[Heard 26*th April*. Judgment, *5th September*, 1844.]

DONALD LINDSAY, Trustee, on the sequestrated estate of the MOST NOBLE GEORGE MARQUIS OF HUNTLY, EARL OF ABOYNE, &c. &c., —*Appellant and Respondent in Cross Appeal.*

THE RIGHT HON. CHARLES EARL OF ABOYNE,—*Respondent and Appellant in Cross Appeal.*

Tailzie.—A prohibition against "burdening or affecting" lands "in "whole or in part, with debts or sums of money, infeftments of "annual-rent, or any other servitude or burden whatsoever," held to be a sufficient prohibition against the contracting of debt, to satisfy the Act 1685.

Ibid.—An irritant clause in its outset, embracing the acts done by the institute of entail, as well as by the heirs, is not limited in its operation to irritating the acts of the heirs only by these words, "and be ineffectual and unavailable against the other heirs called to "succeed," and by a subsequent declaration, that "the heirs, as well "as the said lands and estate, shall no wise be burdened therewith, "but free therefrom, in the same manner as if such debts or deeds "had never been contracted or granted, or such acts or omissions "had never been done or happened."

Ibid—A deed of entail only referring to a previous deed for its fetters, *held* to be ineffectual.

CHARLES HALLYBURTON, Earl of Aboyne, by deed bearing date the 23rd day of September, 1782, executed an entail of his land and lordship of Aboyne and others in favour of himself in liferent, and his eldest son, then George Lord Strathaven, in fee, and the heirs male descending of his body, and a series of other substitutes.

This entail contained the following among other prohibitions:—"And with and under this restriction and limitation "also, as it is hereby expressly conditioned and provided that it

LINDSAY *v.* EARL OF ABOYNE.—5th September, 1844.

" shall not be in the power of the said George Lord Strathaven " my son, nor of any of the other heirs succeeding to the said " lands and estate hereby resigned, to sell, alienate, wadset, " impignorate, or dispone the same, or any part thereof, either " irredeemably or under reversion, or to burden or affect the " same in whole or in part with debts or sums of money, " infeftments of anuual rent, or any other servitude or burden " whatever."

After giving the heirs power to make provisions for their wives and children, and limiting the way in which this should be done, the entail continued, " And with and under this " restriction and limitation also, that the said George Lord " Strathaven my son, and all the other heirs succeeding to the " said lands and estate, are and shall be hereby limited and " restrained from doing any act, and granting any deed directly " or indirectly, whereby the lands and estate before disponed, or " any part thereof, may be affected, apprysed, adjudged, forfeited, " confiscated, or be any manner of way evicted from the said " George Lord Strathaven, or any other of the said heirs, or this " taillie or nomination, or other writ to be granted by me or " the order of succession there or hereby established, be pre- " judged, hurt, or changed, excepting as in the cases before " excepted."

The prohibitions of this entail were fenced by the following clauses:—" And with and under this restriction and limitation " also, as it is hereby expressly conditioned and provided, that " the lands and estate before disponed shall not be affected or " burdened with, or be subjected or liable to be adjudged, " apprysed, or any other way evicted, either in whole or in part, " for or by the deeds or debts legal or voluntary contracted or " granted by the said George Lord Strathaven, or any of the " heirs succeeding thereto, whether before or after their succes- " sion to, or attaining possession of the said lands and estate, " or with, for, or by the omissions, acts, or deeds committed or

" done by them, or any of them, prior or posterior to their suc-
" cession. And with and under these irritances following, as it
" is hereby expressly conditioned and provided, that in case any
" adjudication, apprysing, or other legal diligence and execution
" shall happen to be obtained of or used against the fee or pro-
" perty of the lands and estate before disponed, or any part
" thereof, for not-payment or performance of any debt or deed
" payable or prestable by me or my ancestors whom I repre-
" sent, or of any real, legal, or public burden or other claim
" or demand to which the said lands and estate, or any part
" thereof, are now or may hereafter happen by law to be sub-
" jected or made liable, then and in that case the said George
" Lord Strathaven, or any other heir in possession of the said
" lands and estate for the time, shall be bound and obliged
" to redeem or otherwise purge such adjudications, apprysings,
" or other legal diligence within three years if he be within
" Scotland, and if he shall be forth thereof, within four years at
" most, after the same shall happen to be led and deduced; and
" final decreet therein pronounced. And in case of his or her
" failure to redeem and purge the same accordingly, then he or
" she, though dying or becoming legally disabled to hold and
" enjoy the said lands and estate within the space of three or
" four years, shall forfeit and lose his or her right and title to the
" lands and estate hereby disponed, and the same and right of
" redemption thereof, shall fall and devolve to the next heir
" capable to take and hold the same, who would succeed thereto
" upon the natural death of the person so failing, and such next
" heir called to the succession through the failure, death, or
" disability of the former heir, and also failing, such next heir,
" by death, or becoming legally disabled to take and hold the
" said estate, all the other heirs capable and called to succeed,
" through the death or disability of the former heir, within the
" space of five or six years at most after the obtaining such adju-
" dication or other legal diligence or execution as aforesaid,

" shall severally in their order be holden and obliged to declare " the irritancy of the former contraveener or failer's right, and " to redeem or purge the said diligences within the space of six " years at most, wherein if they also fail, they shall in like " manner forfeit and lose all right and title to the lands and " estate hereby disponed, and the same and right of redemption " thereof shall fall and devolve to any of the subsequent heirs " called after these so failing, whether nearer or remoter, who " shall think fit to redeem the said lands and estates, and purge " the said diligences before the expiry of the legal reversion " thereof, and the heir so redeeming and purging as said is shall " have the sole right and title to the said lands and estate, ex- " clusive of all the prior heirs who failed so to redeem. But " provided always that, in case any two or more of the subse- " quent heirs be ready and willing to redeem and purge as said " is, the nearer heir shall always be preferred to the right and " benefit of such redemption before the remoter heir, though " equally ready and willing to redeem. And provided also, that " the heirs so redeeming, and all the heirs succeeding to them, " shall be liable to the same conditions, restrictions, and irri- " tancies to which the heirs contraveening or failing were liable. " And with and under this irritancy, as it is hereby conditioned " and provided, that in case the said George Lord Strathaven " my son, or any of the other heir succeeding to the lands and " estate before disponed, shall contraveen the before-written con- " ditions, provisions, restrictions, and limitations herein con- " tained, or any of them, that is, shall fail or neglect to obey or " perform the said other conditions and provisions, and each of " them, or shall act contrary to the said other restrictions and " limitations, or any of them, or shall contraveen any other con- " ditions and restrictions to be hereafter added and appointed by " me, excepting as is before excepted; that then, and in any of " these cases, the person or persons so contraveening shall for " him or herself only *ipso facto* amitt, lose, and forfeit all right,

" title, and interest which he or she hath to the lands and estate " before disponed, and as such right shall become void and " extinct, so the said lands and estate should devolve and accrese " and belong to the next heir appointed to succeed, albeit " descended of the contraveener's own body in the same manner " as if the contraveener were naturally dead, and had died before " the contravention. And upon every contravention which may " happen by and through the said Lord George Strathaven my " son, or any of the other heirs succeeding to the said lands and " estate, their failing to perform all and each of the conditions, " or acting contrary to all or any of the restrictions before " written; it is hereby expressly provided and declared, not " only that the lands and estate before disponed shall not be " burdened with or liable to the debts, deeds, or acts of the said " Lord George Strathaven, or any other of the heirs contraveen- " ing, as is already herein provided, but also all debts con- " tracted, deeds granted, and facts done contrary to the condi- " tions and restrictions appointed by me, or to the true intent " and meaning hereof, shall be of no force, strength, or effect, " and be ineffectual and unavailable against the other heirs " called to succeed, and who, as well as the said lands and " estate, shall nowise be burdened therewith, but free therefrom " in the same manner as if such debts or deeds had never been " contracted or granted, or such acts or omissions had never been " done or happened. And also it is hereby provided and de- " clared that it shall be free and lawful to every heir who shall " have a title by and through any contravention or the inca- " pacity of the former heir, and though a minor at the time, to " sue and obtain declarator of his own right, and of the irritancy " of the former heir's right, or to serve heir of the person who " died last vest and seized in the lands and estate before dis- " poned preceding the heir becoming incapable or contraveening, " and thereby, or by adjudication, or any other formal or legal " way or method, to establish in his or her person the right and

LINDSAY *v.* EARL OF ABOYNE.—5th September, 1844.

" title of, and to the said lands and estate, and that without " being subjected to, or liable for the deeds or debts of the person " or persons becoming incapable or contraveening, and without " regard to their neglects or omissions, or any alteration made " or intended, or acts done by them contrary to the conditions " and restrictions appointed by me."

