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## SCOTLAND.

## COURT OF SESSION.

SIR WILLIAM FRANCIS ELIOTT, of } *Appellant*;  
*Stobs*, baronet - - - - - }

GEORGE POTT, Tacksman of the } *Respondent*.  
Farms of *Langside* and *Penchrise* }

A deed, in the form of a bond of tailzie, declared in the prohibitory clause that it should not be lawful for the entailer, nor any of his heirs or successors, to sell; and he and they were thereby bound and obliged not to “sell, analzie, wadset, *dispone*, dilapidate, and put away the lands,” &c. The irritant clause is thus expressed: “and if I, or any of the heirs, whether male or female successive, shall contráveen, &c. by the said heirs female, not using the surname, &c. or who, whether male or female, and I shall *dispone* the said lands, &c.; and if I, or any of the persons or heirs foresaid, whether male or female, shall infringe or alter the succession and substitution foresaid, all such deeds, &c. shall be void, &c.”

One of the heirs of tailzie in possession granted a lease for 77 years, at a reduced rent, &c. upon a grassum: Held, that the irritant clause, though confused and ungrammatical, was intelligible; and having received a construction in judgment upon a former litigation, could not be held to be unintelligible. Held also, that the lease was an *alienation* within the meaning of the prohibitory clause, and that the word “*dispone*” in the irritant clause was equivalent to the word “*alienate*,”

and rendered the prohibition effectual, and the act of contravention void, in a question between third parties as lessees, purchasers, or creditors.

BY a deed in the form of a bond of tailzie, and executed in the year 1719, by Sir Gilbert Elliott, it is “ declared that it shall not be leisome nor law-  
 “ ful to me the said Sir Gilbert Elliott, nor to any  
 “ of my heirs and successors foresaid to sell, and  
 “ I hereby bind and oblige me and them not to sell,  
 “ analzie, wadset, dispone, dilapidate, and put away  
 “ the said lands, baronies and estate, or any part or  
 “ portion thereof, heritably and irredeemably, or  
 “ under reversion, (except in so far as the faculties  
 “ above written do extend), nor contract or ontake  
 “ debts thereupon, or grant bonds or other securities  
 “ therefor, nor do or commit any’ other facts,  
 “ deeds or delicts, civil or criminal, whereby the  
 “ said lands and estate may be anyways apprized,  
 “ adjudged, forfaulted, evicted or affected, nor to  
 “ infringe, alter or innovate this present substitution  
 “ and course of succession, in defraud and prejudice  
 “ of the subsequent heirs of provision above men-  
 “ tioned, conform to the order and substitution  
 “ above specified ; neither shall it be lawful to me,  
 “ nor to any of my heirs of provision foresaid, whe-  
 “ ther male or female, to suffer the said lands,  
 “ baronies and estate, or any part thereof, to be  
 “ adjudged or apprized for debts to be contracted,  
 “ but shall be obliged to redeem the same within the  
 “ space of eight years after deducing and leading  
 “ any such diligence : And if I, or any of the said

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“ heirs, whether male or female successive, shall  
 “ contraveen the premises, or do any fact or deed  
 “ in prejudice hereof by the said heirs female, not  
 “ using the surname of Elliott and my arms and title,  
 “ or by the said unmarried heirs female not marry-  
 “ ing a gentleman who, and their heirs, shall not  
 “ use the same and my arms and title as above ; or  
 “ by the said heirs female, and they and their hus-  
 “ bands and children not using the said surname,  
 “ arms and title as aforesaid ; or who, whether male  
 “ or female, and I shall dispone the said lands and  
 “ estate, or any part thereof, or contract debts, or  
 “ commit any other fact or deed during their respec-  
 “ tive marriages, or in favour of their respective  
 “ husbands, wives and children, (except in so far as  
 “ is above provided,) whereby the said lands and  
 “ estate may be evicted or affected in manner fore-  
 “ said ; or shall permit the same or any part thereof  
 “ to be adjudged or appried for any such debt and  
 “ deeds, and not redeem the same within the limited  
 “ time foresaid after leading thereof ; and if I, or  
 “ any of the persons and heirs foresaid, whether  
 “ male or female, shall infringe or alter the succes-  
 “ sion and substitution foresaid ; then and in any  
 “ of these cases, not only shall all such deeds and  
 “ contraventions to be done by me and the said heirs  
 “ male and female, or any of them, during their  
 “ respective marriages, so far as the same may  
 “ burden and affect the said estate, and infringe or  
 “ alter the succession, be *ipso facto* null, and of no  
 “ effect by way of exception or reply, without any  
 “ sentence and declarator to follow thereupon ; but  
 “ also I shall lose my right of life-rent, and the

