[16*th August* 1839.]

(Appeal from the Court of Session, Scotland.)

GABRIEL HAMILTON LANG of Overton, Writer in Glasgow, Appellant.[1] (No. 33.)

[*Lord Advocate (Rutherfurd) — James Anderson.*]

ALEXANDER LANG, residing in Glasgow, Respondent.

[*A. M'Neill — MacDowall.*]

Entail — Prohibitory Clause. — The prohibitory clause in a deed of entail provided "that it shall at no rate be "allowable to the said (institute) 'nor any of the substitutes "above named,' to sell off or dispose upon, any part of the "lands and subjects before transmitted, nor to contract "debt, or do any other deed whereby the said lands and "subjects may be adjudged or evicted from the succeeding "members of entail, or their hopes of succession thereto "in any measure evaded."—Held (reversing the judgment of the Court of Session) that there was no sufficient prohibition against altering the order of succession.

Irritant Clause.—A deed of entail contained prohibitions to sell, contract debt, &c.; the irritant clause voided "all such debts and deeds."—Held (reversing the judgment of the Court of Session) that there was no effectual irritancy against sale.

Question, Whether a party who takes under an entail as heir male of the body of the institute is affected by prohibitions directed against "the substitutes above named"?

THE late Gabriel Lang of Overton on 25th September 1766 executed a deed of entail of his estate in favour

2D DIVISION.

Lord Ordinary Jeffrey.

[1] 1 D., B., & M., new series, p. 98; Fac. Coll. 23d November 1838.

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of his only son Gabriel Lang (grandfather of the appellant), and various substitutes. The deed of entail provided and declared, inter alia, "That it shall at no rate "be allowable to the said Gabriel Lang, my son, nor "any of the substitutes above named [1] called to the succession of the lands and others before conveyed, to "sell off or dispose upon any part of the lands and "subjects before transmitted, nor to contract debt, or "do any other deed, whereby the said lands and subjects may be adjudged or evicted from the succeeding "members of entail, or their hopes of succession thereto "in any measure evaded. And if they do in the contrary, it is declared, in the first place, that all such "debts and deeds shall be intrinsically void and null, "and of no force, strength, or effect; and, in the next "place, that the contravener, and descendants of his "or her body, shall ipso facto forfeit the benefit," &c.

The appellant, the eldest son of Alexander Lang (entailer's grandson), the party last in possession of the estate, having served nearest and lawful heir in general to him, raised an action of declarator (23d May 1836, in which he called as parties his brother and the other then existing substitutes,) to have it found and declared by decree of Court, that notwithstanding the entail he had right and power to make up titles in fee simple or otherwise, to alter the succession under the entail, and to sell the estate and dispose of the price at his pleasure. The record being closed, upon condescendence and answers, the Lord Ordinary pronounced the following interlocutor: — "27th June 1837. The Lord Ordi- "nary having heard the counsel for the parties on the

[1] See post, p. 883.

" closed record and whole process, repels the defences,
" and declares and decerns in terms of the conclusions
" of the libel: Finds no expenses due."[1]

" [1] *Note.*—The opinion of the Lord Ordinary is with the pursuer, both
" as to the want of a sufficient prohibition against altering the order of
" succession, and the defect of the irritant clause, as not properly applied
" to the prohibition against sale. He has a firmer reliance, however, upon
" the second than the first of those grounds of decision.

" The prohibitory clause, where it is thought to be deficient, is very
" much in the style of the statute of entails, in so far as it runs the pro-
" hibition against contracting debts, or exposing the estate to forfeiture
" or eviction, into that which is supposed to be directed against altering
" the order of succession, with very little attempt at separation; and it
" is almost identical in its phraseology with that in the entail of Lochbuy
" (23d June 1807,) which was found to be in all respects effectual. In
" these circumstances, it is impossible not to see difficulties in this part
" of the case. But on the whole matter, the Lord Ordinary is of
" opinion, that there is still ground enough for holding, that the pro-
" hibition is in this case insufficient to prevent altering the order of
" succession.

" The argument from the example of the statute, in consolidating or
" running into each other the different clauses, which it is admitted must
" all substantially exist in a perfect entail, is not thought to be entitled to
" much weight. The statute by no means professes to give a formula
" for the construction of such clauses; and it has been definitely settled,
" by a series of concurrent decisions, for more than a century, that there
" must be a distinct and independent clause for each of the essential pro-
" hibitions; and that the defect of separate expression cannot be supplied
" either by an extensive construction of words, plainly referable to one
" such prohibition only, or by inference, however probable, as to the
" intention of the entailer. The series of exact precedents upon this
" point begins with the case of Campbell and Wightman, 17th June
" 1746 (Mor. 15505), and ends prior to the case of Lochbuy with that of
" Hoome of Argaty, 8th July 1789 (Mor. 15535).

" The case of Lochbuy no doubt then appears as an exception; and if
" it had appeared to have been fully considered, and had not been dis-
" credited by subsequent decisions, might be thought to have established
" a precedent, by which such a case as the present must necessarily have
" been ruled. To the Lord Ordinary, however, it does appear both to
" have been pronounced in circumstances which detract somewhat from
" its original authority; and to have in point of fact been so largely dis-
" credited by more recent decisions, as to be no longer to be relied on.
" In the first place, it was adjudged at the same time with the case of
" Roxburghe, and without any separate argument from the bar drawing
" the attention of the Court to the manifest distinction of the two cases—
" but apparently on the supposition that both depended on the same prin-

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The defender having reclaimed, the Court, after ordering printed cases, pronounced this judgment:—

" ciple. Now the Lord Ordinary thinks the case of Roxburghe (which " was affirmed on appeal) in all respects an unimpeachable judgment, " while he is humbly of opinion, that the main ground on which it rested " was entirely wanting in that of Lochbuy; and accordingly, he appre- " hends that, in all the subsequent decisions, this ground has been so " distinctly recognized, that a rule may almost be said to be at last esta- " blished to which this case of Lochbuy can in no way be reconciled. " He refers especially to the cases of Brown (Eastfield), 25th May 1808— " of Henderson, 21st November 1815, and of Grant, 9th March 1826, " (with the unreported cases therein cited,) in all which the entail was " found to be defective, as well as to that of Lord Buchan, 9th February " 1837, where it was held to be sufficient, and that of Speid, 21st February " 1837, where the whole law on the subject was very fully considered, " and the issue (though turning on a point different from what occurs " here) was against the validity of the deed.

