estate of Dougalston. I have stated to your Lordships, that this was intended to be the effect of this deed so far as it related to those debts. Your Lordships, in this cause, have nothing to do with the debts of Mr John Glassford the entailer. If the present pursuers can make out, in any other proceeding, that the debts which they are now seeking to recover against this estate of Dougalston were or ought to be considered as the debts of Mr John Glassford, it is admitted on all hands, and it cannot be disputed, that Mr John Glassford could not except this estate from the payment of his own debts; and therefore, if that question could be raised, the effect of your Lordships' judgment, if it shall be to confirm the judgment of the Court below, would not at all prevent the pursuers, or any other persons who have clear demands against Mr John Glassford the entailer, from enforcing those demands if they could make out that proposition.

My Lords,—It has been contended, very ingeniously and very forcibly in this case, that the effect and operation of this trust-deed was to do away the effect of the previous entail, in as far as it respected any debts of Mr Henry Glassford; and that, therefore, the effect of that entail could not be set up in opposition to the trust-deed; that under that trust-deed it was competent to these trustees, in the management of those concerns, which were the concerns of Mr John Glassford the entailer, to contract debts; and that if, in the course of that concern, they contracted debts under the liberty given them in the powers I have already stated to your Lordships, the entailed estate of Dougalston was subject to those debts. But, my Lords, I must confess at the time the argument proceeded at your Lordships' Bar, and on the farther consideration of the case, no doubt has ever been infused into my mind upon the effect of this trust-deed. Upon that branch of the case, the opinion of the Court of Session appears to me to be the only opinion which could be given upon that deed.

My Lords,—That being so, we then come to another extremely important question in this case, not only as it affects this case,

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but as it affects the law of Scotland upon the effect and operation of the entail. My Lords, there are some principles applicable to this subject which are familiar to us, which have been stated at your Lordships' Bar; and which cannot be disputed. Entails, by the law of Scotland, are, in the language of the writers on the law, strictissimi juris. It has therefore been held, that the parties taking under an entail are not to be restricted by any implication, but that the restraint imposed upon them must be clear and express; and that the three clauses, which are called prohibitory, irritant, and resolutive clauses, must be all concurrent and co-extensive, in order to have the effect of securing the entail, which it is intended shall be imposed upon the institute and the heirs of entail; and therefore, my Lords, if the prohibitory clause prohibits the contracting of debts, but the other clauses, though intended to be co-extensive, shall omit any of those forms, it is a feature in the law of Scotland, that the heir of entail will not be bound, except in so far as those three clauses are co-extensive.

My Lords,—Another rule has been established, and I agree with the Counsel for the appellants, that after the case of Duntreath, and those other cases, whatever doubts your Lordships may have entertained on the propriety of those decisions originally, yet it is our bounden duty, in cases which come before us on this branch of the law, to take care, as far as we can, that no infringement be made on the principles of those decisions. Now, my Lords, it has been found in that case of Duntreath, and a variety of other cases, that the first person named in the entail, called the institute, is not restricted by those clauses, if those clauses apply by description only to the heirs of taillie; and, my Lords, it has been remarked frequently upon this subject, as singular enough, that although it is admitted that the institute may be restrained, either nominatim or by effect, yet in the Act of 1685 the expression is merely 'heirs of taillie.' It enacts, 'that it shall be lawful to his Majesty's subjects to taillie their lands 'and estates, and to substitute heirs in their taillies, with such pro- 'visions and conditions as they shall think fit, and to affect the saids 'taillies with irritant and resolutive clauses, whereby it shall not be 'lawful to the heirs of taillie to sell, annalzie, or dispone the said 'lands, or any part thereof, or contract debt, or do any other deed 'whereby the samen may be apprised, adjudged, or evicted from the 'other substitutes in the taillie, or the succession frustrate or inter- 'rupted, declaring all such deeds to be in themselves null and void; 'and that the next heir may, immediately upon contravention, pursue 'declarator thereof, and seize himself heir to him who died last infeft 'in the fee, and did not contravene, without necessity anywise to re- 'present the contravener: it is always declared, that such taillies shall 'only be allowed in which the foresaid irritant and resolutive clauses 'are insert in the procuratories, resignations, and charters,' and so forth.