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“ other persons, doers of said deeds and committers  
 “ of said contraventions or any of them, shall amit  
 “ their right of succession, and be debarred from the  
 “ said lands and estate ; and all the infeftments and  
 “ other rights thereof shall from thenceforth expire  
 “ and become void as if they had never been  
 “ granted ; and the same shall access to the next  
 “ immediate person appointed to succeed to the said  
 “ estate, and so forth, successive in case of divers con-  
 “ traventions ; and that free of all debts, deeds, and  
 “ delicts done, contracted, or committed by the con-  
 “ traveeners ; and it shall be leisome to the next  
 “ succeeding heirs to use and prosecute any legal  
 “ way or method competent for establishing the  
 “ right thereof in their persons, or in the persons of  
 “ the remanent heirs of provision foresaid to succeed  
 “ to them in manner above exprest.”

Under this entail Sir William Elliott, father of the Appellant, entered into possession of the estate. In the year 1790 Sir William granted to Gideon Pott, father of the Respondent, a lease for nineteen years of the farms of Penchrise and Langside, part of the entailed estate, consisting of between 4,000 and 5,000 acres, at the rent of 281*l.* 8*s.* After possessing the farms four years upon this lease, a new transaction was entered into between the parties. On the 20th March 1794, Sir William granted a new lease of the same farms to Mr. Pott, at the rent of 285*l.* for 77 years, on payment of a grassum, which amounted to 2,904*l.* 15*s.* 9*d.* ; and of the same date with the tack, Sir William Elliott granted a back-bond to the tenant, restricting the rent exigible during his life to 200*l.* Sir William

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died in May 1812, and was succeeded by the Appellant his son, who commenced the present action for reducing the lease, as an infringement of the restrictions of the entail.

The action having come before Lord Gillies, Ordinary, the Respondent by his defence maintained, in the first place, that the irritant and resolute clauses of the entail were so inaccurately and so incomprehensibly worded, as to render the entail unavailable against third parties contracting with the heirs in possession of the estate; and secondly, that even supposing the irritant and resolute clauses to be effectual to the extent of the acts of contravention there enumerated, they could not invalidate the lease under discussion, because that enumeration, while it mentioned the act of disposing, omitted that of alienating, under which alone, in the absence of any express limitation of the power of leasing, the lease could be struck at, as contrary to the restrictions of an entail.

On hearing parties the Lord Ordinary, by interlocutor, dated the 27th January 1813, “repelled the reasons of reduction, and assoilzied the defender from the conclusions of the action.”

A short representation having been given in by the Appellant, and refused without answers, a second representation was given in, upon considering which, with answers, the following interlocutor was pronounced:—“The Lord Ordinary having considered this representation, with the answers thereto, finds, that the lease in question having been granted in consideration of a grassum, and for a period of seventy-seven years, is to be considered

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“ as an alienation ; and finds that alienations are  
 “ prohibited by the entail of the estate of Stobs.  
 “ But finds that the irritant and resolute clauses  
 “ in the same deed of entail contain no reference  
 “ to the specific prohibition against alienating, such  
 “ as is necessary to render the same effectual against  
 “ third parties ; therefore refuses the desire of the  
 “ representation, and adheres,” &c. The Appel-  
 lant having submitted this judgment to the review  
 of the Court, “ they adhered to the interlocutor of  
 “ the Lord Ordinary, but found the petitioner not  
 “ liable in the expenses of process.”