On the 30th of November, 1785, the Earl of Aboyne executed an entail of his lands of Drumniachie in favour of the same series of heirs as in the entail of 1783, by a deed which bore special reference to that entail by recital of its date and contents. This deed of 1785 did not contain any express fetters further than by the following Clause: " But with and under " the conditions, provisions, restrictions, limitations, exceptions, " clauses irritant and resolutive, and declarations specified in the " said deed of entail, and likewise herein referred to and held as " repeated *brevitatis causâ*, but which are appointed to be in- " grossed in the charters and infeftments to follow thereupon, " and on these presents."

The maker of these deeds died, and was succeeded in his estates by his eldest son, the institute in the deeds, who afterwards became George Marquis of Huntly and Earl of Aboyne. The estates of the Marquis of Huntly were sequestrated by the Court of Session for payment of his debts, and the appellant was appointed trustee under the sequestration. In that character he brought an action against the Marquis of Huntly and the substitutes of entail, concluding that it should be found " that " the said deed of entail, dated 23rd September, 1782, is not " entitled to the protection of the Act of Parliament anent " tailzies, and therefore that the said lands and lordship of " Aboyne, and others, are liable for the debts of the defender, " the said George Marquis of Huntly, and are liable to be " attached by the diligence of his creditors; and in particular " that, notwithstanding the provisions and declarations, prohi- " bitions, limitations, and restrictions, and clauses irritant and

" resolutive, of the said deed of entail, the said lands and others " are liable for the debts due to the creditors of the said Marquis, " and consequently, the said lands and others are legally, validly, " and effectually adjudged from the defender and the subsequent " heirs of entail above mentioned, in virtue of the decree of adju- " dication pronounced in favour of the pursuer as trustee afore- " said, for payment and satisfaction of the debts due by the said " Marquis: and it ought and should be found and declared that " the pursuer has a good and sufficient right to grant leases of " the said lands and others before mentioned, for the space of " two nineteen years, or for nineteen years and the lifetime of " the tenant in possession at the expiry of the said nineteen " years, according to the powers contained in the said deed of " entail: and *separatim*, it ought to be found and declared, by " decree foresaid, that the supplementary deed of entail, dated " 30th November, 1785, is invalid and ineffectual, and does not " protect the lands of Drumniachie, and others therein men- " tioned, or the advocation and donation and right of patronage " of the united parishes of Glenmuick and Glengarden, from " being affected by the debts and deeds of the said Marquis of " Huntly, and that they are liable therefore and are adjudged, " by decree foresaid, to pertain and belong to the pursuer, as " trustee foresaid, for payment and satisfaction of the debts due " by the said George Marquis of Huntly."

The pleas which the appellant maintained in support of this action were as follow:

" 1. The prohibitory clause contained in the deeds of entail " executed by Charles Earl of Aboyne, in the years 1782 and " 1785, do not contain the substantive prohibitions required by " the Act 1685; and in particular, they do not contain a pro- " hibition in terms of that Act against the contraction, nor do " they prohibit the contraction of debt, which may be made " good and effectual against the tailzied lands and estate by " process of law.

LINDSAY *v.* EARL OF ABOYNE.—5th September, 1844.

" 2. The deeds of entail libelled on do not contain a decla-
" ration in conformity with the Statute 1685, that all debts con-
" tracted, deeds granted, or facts done by the institute or heirs of
" entail, in opposition to, or in contravention of, the prohibitions
" contained in the deed of entail, shall be in themselves null and
" void.

" 3. The irritant and resolutive clauses contained in the
" deed of entail do not apply to the prohibitions, and therefore
" the prohibitory clauses are not fenced, in terms of the Act
" 1685, by the requisite irritant and resolutive clauses; and con-
" sequently, as the deed is not framed in terms of the Act 1685,
" the heirs of entail are not entitled to plead the terms of that
" statute or prevent the estate from being adjudged by the
" trustee.

" 4. The resolutive clause in the deed of entail declares, that
" if Lord Strathaven or the heirs of entail should contravene the
" prohibitions, then he should *ipso facto* lose the title to the
" estate; but this resolutive clause does not apply to any act
" done by the creditors for the purpose of adjudication, as that
" act is not done by the institute or heirs in possession, and the
" penalty cannot apply to the acts of third parties.

" 5. The irritant and resolutive clauses in the deed of entail
" libelled upon cannot prevent the adjudication of lands in pay-
" ment of debt, although they are contained in the deed of entail,
" if there is not a substantive prohibition against the contraction
" of debt, because the diligence of the law cannot be excluded if
" the prohibition do not reach the personal contractions of the
" heir.

" 6. There being no prohibition against the contraction of
" debt, and the irritant and resolutive clauses being only directed
" against and applied to acts done by the Marquis, or to things
" done in consequence of acts of the Marquis, which are prohi-
" bited, or to a failure on his part to obey an obligation or in-
" junction imposed on him, neither the irritant nor resolutive

" clauses can have any effect or operation in the case of adjudi-
" cation or other diligence being used against the estate upon
" debts contracted by the Marquis, there being in such proceed-
" ing no direct act or interference on the part of the Marquis,
" nor any thing following upon any act of the Marquis which is
" prohibited, nor any failure on the part of the Marquis to obey
" any obligation or injunction imposed on him by the entail; or,
" at all events, the irritant clause does not apply to the case
" supposed.

" 7. The entail is not valid and effectual, because, while it
" purports to resolve the right of the contravening heir, and
" declares that the next heir shall be entitled to complete his
" right to the estate, without respect to the acts of the contra-
" vener, it omits, in a special enumeration of such acts, all refe-
" rence to deeds of sale and alienation.

" 8. The entail is not valid and effectual, in respect that the
" provision for enabling any of the heirs-substitute, in the event
" of a contravention of the entail, to sue and obtain declarator
" of his own right, and the irritancy of the contravener's right
" only applies to cases of contravention by an heir of entail, and
" not to the case of contravention by the institute, so that, in
" terms of the said provision, it is not in the power of an heir-
" substitute to pursue a declarator of his own right, or irritancy
" of the Marquis of Huntly's right, in the case of a contravention
" by him, he being the institute, and not an heir of entail; and
" consequently the entail contains no irritancy or resolution of
" the Marquis of Huntly's right to the estate, which can be
" made effectual against him, which is essential to the validity
" of the irritancies in the entail as regards him, and hence also
" essential to the validity of the entail itself.

" 9. The Marquis of Huntly, the institute under the entail,
" is not precluded from letting leases for any period, or in any
" way, for or in which a fee-simple proprietor may grant leases
" according to law.

LINDSAY *v.* EARL OF ABOYNE.—5th September, 1844.

"10. The lands contained in the supplementary deed of "entail executed in 1785, are not entailed, because no entail "can, in a question with third parties, be made by a mere deed "of reference to a previous deed of entail."

The respondent, the eldest son of the Marquis of Huntly, on the other hand, pleaded as follows:—

"1. The action has been incompetently raised, or at least "cannot now be insisted on, being barred by the provisions and "enactments of the Sequestration Act.

"2. The action is groundless in itself, in respect the deed or "deeds of entail libelled, are in every respect formal and com- "plete, both under the Act 1685, and otherwise; and in parti- "cular, said deed or deeds, by sound construction, effectually "prohibit the contracting of debt, and protect the estate from "all claim or diligence at the instance of the creditors of the "Marquis of Huntly."

The questions raised were argued in elaborate cases. Upon considering these papers the Lord Ordinary (Jeffrey) made avizandum with the cause to the Inner House, accompanying his interlocutor by a note in these terms.

"*Note.*—The Lord Ordinary reports this case without a "judgment, that it may be decided with the least possible "delay: there are points of nicety in it, but, on the whole, he is "inclined to sustain the defences.