" Now the rule which the Lord Ordinary humbly thinks is to be " extracted from all these recent cases, as well as from the whole " series prior to that of Lochbuy, is this,—that wherever the prohibi- " tion against altering the order of succession is only to be inferred " from the circumstance of the description of acts primarily prohibited, " as leading to adjudication, apprising, forfeiture, and eviction, being " terminated by representing them as also calculated to prejudice, dis- " appoint, defeat, or evade the succession of the several substitutes, or the " tailzie generally; in all such cases, the prohibition will be insufficient to " prevent a direct alteration of the order of succession,—the true mean- " ing of all such clauses, and of the words with which they conclude, " being merely to prohibit acts, whose primary effect and character it is, " that they afford ground for adjudication or forfeiture,—and where it is " only in consequence of this, that they are described as leading also to " the disappointment of the order of succession, the just and real con- " struction being, that no acts are truly prohibited by such clauses, except " such as would warrant adjudication or forfeiture, and thereby defeat " the rights of the succeeding substitutes. On the other hand, there " will be an effectual prohibition against altering the order of succession, " though these words are not expressly mentioned, and though the words " held to be equivalent are introduced in sequence and connexion with " another prohibition, provided the description of the acts previously pro- " hibited is complete, before the words, relied on for this last purpose, " are introduced, and especially provided those last words are exclusively " applied to another class of acts, deeds, or things, from those primarily " characterized as leading to adjudication, eviction, or forfeiture.

" This distinction, it is humbly conceived, will be found to run through " the whole series of cases from 1746 to 1837, without a single exception, " but that of Lochbuy alone. In every one of them where the prohibi- " tion against altering the succession was found ineffectual, the words

" The Lords having heard counsel for the parties, and " advised the cases, alter the interlocutor of the Lord

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" touching the prejudice or disappointment of the substitutes formed " parts only of the description of one and the same class of acts or deeds, " which had been previously characterized as leading to adjudication or " forfeiture, and was a mere continuation of that description; while in " all these cases (except Lochbuy,) where the prohibition was found " effectual, the words touching the disappointment, &c. of the succession, " are distinctly applied to a separate class of acts and deeds, which are " nowhere described as leading to adjudication or forfeiture, and of which " the only description in the entail is, that they may interfere with, " prejudge, or frustrate, the succession of the substitutes. When the " prohibitions, therefore, are separately applied to such acts and deeds, it " would seem impossible to doubt, that alteration of the order of succes- " sion is as effectually prohibited, as if this had been said in express " words, since there is no other quality or consequence ascribed to the " acts in question, on account of which they could be included in the " prohibitions.

" Nothing can illustrate this better than a comparison of the clauses " in the case of Roxburghe, with those which occur in the subsequent " decisions already referred to, where an opposite judgment was given as " to the validity of the prohibition. In the Roxburghe entail there is " first, an express prohibition, ' to contract debt, or to do any deeds, " ' whereby the said estate, or any parts thereof, may be apprized, ad- " ' judged, or evicted ;'—thus satisfying and concluding the description " of that class of deeds; and then there immediately follows ' nor yet do " ' any other thing in hurt or prejudice of the foresaid tailzie and suc- " ' cession in haill or in part.' Now upon the principle already stated, " it was rightly adjudged that there was here a sufficient prohibition " against altering the order of succession. Since, after exhausting the " acts and deeds that might lead to apprizing or eviction, the prohibitions " are distinctly extended to a class of ' other things,' which are no other- " ways described than as being ' in hurt and prejudice of the foresaid " ' tailzie and order of succession.' The only subsequent case in which " a similar judgment was given is believed to be that of Lord Buchan, " 9th February 1837, and it was precisely of the same description. " There was there a clear prohibition of ' contracting debt whereby the " ' lands might be apprized or adjudged,'—and then against ' doing any " ' other fact or deed in prejudice of the said tailzie, and of the persons " ' above-named or their foresaids.' In short, after prohibiting acts leading " to adjudication or apprizing, there is here also a distinct prohibition " against other acts, not leading of course to any such result, but only " described as being in prejudice of the tailzie, and the substitutes called " to the succession.

" Contrast now with these the series of cases in which it has since been " found that there was no effectual prohibition, and see whether it be " possible to account for the difference, except upon the plain and reason- " able distinction which has now been indicated. There is, first, the East-

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" Ordinary submitted to review, sustain the defences, " assoilzie the defender, and decern."

The pursuer appealed.