In pronouncing this interlocutor, the Court being influenced, as it appeared to the Appellant, chiefly by an opinion that the entail was unavailable against third parties, in consequence of the inaccuracy and obscurity of the irritant and resolute clauses, the Appellant presented a petition, in which his argument was principally directed to establish the general efficacy of the entail. But the Court, having heard this petition, adhered to their former interlocutor.

The Appellant, by his appeal to the House of Lords, complained of the interlocutors of the Lord Ordinary of the 27th January and 19th February 1813, the interlocutor of the Lord Ordinary of 17th December 1813, in as far as the same finds that the irritant and resolute clauses in the deed of entail contain no reference to the specific prohibition against alienating such as is necessary to render the same effectual against third parties ; and the interlocutors of the first division of the Lords of the 17th February and 10th March 1814, adhering to the interlocutors of the Lord Ordinary complained

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of. The Respondent also, by his cross-appeal, complained of the Interlocutors, in so far as they find that the lease in question having been granted in consideration of a grassum, and for a period of 77 years, is to be considered as an alienation; and that alienations are prohibited by the entail of the estate of Stobs, and find the Appellant not liable in the expenses of process.

For the Appellant, *Mr. Brougham*.

For the Respondent, *The Attorney General* \*.

\* This was the second argument. On the first point, the question as to the grammatical construction, no authorities were cited, except that it was urged by Mr. Brougham, that in the Roxburgh and Tillicoultry cases there were the same errors of grammar; but it was argued on general grounds, and the structure of the clauses, on the one hand, that they were unintelligible, on the other, that they were intelligible, though ungrammatical and perplexed, and that they had already received a construction judicially in *Elliott v. Elliott*, May 1803. On the other questions, whether by the word “*dispone*” alienation was prohibited, and whether a lease of 77 years with a grassum was an alienation, the argument was in substance and effect the same as on the similar points in the Queensberry leases, *ante*, vol. 1, p. 339. See the Lord Chancellor’s speech in moving judgment.

For the Appellant the following authorities were cited:—*Fac. Coll.* 19 May 1803, *Elliott v. Elliott*: *Spottiswoode’s Practics*, *voce* Revocation, p. 306. *Voce* Improbat. Id. p. 168. *Stair*, b. 3, t. 2, s. 1, 3, and *Introductory Remarks*; *Stat.* 1571, c. 36. 39; 1581, c. 101; 1587, c. 111; 1593, c. 180; 1594, c. 211; 1597, c. 233, 234. 241. 256. *M’Kenzie*, vol. 2, p. 487. *Kilkerran’s Decis.* p. 541. *Turner v. Turner*, 17 Nov. 1807, and 6 Dec. 1811; *Malcolm v. Henderson*, 17 Nov. 1807; *Duke of Queensberry*, 17 Nov. 1807; *Welch v. D. of Queensberry*, 12 Nov. 1812; *Balfour’s Prac.* 171;

*The Lord Chancellor*, after having stated the facts and pleadings, and the points at issue in the cause, proceeded as follows :—It is unnecessary for me to state, that in order to make the prohibition effectual against third parties there must be not only a clause prohibiting the thing to be done, but a clause rendering it null and void, and a clause

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Hope's Major Prac. MS. Reg. Maj. b. 2, c. 20 & 23; Ersk. b. 3, tit. 5, s. 1; Craig. Lib. 3, Dieg. 4, s. 5, p. 479, and the *dict.* of Bailey and Jamieson. As to the form of the entail, Jurid. Styles, vol. 1, p. 202.