"Upon the leading question, as to the sufficiency of the "prohibition against *debts*, he sees no reason for departing from "the authority of the cases of Gala, in 1722, Sheuchan, in 1820, "and Newhall and Cappledrae, both in 1823; and he cannot "consider these cases as at all discredited by the later judgment "in the case of Carleton, in 1830; both because there is no "mention whatever of *debts* in the leading clauses of that entail; "—but a prohibition merely against 'burdening with *infeftments* "'*of annual rent, or any other servitude or burden*,'—and because "there was, in fact, no decision, or room indeed for deciding—

" whether even these words might not amount to an effectual " prohibition of debts; inasmuch as the case was disposed of on " the ground that there had, in reality, been no debt contracted, " and that it was consequently unnecessary to determine what " would have been the effect if there had. In any question upon " the construction of so succinct and imperfectly expressed a " statute as that of 1685, it would be most hazardous to disturb " or depart from such a series of decisions; but if the question " were open, the Lord Ordinary conceives that effect would now " be given to the views on which these judgments proceeded. " The very basis of the pursuer's argument appears to him to be " unsound. He necessarily assumes that it was really intended " by the statute to prohibit the contraction of *personal debt;* that " in strictness of law, every heir who signs a bill or personal " bond, or who owes an account to his tailor, has truly incurred " an irritancy; and that there is nothing but the *want of in-* " *terest* in the succeeding heirs that prevents it from being " enforced. Now, the succeeding heirs have as little interest in " one-half of the irritancies which occur in some entails, as in " this of contracting personal debt. But take the most usual " and common provisions of irritancy, as by not taking the name " and arms, or forfeiting on succeeding to a peerage, or to " another estate: what possible interest have the succeeding " heirs in the enforcement of these, or of more capricious condi- " tions, which do not in the least affect the integrity or value of " the estate, or in any way shake the security of its descent " through the whole course of the destination? Yet all these " are enforced daily, and are indeed among the most common " cases of actual forfeiture. The decisions, therefore, which " have settled that no irritancy is incurred by the mere con- " traction of personal debt, *could not* not have proceeded on the " ground of want of interest to enforce it; there being always " the solid and sufficient interest to bring the succession nearer to " the substitutes who might challenge. And it is plain, indeed,

LINDSAY *v.* EARL OF ABOYNE.—5th September, 1844.

" both from the reason of the thing and the reports, that they
" did proceed upon the more fundamental ground, *that it was*
" *not the true meaning of the statute* to prohibit such contractions,
" but only their being allowed to affect or become burdens on the
" estate. They are truly decisions, therefore, not on the import
" of clauses in the deeds under consideration, but *on the construc-*
" *tion of the act;* and to the Lord Ordinary they appear most
" sound decisions. The Act itself does not, even in terms, pro-
" hibit the contraction of debt *generally or absolutely;* but only
" the contraction of debt, 'whereby the lands may be adjudged,
" 'apprised, or evicted:' *may* obviously meaning *shall actually*
" *be* (or rather be attempted to be) so adjudged or affected; since,
" on any other view, these most important words would have no
" meaning or effect whatever; *all* lawful debts being *capable* of
" being made the means of attaching the property. The very best
" and most accurate *formula* therefore, for following out this pro-
" vision of the statute, would seem to be that adopted (and found
" sufficient), in the case of M'Kenzie (Newhall), of a prohibition
" 'to contract debts *on the property*,' which in the succeeding
" case of Cappledrae was justly thought to be synonymous with
" 'burdening the property with debts.'

" It is to be observed, too, that if these be substantially deci-
" sions on the true import and meaning of the statute, the prin-
" ciple of *strict construction* (so much pressed by the pursuer), is
" quite as applicable to a statute limiting the rights of property,
" as to any private instrument executed under its authority, and
" is *wholly against* the interpretation for which he now contends,
" —it being plainly a far greater infringement of common law
" rights, and far more penal and odious in itself, to subject a
" proprietor to forfeiture merely for contracting *personal* debts,
" than to reserve that penalty for making them burdens on a
" privileged or protected property.

" These views are probably sufficient for the decision of the
" present question. But the Lord Ordinary has a strong im-

LINDSAY *v.* EARL OF ABOYNE.—5th September, 1844.

" pression that the reasoning of the pursuer rests on a still more " fundamental fallacy. What he chiefly relies on, is an alleged " defect in the *prohibitory* clause; and, pretty nearly admit- " ting that the irritant and resolutive clauses are sufficient, he " puts the case distinctly on the proposition that a prohibitory " clause is essential; and that no form of expression in " the other operative clauses can supply its want or imper- " fection. Now, the Lord Ordinary demurs to the whole " of this doctrine. The statute requires no prohibitory clause, " and makes no mention of any such clause; and accordingly the " Lord Ordinary cannot now bring to his recollection that he " has ever seen an entail in which words of proper *prohibition* or " interdiction occur. The most common form of the introduc- " tory enumeration of the things to be irritated is, that 'it shall " 'not be lawful' to the institute and heirs to do so and so; or, " *as happens to be the case in the present instance*, that 'it shall " 'not be in the power' of the said parties (see printed deed, p. " 9, C) to do so and so. But these, it is thought, are in sub- " stance *not prohibitory*, but general and preparatory *irritant* " clauses. That 'it shall not be lawful' to do certain acts, means " only that these acts *shall not be effectual in law;* and that the " 'heirs shall not have power' to do them, can import nothing " else (since the physical or *actual power* undoubtedly remains), " but that they shall not do them *with effect;* or, in other words, " that they shall be null, in respect of the declaration of irritancy, " to which this statement is but introductory. The Lord Ordi- " nary's notion, in short, is, that the clauses called prohibitory " are truly in all cases but preambles to the only really operative " clauses, the irritant and resolutive; and preambles, too, which " might be very safely omitted. For he is of opinion further, " that there is no need, either under the statute or in the nature " of the thing, for any such introductory specification; and that " a perfectly valid entail might be made by proper irritant and " resolutive clauses alone, without anything in the nature of that

LINDSAY *v.* EARL OF ABOYNE.—5th September, 1844.

" previous enumeration, which the pursuer calls prohibitory, and " maintains to be essential. If the maker of such a deed, for " example, immediately after disponing the lands to a certain " series of persons, under the conditions, provisions, and limita- " tions after written, were merely to proceed in some such words " as these: 'That is to say, that if any of the said persons shall " ' sell, alienate, or dispone the said lands, or shall burden or " ' allow them to be burdened with debt, or shall alter the order " ' of succession, &c., then, not only shall all such acts and deeds " ' be null and of no effect against the said lands, but every " ' person so acting shall forfeit all right thereto,' &c.; would " not *this* be altogether as good and effectual a deed, as if these " irritant and resolutive clauses had been introduced by a decla- " ration that it should not be lawful to (or in the power of) the " the said persons to sell, burden with debt, or alter the order of " succession? Now, even assuming that the introductory pro- " vision in the present case, that it shall not be in the power of " the institute or heirs to burden the lands with debt, would not " be sufficient to protect them from adjudication at the instance " of creditors, the Lord Ordinary thinks there is enough in the " irritant clauses which ensue to effect this purpose.

" First of all, however, there is a distinct obligation laid on " the heirs to purge, within three years of their date, *any adju-* " *dications* which may be deduced, not merely for debts or obli- " gations of the entailer himself, or his ancestors (though these " are first mentioned), but 'for any legal or public burden, *or* " ' *any claim or demand* to which the said lands, or any part " ' thereof, may hereafter happen *to be subjected or made liable.*' " Now, if this is to be read as supplementary to, or exegetic of, " the previous provision that there should be no power to burden " with debt, it would seem to leave no doubt as to the fact that " burdening, and *allowing to be burdened*, were expressly placed " and brought under the same category by the entailer.

LINDSAY *v.* EARL OF ABOYNE.—5th September, 1844.

"But at all events, there is a distinct and *independent* "clause, providing 'that the lands above disponed shall not "'be affected or burdened with, or be liable to be adjudged, "'apprised, or evicted (in whole or in part) for or by the debts "'or deeds, whether legal or voluntary, of the said George (the "'institute) or any of the heirs succeeding, or by any omissions "'or acts committed or done by them, either prior or posterior "'to their succession.' Now, the Lord Ordinary considers this "as a proper and *specific, or special irritant clause*, importing in "direct terms that all such debts and deeds shall be null, and of "no effect in regard to the said property. And, as it bears no "reference to any previous prohibition or declaration of want of "power, he does not see why it should not be admitted to its "full effect, exactly as if there had been in the deed no such "previous declaration; and then the only question as to the "complete validity of the provision must depend upon its being "sufficiently covered by the terms of the *resolutive* clause. That "clause, however, which immediately follows the two which "have been last referred to, is of the most general and com-"prehensive description, and purports, 'That if any of the "'persons so called to the succession shall contravene *any* "'*of the said provisions or limitations*, or shall *fail or neglect to* "'*obey or perform the whole said conditions and provisions, or* "'*any of them*,' they shall omit, lose, and forfeit all right to the "lands, &c. Now, as it cannot be disputed that both the in-"junction to purge all adjudications, and the provision that no "debts or deeds of the heirs should be allowed to affect or burden "the lands, are among 'the provisions, conditions, and limita-"'tions' of the deed, it seems necessarily to follow that any heir "who should allow the lands to be affected or adjudged for his "debts or deeds must be held to have 'failed or neglected to "'perform the whole of the said conditions and provisions;' "and consequently to have incurred the full penalties of the "resolutive clause.

LINDSAY *v.* EARL OF ABOYNE.—5th September, 1844.