" field case, 25th May 1808, within a year after that of Roxburghe. The " prohibition there was merely 'not to contract debt, or to do any other " 'deed whereby the lands may be apprised, adjudged, or in any way " 'evicted in prejudice of this present tailzie, or those who in virtue " 'thereof are to succeed;' thus specifying only one class of deeds, the " first and leading character of which is to bring an adjudication or " eviction, and as a consequence of which alone these deeds are farther " described as likely to prejudge the tailzie and the rights of the substi- " tutes. The case of Henderson, 21st November 1815, is exactly of the " same description. There the prohibition is against 'contracting debts, " 'or doing any fact or deed, civil or criminal, whereby the said lands " 'may be anyways adjudged, evicted, or forfeited, or may be any way " 'affected in prejudice and defraud of the subsequent heirs of tailzie " 'successively, conform to the order and substitution above specified;' " there being here again but one class of acts prohibited, viz., acts inferring " adjudication, eviction, or forfeiture, and consequently calculated to pre- " judice and defraud the substitutes appointed to succeed in their order; " but no mention of any other class (as in Roxburghe and Buchan) " inferring no forfeiture or adjudication, but merely prejudicial to the " rights of the substitutes. The case of Grant and Tytler, 9th March " 1826, (F. C.) was a clearer case perhaps than any of the others, but it " rested on the same principle, the only prohibition alleged to strike at " deeds of alteration being against any 'deed or act, civil or criminal, " 'which might be the ground of adjudication, eviction, or forfeiture of " 'the said lands, or which might any ways affect or burden the same.' " But the case of Dickson (Blairhall) 6th July 1816, recited in this " of Tytler, and not elsewhere reported, is perhaps the strongest of all " against the sufficiency of the alleged prohibition, either in the present " case or that of Lochbuy. After a very express prohibition against " contracting debt, it is added: 'nor shall they do or suffer any other " 'thing whereby the said lands may be anyways affected or adjudged, or " 'the heirs of tailzie deprived of the same or interrupted in the enjoy- " 'ment thereof.' And after a special prohibition against treason: 'nor " 'do any other fact or criminal deed or action whatever, whereby the " 'lands may be evicted, forfeited, or escheat, or the heirs of entail in the " 'order foresaid disappointed of their right of succession thereto.' Yet " the Court found there was here no valid prohibition against altering " the order of succession, the reference to such an effect being held to " have been introduced merely as a consequence of the adjudication or " forfeiture primarily attaching to the only acts truly meant to be pro- " hibited.

" If there be any weight however in these authorities, and in all the " earlier series, it does seem altogether impossible to justify the decision " in the case of Lochbuy, which it has been seen was adjudicated without

Appellant.—The entail of Overton contains no effectual prohibition against altering the order of succession.

" special argument, under the very unaccountable assumption that it was " not to be distinguished on the merits from that of Roxburghe. In " Lochbuy the prohibition was almost in the words of the present case; " ' to contract debts, or do any other deed whereby the lands might be " ' adjudged or evicted from the succeeding members, or their hopes of " ' succession thereto in any way evaded.' Now there is here, as in all " the other cases, but one class of acts prohibited, the primary charac- " teristic of which is that they might induce adjudication and eviction of " the lands to the disappointment of the succession of the succeeding sub- " stitutes, the structure of the clause being totally different from that of " Roxburghe or Strathbrock, and identical in this respect with the cases " first cited, though far less favourable for the prohibition than that of " Brown, Henderson, or Dickson, inasmuch as the words used in these " cases as to the prohibited acts being to the prejudice and defraud of the " substitutes, or their being disappointed thereby of their right of suc- " cession, are far better fitted to describe a direct alteration of the order " of succession than those which occur here or in Lochbuy, which are " merely against acts by which their hopes of succession might be ' in " ' some measure evaded,' an expression which is obviously much more " appropriate to some partial and indirect injury, by contraction of debts " or other burdens of that kind, than to a total and direct frustration of " their rights by a deed of alteration. The Lord Ordinary cannot per- " suade himself therefore that this case of Lochbuy is now of binding " authority, and being the only precedent to which the defenders can " refer in support of this part of their argument, he has not hesitated to " reject that argument.

" 2. The defect in the irritant clause is conceived to be still plainer, " or, at least, the difficulty is not increased by an apparent conflict of " authority. If the rule laid down in the case of Dick (14th January " 1812), that where a word of flexible signification is used in a fixed and " limited sense in one part of a deed of entail, it shall be held to have " that and no more extensive sense when it occurs in any subsequent and " relative part of the same deed, was a sound and correct rule; and if it " be still the law of Scotland, as was found in the late case of Speid, " (21st February 1837) that clauses importing fetters are to receive the " narrowest and most rigorous construction, (and the Lord Ordinary " fully adopts both maxims) it does not appear doubtful that the irritant " clause in this case is not properly applied to the prohibition against " sale. The leading prohibition is expressly against selling or disponing; " and then this is followed up by a continuous prohibition (as already " noticed) against contracting debt or doing any deed by which the lands " might be adjudged or the succession of the substitutes evaded. The " irritant clause follows immediately after, and in reference and connection " with these prohibitions, declares merely that if any of the heirs ' do in " ' the contrary, all such debts and deeds shall be null and void;' and

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Appellant's Argument.