Your Lordships perceive, that though it is admitted the institute

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may be bound by these clauses, on which there is no dispute, yet he cannot be bound by the description of the heir of taillie; and in the case of Duntreath, where those clauses applied only to the heirs, though in other parts of the deed the institute was mentioned in this way,—A, B, and the other heirs of taillie,—it was declared by an authority not to be shaken, and the principle of that case must be applied to other cases under such an entail as that,—that as the institute was not to be considered an heir of taillie, he must be fettered, either by naming him expressly, or by some other expression clearly doing that.

It is not my intention to go through minutely the various cases which have been cited and commented upon at your Lordships' Bar. Two cases have, however, been mainly relied upon, one for the appellants, and the other for the respondent. The case of Steel *v.* Steel on the part of the appellants, and the case of Syme *v.* Ronaldson Dickson on the part of the respondent. Now, my Lords, in order to apply these rules,—because the only question is with respect to the application of the rules; there is no difference of opinion, nor can there be, as to the principles themselves,—in order to apply these rules and principles, it is of the utmost importance to look to the instrument itself, and to consider the language of the entail. My Lords, in this entail, as I have stated to your Lordships, the lands are disponed 'to 'myself in liferent, and to the said Henry Glassford, my son, in fee, 'and the heirs-male of his body; whom failing, to James Glassford:' so that Henry Glassford the son is the institute in this entail. He then goes on afterwards to impose restrictions upon the parties to whom this estate was destined; and those restrictions begin as usual, with what is called the prohibitory clause; and there it is provided, 'And that it shall not be lawful to, nor in the power of, the said Henry 'Glassford, or any of the heirs of taillie and provision substituted to 'him as before written, to alter, innovate, or change, or to do or grant 'any act or deed which may have any effect, directly or indirectly, to 'alter, innovate, or change this present taillie, and the order of suc-'cession hereby established, or to be established by any nomination or 'other writ relative hereunto, which I may hereafter make and exe-'cute, or any part thereof; nor to sell, wadset, or dispone the said 'lands and others, or any part or portion thereof; nor to grant rights 'of annuity or annualrent payable forth of the said lands and others, 'or any security upon the same, or any part thereof, redeemable or 'irredeemable; nor to contract debts, either before or subsequent to 'their succession, or allow or suffer the duties and casualties pay-'able to the superior, or any other burdens legally affecting the said 'lands and others, to remain unpaid, or to do any other act or deed 'whereby the said lands and others, or any part thereof, may be 'apprised, adjudged, or otherwise evicted or encumbered.'

Your Lordships perceive Henry Glassford is named expressly. There is no doubt he is comprehended in some of the clauses in question, the irritant and resolutive clauses, which are here rather compre-

hended in one clause, consisting of two branches; and it begins in this way:—'And provided also, and it is hereby expressly provided and 'declared, that in case the said Henry Glassford, or any of the heirs 'of taillie and provision substituted to him as before written, shall fail 'or neglect to observe and fulfil any one or more of the conditions 'before specified, or shall do or act contrary to, or contravene any 'one or more of the limitations and prohibitions before written, then, 'and in every such case, not only shall all and every one of such acts 'and deeds, with all that shall happen, or be competent to follow 'thereupon, or upon the failure or neglect to observe and fulfil any 'of the foresaid conditions or provisions, be, as they hereby are de-'clared to be, funditus void and null, and of no force, strength, or 'effect whatever, in the same manner as if no such failure or neglect 'had ever happened, and as if no such acts or deeds had ever 'been done or granted;' but also,—your Lordships perceive, not only that the heir or the heirs of taillie shall do so and so, but also—'each 'and every heir or person so contravening or acting contrary to the 'said limitations and prohibitions, or any of them, or failing or neglect-'ing to fulfil the said conditions and provisions, or any of them, shall, 'for himself or herself alone, immediately on such contravention, 'failure, or neglect, forfeit, amit, and lose all right and title which he 'or she previously had, or has, or can claim or pretend to the said 'lands and others, or any part thereof; and the same shall ipso 'facto and immediately devolve upon and belong to the next heir of 'taillie existing at the time, who shall prosecute and declare such irri-'tancy, albeit descended of the failzier or contravener's own body.'