" The whole is wound up by an anxious and comprehensive " iteration of the irritant clause; declaring, 'not only that the " ' lands shall not be burdened or affected by the debts or deeds " ' of the said George (the institute), as the heir succeeding, *as* " ' *is already provided*, but that all debts contracted, deeds " ' granted, and facts done, contrary (not to any previous *pro-* " ' *hibitions*, but generally), to *the conditions or provisions ap-* " ' *pointed by me*, or the true meaning thereof, shall be *of no* " ' *force, strength, or effect, and ineffectual and unavailable* " ' *against the other heirs and the estate*, which shall nowise be " ' burdened therewith, but free therefrom, as if such debts or " ' deeds had never been contracted or granted, or any such acts " ' or omissions had never been done or happened.' The cavil " of the pursuer as to the want of the words 'null and void,' " in this most elaborate irritant clause, seems entitled to no " consideration, any more than that as to the introduction of " the word 'other' in the preamble to the resolutive clause, " which manifestly refers and can only refer to the immediately " preceding provision about purging adjudications; and cannot " possibly refer merely to future contemplated provisions; inas- " much as the leading words are '*the said other* provisions and " ' restrictions, or any of them;' after which it is added, as a " separate and alternative provision, 'or any other conditions and " ' restrictions to be hereafter added and appointed by me.' The " defender's answer to the seventh and eighth pleas of the pur- " suer is also satisfactory to the Lord Ordinary. He is inclined " to hold, however, that the limitation of the power of *leasing* is " not so expressed as to affect the institute; but the plea upon " this point seems not to be within the libel, and indeed, to be " inconsistent with the only conclusion in the summons with " regard to it.

" With regard to the supplementary entail of Drumniachie, " the Lord Ordinary is satisfied, on the whole, with the autho- " rities and explanations of the actual state of the titles furnished

" or referred to by the defender. He thinks it material, however, " to observe, that the only decision which is reported in the case " of Bromfield (or Paterson of Eccles), mainly relied on by the " pursuer, as of June 1784, was not in fact the ultimate decision " in that cause, having been recalled by the House of Lords, " when the case, in consequence of an appeal against that deci- " sion, was remitted for the consideration of this Court; upon " which remit appearance was for the first time made for the " heirs who had been omitted in the second entail, and the " ultimate judgment of the Court against its validity was then " (March 1786) specially rested on the ground of that omission; " the ultimate finding being ' that in respect of the alterations in " ' the last deed, *and in particular that certain heirs called in the* " ' *entail of* 1743 *are omitted in the disposition of* 1758, the said " ' disposition is to be held as a new settlement of the estate, and " ' *not being insert in the register of tailzies*, is not effectual " ' against creditors.' The present Lord Ordinary had occasion " to consider the particulars of that case in deciding that of " Turnbull and Hay Newton, in June 1836; and his account of " it will be found in a note to p. 1033, &c. of the 14th volume " of Mr. Shaw's *Reports*. Not having again looked back to the " Appeal Cases, he cannot say positively whether the separate " finding in the first judgment of June 1784, on which the pursuer " relies (as to the limitations of the one deed being only referred " to in the other), was repeated in the ultimate judgment of " 1786, which was affirmed *simpliciter* upon a second appeal. " But his impression is that it was not. The parties, however, " can easily satisfy themselves as to this (if thought material) " before the case comes on for judgment."

The Inner House (*First Division*) allowed the parties further argument in printed Minutes, and directed the pleadings to be laid before the other Judges for their opinions. That opinion was unanimous as to eight of the Judges (the Lord Ordinary adhered to the opinion in his note), and was in the following terms:—

LINDSAY *v.* EARL OF ABOYNE.—5th September, 1844.

" I. The first question raised in this case by the record and " the revised cases is, whether there is a sufficient prohibition in " the original entail of 1782 against the contraction of debts?

" I do not entertain the least doubt, that a direct prohibition " to this effect is indispensable to the validity of every entail, in " so far as debts may be contracted to third parties by which the " estate may be affected. Every one understands what is meant " by the prohibitory clause. It is the clause, which in direct " terms prohibits, or declares it not to be lawful for, the " heirs to alter the order of succession, to sell or alienate the " estate, or to contract debts. It is so described by Mr. Erskine, " B. iii. tit. 8, § 23; and I have always understood it to be " settled law (as it has been expressed in emphatic words), that " the prohibitory clause is the key-stone of the entail. All the " cases of Argaty, Roxburgh, Lochbuy, Eastfield, &c. entirely " depended on this assumption, and on the question, whether " there was or was not a substantive prohibition against altering " the order of succession in that which all the lawyers held " to be the prohibitory clause; and the same has been the basis " of innumerable questions on the sufficiency of the words to " constitute *prohibitions* against *sales*, against *leases*, against *con-* " *tracting debts*, &c. I could not, therefore, assent to some of " the propositions in the Lord Ordinary's note in the present " cause, if I rightly understand them. I could not hold, either " that the usual clause which has been so denominated is not a " prohibitory clause, or that, without such a clause applying to " the three distinct classes of deeds, any entail would be effectual " to its purpose. More particularly, I could not think, that a " deed containing merely irritant and resolutive clauses could be " effectual as an entail under the Act 1685, if there was no pro- " hibitory clause, to which the forfeitures and irritancies declared " could be applied. The example of such a thing suggested " hypothetically would not, in my humble apprehension, consti- " tute a valid entail.

LINDSAY *v.* EARL OF ABOYNE.—5th September, 1844.

" In expressing my opinion, therefore, in the present case, " I assume the necessity of a prohibitory clause, applying specifically to the case of debts contracted. But, when this is " granted, I am of opinion, that there is a sufficient prohibitiou " against debts in the entail now before the Court.

" If this question had occurred for the first time, I might " have thought it to be attended with great doubt. But, as the " matter stands, I think that the point is ruled by decisions to " which I see no answer; and being of opinion, that there has " been no change of the law since those decisions were pro- " nounced, I cannot discover any ground on which the Court can " now depart from them. The material words in this entail are, " that it shall not be in the power of the heirs to sell, alienate, " &c., 'or to *burden or affect* the same in whole or in part *with* " '*debts or sums of money*, infeftments of annual rent, or any " 'other servitude or burden whatever.' Now, in the case of " Haggart *v.* Vans Agnew, December 19, 1820, the words were, " 'or to *burden the same in whole or in part with debts, sums of* " '*money*, infeftments of annual rent, or any other security or " 'burden whatever.' It is evident that the words in the two " cases are the very same. But, in the case of Agnew, the " Court were clearly and unanimously of opinion, 'that the " 'clause in question was quite effectual to free the estate from " 'the claims of Robert Vans Agnew's creditors.' It does not " appear that any appeal was taken against that judgment: and " it is impossible to deny that it is directly in point to the " present question.

" The case of Mackenzie, May 23, 1823, was not exactly " the same, the words being 'or to contract debts *thereon*, or " 'grant infeftments of annual rent,' &c. But it was held to " stand on the same principle; and the Court adhered to the " Lord Ordinary's interlocutor, which found that 'the deed of " 'entail libelled is sufficient to protect the estate against being " 'affected, burdened, or adjudged by the debts in question.'

LINDSAY *v.* EARL OF ABOYNE.—5th September, 1844.

" But the subsequent case of Nisbett against Sir David Mon-
" crieff, &c., June 10, 1823, is again identical with the present
" case, the words of prohibition being, '*nor to burden the same in*
" '*whole or in part with debts or sums of money*,' &c., whereby
" the lands might be affected or adjudged—which the Court
" found to be sufficient to prevent the estate from being attached
" for a personal debt.

" The ground of doubt in these cases was, that, as there was
" not a direct prohibition against *contracting debts* simply, as the
" Act 1685 might be thought to point out, but only a prohi-
" bition to *burden the estate* with debt, it might be held that the
" clause was not direct or explicit against the *contraction of per-*
" *sonal debts* on which adjudication might follow. But the
" answer was thought satisfactory, that the object being only to
" protect the estate and the heirs of tailzie against being bur-
" dened with the debts of any heir, the words were sufficient for
" that purpose. The argument of the pursuer in the present
" case, however ably conducted, is the very same which was
" employed unsuccessfully in those cases. And, the point having
" been thus deliberately discussed and determined in two if not
" in three cases, I think it impossible for the Court now to
" depart from the law so laid down.

" The pursuer refers to the interlocutor of the Lord Ordinary
" in the case of Cathcart, February 12, 1830. That is in reality
" no judgment; because, although the Court adhered to the
" interlocutor in the material part of it, they expressly recalled
" the findings on which the pursuer founds, and refused to pro-
" nounce any judgment on the question whether there was a
" sufficient prohibition against debts or not. But, in reality, the
" words of the clause in that case were essentially different from
" those which occur in the present entail, or which occurred in
" those of Sheuchan, Newhall, or Moncrieff. For there was
" nothing there but general words, added to the prohibition
" against alienation, 'nor yet to wadset or burden with *infeft-*

LINDSAY *v.* EARL OF ABOYNE.—5th September, 1844.