Prohibition to alter the order of succession was not the primary object of the clause. Its primary object was to prohibit acts whereby the estate might be evicted by adjudication or otherways; disappointment of the hopes of succession was merely introduced as the consequence of such eviction. The only acts struck at are those by which the succession may be defeated or frustrated through the eviction of the estate. Deeds altering the order of succession are deeds executed expressly with that intent, deeds directly defeating the destination; the deeds prohibited in the present entail are not such, they are merely those whereby the rights of the substitute heirs may be partially or wholly disappointed, according as they may or may not be subsequently acted on. They are deeds which do not in themselves alter or defeat the succession, but which may give rise to other deeds having the effect of attaching the estate, and so indirectly depriving the subsequent heirs of their hopes of succeeding, i. e. evading their succession to the extent or measure to which the said attachments may

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" the question is whether this must not be limited to the debts and deeds
" specifically mentioned in the close of the prohibitory clause? or may be
" extended by a large construction of the word " deeds" to the preceding
" prohibition against sales and dispositions also? If the matters were
" otherwise doubtful, the Lord Ordinary would hold himself bound by
" the case of Barclay and Adam, decided in this Court 8th February
" 1821, and affirmed on appeal 18th May of the same year. It is only
" reported in Shaw's Appeal Cases, (vol. i. p. 25.) but appears to have
" been almost identical with the present. There was a distinct prohi-
" bition there against sale, and also against contracting debt, altering the
" order of succession, or doing any deed whereby the lands might be
" evicted, &c. But the irritant clause provided only that ' all such
" ' debts, deeds, and contractions should be null,' and it was held clear
" that this did not apply to a sale. Debts and contractions being plainly
" synonymous, the only irritancy truly expressed in that case was merely
" of debts and deeds, which are the very words which occur here, and the
" Lord Ordinary can make no distinction."

operate, not necessarily defeating or frustrating entirely their right of succession. The practical result of the cases which have hitherto occurred on this point, with the exception of the case of Lochbuy, which, as is justly observed by the Lord Ordinary, though not actually reversed has been substantially overruled, is clearly that which is set forth in his Lordship's note.[1]

Appellant's Argument.

The prohibition against selling is not effectually fenced by the irritant and resolutive clauses. These clauses are framed on the principle of enumeration of the acts prohibited. They enumerate the debts and deeds specially mentioned in the prohibitory clause, but they do not enumerate sales or alienations. Hence the prohibition against sales and alienations is not properly fenced. But, on whatever principle these clauses are framed, they are susceptible of a construction either exclusive or inclusive of sales and alienations. They must therefore be construed as exclusive of sales and alienations, which is the construction in favour of freedom from fetters.[2]

Respondent's Argument.

Respondent.—The prohibitory clause is conceived in such terms as sufficiently to prevent alteration of the

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[1] Campbell v. Wightman, 17th June 1746, Mor. 15505; Sinclair v. Sinclair (Carlowrie), 8th November 1749, Mor. 15382; Nisbet v. Young, November 1763, Mor. 15516; Stewart v. Hoome (Argaty), 8th July 1789, Mor. 15535; Brown v. Countess of Dalhousie (Eastfield), 25th May 1808; Henderson v. Henderson (Earlshall), 21st November 1815, Fac. Coll.; Dickson (Blairhall), 6th July 1816; Grant v. Tytler (Burdsyards), 9th March 1826, Fac. Coll.; Rowe v. Monypenny (Strathbrock), 9th February 1837, (see post, p. 898); Brown v. Macgregor, 2d March 1837; Little Gilmour v. Caddell, 5th July 1838; Braimer v. Bethune, 18th January 1839; all as in Fac. Coll. under respective dates.

[2] Dick v. Drysdale, 14th January 1812, Fac. Coll.; Barclay v. Adam (Blairadam), 18th May 1821, 1 Shaw's Appeal Cases, 24; Speid v. Speid (Ardovie), 21st February 1837, 15 Shaw & Dunlop, 618; Rennie v. Horne, 13th March 1838, 3 Shaw & Maclean's Appeal Cases, p. 142.

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Respondent's Argument.

order of succession. It is important to observe that the words used are in substance the same as those in the statute 1685, c. 22. The estate may be affected so as to alter the succession in other ways besides selling and contracting debts; and yet these other modes are not required by the statute to be expressly described in order to be effectually prevented. It is sufficient that the deed have the effect of frustrating or altering the succession. This is clearly all that was meant or intended by the framers of the statute.

But then it may be said the statute did not profess to deal with entails in questions inter hæredes,—alteration of the succession operates only inter hæredes,—therefore some expression should have been used to indicate the entailer's intention to prohibit an alteration of the succession, as distinguished from acts creating a defeazance of the entail, in consequence of rights acquired by third parties. If that be so, then it is important to observe that the words used in this entail are not precisely similar to those in the statute. The framer of the deed would clearly have adopted them, had it not been the intention of the entailer to provide against an alteration of the succession otherways than by the intervention of third parties. A donee in tail may alter the order of succession, and yet not do a deed whereby the succession under the entail is frustrated and interrupted, i. e. actually put an end to; but he cannot alter the order of succession without, in some measure, evading the hopes of succession of the heirs of entail. But again, in this view of the statute, the whole doctrine of strictness of interpretation is inapplicable. It is to those clauses which prevent heirs of entail from dealing with third parties in reference to the estate,—to those clauses

Respondent's Argument.

which deprive heirs of entail of the ordinary rights of ownership, that this doctrine is alone applicable; these, and these only, require the statutory formality of being fenced with irritant and resolutive clauses, which clauses create what are called the fetters of an entail. Other provisions are mere conditions of descent, affecting only the heirs who take under and are bound by them, but not their creditors or those who may deal with them, and hence they ought to receive effect inter hæredes, according to the intention of the entailer.[1] Even if the words used may be made as well to comprehend acts which require to be restrained by fetters as an ordinary condition of descent, it is not the less clear that the testator has expressed his intention to impose a simple condition of descent. That expressed intention cannot be legally counteracted, although the words may be susceptible of another meaning, unless it can clearly be shewn that the testator limited his intention to that other meaning. Limitations inter hæredes, as distinguished from statutory fetters, must be construed ut res majus valeat quam pereat. It would be utterly inconsistent with this rule to say, that the expressed intention of an entailer to create a limitation not subject to strict interpretation is to be disregarded, merely because one consequence of the breach of a statutory fetter would be to defeat that limitation.