For the Respondent the following authorities were cited;—Case of Viscount Stormont, Feb. 26, 1662, Stair's Decis.; Mackenzie on Tailzies, v. 2, p. 487; Stair, b. 2, c. 3, s. 56; Erskine, b. 3, c. 8, s. 25; Young v. Bothwells, Dec. 7, 1705, Forbes; Redhaugh v. Bruce, 11 Mar. 1707, Forbes; Cray of Riccarton, 13 June 1712; Baillie v. Carmichael, 11 July 1734; Primrose, 27 Jan. 1744; Kilk. p. 540; Hay v. His Maj. Advocate, 9 Feb. 1758; Creditors of Hepburn, Feb. 1758, affirmed on appeal; Bryson v. Chapman, 22 Jan. 1760; Bruce v. Bruce, 15 Jan. 1799, affirmed on appeal; Craig, p. 340, s. 12; Hope's, Minor Prac. p. 406, tit. 16, s. 11; Stair, b. 2, tit. 3, s. 38; Mackenzie, b. 3, tit. 8, s. 17; Bankton, vol. 1, p. 587, s. 149; Ersk. b. 3, tit. 8, s. 29; Ross, 4 Nov. 1743; Lesslie of Findrassie, 24 July 1752; Balfour of Randieston, 14 Feb. 1758; Case of Duntreath, D. P. 15 April 1771; Hepburn v. Lord Hopetown, 15 Feb. 1732, affirmed on appeal; Campbell v. Wightman, 17 June 1746, Falc.; Sinclair v. Sinclair, 9 Nov. 1749, Falc.; Weir v. Drummond, 28 Nov. 1752; Scott Nisbet v. Young, Nov. 1763; Case of Tillicoultry, Nov. 1763; Kemp v. Watt, 15 Jan. 1779; Stewart v. Horne, 8 July 1789; Brown v. Countess of Dalhousie, 25 May 1808; Craig. L. 2; Dieg. 3, p. 201, s. 27; Bankton, b. 2, tit. 9; b. 3, tit. 2, s. 1, 2, 5 & 6; Ersk. Inst. b. 2, tit. 7, s. 2; Ersk. smaller work, p. 323, tit. 5; Jurid. Styles, vol. 1, p. 502, 503, 504; Russell's Conveyancing, Index, Dallas's Styles, Supplement to Spottiswoode, p. 38; Mack. Inst. b. 3, tit. 5, s. 1.



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resolutive in its nature, so that all the three clauses must strike at the act complained of; and if the one does strike at the act complained of, and the others do not, it would not be effectual as against third parties.

Two appeals have been presented, one of them against that part of the interlocutor which represented the lease in question as an alienation having been granted in consideration of a grassum, and for a period of seventy-seven years; of that appeal it appears now unnecessary to take much notice, because, by many late decisions, such a lease has been considered in this House an alienation; and therefore, if the prohibitory, irritant, and resolutive clauses are sufficient to prohibit alienation, they must now, under the effect of those decisions, be taken to prohibit such a lease as an alienation. With respect to the other appeal, the substance of it is, that the Court ought not to have held the bond of tailzie to be unintelligible; or if they held it to be intelligible, but that the act which is to be taken as the alienation was not struck at by all the irritant and resolutive clauses, that they erred in so considering it, because the word *disponing* being in the other clauses, while the word *alienate* is in the prohibitory clause, that the word *disponing* is in law a word which includes in it all that would be expressed by *alienating*; that it is not to be understood as technically meaning merely disposition, but that it will include alienation; and therefore, if a lease for seventy-seven years, with a grassum, is an alienation, such an alienation is struck at by the word

*dispone*, as much as it would be struck at by the word *alienate*, if the word *alienate* had been in all the clauses.

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This case has been twice decided by the Court of Session. In the year 1803 there was a cause in the Court of Session, Sir William Elliott against the heirs of entail of Stobbs; it was a question *inter hæredes*, and not a question between strangers, but that does not make any difference as to the point, whether the deed of tailzie is intelligible; it may make a difference as to the other question in this appeal. The case, after stating the deed of entail of the 17th of September 1718, which is the deed of restriction now under consideration, stated that Sir Gilbert made up new titles to his estate, on the footing of his entail, in 1719 and 1720, upon which he and his eldest son were infeft. The entail was recorded in 1724, and Sir Gilbert possessed the lands upon these titles till his death in 1764. He was then succeeded by his eldest son Sir John, who possessed the estate upon the titles made up in his father's lifetime, and died in 1767, being succeeded by his eldest son Sir Francis, who also made up titles in terms of the entail; and, upon his death in 1791, Sir William succeeded, and made up his titles under the entail as his predecessors had done, on which titles he has ever since possessed the estate. In the year 1801 Sir William entered into a minute of sale with Mr. Joseph Gillon, writer in Edinburgh, of a part of the estate. Mr. Gillon suspended the payment of the price, on this ground, that Sir William had no power to implement the minute of sale on his part, being restricted from selling by the