Now, my Lords, the question which has been raised in this case upon this second branch of the clause, which is the resolutive branch of it, is this:—It is contended, that inasmuch as Henry Glassford's name is not there actually expressly repeated, the words 'every heir or person 'so contravening,' do not include him; that though the word 'person,' if used alone, 'every person so contravening' might have included him, yet, that being coupled with the word 'heir,' this branch of the clause points only at those who, under this entail, fill strictly and correctly the character of heirs of taillie, which they say, and say correctly, the institute does not.

My Lords,—There are many other parts of this instrument from which it has been contended, that, looking at the language which is used in these different clauses, beginning in this way,—'It shall be lawful to, 'and in the power of the said Henry Glassford, or any of the heirs who 'shall have succeeded to the said lands;' afterwards, 'it shall be lawful 'to, and in the power of the said Henry Glassford, and the other heirs 'of taillie,' and so on, the person who framed this deed as the entailer, did certainly consider that Henry Glassford was an heir of entail, and that, therefore, taking this part of the deed in connexion with, or in explanation of this resolutive clause, it ought to be considered, that

June 10. 1825. the words 'every heir or person' mean, that class of persons in this destination who filled the character of heirs of entail, and were not intended to include Henry Glassford the institute.

My Lords,—The case of Steel, a very high authority, the very highest, because decided by your Lordships, and after very great consideration, has been pressed very much upon your Lordships as a decision that ought to govern the present case; and therefore, my Lords, it is important that I should state to your Lordships what the nature of that case was.—In that case there was an entail of the estate of Baldastard in favour of the entailer 'in liferent, for his life-'rent use only, and then to George Steel, his nephew, and Harriet 'Applin, his spouse, in conjunct fee and liferent, and the heirs whatso-'ever of the body of the said George Steel, in fee; whom failing, to 'his own nearest heirs and assignees whatsoever;' whereby George Steel became disponee or institute under the deed. The procura-tory of resignation was granted in terms of the above dispositive clause, but declared to be also under the 'conditions, prohibitory, irri-'tant, and resolutive clauses, powers, and faculties after expressed and 'appointed to be inserted in the charters, sasines, &c. of the foresaid 'lands in all time coming, and to be observed by all my heirs and 'substitutes above named.' The deed then, after providing, primo, 'That in case the estate should devolve on heirs-female, the eldest 'daughter should succeed without division,' proceeded with the prohibitory, irritant, and resolutive clauses as follows:—'Secundo, 'That every person and heir, whether male or female, who shall suc-'ceed to the foresaid lands, &c. and their heirs and successors what-'soever, shall, immediately upon their accession, assume and take, 'and afterwards bear and carry, the surname and arms of Steel of 'Baldastard. Tertio, That it shall not be leisome or lawful to any 'of the said heirs or members of taillie, or their descendants, who 'shall succeed to his estate, to bruick or enjoy the same, or any 'part thereof, by any right or title whatsoever other than this present 'deed of entail. Quarto, That it shall not be leisome or lawful to, 'or in the power of all or any of the said heirs, to alter, innovate, 'or change the order of succession above laid down, nor yet to do 'any other act or deed, directly or indirectly, whereby the same 'may be any ways innovated or changed; nor yet to grant tacks for 'any space longer than 19 years, nor to accept of any tack-duty under 'the present rental, at least not without a regular roup, publicly ad-'vertised in the Edinburgh newspapers. Quinto, That it shall not be 'in the power of all or any of the said heirs or members of taillie, or 'their successors, to sell, dispone,' and so forth. 'Sexto, That the said 'George Steel and Harriet Applin, and the whole other heirs and 'members of taillie above-mentioned, and their heirs and successors 'who may happen to succeed to the said lands and estate, shall be 'bound and obliged to pay Ann Applin, presently residing with me, 'daughter of William Applin, clerk in the East India House at Lon-