The present case is identical with that of Lochbuy[2] decided upwards of thirty years ago, and acknowledged as authority since its date. They both fall under that class of cases of which the case of Roxburghe[3] is the

[1] Erskine, b. 3. t. 8. s. 23.

[2] Maclaine v. Maclaine, 23d June 1807, Fac. Coll.

[3] Kerr v. Innes, 23d June 1807, Fac. Coll.; affirmed, 8th June 1811, Lords Journals, vol. 48. p. 376.

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leading one. In the cases of Roxburghe and Lochbuy, as in the present case, the parties are prohibited from doing some other act in prejudice of the succession, besides the acts previously prohibited, whereas in the other class of cases, viz. those of Argaty and others, (referred to in the appellant's argument,) there is no separate announcement of any other act, but the prejudice to the succession is stated exclusively as the result of the acts previously prohibited. If the cases are examined with a view to this observation, the distinction will be at once apparent.

The deed of entail contains an irritant clause, applicable as well to sales as to debts, &c. The statute has fixed the meaning of the word "deeds" to comprehend every one of the acts which it requires irritant clauses to prevent. The mere mention of the word "debts" will not alter the meaning so fixed. If the words used had been, "all debts and such like deeds, or deeds of a "similar character," then it might have been plausibly contended, that the entailer had himself created a limitation upon the word "deeds"; but the words used are "such debts and deeds," that is, such debts and such deeds as have been previously prohibited, thereby including every deed to prevent which the irritant clause was necessary. It may be conceded that a court is entitled to give an interpretation in favour of freedom, where the expressions used will admit of that interpretation as well as of an interpretation against freedom; but here an interpretation in favour of freedom can only be given by forcing the construction, or rather by transposing the sentence, that is to say, by transferring the word "such" from its actual position in the sentence to a different position, by placing it, not as it was placed

by the entailer in connexion with the word "debts," but by removing it from that place, and placing it in connexion with the subsequent word "deeds."

In the case of Blairadam (ante, 879,) an enumeration was clearly intended, and therefore it was justly held that there had been an omission, but here there was clearly no such intention; neither has the testator in this case, as in the case of Dick, (ante, 879,) fixed a specific meaning upon the word "deeds" in the prohibitory clause, so as to render it necessary that it should be received in the same meaning in the irritant clause.

Respondent's Argument.

LORD CHANCELLOR.—My Lords, in this case of Lang v. Lang the prayer of the summons was, that it might be declared "that the pursuer has full and undoubted "right and power to make up and complete, in his "person, valid titles to the said lands and others, in fee "simple or otherwise, and to alter the order of succession." The question arose on a settlement, which contained the provisions I will state to your Lordships, after settling the estate on a certain succession of parties. Though there is a question raised as to how far the party is within the description, in the view I take of the case, I do not feel it necessary to call your Lordships attention to that question, because it formed no part of the decision below.[1] There are other grounds on which I think the case can be safely disposed of. The prohibitory clause is in these words: "Providing also, as I "hereby expressly provide and declare, that it shall at

Ld. Chancellor's Speech.

Question:—Whether a party who takes under an entail as heir male of the body of the institute, is affected by prohibitions directed against "the substitute above named"?

[1] It was contended, that as the prohibitions were directed against "the "substitutes above named" (ante, p. 872,) they did not extend to the appellant, who took as heir male of the body of the institute.

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" no rate be allowable to the said Gabriel Lang my " son, nor any of the substitutes above named, called " to the succession of the lands and others before con- " veyed, to sell off or dispone upon any part of the " lands and subjects before transmitted, nor to contract " debt, or do any other deed whereby the said lands " and subjects may be adjudged or evicted from the " succeeding members of entail, or their hopes of suc- " cession thereto in any measure evaded; and if they " do in the contrary, it is declared, in the first place, " that all such debts and deeds shall be intrinsically " void and null, and of no force, strength, or effect," &c.

My Lords, in the course of the discussion of this case, as to how far these clauses raised an effectual prohibition against altering the course of succession, the terms of the statute were very much referred to. It does not appear to me that any great assistance can be derived from reference to the terms of the statute, for that merely describes the general rule,—(it does not affect to describe the form in which the thing is to be done,)—that in settlements to be made in pursuance of that statute there shall be clauses irritant and resolutive, which shall have the effect, among other things, of preventing any acts being done whereby the succession shall be altered, leaving the question entirely open, as to how that shall be carried out. Consequently the question, as to what clauses shall have the effect to prevent any thing being done which may alter the purposes of the settlement, is to be arrived at from a consideration of the decisions, rather than from the terms of the statute. The question really is, how far this case falls within the acknowledged rule, which, in fact, does not

appear to be disputed, viz. that there must be a distinct prohibition as to the particular matter which is brought under consideration, and that the prohibition of any particular act is not to be inferred from expressions supposed to include it, or as the consequences of some other prohibition.

This being the rule, it appears to me to be quite clear that the cases of Roxburghe and Lochbuy are distinguishable. In the case of Sinclair v. Sinclair [1], (ante, p. 879,) which was so early as 1749, a prohibition against altering the order of succession, granting wadsets, or the doing any other fact or deed that might anywise affect, burden, or evict the lands, or whereby the right and benefit of succession by virtue of the tailzie might be prejudged any manner of way, or whereby the lands might be evicted, adjudged, apprized, &c., was held not to include a prohibition against selling, although the consequences of selling would clearly fall within the mischief intended to be guarded against, and although there were expressions which, separated from the other parts of the sentence, would have described it. The cases of Campbell v. Wightman [2], in 1746 (ante, p. 879,) and Nisbet v. Young [3], in 1763, (ante, p. 879,) proceeded upon the same principle. In the Argaty case (Stewart v. Hoome [4], in 1789, ante, p. 879,) the expressions were less comprehensive than in some of the subsequent cases. I therefore pass over that case, and shall afterwards observe upon the cases of Lochbuy and Roxburghe.