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entail of Stobs. The bill of suspension was passed of consent. Then there arose another cause. Sir William brought actions of reduction and declarator of the tailzie and subsequent investitures, calling as defenders all the heirs of entail in existence. There is a mode of proceeding in Scotland which we do not adopt in this part of the kingdom, that is, that where persons conceive themselves entitled to certain estates, they bring an action of declarator, when no persons dispute it, against all those who may choose to oppose their claim; and there certainly is great convenience in this practice. The Courts of Scotland are very much attached to this mode of proceeding; whereas our courts of justice are very much in the habit, when they find that the proceeding is to settle a question which cannot be said strictly to have arisen between the parties, to refuse to give any decision whatever upon it. Within my own recollection in practice this House has been called upon to decide, and has occasionally decided in similar cases. Formerly contracts used to be made for sales of estates. Bills were filed in the Court of Chancery for the specific performance of the contracts, the intention and ultimate object being to bring the question before the House of Lords to get their decision, which could not bind others, though it would be a great authority as to whether the party had or not the right to sell. This appears to have been put an end to by another mode of proceeding, which began about the time of *Shapland v. Smith*\*, in which case Lord Thurlow decided,

\* 1 Brown's C. C. 74.

that if there was considerable doubt with respect to a title, he would not compel the purchaser to take. Mr. Baron Eyre, (afterwards Lord Chief Baron, and Lord Chief Justice Eyre,) I remember, was a good deal shocked, because he was of opinion there could be no such thing as uncertainty in the law; and he did not approve of that decision. But it has since been taken for granted, that if there is serious doubt of the title, whatever might be the law before, the Court will not compel the party to take the title, and so that mode of proceeding appears to have been very much discussed in the courts of justice in England.

In the result of this action of declarator, Sir William maintained this separate plea, “that the  
 “entail was ineffectual to prevent a sale, being  
 “defective in its various clauses, in support of which  
 “he maintained that the limitations of an entail  
 “are not to be extended by inference or implication  
 “beyond what is expressed in the entail itself (a  
 “proposition to which full assent will be given);  
 “and wherever these limitations are directed against  
 “third parties, as in the case of a prohibition to sell  
 “or contract debt, in order to render these effectual  
 “against purchasers or creditors, it is necessary that  
 “the prohibitory and irritant clauses should be  
 “accompanied by a resolute clause making void  
 “the right of the contravener.” Then cases are mentioned. “The irritant and resolute clauses,  
 “besides, must be precisely applicable to the act of  
 “contravention, in order to be effectual against  
 “third parties,” and Bruce of Tillycoultry’s case is cited.

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In this case it is said “ the irritant and resolute clauses, instead of bearing in general that all the acts of contravention contained in the prohibitory clause shall be void and null, or shall subject the heir to a forfeiture, specially enumerate the various cases to which they are meant to apply.” That would be more accurately put if it was stated that after the declaration, that they are not to contravene in any respect the provisions contained in the instrument, it enumerates various cases to which such contravention would extend. They say further, “ That in order to render void an act of contravention it must be done by Sir Gilbert and the heirs,—it must be done by the heirs during their respective marriages,—and it must be such as to burden or affect the estate, and infringe or alter the succession. But to enter into a minute of sale does not fall under any of the cases enumerated as qualified and explained by the irritant clause, in which cases alone contravention of the entail can be effectual against third parties. The prohibition to sell, analzie, wadset, dispone, dilapidate, and put away the said lands, is most ample ; but in the irritant and resolute clauses there is not one word about selling, nor any thing which in sound legal construction can be held to be equivalent to it.” (Whether there is any thing which can be held to be equivalent to it is precisely the question.) “ The only words having the least reference to this prohibition are those in the irritant and resolute clauses, ‘ or *who*, whether male or female, and I shall dispone the said lands and estate, or any part thereof.’ Now, the relative *who* refers to the nearest antecedent clause, heirs-