" ' *ment of annual rent nor any other servitude or burden.*' These " words are quite general. They occur in almost every entail, " quite distinct from the prohibition to contract debt. They " are in the present entail; and similar words were in the entail " of Sheuchan. But the question here does not depend on any " such vague words. The terms relied upon as a prohibition, as " they were relied upon in Sheuchan and Moncrieff, are 'or to " ' *burden or affect* the same in whole or in part *with debts or* " ' *sums of money.*' This is a very different clause from the more " general terms which occurred in the entail of Carleton. And, " after all, there was no judgment on the effect of it. Whatever " I may have thought on that point, I hold the case now before " the Court to be essentially different, and to be ruled by the " positive decisions in the other cases.

" II. The second question is, whether, assuming that there is " sufficient prohibition against debts, the resolutive clause is so " expressed as to be effectual to protect the estate against credi- " tors. I am of opinion that it is sufficient.

" The pursuer's argument against the efficacy of the resolutive " clause really comes to a very narrow point. The maker of the " entail has in some degree perplexed his deed by the anxious " introduction of injunctions on the heir to purge the estate of all " adjudications, which might be led for entailer's debts, or for " legal burdens affecting the lands, and a very special and minute " resolutive clause directed against any failure in that point. It " is after that long and particular clause that the general resolu- " tive and irritant clauses, in plain terms directed to the fortifica- " tion of the general prohibitory clause, are introduced. That " this is the nature of them, is manifest from the introductory " words: 'And with and under this irritancy, as it is hereby " ' conditioned and provided, that in case the said George Lord " ' Strathaven, my son, or any of the other heirs succeeding to " ' the lands and estate before disponed, *shall contravene the* " ' *before written conditions, provisions, restrictions, and limita-*

LINDSAY *v.* EARL OF ABOYNE.—5th September, 1844.

" ' *tions*, HEREIN CONTAINED, *or any of them.*' It seems to be " granted by the pursuer, and is too clear for argument, that these " words are sufficient to cover the whole prohibitions, and that if " the clause had gone on directly to the operative part of it, with- " out further explanation, there could have been no doubt of its " sufficiency. But he maintains, that the words which follow are " to be taken as explanatory, and that they limit the forfeiture " declared, in some way which cannot be defined, and really is " not easily understood. If, indeed, the clause had gone on to a " special enumeration of particulars, and in that enumeration had " omitted any of the essential cases, such as sales or the contrac- " tion of debts, there would be very good ground for maintaining, " that the general words were to be taken as qualified by the " special definition, and that the clause could not apply to the " omitted case. But in this entail there is no such thing. The " object of the explanatory words is merely, to distinguish be- " tween acts of *omission* or *disobedience* of things enjoined, and " *positive* acts in *violation* of *direct prohibitions;* and it is only by " laying hold of a single word, the meaning and effect of which " are perfectly clear, that any appearance of difficulty can be " raised. The words are, ' That is, shall *fail* or *neglect to obey* or " ' *perform* the SAID *other* conditions and provisions and each of " ' them, or shall *act contrary* to the said *other restrictions* and " ' *limitations*, or any of them.' Some words are added, which " seem to me to be immaterial,—' or shall contravene any other " ' conditions or restrictions *to be hereafter added* and appointed " ' by me.' Whatever may be the effect of these last words, " they can have no influence to hurt the efficacy of the preceding " words. And, laying them aside, the clause goes on,—' that " ' then, and *in any of these cases*,' the person contravening shall " forfeit all right to the estate, in the most ample terms. Now " there is really nothing to be said against this clause, as import- " ing any limitation of the general words in the beginning of the " sentence, but that the word *other* has been introduced into it.

LINDSAY *v.* EARL OF ABOYNE.—5th September, 1844.

" But it is very evident to me, that that word, though unneces-
" sary, rather tends to give precision and definite application to
" the clause, as relating to the various limitations expressed in
" the general prohibitory clause. The object and the effect of the
" word are, to disconnect the clause from the special matters to
" which the immediately preceding particular resolutive clause
" relates. It tends to prevent that very ambiguity which has
" occurred in other cases, by which a clause of this nature has
" been held or maintained to be restricted to the sort of acts or
" deeds against which the immediately preceding clauses were
" directed. But, if any doubt could exist about this matter, it
" would be removed by the words immediately following, which
" are introductory to the irritant clause; that upon any *contra-*
" *vention* 'by and through the said George Lord Strathaven,' &c.,
" ' or any of the heirs, *their* FAILING TO PERFORM *all and each of the*
" ' *conditions, or* ACTING CONTRARY *to all or any of the restrictions*
" ' BEFORE WRITTEN.' These are plain words, and they define pre-
" cisely what the contravention is, which is expressed in the
" preceding resolutive or forfeiting clause.

" I cannot, therefore, see any reasonable ground for doubt that
" the resolutive clause is sufficient.

" III. A separate objection is taken to the *irritant* clause,
" viz., that it does not bear in so many words, that the acts or
" deeds done in contravention shall be *null and void.*

" There is no doubt that these words constitute the most
" common form, and certainly the best style, of an irritant
" clause. They are used in the statute perhaps descriptively.
" But as it is quite settled that the statute does not prescribe
" any precise form of any of the clauses, the question must
" always be, whether the terms actually employed in any parti-
" cular entail are sufficient to express clearly the thing contem-
" plated in such a clause. Now, the provision here is, that on
" every contravention, as above quoted, not only the estate ' shall
" ' not be burdened with or liable to the debts, deeds, or acts of

LINDSAY *v.* EARL OF ABOYNE.—5th September, 1844.

" ' the said George,' &c., ' but also all *debts contracted, deeds*
" ' *granted, and facts done, contrary to the conditions and restric-*
" ' *tions appointed by me, or to the true intent and meaning*
" ' *hereof*, shall be *of* NO FORCE, STRENGTH, NOR EFFECT,' &c. The
" clause goes on with other words amplifying the provision,
" ' and be ineffectual and unavailable against the other heirs,'
" &c. who ' as well as the estate shall be free therefrom, *in the*
" ' *same manner as if such debts or deeds had never been con-*
" ' *tracted or granted, or such acts or omissions had never been done*
" ' *or happened.*'

" Thinking that there is nothing in the connection of this
" clause which can at all limit its operation to anything less than
" the infringement of any of the general limitations of the entail,
" and that the words are sufficient to cover any such contraven-
" tion, I am of opinion that the words, ' shall be of *no force,*
" ' *strength, nor effect,*' must be considered as equivalent to the
" declaration of nullity contemplated by the statute and in the
" principle of such a clause. It is certainly true, that in very
" many entails the same words occur in connection with the
" words ' shall be null and void.' But, as it is in the nature of
" such deeds that many terms having the same legal effect may
" be employed, the question still is, what is the legal import of
" the words actually employed; and, as the meaning of such a
" declaration of nullity can never be to make an absolute nullity
" of onerous transactions, but only to render the deeds of *no legal*
" *force or effect in regard to the estate entailed*, I think that the
" terms here employed must be held sufficient.

" I do not find in any reported case, except the late case of
" *Sharpe*, that the words of the entail in this part of the irritant
" clause were exactly the same as they are here; though I have
" an impression that a similar clause had been found to be suffi-
" cient. In the case of Sharpe, the same words ' shall be of *no*
" ' *force, strength, nor effect,*' &c., occurred. But there was a
" defect in the grammar of the clause, the nominative which

" should have applied to the words 'shall be' having been alto-
" gether omitted. That created the only doubt in this Court;
" and a very serious ground of doubt it certainly was. It does
" not appear to have been thought at all doubtful, that the
" words otherwise were sufficient. Another difficulty, certainly,
" occurred in the House of Lords, arising from the connection of
" the previous words in that case, and from the mixture of debts,
" deeds, *crimes*, and acts. The judgment of the Court was
" reversed, not, as I understand the decision, upon any idea that
" the words 'shall be of no force, strength, nor effect,' would not
" have been sufficient, if the clause had been otherwise perfect,
" but on the principle that, in a question of strict entail, it is
" inadmissible to supply any words, and that the most favourable
" construction must be given of which the words in connection
" with which they stand will admit. But indeed it was after-
" wards explained, that the judgment in that case was incor-
" rectly drawn up, and that there was no intention to do more
" than to find that there was no irritant clause in that entail
" *valeat quantum*.—Maclean and Robinson, vol. i., p. 908.

" On the whole, therefore, though the question is not quite
" so clear as the points already considered appear to me to be,
" I think that the irritant clause also in the present case is
" sufficient.

" IV. There is a fourth question of a different nature. That
" question is, whether certain special lands called *Drumniachie*
" have been effectually brought under the fetters of the entail?