[1] Sinclair v. Sinclair, 8th November 1749.
[2] Campbell v. Wightman, 17th June 1746.
[3] Nisbet v. Young, November 1763.
[4] Stewart v. Hoome, 8th July 1789.

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I now proceed to the Eastfield case[1], in 1808, (ante, p. 879,) in which the prohibition was against contracting debt, or doing any deed whereby the said lands might be apprized, adjudged, or in any manner of way evicted, in prejudice of the tailzie, "or of those who by virtue "thereof shall be then to succeed." This was held not to include a prohibition against altering the order of succession. The Earlshall case[2], in 1815, (ante, p. 879), is stronger. The prohibition was against selling, or contracting debts, or doing or committing any fact or deed, civil or criminal, whereby the said lands and estate or any part thereof might be in anywise adjudged, evicted, or forfeited anyways from them, or might be "affected in prejudice and defraud of the subsequent "heirs of tailzie and provision successively, conform to "the order and substitution above specified." Now, altering the order of succession would be most accurately described as "a fact or deed whereby the estate "would be affected in prejudice of the heirs of tailzie," but the prohibition was held not to include alteration of the succession, because these terms were so involved in the prohibition against contracting debts as to express rather a consequence of any such act, than a distinct prohibition against altering the succession. In Brown v. M'Gregor[3], in 1837, (ante, p. 879,) the same principles were acted upon by Lord Corehouse as Lord Ordinary. The terms used in Little Gilmour v. Caddel[4], in 1838, (ante, p. 879,) were not similar to those

[1] Brown v. Countess of Dalhousie, 25th May 1808.
[2] Henderson v. Henderson, 21st November 1815.
[3] Brown v. M'Gregor, 2d March 1837.
[4] Little Gilmour v. Caddel, 5th July 1838.

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used in the present case; but all the Judges of the Inner House recognized the principles upon which the preceding cases had been determined; and Lord Corehouse said, "I hold it to be a point as much settled "as any point in the law of entail, that an entail must "contain a substantive prohibition against alienation, a "substantive prohibition against contracting debt, and "a substantive prohibition against altering the order of "succession. There is no set form of words in which "these three prohibitions require to be expressed, nor "is a separate and distinct clause of any given style "necessary for each several prohibition, but the three "substantive prohibitions must be all there, and all of "them expressed."

The last case which has occurred is consistent with all those which I have before observed upon,—Braimer v. Bethune[1], in 1839 (ante, p. 879). The prohibition was, that it should not be lawful to alienate and contract debt, "nor to do or commit any fact or deed, civil or "criminal, whereby the said lands and estate, or any "part thereof, may be anywise adjudged or evicted "from them, or forfeited, or may be anyways affected "in prejudice and defraud of the subsequent heirs of "taillie and provision successively, conform to the order "and substitution above specified." Altering the order of succession was, no doubt, a fact or deed whereby the estate was affected to the prejudice of the heirs of tailzie; but it was held that such fact and deed was not prohibited. Here, then, is a succession of cases for above ninety years, in which the same principle has been acted upon; and how is the present case to be distinguished

[1] Braimer v. Bethune, 18th January 1839.

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from them? There is no substantive prohibition against altering the order of succession. There are, indeed, terms to be found in the prohibition against contracting debt, which, if used by themselves in a separate sentence, might have been sufficient to express such a prohibition; but which, when intermixed with other parts of a sentence addressed to a different purpose, are, according to all these cases, incapable of being selected and used for the purpose of expressing a new and distinct prohibition.

The present case appears to be clearly governed by the long train of decisions to which I have referred, and particularly the cases of Earlshall, and Braimer v. Bethune.

Against all these authorities one case only can be quoted, (for the Roxburghe case[1] (ante, p. 881,) is clearly distinguishable,) and that is the Lochbuy case[2], in 1807 (ante, p. 881). If that case had been now the subject of appeal, and no subsequent decisions had taken place impeaching it, I should not have hesitated between adhering to an intelligible rule which for nearly a century has regulated the law of property in Scotland upon this point, and a single decision contrary to all preceding decisions on the particular point, and inconsistent likewise with a rule established, not only by cases in Scotland, but by many decisions of this House, viz. that clauses imposing fetters are to be construed with strictness. But when we find that the Lochbuy case was decided in 1807, and that all the cases to which I have referred after that of Argaty have been subsequently decided, no weight can

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[1] Kerr v. Innes, 23d June 1807; affirmed 8th June 1811.
[2] Maclaine v. Maclaine, 23d June 1807.

be given to it as an authority; and one cannot but feel surprised that, after it had been so repeatedly overruled, it should have been made the ground of the decision in the case now under consideration. The case of Roxburghe, which is supposed to have governed that of Lochbuy, is clearly distinguishable from that case and from the present. The objection in this case is, that the expressions relied upon, as prohibiting alteration in the order of succession, are so involved in the prohibition against contracting debts, &c. that they cannot be separated,—that they express rather a consequence of one prohibited act than a distinct prohibition of another. That objection, however, has no place in the Roxburghe case, in which the prohibition against contracting debt, &c. is first completed and exhausted; and then a new sentence is added; viz. "nor zitt to do any other thing in "hurt and prejudice of the aforesaid tailzie and suc- "cession in haill or in part." I do not therefore hesitate to say, that I entirely concur in the opinion of the Lord Ordinary upon this point.