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“ female, their husbands and children, none of which  
 “ Sir William is; at least, if it does not, this clause  
 “ is so uncertain as to be insufficient for imposing  
 “ fetters, which can only be done by clear expression  
 “ to affect the rights of purchasers and creditors.  
 “ Again, the disposition must be granted in concur-  
 “ rence with Sir Gilbert himself; ‘ who, whether male  
 “ or female, *and I* ;’ and it can only take place in  
 “ case they concur to dispone the estate, but does not  
 “ take place in any of the other ways by which the  
 “ estate may be alienated ; *e. g.* by a minute of sale.  
 “ The statute 1685 distinguishes between selling,  
 “ analzieing, and disponing, as being different modes  
 “ of affecting property. Selling or analzieing, there-  
 “ fore, by a minute of sale, is different from disponing,  
 “ and the minute of sale may be completed by the  
 “ purchaser adjudging in implement.” I read this,  
 because it appears to me that the substance and mar-  
 row of the argument is contained in these pleadings.

On the other hand, the answer appears to me to  
 contain the substance of all that has been stated at  
 the bar on the other side. The act of 1685, per-  
 mitting proprietors to entail their property, has  
 prescribed no form of words which shall be essential  
 for carrying the entailer’s intention into effect, nor  
 have the decisions of the Court as yet supplied the  
 deficiency. It is only necessary that the clauses  
 should be clearly and distinctly expressed, so that  
 the meaning of the entailer may be carried into  
 effect, without resorting to any constrained or vio-  
 lent construction of the words.

In *Bruce v. Bruce*\*, the entail of Tillycoultry,

\* 15 Jan. 1799. Dict. 15539.

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among other prohibitions, contained one directed against selling, analzieing, dilapidating, or putting away the foresaid lands or estate. The resolute clause did not contain a general reference merely to the various prohibitions as the irritant clause did, but proceeded to a special enumeration of the acts of contravention; which would forfeit the contravener's right, thus limiting and circumscribing the effects of the general reference. Among those acts of contravention the whole clause *de non alienando* was omitted, and no words which could apply to it were inserted. The strict interpretation of entails will probably not be carried farther than it was there. The present question, however, is one very different. On examining the enumeration of cases to which the irritant and resolute clauses of the estate of Stobbs are meant to apply, the first part of them refers to the prohibitions with regard to the entailer's surname, title, and arms, and with regard to the heirs-female and their husbands and children using the same surname, title, and arms. Then, as the heirs of entail, as well as the entailer, were prohibited from alienating, contracting debt, or altering the succession, the next part of the clause,—quite distinct and independent of the former, and beginning, “or who, whether male or female, and I shall dis-  
“pone the said lands,”—relates to these last prohibitions. The irritant clause begins with the words, “And if I or any of the said heirs, whether male  
“or female, successive, shall contravene the pre-  
“mises;” and the remainder is merely a continuation of that sentence. The pronoun *who*, therefore, applies to any of the said heirs; and particularly

when connected with the words, "whether male or female, and I shall dispone," it can relate to no others than the heirs of entail, as the heirs of entail, male and female, and the entailer himself, had been prohibited from alienation. Nor is the irritancy confined to a deed of an heir, in concurrence with the entailer; that depends certainly upon the whole extent and meaning and construction of the clause. The entailer, by the construction of the tailzie, became a life-renter, and no prohibition against him was necessary; and if he had not, he could not have irritated his own deed, or deprived his creditors of the means of attaching his estate, so long as he continued proprietor of it, so that the addition *and I* to the various clauses is unnecessary, and should be held *pro non scripto*. The intention of the entailer is obvious. The clause itself begins thus, "If I, or any of the said heirs." Afterwards, when *and* is used, it is used as being synonymous with *or*, which, in common language, it frequently is. Again, the irritancy is applicable to a sale of the estate, as disposing is one of the acts specially enumerated, making this case thus far different from the case of Tillycoultry. Selling, however, it is said, is not included under the general term to dispone. But these words are synonymous; they are different modes of expressing the same act, and, together with *analzie*, are so used by the statute of 1685. Perhaps, of all the terms, sell, *analzie*, wadset, dispone, dilapidate, and put away, used in the prohibitory clause, *dispone* is the most general, and it is therefore used as an equivalent to them. What this House has found in other cases as to the effect