" This part of the case appears to me to be attended with
" very considerable difficulty. From the nature of the titles,
" and the manner in which these lands were dealt with by the
" entailer himself, I think it impossible to hold, that they were
" validly entailed as *part and pertinent* of the other lands by the
" mere force of the original entail. The question, therefore, is,
" whether the supplementary entail, by which these lands were
" disponed to the heirs called by the former deed *under all the*

LINDSAY *v.* EARL OF ABOYNE.—5th September, 1844.

"*provisions and restrictions of that entail* in general terms, "without the limiting and irritant clauses being *engrossed in* "*the deed itself*, was sufficient to constitute a binding entail *by* "*reference*, in a question with third parties creditors of the heir "in possession.

"It appears that that supplementary deed was recorded in the "register of tailzies; in which the original entail had also been "recorded. But, from the nature of the supplementary deed, the "entailing clauses did not appear in it. It is stated, however, "that a crown charter was obtained, containing the whole lands, "both those in the original entail, and the lands of Drumniachie, "as disponed by the supplementary deed—which charter con- "tained *ad longum* the whole clauses, prohibitory, irritant, and "resolutive,—applied, as I understand, to all the lands in the "charter; and that on the precept in that charter seisin followed, "all the clauses being again repeated in the instrument.

"In this state of the titles, the question seems to me to be, "whether it can be held, that there is an effectual entail of the "lands of Drumniachie, *duly recorded, in the terms of the statute,* "*in the register of tailzies*; and whether that other provision of "the statute has been complied with, which requires that the "clauses irritant and resolutive shall be inserted in the *procura-* "*tories of resignation*, charters, *precepts*, and instruments of seisin. "The clauses are not inserted in the procuratory of resignation in "the supplementary deed, and they do not, of course, appear in "that deed as registered in the register of tailzie. It is perfectly "true, as the defender argues, that, where there is, *in one and* "*the same deed*, a full recitation of the entailing clauses in the "*dispositive* clause, or in the *procuratory of resignation*, it has "been held, and may be considered as settled law, that it is suffi- "cient, if, in the *precept of seisin*, the clause be referred to in "general terms as so before recited. This has been held ever "since the case of Murray Kinninmond, July 5, 1744, as reported "by Kilkerran—and also by Monboddo, Br. Suppl. 5. 739.

" And therefore it would be no objection to the validity of this " entail, that, in the charter which followed upon it, the clauses " were not *verbatim* recited in the *precept* of seisin of that char- " ter. But this rule of construction in the application of the " statute is distinctly rested on the ground, that, where the whole " clauses are *within the deed* in which the *precept* referring to them " is contained, the whole deed ought to be considered as the pre- " cept or warrant for the seisin to follow.

" There is no doubt that it has been found in various cases " that an entail may be effectually made by reference from one " deed to another. It was so found in the case of Don, 5th " February 1713, and in the late case of Hope Vere, 5th March " 1833. But, in both these cases, the question undoubtedly was " *inter hæredes* only; so that the proper operation of the statute, " as against creditors, was not brought into discussion. For " though, in the last of them, the pursuer concluded in general " terms that he was entitled to hold the lands without being " subject to any conditions or limitations, there was a qualifica- " tion even of that conclusion, '*at least* subject to no valid prohi- " ' bition *against altering the order of succession*;' and the case " was tried simply as a question *inter hæredes*. No sale had been " attempted; and it is a mistake to say, as the pursuer does, that, " if there be an effectual entail *inter hæredes*, the Court will try " a question concerning the possibility of a valid sale being made, " where no sale has been attempted: They have repeatedly refused " to do so.

" The case of Laurie *v.* Spalding, July 24, 1764, is, however, " materially different. For, as I read that case, it certainly did " come to be a question between an heir-substitute of entail and " a purchaser; and one general plea maintained for the purchaser " was distinctly, that the entail of the lands of Ervies, by mere " *reference* from one deed to another, could not be effectual " against creditors and purchasers, as not being duly recorded in " terms of the Act 1685. The case was perplexed in its circum-

LINDSAY *v.* EARL OF ABOYNE.—5th September, 1844.

" stances ; and there was a specialty strongly urged, which almost " certainly affected the decision, that the purchaser had dealt with " the heir in possession at a time *when he had only a personal* " *right to the property ;* in which case the general rule is, that the " purchaser is affected by all the qualities of his author's title. " Accordingly, I find, that, that case having been appealed, this " was the point mainly relied on in the respondent's appeal case. " Nevertheless, if there were no authority against it, I should " find it difficult to extricate that case from the peculiarities of " the titles which had been constituted in the vendor before the " question came to be tried.

" But any judgment pronounced in so special a case cannot, I " should think, in any view, be considered as sufficient to settle " so important a point of law. It appears to me, that the terms " of the statute 1685 require the clauses to be inserted in the " *procuratories of resignation* and precepts of seisin of the *entails* " *themselves*, and not merely in the conveyances and charters and " seisins to follow thereon. And it clearly supposes, or rather " indeed peremptorily requires, that the entail, *with all the clauses* " *expressed therein*, shall be recorded in the register of tailzies. " It is not enough that the clauses are in the *register of seisins.* " A *special* register was provided, that creditors and purchasers " might with ease and certainty know what the condition of the " party with whom they dealt as a proprietor in the fee was. " Such a register would have been a very useless arrangement, if " the act had not required, as an essential quality of the tailzies " to be allowed, that all the clauses should be engrossed *in the* " *deed to be so recorded.* The words of the act are clear and un- " ambiguous. The clauses must be in the tailzies ; but not only " so—they must be in the *procuratories of resignation* and *pre-* " *cepts of sasine* in *that* deed. I have no doubt that this is " necessary, and I do not think it at all inconsistent with this " opinion to hold, according to the decisions, that, if the clauses " be in any part of *the same* deed, they will be held to be in the

" procuratory or precept. They will still appear in the *deed* " *registered;* and the *creditor* or *purchaser*, who has no occasion " to look farther, will find them there.

" But how does the matter stand on such a deed as the sup- " plementary entail here in question? The clauses of restriction " are not in it at all. Let it be recorded; but when the creditor " looks at it in that register, he can discover nothing *specific* to qua- " lify the title of the proprietor in the fee. To refer him to another " entail, or another title as to a different estate, is contrary to the " statute. He must find *the* entail of *this* estate, in regard to " which he contracts, in the register, with all the necessary " clauses engrossed; and he can find no such thing. There are " thus two departures from the statute. 1. These clauses pro- " hibitory, but more especially the *irritant* and *resolutive clauses*, " are not '*insert in the procuratories*,' &c.; and 2. There is no " *recorded* entail with those clauses so engrossed.

" These considerations present great difficulties in the statu- " tory principle. Bnt the case of Bromfield *v.* Paterson very " greatly increases the difficulty. The Lord Ordinary is perfectly " right in his observation, that the case, as reported, is only in the " first decision of it, and that, having been appealed it was after- " wards remitted, and another judgment pronounced. But his " recollection is wrong as to the result of that judgment. The " House of Lords had been led to know that there were parties " interested, substitute heirs of entail, beyond those who had first " appeared, and against whom complicated grounds of personal " exception were maintained; and they remitted the case, in " order that these other parties might be heard. But when they " did appear, what was the issue and result? There was con- " siderable difficulty in the question, whether the deed of entail " dated in 1758, should be considered as a new entail, requiring " to be *complete* and *registered* under the Act 1685, to make it " effectual against creditors, or was merely a renewal of the " original entail referred to. That question was what constituted

LINDSAY *v.* EARL OF ABOYNE.—5th September, 1844.

" the whole perplexity of the case. But, as soon as that was " held affirmatively, the consequences were at once and decidedly " declared—1. That it could not be effectual without registration " in the register of tailzies; but 2. That, *registered* or *not*, it " could not have any effect against the creditors, because the " clauses prohibitive, irritant, and resolutive, were not contained " *in it*. The final judgment of the Court here was, that that " deed was to be considered *as a new settlement*, ' and *not* having " ' *contained* the clauses prohibitive, irritant, and resolutive, *and* " ' not having been recorded in the register of entails, is not an " ' effectual entail: Find, that, *in respect the clauses irritant* " ' *and resolutive in the entail* 1743 *are not particularly inserted* " ' *in the disposition* 1758, *the same*, though held as a conveyance, " ' *is not effectual against creditors*,' &c. There can be nothing " more precise than this. I cannot possibly understand it other- " wise than as an authoritative judgment, that a new settlement " which required registration as an entail, but *which did not con-* " *tain in itself* the clauses prohibitive, irritant, and resolutive, " could not be effectual as an entail against creditors.