Being of this opinion upon this point, it is not necessary to say much upon the other, viz. as to whether the irritant and resolutive clauses are so expressed as to apply to the prohibition against selling. The prohibition is against selling, or contracting debt, or doing any other deed, and the irritant clause is as to all such debts and deeds,—taking up the very words of the prohibition so far as regards contracting debts, but passing over the prohibition against selling. The cases of Blairadam[1], and of Rennie v. Horne[2], (ante, p. 879,) in this House, appear to me to be conclusive.

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[1] Barclay v. Adam, 18th May 1821.

[2] Rennie v. Horne, 13th March 1838.

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I abstain from expressing any opinion upon other points, the above being sufficient to enable your Lordships to dispose of this appeal. I therefore move your Lordships that the interlocutor appealed from be reversed.

Ld. Brougham's Speech.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend in the opinion he has expressed. I had no doubt during the whole progress of this case that the interlocutor of the Lord Ordinary (Lord Jeffrey) gives a correct view of the case, and the law relating to it; and that the reversal of that interlocutor by the Lords of the Inner House was wrong, and ought to be reversed. My Lords, if we go to the statute, and endeavour to shape our course by any opinion to be deduced from that statute, (namely, the act of 1685,) we shall find that we are wholly at sea, that we have no compass or guide, and that we must resort, as my noble and learned friend has justly observed, to the law as expounded by the decisions, the statute itself affording no decisive rule one way or the other in the great majority of the cases which occur. This has been so frequently before remarked, that I need not illustrate the proposition by any instances, further than to say, that if the law of entail were to be taken merely from the statute, I venture to say that half a dozen persons sitting down to write a digest of Scotch law drawn from the statute alone, without opening any book of decisions, would make, every one of them, a different code of the Scotch law of entail: that I will venture to say, at all events, is the probability of the case.

My Lords, looking then to the rule of law upon this subject, as it is to be gathered from the decisions, it appears to me to be clearly in favour of the interlocutor

of the Lord Ordinary; nothing can be more clear than that there must be a substantive prohibition against selling, against alienating or disponing, against contracting debt, and against altering the order of succession. The question is, have we here a substantive prohibition against that act being done? There must, besides, be an irritancy of the act if attempted to be done, and there must be a resolution of the right of the contravener who has done that act. All these things are absolutely necessary to make it a valid entail, and two of those things are here wanting. There is no absolute prohibition against altering the order of succession, and in my humble judgment there is no irritancy in respect of altering the order of succession if that shall be attempted. When I say there must be a substantive prohibition, and a substantive irritancy, and a substantive resolution, I mean of course this, that each must be self-subsisting, — standing and existing by itself; it must not be merely brought in by way of inference from some other provision directed against some other act. Thus, you cannot by a side wind, and in dealing with the consequences of what you are prohibiting, prohibit at the same time burdening with debt or altering the order of succession. If, for example, you only state burdening with debt or altering the order of succession, as consequent on the act of selling or disponing or alienating, when you are principally and substantively dealing therewith, that will have no effect against those acts; it is not enough to say, "he, "my heir of entail, shall not sell, whereby the estate "may be incumbered or evicted, or the future succes-"sion defeated." That is not a substantive prohibition either against burdening or altering the order of suc-

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cession, it is a substantive prohibition against selling; and the fact of altering the order of succession is only brought in consequentially, and under the cover of the other, as connected with and arising out of it. Such is now the clear rule as to prohibitions, and so it is with respect to an irritancy. There must be an irritancy, not only of the act of sale, but an irritancy of the disposition, whereby the order of succession laid down in the destination clause is varied, and the rights of some heirs of entail defeated, or, as we should say, some remainder-men disappointed in favour of others. The irritancy must be levelled at the act of altering the order of succession; it is not sufficient that it should be levelled at it as a consequence and implication from the act of sale; it must comprehend distinctly an act which shall touch or affect the order of succession.

Now, my Lords, have we here a prohibition and an irritancy self-subsisting, and not being a consequence arising out of some other prohibition and irritancy, or have we not? That is the whole question. On looking into the entail it is perfectly clear we have not. The expression used is, "that it shall at no rate be "allowable, &c., to sell off or dispone upon any part of "the lands and subjects before transmitted, nor to "contract debt, or do any other deed," (now "contract "debt" rides over the whole, then what follows) "whereby the said lands and subjects may be adjudged "or evicted from the succeeding members of entail, or "their hopes of succession thereto in any measure "evaded."

But then it is said this sentence, no doubt, contains a prohibition to contract debt whereby the lands may be adjudged, and whereby the hopes of succession may be

evaded; but it contains, besides that, another substantive prohibition to do any other deed whereby the hopes of succession may be in any measure evaded, and this latter prohibition necessarily includes alteration of the succession. That, I admit, is one mode of construing it; and if that were the only mode of construing it, it might be fairly contended that there is a prohibition against altering the order of succession, as well as against contracting debt.

But is there not another mode of construing it? most manifestly there is. Observe the words used:—"or con-" tract debt, or do any other deed whereby"—that is, by which debt or by which deed eviction may take place, and an alteration of the order of succession may take place. It is not then a substantive prohibition against altering the order of succession, it is a prohibition against contracting debt whereby that order of succession may be altered, as well as whereby the lands may be evicted. Now, my Lords, I take it to be clear that if there are two constructions open, one of which makes this clause against altering the succession a substantive, and the other only an auxiliary clause,—one of which makes it a complete and separate fetter, and the other makes it not a complete and separate fetter,—you are bound by the principles of the Scotch law of entail to prefer that construction which is in favour of the freedom of the heir. The rule of the Scotch law is, that heirs of entail in succession are fiars; that is the cardinal point; that is the very corner stone of the law of entail in Scotland. The heirs of entail in succession in Scotland are every one of them perfectly free, unless in so far as they are fettered, whereas with us the tenant in

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tail is fettered except in so far as he is made free. If I make A. tenant for life, with remainder to B. and his first and other sons, that is a strict settlement in favour of A.; A. has only a life interest in the estate, unless I enable him to do certain things by adding a power. But in the Scotch law of entail the rule is, that each heir of entail takes a fee simple, unless in so far as he is fettered, and the proof that he is fettered is thrown upon those who would fetter him, consequently if there are two modes of construction of any given clause, (one of which leaves him free and the other fetters him,) the construction to be given to that clause is in favour of leaving him free, just as much as if there were only one construction, and that construction in his favour.