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of the word *dispone* I need not remind you. The question which arises is not whether in many cases the meaning of the word *dispone* may not be to sell, but whether it is so in this case, taken in the way in which it stands here. The irritant clause continues, “Then, and in any of these cases, not only shall all such deeds and contraventions to be done by me and the said heirs male or female,”—this first part applying to such prohibitions as are directed against the entailer or the heirs of entail; and then proceeds,—“or any of them, during their respective marriages,” comprehending the other class of contraventions as to the name, arms, and title which are to be borne by the heirs-female and their husbands, and which prohibitions are contradistinguished throughout every clause in the entail. All these are irritated, so far as they burden and affect the estate, which last term is sufficient to include the sale in question.

Mr. Solicitor-General Blair and Mr. Ross were concerned as counsel in this cause; and the Court of Session were of opinion, which they expressed on the 19th of May 1803, both that this clause was intelligible, and that the word *dispone* in the irritant and resolute clause was quite sufficient to support the entail. But it has been intimated to us, that we are to consider this a case of collusion. Now I do not see how that is made out; for unless the Judges were colluding, I must look at it as containing their opinions in 1803. It is said this is not a *res judicata* between the parties. I agree that it is not a *res judicata* with respect to the Respondent at the bar; but still it is the opinion of the Court of

Session upon precisely the same points; and if they were of opinion that a man cannot sell, they must be of opinion a man cannot buy. The question therefore, upon the whole, appears to be this, Whether the opinion of the Court of Session in 1803, or the opinion of the Court of Session in the present case, is the better opinion? It appears to me to be reduced to two points; namely, whether this deed is intelligible; and if this deed be intelligible, what is the effect of it with respect to the sufficiency of the three respective clauses. Now it is a very dangerous thing to come to a decision that an instrument is not intelligible which has been so far the subject of judgment; and though one cannot help seeing that almost every rule of grammar is sacrificed in this deed, yet, if we were to hold this to be unintelligible, I cannot conceive how it can be said to have been satisfactorily determined unless it was understood. I am of opinion this instrument is an instrument capable of being understood, and that reduces it to the question, What is the effect of the word *dispone*, regard being had to the whole context of this instrument? After the decisions which have been come to upon the word *dispone*, and after (what is of infinitely more weight) the great authority to be found in the law of Scotland, antecedent to any such decision, as to the effect of the word *dispone*, I cannot help stating it, after much consideration of the case, as my judgment, that this word *dispone* in these other clauses is quite sufficient for the purpose of protecting this entail; and unless any of your Lordships are of a different opinion, it appears to me that this judgment must be reversed.

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14 March 1821.

Ordered and adjudged, That the said interlocutor of the Lord Ordinary of the 27th of January and the 19th of February 1813, complained of in the said appeal, be and the same are hereby reversed: Further ordered and adjudged, that the said interlocutor of the Lord Ordinary of the 17th December 1813, also complained of, be and the same is hereby reversed; except so much thereof as finds that the case in question having been granted in consideration of a grassum for a period of 77 years, was to be considered as an alienation; and as finds that alienations were prohibited by the entail of the estate of Stobs: Further ordered and adjudged, that the said interlocutors of the Lords of Session, of the 1st division of the 17th of February and 10th of March 1814, also complained of in the said appeal, be and the same are hereby reversed: and the Lords find, that according to the true construction of the deed of entail of the estate, the prohibition to dispose extends to the lease in question, and that the irritant and resolute clauses in the same deed of entail do so refer to the specific prohibition to dispose, as to render the same effectual against third parties, and therefore sustain the reasons of reduction of the lease in question: Further ordered and adjudged, that the said cross-appeal be dismissed this house: Further ordered, that the said cause be remitted back to the court of Session in Scotland, to do therein as shall be consistent with this judgment, and as shall be just.