

344); Simpson, Dec. 10, 1736 (No. 2, Elchies Arbit. and 17,007); Woodrop, Feb. 4, 1794 (628); Glover v. Glover, 1802 (Wilson's Digest, House of Lords).

Respondents' Authorities.—Robertson, June 20, 1783 (653); 2 Hailes, 912; Maxwell, Dec. 19, 1561 (643).

RICHARDSON and CONNELL,—MONCREIFF, WEBSTER,
THOMPSON,—Solicitors.

JOHN CATHCART of Genoch, *Appellant.*—
Dr. Lushington—Greenshields.

No. 27.

SIR JOHN ANDREW CATHCART Bart. and Curator, *Respondent.*—
Lord Advocate (Jeffrey)—Rutherford.

Tailzie—Stat. 1685.—An heir of entail was in possession of estates under an entail, restraining him by effective prohibitory, irritant, and resolute clauses from altering the order of succession, but not (as he considered) from contracting debt—circumstances in which (affirming the judgment of the Court of Session) the debt he contracted was regarded not to be a real debt, but the whole to be a collusive and simulate contrivance, with the view not to contract a true debt, but to alter the order of succession, and therefore the transaction was reduced at the instance of the next heir of entail.

The reading of the Statute 1685, that a defect in any part of the statutory requisition of an entail vitiated the whole entail, as well in questions with creditors as inter hæredes—rejected by the House of Lords.

SIR ANDREW CATHCART of Carleton, Bart., made up titles, July 18, 1831.
was infest in and possessed, as heir of entail, the estates of Carleton and others in Ayrshire. The entail was contained in a marriage contract executed in 1717, and in a procuratory of resignation, dated 1722, under reserved powers in the marriage contract. The prohibitory clause in the entail was in these words:—
“ That it shall not be lawful to nor in the power of the said
“ John Cathcart, nor any of the heirs of tailzie and provision
“ above specified, to alter, innovate, or change this present tail-
“ zie and order of succession, or to sell, alienate, or dispo-
“ ne, neither irredeemably nor under reversion, nor yet to wedsett
“ or burden with infeffments of a'rent, nor any other servitude or
“ burden, the tailzied lands and estate above wryten whatsom-

1ST DIVISION.
Lord Moncrieff.

July 18, 1831. “ ever, or any part thereof, except in the cases and in the way
 “ and manner above provided,” (these relating merely to family
 provisions,) “ nor to sett tacks nor rentalls of the samen for any
 “ longer space than nynteen years, or the setter’s lifetyme, and
 “ without diminution of the rentall, except in the cases of neces-
 “ sitie, where a sufficient tennent cannot be found to pay the
 “ whole rent, nor to doe no other fact or deed, civill or crimi-
 “ nall, directly or indirectly, in any sort, whereby the said tailzied
 “ lands and estate, or any part thereof, may be affected, apprised,
 “ adjudged, forfaulted, or any other way evicted from the said
 “ heirs of tailzie, and this present tailzie and order of succession
 “ thereby prejudged, hurt, or changed.” The deed of entail
 also provided, “ That the said John Cathcart and the heirs of
 “ taillie above mentioned shall bruik, enjoy, and possess the
 “ said tailzied lands and estate by vertue of this present tailzie,
 “ infestments, conveyances, and rights to follow hereupon, and
 “ by no other right or title whatsomever.” These provisions
 and prohibitions are fortified by the following irritant and
 resolute clauses:—“ Declaring allwayes, that if the saids heirs-
 “ female and descendents of their bodies succeeding to the saids
 “ lands and estate shall failzie to assume, bear, and use in all
 “ tyme thereafter the sirname, arms, title, and designation above
 “ wryten, or that the said John Cathcart, or any of the heirs of
 “ tailzie, shall contraveen or fail to fullfill the conditions and pro-
 “ visions of this present tailzie, or any one of them, any manner
 “ of way, and specially, but prejudice of the generality forsaid, by
 “ alltering or changeing the order of succession, or disponeing,
 “ selling, wadsetting, or burdening with infestments of a’rent, or
 “ other servitudes and burdens, the saids lands, or any part
 “ thereof, otherwaies than is as above provided, or by provideing
 “ their spouses in liferent provisions of the lands and others fore-
 “ said, exceeding a third part of the free rent of the samen, or by
 “ infesting and securing their spouses, male or female, in any
 “ a’rents or annuities to be uplifted out of the saids lands, but in
 “ the lands themselves, or by burdening the samen, for provision
 “ of the daughters or younger children, with more than the sum
 “ of ten thousand merks, in manner above provided; or by
 “ granting absolute or irredeemable dispositions for payment of
 “ the saids provisions or a’rents thereof; or by granting infest-
 “ ments of a’rent for the saids provisions; or by not inserting in