'don, deceased, an yearly annuity of L.100 sterling, after my decease, 'at two terms in the year, Whitsunday and Martinmas, by equal 'portions, beginning the first term's payment thereof at the first term 'of Whitsunday or Martinmas that shall happen after my death, and 'so forth thereafter during her lifetime, with a fifth part more of pen- 'alty in case of faillie, and annualrent from each term's payment till 'payment of the same; which annuity is hereby declared to be a real 'burden on the foresaid lands and estate during the subsistence thereof. 'Septimo, That the whole heirs and members of taillie above-mentioned, 'and their heirs and successors, who shall happen to succeed to the said 'lands and estates, shall become bound, as, by their acceptance hereof, 'they become bound and obliged to perform and observe every one of 'the different clauses and articles before-mentioned; declaring always, 'as it is hereby expressly provided and declared, that in case all or any 'of them shall contravene, and do on the contrary hereof, or of any of 'the conditions, provisions, and obligations before specified, or omit 'and neglect the fulfilling and observing the same, such person or per- 'sons so contravening, or omitting and neglecting, shall, immediately 'upon such contravention, lose, tyne, and amit all right, title, and 'interest which they have or can pretend to by this present deed; and 'the succession to the foresaid lands and others shall immediately de- 'volve upon and descend to the next heir substitute by this present 'right, in the same manner, though descended of the contravener's 'body, as if they had been naturally dead, or not mentioned herein; 'and the person so succeeding upon such contravention may take up 'their titles to the foresaid lands and others by declarator, adjudica- 'tion, or any other manner competent by law, without being liable to 'the contravener's debts or deeds, but subject always to the whole 'clauses, prohibitory, irritant, and resolutive, above-mentioned,' &c. June 10. 1825.

In a subsequent part of the deed, the entailer authorized 'George 'Steel and Harriet Applin, or any other member of this entail,' to apply to the Court to have it recorded.

Now, your Lordships will perceive in this entail, except in the sixth clause, you do not find the institute named; and in that sixth clause, the institutes, George Steel and Harriet Applin, are named in this way,—'That the said George Steel and Harriet Applin, and the 'whole other heirs and members of taillie above-mentioned, and their 'heirs and successors who may happen to succeed to the said lands 'and estate, shall be bound' to do what is there directed.

My Lords,—It was contended in that case, as it is contended in this, that the institute was not bound by those restrictions, inasmuch as he was not either mentioned nominatim, or by sufficient description, in any of the irritant and resolutive clauses, which it was necessary he should be, in order to be bound. My Lords, a very elaborate interlocutor was pronounced in that case by the Lord Ordinary before whom the case first came; and he found, 'that George Steel disponed his 'lands in favour of himself in liferent, for his liferent use only, and to

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'George Steel, his nephew, and Harriet Applin, his spouse, in conjunct' 'fee and liferent, &c., whereby the said George Steel, junior, became' 'disponee or institute upon the said deed.' He then found, 'that by' 'the fifth clause of the entail it is declared, that it shall not be in the' 'power of all or any of the said heirs or members of taillie, or other' 'successors, to sell, dispone, wadset, &c.; and that the irritant clause' 'following this prohibitory clause is directed against all debts, acts, and' 'deeds, of all or any of the said heirs of taillie and substitution, or' 'their heirs.'