" There is no denying that the supplementary entail in the " present case is a new settlement. The plea to the contrary is " very faint, and evidently not tenable. It is much more " decidedly a new settlement than the deed 1758 was in the case " of Paterson. For it is a conveyance of lands, which were not " comprehended in the original entail, and which, but for it, " would have stood on the fee simple titles in the person of the " entailer. And if, then, it is within the same rule with that " case in the application of the statute, it cannot be enough to " say that, such as it was, it was recorded in the register of " tailzies. For the *very first ratio* of the judgment in the case of " Paterson is, that the *deed itself did not contain* the restrictive " clauses—the non-registration being put as a *separate* ground; " and then the last finding is pointed and explicit, that, in " respect those clauses were *not inserted in the disposition* 1758,

" the entail was *not effectual against creditors.* That judgment " was *simpliciter*, affirmed on the second appeal—and, this, not-" withstanding that the very plea now maintained on the efficacy " of an entail by reference, even against creditors, was specifically " stated in the *third reason of Appeal*, and the case of *Laurie* " *and Spalding* most particularly referred to in support of it.

" I am not able to resist the weight of that authority, more " especially as I cannot feel at all confident that there is any " authority the other way. Certainly, the result in the case " of Paterson appears to be the most consistent with the terms " and the spirit of the statute.

" And I am, therefore, of opinion, though not without being " sensible of the difficulty of the question, that the demand of the " pursuer in this part of his case ought to be sustained: that " these lands of Drumniachie are not validly entailed against " creditors, and are therefore liable to the pursuer's action.

" JAMES W. MONCREIFF.

" We concur,

" A. MACONOCHIE.
" J. H. FORBES.
" H. COCKBURN.
" J. CUNINGHAME.
" J. A. MURRAY.
" J. IVORY.

Thereafter the Court pronounced the following interlocutor, 2nd March, 1844:—" The Lords having resumed consi-" deration of this case, with the opinions of the consulted Judges " in the conjoined actions of declarator, and of declarator and " adjudication,—repel the objections stated to the validity and " effect of the entail of the lands and estate of Aboyne, rights " and others therein contained; sustain the defences, and assoilzie " the defenders from the conclusions of the libel of declarator, " and of the libel of adjudication, in so far as relates to the said " lands and estate, rights and others, and decern. But in respect

LINDSAY *v.* EARL OF ABOYNE.—5th September, 1844.

" to the lands of Drumniachie; find, that the deeds of entail " in question are not effectual to save or protect those lands from " the acts, debts and deeds, of the Marquis of Huntly; therefore " find and declare that the same fall under the sequestration " libelled, and were adjudged in terms of the Statute passed " in the 2nd and 3rd years of Her present Majesty, cap. 41, and " pertain and belong to the pursuer, Donald Lindsay, as trustee " on the sequestrated estates of the said Marquis of Huntly, for " payment and satisfaction of the debts due by his Lordship, " and decern, and find no expenses due by either party to the " other."

Mr. Kelly, *Mr. Sandford*, and *Mr. Anderson*, for the Appellant.—The prohibitory clause does not contain any prohibition against the contracting of debt, all that it does is to prohibit the heirs from "burdening" the lands, a debt contracted by the heir may affect the lands ultimately by the measures adopted by the creditor for his payment, but cannot, in legal language, be said to be a burden on the lands,—a burden is not the consequence of another act, but is an act itself directly charging the land,—all the instances cited in *Ersk.* ii. 3, 49, are of this nature. To hold that a prohibition to burden is a prohibition to contract debt, can only be arrived at by giving to contraction of debt one of its possible consequences. Even if this could be done, the prohibition would still not be effectual, as it has repeatedly been found that it will not do to prohibit the consequences of an act, but that the act itself must be prohibited. Now, the act to be prohibited is in the terms of the Statute.

[*Lord Chancellor.*—What is the reason why conveyancers do not use the words of the statute?]

It is impossible to tell. The act to be prohibited is the contracting of debt, but the act which is prohibited is the mere consequence of the other; the two cannot be held to be identical without confounding the act with its consequences, without

confounding the act of the law with the act of the heir, and without oversetting those principles of strict construction which have been so well established and which altogether repudiate the doctrine of equivalents.

The point contended for is fortified by the terms of the Act 1685, which are specially directed to the act of the heir in contracting personal debt, upon which real diligence might follow, which is quite a different act from executing a deed which immediately charges the lands. That it was so considered by the framers of the statute is shewn by a variety of entails made shortly after the date of the act, one of them framed by Sir G. McKenzie, the framer of the statute itself, in all of which the contraction of debt is treated as a distinct act from burdening the lands.

If there be no substantive prohibition against contracting debt, that cannot be supplied by the clause which prohibits the heirs from "doing any act, or granting any deed whereby the "lands may be affected," &c., these expressions are applicable to cases of civil or criminal delinquency, and have always been so construed. The statute has in view other acts than selling and contracting debt, and this clause applies to these other acts. Sinclair *v.* Sinclair, *Mor.* 15,382; Tillycoultry case, *Mor.* 15,539; Brown *v.* Dalhousie, *Mor.* App. Tailzie, p. 73; Nisbet *v.* Moncrieff, 2 *S.* & *D.* 381.

The judgment of the Court below proceeded mainly on the authority of three cases. The first of these was, Haggart *v.* Agnew, 20 *F. C.* 223; no reasons are given for the judgment, which was that only of one branch of the Court, and while as yet the rules of interpretation were by no means clearly fixed; and, moreover, the sum at stake was trifling, being only 246*l.* In McKenzie *v.* McKenzie, 2 *S.* & *D.* 331, the next case, the report of which is very short, there does not appear to have been much argument,—no reasons are given for the judgment, and it was never carried to appeal, but, moreover, the question

raised was different from the present, for the prohibition was in terms against the contracting of debt.

[*Lord Chancellor.*—The words were contracting debt on the lands, that was burdening.]

Yes; but in the present case there is no prohibition of the act of the heir in contracting debt, there there was. The last of the cases alluded to was Nisbett *v.* Moncrieff, 2 *S.* & *D.* 381, that proceeded on the assumption that the case of McKenzie had already decided the point, and was in truth but an echo of that case; no other reason was given. All of these cases carry but the authority of the Court below, in none of them were the questions raised settled by the Judgment of this House; but after them arose the case of Cathcart *v.* Cathcart, 5 *W.* & *Sh.* 531; there the prohibition was "to burden with infeftments of annual rent, or "any other servitude or burden," and though the case was decided upon the question as to whether a debt had really been *bona fide* contracted, yet Lord Brougham expressed himself to the effect, that he inclined to think "there was no effectual "prohibition to contract debt;" the Lord Ordinary had specially found that there was none, and the late Lord Eldon, who had been consulted while at the bar, had given an opinion to the same effect.

The judgment in the present case would not have been given, it is believed, but for the weight of those previous authorities, in none of which any reason had been assigned upon the statutes or otherwise. This House, however, is not bound by these precedents.

[*Lord Campbell.*—Where there is a series of authorities on questions of real property which have stood for years, and been acted on, the House feels itself almost bound by them.]

From what is said in Sandford, p. 269, it can hardly be said that the profession had acquiesced in these judgments.

II. The resolutive clause is so ambiguous in its terms in that part which irritates the heir's right by contravention of the pro-

hibitions, that it cannot receive effect. It commences by speaking of the "before written conditions, provisions," &c., and then goes on to explain this by saying, "that is, if the heirs shall fail "to perform the said *other* conditions and restrictions." So that this last part destroys the first, and makes it impossible to ascertain what conditions and provisions are really intended.

III. The irritant clause does not contain any declaration of nullity of the acts of contravention by the heirs. The first part declares that the lands shall not be affected by the debts, deeds, or acts of the heirs contravening; but that is a declaration not authorized by the statute, and which could not receive effect if the debts, deeds, and acts were otherwise valid but for this declaration, they would in such a case receive their legal effect, notwithstanding the declaration. The second part declares, that the debts contracted, deeds granted, and facts done in contravention, shall be of no force, strength, or effect, but this is only "against "the *other* heirs called to succeed;" and as the Marquis of Huntly, the institute, is not an heir, the effect is to leave his debts, deeds, and facts untouched, and to irritate only the debts, deeds, and facts of the heirs, as against the *other* heirs. To make an irritant clause effectual, it must in terms declare the acts intended to be embraced, to be null and void at the moment of their being done.—*Hope's Min. Prac.* 104; Mackenzie iii., 8, 3; Ersk. iii., 8, 25; Primrose *v.* Dunipace, *Kilk.* 540.

IV. The irritant clause is further defective inasmuch as it does not embrace sales. All that is irritated is debts, deeds, or acts, by which the estate is burdened, or for which it may be liable.

V. The supplementary deed of entail of the lands of Drumniachie, is void, as no entail can effectually be made by mere reference for the restrictions to a previous deed of entail, as the statute expressly requires, that in order to be effectual, the restrictions must be recited *verbatim*.

LINDSAY *v.* EARL OF ABOYNE.—5th September, 1844.