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“ every bond, securitie, or obligation which shall be granted for
 “ the sums wherew^h they are allowed to provide their younger
 “ children, the particular clauses and provisions above appointed
 “ to be insert therein ; or by granting tacks and rentalls other-
 “ waies than as above ; or by contracting debts, except in so far
 “ as they are empowered in manner above mentioned ; or by
 “ doeing any other fact or deed, civill or criminall, whereby the
 “ s^{ds} lands may be burdened, evicted, forefaulted, or adjudged ;
 “ or by possessing of the saids lands by vertue of any other title
 “ or right than this present tailzie, infestments and conveyances
 “ to follow hereupon ; or by not inserting in their severall rights
 “ and conveyances the hails conditions and irritancies hereof ; or
 “ by lying out unentered, or by not paying the saids casualties
 “ of superiority, or other publick burdens, whereby the said
 “ estate may be anywaies adjudged or evicted for the samen, or
 “ by not purgeing of the saids adjudications at least two years
 “ before the legall expire : That then, and in these or any of
 “ these cases, not only all such facts and deeds committed, done,
 “ or contracted contrair hereunto, with all that may follow
 “ thereon, shall be of themselves void and null, and of no force,
 “ sikelike as if the samen had never been done, contracted, or
 “ committed, in so far as concerns the saids lands and estate
 “ above exprest, which, nor no part thereof, shall be anywaies
 “ affected or burdened therewith in prejudice of the saids heirs of
 “ tailzie and provision above specified, appoynted to succeed by
 “ vertue of these presents, which are made and granted sub modo,
 “ with and under the provisions above specified, and no other-
 “ waies : And also the persone or persones so contraveening, or
 “ failzing to fullfill the above-wryten conditions or irritancies or
 “ any of them, shall for themselves ipso facto lose, amitt, and
 “ forfault their right and interest in the saids lands and estate,
 “ and the samen shall become void and extinct ; and it shall be
 “ lawful for the nixt heir of tailzie who would succeed if the con-
 “ traveener were naturally deed, albeit descended of the con-
 “ traveener’s body, to purchase and obtain declarators upon the
 “ contravention or failzeing to fullfill any of the saids provisions
 “ and conditions, or to obtain themselves served and retoured,
 “ infest and seised in the saids tailzied lands, in the same way as
 “ if the contraveener were naturally dead : In respect the right
 “ of the said contraveener is hereby declared to be void and

“ extinct, as said is, and the right of succession of the foresaids
 “ lands and estate is hereby provided to devolve and pertain to
 “ the nixt heir of tailzie, and the persone so succeeding, and
 “ all the subsequent heirs of tailzie, shall be lyable to the same
 “ irritancies.”

Sir Andrew being anxious to alter the destination in the entail and procuratory, and being led to think that this might be accomplished in consequence of a supposed defect in the prohibition against contracting debt, in March 1821 consulted counsel on these points, and was assured in answer that the entail did not contain proper and effectual prohibition against the contraction of debt, and that Sir Andrew was entitled to come under an obligation of debt, which obligation would be effectual against the property. Counsel also described the method which Sir Andrew should adopt in order to hold the estates unfettered by the entail.

July 6 and 25,
1717.

Sir Andrew Cathcart submitted the following memorial to Mr. John Clerk, advocate:—“ By contract of marriage, entered
 “ into of these dates, between John Cathcart younger of Carleton,
 “ the memorialist’s father, with consent of Sir Hew Cathcart of
 “ Carleton, Baronet, the father of John, on the one part, and
 “ Katharine Dundas, daughter of Robert Dundas of Arniston,
 “ on the other part, Sir Hew, in contemplation of a marriage
 “ which was afterwards entered into between his son and Miss
 “ Dundas, became bound to infest and seise the said John Cath-
 “ cart and the heirs-male to be procreated of the said marriage,
 “ whom failing, the other heirs and substitutes therein mentioned,
 “ in his lands and estate of Carleton and others. The interest
 “ of the persons called to the succession under this deed is pro-
 “ tected by most of the prohibitory, irritant, and resolute
 “ clauses usually inserted in entails at that period; and it was
 “ duly recorded in the register of tailzies during the lifetime of
 “ Sir Hew. By this deed power is reserved to Sir Hew to alter
 “ or innovate this present tailzie and order of succession above
 “ expressed, except in so far as concerns the said John Cathcart,
 “ and the heirs male or female of this present marriage, to whose
 “ prejudice he is hereby bound and obliged to make no altera-
 “ tion. Accordingly, in exercise of this reserved power, Sir Hew
 “ executed a procuratory of resignation, bearing reference to the
 “ contract of marriage, and which is declared to be granted under

Nov. 9, —

Aug. 17, 1772.