Now, my Lords, upon this branch of the case my Lord Chancellor, in moving your Lordships' judgment upon it, remarked,—'The words' 'are, all my heirs and substitutes,'—though I do not say that 'an insti-' 'tute may not be included in the words members of taillie, yet it must' 'be clear, that the entailer so intended it; and here he uses the words,' '"heirs and substitutes," which has a tendency to shew that he had in' 'view in this instrument his heirs and substitutes only.' I mention this, to shew your Lordships that, in the Lord Chancellor's view of the law of Scotland, an institute might be included in the term or description of member of taillie; he could not where the terms were, heirs and substitutes, according to the previous authorities; and his opinion in this case was formed upon a view of the whole instrument, that in this case the words, 'members of taillie,' could not be considered as including the institute. I find this also mentioned by the Lord Chancellor:— 'The Lord Ordinary finds, that in the sixth clause of the entail, where 'an annuity is granted to Ann Applin, the aforesaid George Steel, and 'Harriet Applin his spouse, is contradistinguished to the other heirs' 'and members of taillie; where the institutes were named by name, as I 'have stated to your Lordships, the Lord Ordinary considered that they 'were named as contradistinguished to the other heirs and members of 'taillie. There George Steel is named in contradistinction to other 'heirs and members, and to the word "other." That form of expression 'occurred and was argued upon in the Duntreath case, but the argu-' 'ment did not there prevail. As I have stated to your Lordships on 'that part of the case, the sentence contained the words, "other heirs of 'taillie;" but that was not considered sufficient to include him, where the 'expression in the resolutive and prohibitory clauses were heirs of taillie 'only. Then the Lord Ordinary found, "that under these circumstan-' 'ces the expressions in the entail, of heirs or members, and of heirs and 'members of taillie, cannot be held to apply to George Steel the dis-' 'ponee or institute, but that the expressions, "heirs or members," or '"heirs and members," must be held as synonymous terms, that is, 'with heirs and substitutes, mentioned in the first part of the deed." Then the Lord Chancellor says,—'Agreeing in these findings of the 'Lord Ordinary and the Court, I think the result under this instrument 'is such as they have found it to be; and it appears to me that other 'passages in this instrument lead to the same result." The Lord Chancellor was so anxious to have it declared upon what grounds the House

went, that he proposed to find that, under the particular circumstances mentioned in the Lord Ordinary's interlocutor, and adverting also to the whole of the circumstances as they appeared in the instrument, the word members, as used in the deed, did not include the institute. My Lords, it does not follow that another instrument might not be framed, in which the words, members of taillie, might not include the institute though not expressly named. June 10. 1825.

Now, my Lords, this is a case which has been relied upon in this case for saying, that looking at the manner in which those rules were applied in the case of Steel *v.* Steel, though there the words, 'members of entail,' which in their proper construction may be considered as including not only the heirs of entail but the institute; still, in that case, it was not considered sufficient to include the institute by that description, he not having been named excepting in the other clause, in which he was named as contradistinguished from the other heirs of entail; and when that occurs in this case, which I believe has not occurred in any of the others, that the institute here is expressly named in the prohibitory and at the commencement of that other clause, which is afterwards divided into two members or branches; in fact, the introduction of the irritant and resolutive clauses.

My Lords,—The case cited on the other side (the only difficulty being, not the rule itself, but the application of it) is the case of Syme *v.* Ronaldson Dickson. I would not detain your Lordships upon this case, but that I feel, considering the decisions which have taken place upon this subject, it is extremely important I should explain to your Lordships, as clearly as I can, the grounds of my judgment; for I am free to admit that this is, as it has been stated at your Lordships' Bar and argued, an extremely important case, as affecting that which is a most important branch of the law of Scotland. Now, my Lords, the case of Syme *v.* Dickson, which was cited in the Court of Session, as it appears to be correctly stated in the respondent's case, is this:—'Andrew Ronaldson executed an entail of his lands of Blairhall and 'others, containing a procuratory of resignation in favour of himself in 'liferent, and of John Ronaldson, his eldest son, and the heirs-male 'to be lawfully procreated of his body, in fee; whom failing, to his 'younger children, and certain other substitutes.' The prohibitory, irritant, and resolutive clauses, were as follows:—'Sixthly, Providing 'and declaring always, as it is hereby expressly provided and declared, that it shall not be lawful to nor in the power of the said John 'Ronaldson, my son, or any of the other heirs of taillie above-mentioned, whether male or female, or the descendants of their body, to 'sell, alienate, wadset, dispone, or grant in feu-farm, either redeemably or irredeemably, except as hereafter mentioned, the lands and 'estate above resigned, or any part or portion thereof, or to contract 'debts or grant bonds, or other securities, of whatever nature, whether 'heritable or moveable. Eighthly, Providing and declaring always, as 'it is hereby expressly provided and declared, that in case my said