The Lord Advocate and *Mr. G. Bell*, for the respondent, cited the following cases. Scott *v.* Crs. of Gala, *Mor.* 3673 and 15,553; *Ersk.* iii., 8, 30; *Bank.* ii., 3, 585; Haggart *v.* Agnew, 20 *F. C.*, 223; Mackenzie *v.* Mackenzie, 2 *S.* & *D.*, 331; Nisbet *v.* Moncrieff, 2 *S.* & *D.*, 381.

LORD CAMPBELL.—This is an action of declarator by the trustee upon the sequestrated estate of the Marquis of Huntly, that it may be found and declared that the deed of entail under which he possessed the estate of Aboyne, executed by his late father, is not sufficient to protect the estate from the diligence of creditors, in terms of the Act of 1685.

The Judges of the Court of Session have unanimously held the entail to be valid; and after a very careful consideration of the case, I am of opinion that the interlocutors appealed against ought to be affirmed.

The appellant first objects to the prohibitory clause, on the ground that it does not sufficiently prohibit the contracting of debt.

I cannot adopt the answer suggested to this objection (although it comes from a Judge generally distinguished for great caution, as well as great learning and acuteness,) that under the Act of 1685, no prohibitory clause is necessary. This dictum is contrary to the universal understanding of the profession, since the Act passed, to the doctrine laid dow by all the institutional writers upon the subject, to the principle on which various decisions have proceeded both in the Court below and in this House, and I think contrary to the plain language of the legislature, which, though it does not contain the word "prohibitory," requires that by the deed "it shall not be lawful to the heirs of "tailzie to sell," &c., that is, that they shall be prohibited from doing so. After a long established usage with respect to the prohibitory clause, I own I am rather surprised at finding an opinion unnecessarily thrown out, that it may be safely omitted. Experiments are good in science, but not in conveyancing.

LINDSAY *v.* EARL OF ABOYNE.—5th September, 1844.

In this case, however, there is a prohibitory clause in these words, "that it shall not be in the power of the said George "Lord Strathaven, my son, nor of any of the other heirs succeed- "ing to the said lands and estate, to sell, alienate, wadset, im- "pignorate or dispone the same, or any part thereof, either irre- "deemably, or under reversion, or to burden or affect the same in "whole, or in part, with debts or sums of money, infeftments of "annual rent, or any other servitude or burden whatsoever."

The deficiency pointed out is, that the clause does not apply to the contracting of debt, and is merely a prohibition directed against burdening the land by a deed having that purpose, or doing any act whereby the land is immediately burdened with debt, so that the heir of entail might contract debts, not meaning in the first instance to burden or affect the lands with them, and afterwords allow the lands to be adjudicated for these debts, without infringing this prohibition. But I am of opinion that this is a prohibition against allowing the lands to be adjudicated for debts contracted by the heir, and therefore that it is sufficient. The Act, without prescribing any form of words, only requires an effect to be accomplished, that by the deed of entail, "it shall "not be lawful for the heirs of tailzie to contract debts whereby "the lands may be apprised, adjudged, or evicted from the sub- "stitute." The lands are to be protected for the benefit of the substitute from the heir of tailzie in possession contracting debt. The act does not say absolutely that he shall not contract debt, an injunction which could not possibly be observed by any person living in society, but only that he shall not contract debt whereby the estate may be burdened. If the prohibition were in the words of the statute, it would not be infringed by the mere contracting of debt, and not until adjudication made the debt a burden on the land. A prohibition against burdening the land with debt, and a prohibition against contracting debt, whereby the land may be adjudged or burdened, having the same legal operation, are substantially the same. If the heirs of tailzie were to contract debt,

and allow the land to be adjudged for the debt, could it be contended that he had not "burdened or affected the same in whole "or in part with debt." The express prohibition in this case commences at the point where the more general prohibition would practically begin to operate.

The clause is not to be made good by reference or implication, but the language in which it is framed must receive its natural and grammatical construction.

Therefore, if the question were entire, I should have been strongly inclined to hold this clause to be sufficient. But there are three cases decided by the Court of Session, expressly in point, Haggart *v.* Vans Agnew, December 19, 1820; Mackenzie, May 23, 1823; and Nisbet *v.* Sir David Moncrieff, June 10, 1823. In two of these cases the prohibitory clause was identically the same as the present, and in the third it was the same in substance. In all the three the Judges of the Court of Session held the clause sufficient, and they proceeded on the older case of Gala, decided in 1722. None of these cases have been brought by appeal to this House, and we are not absolutely bound by them; but even if we doubted them, we should be very reluctant to overturn them, after so long an acquiescence, as many entails may have been framed upon their authority. They appear to me to have been well decided, and they enable me, without hesitation, to advise your Lordships to repel this objection. I may likewise observe, as was mentioned by my noble and learned friend in the first case mentioned to-day, that that is in accordance with many ancient entails which never have been considered exceptionable.

The next objection is to the irritant clause. The deed says, "that upon every contravention which may happen by and "through the said George Lord Strathaven, my son, or any of "the other heirs succeeding to the said lands and estate, their "failing to perform all and each of the conditions, or acting con-"trary to all or any of the restrictions before written, it is hereby

LINDSAY *v.* EARL OF ABOYNE.—5th September, 1844.

" expressly provided and declared, not only that the lands and " estate before disponed, shall not be burdened with or liable to " the debts, deeds, or acts of the said George Lord Strathaven, or " any other of the heirs contravening, as is already herein pro- " vided, but also all debts contracted, deeds granted, and facts " done contrary to the conditions and restrictions appointed by " me, or to the true intent and meaning hereof, shall be of no " force, strength, nor effect, and be ineffectual and unavailable " against the other heirs called to succeed, and who, as well as " the said lands and estate, shall nowise be burdened therewith, " but free therefrom in the same manner as if such debts or " deeds had never been contracted or granted, or such acts or " omissions had never been done or happened."

The appellant contends, that this does not strike at the debts, deeds, and acts of the institute, and that the words of irritancy are not a sufficient compliance with the statute. But Lord Strathaven is expressly mentioned in the first part of the clause; and " all " debts, deeds, and facts contrary to the conditions and restric- " tions of the entail," are declared to be " of no force, strength, " nor effect." If the clause had there stopped, there can be no doubt that the debts, deeds, and facts of the institute would have been included in the irritancy, and that it would have been sufficient. How then is it vitiated by the words which follow, " and " be ineffectual and unavailable against the other heirs called to " succeed." These words do not confine the preceding part of the clause to the debts, deeds, and facts of the other heirs, excluding those of the institute, and in declaring that they shall be ineffectual and unavailable against the other heirs called to succeed, all is done that the law will allow, for they must be effectual and available against the heir himself, whose debts, deeds, and facts they are. Then follows the declaration, that " the " other heirs, as well as the said lands and estate, shall nowise be " burdened therewith, but free therefrom in the same manner as " if such debts or deeds had never been contracted or granted, or

"such acts or omissions had never been done or happened." There is not a declaration in the very words of the statute, that "all such deeds shall be in themselves null and void," but there are words which clearly express the legal effect of these words if they had been used, and which are therefore equally available.

Great reliance has been placed both in the printed cases and in the arguments at the Bar, upon a supposed decision of this House, upon an irritant clause, said to be similar to this, in Carrick *v.* Buchanan; but upon the occasion referred to the greatest pains were taken to make it understood that nothing was then decided. I myself then abstained from hinting any opinion upon that irritant clause; and since I have had full time to consider it, I have come to the conclusion that it is sufficient.

Upon the whole, I feel no difficulty in moving your Lordships that the interlocutors be affirmed.

There was a cross appeal, which we disposed of in the course of the argument respecting the lands of Drumniachie. These lands were not included in the original entail, and were sought to be entailed by a subsequent supplemental deed, referring to the former deed, but not itself containing the fettering clauses. With the exception of Lord Jeffrey, the Judges below all held that this entail was defective, and we were clearly of the same opinion, as a deed of entail must be perfect in itself, and on the face of it convey all necessary information to any one who reads it when recorded, of the fetters it imposes. This seems to be required by the Act 1685, and the authorities are strong to show that it is indispensable. Therefore, in both cases, I move your Lordships that the interlocutors be affirmed.

LORD BROUGHAM.—My Lords, in this case I entirely agree with my noble and learned friend; and he has so fully gone into the argument, so succinctly, but at the same time so clearly and satisfactorily, that it is unnecessary for me to trouble your Lordships any further. The costs must follow the event both in the cross appeal and in the other case.

LINDSAY *v.* EARL OF ABOYNE.—5th September, 1844.

Ordered and Adjudged, That the original petition and appeal be dismissed this House, and that the Interlocutor, so far as therein complained of in the original appeal, be affirmed. And it is further Ordered and Adjudged, that the cross appeal be dismissed this House, and that the Interlocutor, so far as complained of in the said cross appeal, be affirmed with costs.

SPOTTISWOODE and ROBERTSON—F. T. BIRCHAM, Agents.