Then with respect to the second point, Lord Jeffrey says he thinks it clearer than the first. The second point is this: there is an irritancy, and it is a substantive and independent and effectual irritancy. The words used are, "That all such deeds and debts shall be in- "trinsically void and null, and of no force, strength, or "effect." If it had been "all deeds," that would have included (as well as debts) deeds, aliening, disponing, and otherwise altering the order of succession. But what deeds are covered by it? "All such deeds and "debts;" that is, the deeds and debts referred to in the last antecedent clause, the clause I have been dealing with, viz. "not to contract debt or do any other deed "whereby the said lands and subjects may be ad- "judged," which as we all know by the law of Scotland means "prejudiced." Now my Lords, that being the case, I hold those words to mean deeds in the nature of incumbrances, and that they do not apply to sale, to

disposition, to alienation, and alteration of the order of succession. This is an irritancy simply levelled at the last antecedent.

My noble and learned friend has already dealt with the cases on the subject, which dispenses with my going through them, except as regards the case which stands next for your Lordships decision; and as I am obliged to leave the House on other business at present, I shall merely state in passing how I think the two cases differ, because I should recommend to your Lordships, as I know my noble and learned friend is about to do, to reverse the interlocutor in this case of Lang v. Lang, but to affirm that in Monypenny v. Campbell, a case of great importance, but quite distinguishable from the present case. I mention Monypenny v. Campbell as a case prior, in point of decision, to this of Lang v. Lang. Lang v. Lang was in 1838. The Strathbrock case is in opposition to the Lochbuy case, which case is clearly the only one in accordance with the decision of the Court in Lang v. Lang, and against the decision of the Lord Ordinary. The decision in the case of Lochbuy is in the face of all the previous decisions, particularly the case of Strathbrock. It is most decidedly against that case, and I agree with my noble and learned friend in holding it not to be law. It is a painful thing to a court to be reduced to the necessity of saying that a case is not law which has never been reversed, and which has been so far acted upon that it has been adopted as a cardinal decision in this very case of Lang v. Lang; it is the only leg upon which that decision can stand. It is a very unpleasant thing to be reduced to the necessity of saying that a case which has been adduced in the Court below to support the present

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decision is not law; but if your Lordships say that that is law you must say that the Strathbrock case is not law, as well as a crowd of cases. It may, in some instances, be difficult with opposing decisions to find our way, but we have no such difficulty here; for the question is, whether one case is to be taken as law and a series of cases not law. I have no hesitation in saying I think the Court is wrong here, and that the Lochbuy case is not law.

I have only to add with respect to the Strathbrock case (that which stands next for judgment), that it is perfectly distinct from the present. If there had been only the words "to contract debt or do any other deed "whereby the said lands and subjects may be adjudged," that would have been consequential. It would have been the Lochbuy case wrongly decided, and Lang v. Lang wrongly decided. But the words are perfectly different; they are "that they shall not contract debt "for which the samen may be apprized and adjudged," and then comes a totally different clause, "or do any "other fact or deed in prejudice of the said tailzie." If the words had been "to contract debt or do any other "deed, whereby the said lands may be adjudged or "evicted from the succeeding members of tailzie or the "tailzie prejudiced," it would have been the same case as Lang v. Lang; it would have been the same case as Lochbuy; but it is totally different, the words "or do "any other fact or deed" are in a postponed clause to the words "or to contract debt for which the samen may "be apprized or adjudged." The prohibition of acts or deeds creating an alteration of the order of succession is distinguished and kept apart from the other, it is not dependent, ancillary, or consequential, but a distinct and substantial prohibition. It therefore is a perfectly different

case from Lang v. Lang, and affords no authority for it. It is a case, according to strict construction, in conformity with the Roxburghe case, the words in which are, " to " contract debt or do any deeds whereby the said estate " or any part thereof may be apprized, adjudged, or " evicted, nor yet to do any other thing in hurt or pre- " judice of the aforesaid tailzie and succession, in haill " or in part." The Roxburghe case sanctions and governs the Strathbrock case, and is the rule for deciding it. But, for the same reason, these cases do not interfere with Lang v. Lang, although they were decided, the one thirty years, and the other one year before Lang v. Lang. It follows, therefore, that the interlocutor in Lang v. Lang may be reversed, and that in the Strathbrock case consistently affirmed, the one being contrary to the current of all decisions, with the exception of the Lochbuy case, which we hold not to be law, and the other being according to the current of all the decisions, but particularly the decision in the Roxburghe case.

For these reasons, my Lords, I entirely agree with my noble and learned friend in the motion he has made to reverse the judgment of the Court below in the present case, as I shall equally concur in his intended motion to affirm the judgment in the case of Monypenny v. Campbell.

The House of Lords ordered and adjudged, That the said interlocutor complained of in the said appeal be and the same is hereby reversed.

ARCHIBALD GRAHAME — DEANS and DUNLOP, Solicitors.