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'son, or any of the heirs of taillie appointed to succeed him in manner 'before-mentioned, shall fail in the performance of all or any of the 'conditions; provisions, limitations, declarations, and others specified 'in the second, third, fourth, fifth, sixth, and seventh articles of this 'present deed of entail, which are held as word by word repeated for 'the sake of brevity, or in the performance of any one article thereof, 'then, and in either of these cases, not only shall all such acts, facts, 'deeds, conveyances, bonds, adjudications, or other writs, of whatever 'nature, executed, subscribed, led, deduced, or permitted to be de-'duced, done, or executed, contrary or inconsistent with the foresaid 'provisions, conditions, and others contained in the said six articles, 'being themselves absolutely void and null, but also the person or per-'sons, heirs of taillie aforesaid, so contravening these conditions, shall, 'for him or herself alone, but not for the descendants of his or her 'bodies, forfeit all right, title, or interest to the lands and others be-'fore resigned, or any part or portion thereof, or rents, mails, and 'duties of the same, and all the right of succession otherwise compe-'tent to them to the lands and others aforesaid, and the same shall 'immediately thereafter fall and belong to the next heir of taillie.'

My Lords,—It was there contended, as it is contended in this case, that the institute could not be considered as comprehended within the words 'person or persons, heirs of taillie aforesaid;' but it was argued on the other side that it was so intended; for when you look back to see who the heirs of taillie were, you find that they were his son, or any of the heirs of taillie appointed to succeed him in manner before-mentioned; and therefore in that case the Court thought the reference to the institute in the resolutive clause was sufficiently explicit to bring him under the entail, and assoilzied the defender. And, my Lords, that judgment was affirmed by this House, so that the word 'person' was considered as sufficiently designating the institute. Now it is said that the case of Syme *v.* Ronaldson Dickson was a less favourable case for the entail than the present,—that it differs from the present chiefly in this, that in that case the words 'person or persons, heirs of taillie foresaid,' were in grammar perfectly capable of a construction which, under the rule fixed by the Duntreath case, must exclude the institute,—that it was only necessary to read the words thus, person or persons, heirs of taillie; that is, the son or other persons, heirs of taillie; that is, the other heirs of taillie appointed to succeed him mentioned in the preceding clause, and yet there was held to be a sufficient reference to the institute.

But what is the language of this instrument? After stating, that if Henry Glassford, or any of the heirs of taillie and provision, shall fail or neglect to observe any of the conditions, or shall contravene any one or more of the limitations and prohibitions, such acts and deeds shall be void, the words which follow are, 'but also each 'and every heir or person so contravening.' Then, my Lords, we are to look back and see what are the words in the preceding part of the

same sentence, because your Lordships will perceive it is all one branch of the same sentence divided into two branches. Then when you look back to see who are the persons previously stated, you find they 'are Henry Glassford, or any of the heirs of taillie;' therefore I cannot but think that the words in this case, 'every heir or person,' will, by reference to the preceding part of the clause, not only be intended, but in grammatical construction and fair reasonable construction must be considered, as comprehending Henry Glassford, the institute, who had been previously named as the person who might contravene by possibility the fetters of this entail. June 10. 1825.

Without troubling your Lordships with the various other cases to which reference has been made, because it would be only consuming your Lordships' time to enter into the distinctions which take place between one case and another in point of language, because the principle applies,—whether rightly or wrongly, it is not for me to say,—but the principle in all those cases is the same, and the cases must resolve themselves into the same principle, considering the strictness with which entails are to be construed, particularly in favour of the institute. Bearing this in mind, and keeping it constantly in view, in order to arrive at a proper and consistent conclusion, I say that, looking at this clause of the instrument, and looking at the other parts of it—for the other parts of it are to be made the subject of reference in the construction of this particular clause—finding that, in the other clauses of the deed, the word 'heir' is coupled with the institute, Mr Glassford; the question is, looking (to use the expression of the Lord Chancellor in the case of Steel *v.* Steel) at all which is to be found within the four corners of the instrument, and considering the fair legitimate construction to be applied to the whole instrument; keeping in view those distinct rules, which, I say, must be kept in view in considering instruments of this kind,—can it be said that Mr Henry Glassford is not included as an heir and person so contravening, when he himself is stated in the preceding part of the sentence by name as a person who may contravene, and may therefore be subject to the forfeiture?

My Lords,—I do humbly state to your Lordships my decided conviction, upon a consideration of the cases which have been referred to, that the opinion that the majority of the Court of Session have formed upon this subject is the right conclusion. There is one very learned person who differed from them, but who spoke with great hesitation, who at least certainly entertained great doubts, but, upon the whole, considered the case of Steel *v.* Steel an authority for saying that the institute in this was not bound. After, however, considering the reasons which that learned person gave, and the reasons which have been so very ably urged at your Lordships' Bar, it does appear to me, upon the grounds I have taken the liberty of stating, that the decision below is right, and therefore I shall humbly move your Lordships that the interlocutor be affirmed.

June 10. 1825. I have already stated the reason for my going so much at length into this case. Although I am about to move your Lordships for an affirmance of the judgment, I have thought it my duty, on a case on such a branch of the law, and where the cases run so very near each other, the distinctions between them being so very nice, to state to your Lordships at large, and as clearly as I could, the grounds on which I am humbly of opinion this judgment should be affirmed. I will only further move your Lordships, that this judgment be affirmed.

Appellants' Authorities.—3. Ersk. 8. 29.; Bruce, Jan. 15. 1799, (15,539.); Bryson, Jan. 22. 1760, (15,511.); Ankerville, Aug. 8. 1787, (7010.); Moncreiff, March 3. 8104, (not reported, affirmed); Ross, Nov. 4. 1743; Lesslie, July 24. 1752, (No. 49. Elchies, Taillie); Erskine, Feb. 14. 1758, (4406.); Edmonstone, (case of Duntreath), Dec. 24. 1769, (4409.); Gordon, July 8. 1777, (15,462. and No. 2. Ap. Taillie); Menzies, June 25. 1785, (15,436. Rem. June 30. 1801); Wellwood, Feb. 23. 1791, (15,463.) and May 31. 1797, (15,466.); Titchfield, May 22. 1798, (15,467. affirmed); Jan. 20. 1800, (No. 4. Ap. Taillie); Millar, Feb. 12. 1799, (15,471.); Steel, June 24. 1817, (5, Dow, p. 72.)

Respondent's Authorities.—Syme *v.* Dickson, Feb. 27. 1799, (15,473. affirmed, April 26. 1803), Logan, Dec. 13. 1797, (11,379.)

J. CAMPBELL—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 37. SOLICITORS in the SUPREME COURTS of Scotland, Appellants. *Shadwell—Lushington.*

KEEPER and CLERKS of his MAJESTY'S SIGNET, Respondents. *Warren.*

College of Justice.—Found, (affirming the judgment of the Court of Session), That it is the privilege, and has been the practice of the Court of Session, to regulate the accommodation necessary for the different bodies composing the College of Justice in the Inner and Outer-Houses; that the Incorporation of Solicitors have no right to demand any specific accommodation beyond what is necessary for attending the daily business of the Court; that such accommodation had been assigned to them equally with other agents; and that an action at the instance of the Incorporation, for further special and general accommodation as a matter of right, and particularly in relation to the conclusion that they had any real and just right and title, with any other class of practitioners, to possess the areas set apart for practitioners and others, is incompetent.

June 10. 1825.

1ST DIVISION. Lord Alloway.

THE Court of Session hold their sittings in three apartments:—1. The Outer-House, or Great Hall, in which the Scotch Parliament anciently assembled, and where the Lords Ordinaries now sit separately as single Judges, to hear causes when first moved in Court, or under remit from the Inner-House: 2. The Inner-House of the First Division, for hearing causes carried for review, or for decision, from the Lords Ordi-