“ all the reservations, conditions, limitations, &c. expressed in
 “ that deed, by which he made certain alterations in the order
 “ of succession. This procuratory has not been recorded in the
 “ register of tailzies. It may be mentioned, historically, that the
 “ marriage between John Cathcart and Katherine Dundas was
 “ dissolved by the death of the latter in 1722, and that Sir Hew
 “ Cathcart died in 1723. Of this date, John Cathcart, then be- July 24, 1729.
 “ come Sir John, contracted a second marriage with Elizabeth
 “ Kennedy, eldest daughter of Sir John Kennedy of Cullean,
 “ of which marriage the memorialist is the heir-male, and is in
 “ right of the estate under the destination in the contract of mar-
 “ riage, and that in the procuratory of resignation. Sir John
 “ Cathcart, the institute, never made up titles to the estate, but
 “ possessed it in apparency from the death of his father in 1723
 “ till his own death in 1759. On that event he was succeeded May 9, 1759.
 “ by his eldest son John, who for some time made up no titles;
 “ and it is known to the memorialist that he was very anxious to
 “ avoid completing titles under the entail. He was advised,
 “ however, by eminent counsel, that it was hazardous to trust to
 “ the negative prescription, which had run against the entail,
 “ as a protection against a declarator of irritancy, whether he
 “ should continue to possess on his apparency, or should overlook
 “ the entail, and serve heir to his grandfather Sir Hew. He
 “ therefore expedite a general service, as heir-male of the body
 “ and heir of tailzie and provision of Sir John Cathcart his
 “ father, in terms of the contract of marriage, and the procura-
 “ tory of resignation executed by Sir Hew; and having obtained
 “ charters of resignation on that procuratory, he was duly infest,
 “ under all the conditions, provisions, &c. expressed in the
 “ entail. Sir John, the second, died in the month of March
 “ 1783, and was succeeded by the memorialist, who, of this date, April 7, 1784.
 “ expedite a special service, as heir-male and of tailzie and pro-
 “ vision of his brother Sir John, in terms of the contract of mar-
 “ riage and the procuratory of resignation; and was infest,
 “ under all the conditions, provisions, &c. expressed in these
 “ deeds. The memorialist is very anxious to alter the destination
 “ contained in the contract of marriage and procuratory of re-
 “ signation in some respects; but he understands that the pro-
 “ hibitory, irritant, and resolute clauses in the contract of
 “ marriage are sufficient to prevent him from accomplishing this

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“ object, either by a new destination, or by a sale. He is
“ advised, however, that there is no effectual prohibition against
“ the contraction of debt, and that his object may be attained
“ in that way. The only clause which aims at a direct pro-
“ hibition against the contraction of debts in general is the fol-
“ lowing:—Providing also, that it shall not be lawful to, nor in
“ the power of the said John Cathcart, nor any of the heirs of
“ tailzie and provision above specified, to alter, innovate, or
“ change this present tailzie and order of succession, or to sell,
“ alienate, or dispone, neither irredeemably nor under reversion,
“ nor yet to wadset or burden with infestments of annual rent,
“ nor any other servitude of burden, the tailzied lands and estate
“ above written whatsoever, or any part thereof, except in the
“ cases and in the way and manner above provided; nor to set
“ tacks nor rentals of the samen for any longer space than nine-
“ teen years, or the setter’s lifetime, and without diminution of
“ the rental, except in the cases of necessity, where a sufficient
“ tenant cannot be found to pay the whole rent; nor to do no
“ other fact or deed, civil or criminal, directly or indirectly, in
“ any sort, whereby the said tailzied lands and estate, or any part
“ thereof, may be affected, apprised, adjudged, forefaulted, or
“ any other way evicted from the said heirs of tailzie, and this
“ present tailzie and order of succession thereby prejudged, hurt,
“ or changed. The irritant and resolute clauses are in the
“ following terms:—Declaring always, that if the saids heirs-
“ female, and descendents of their bodies succeeding to the saids
“ lands and estate, shall failzie to assume, bear, and use, in all
“ time thereafter, the sirname, arms, title, and designation above
“ written, or that the said John Cathcart, or any of the heirs of
“ tailzie, shall contraveen, or fail to fulfil the conditions and pro-
“ visions of this present tailzie, or any one of them, any manner
“ of way, and specially, but prejudice of the generality foresaid,
“ by altering or changing the order of succession, or disponing,
“ selling, wadsetting, or burdening with infestments of annual
“ rent, or other servitudes or burdens, the saids lands, or any part
“ thereof, otherwise than as it is above provided, or by providing
“ their spouses in liferent provisions of the lands and others fore-
“ said, exceeding a third part of the free rent of the samen, or
“ by infesting and securing their spouses, male or female, in any
“ annual rents or annuities to be uplifted out of the said lands,

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“ but in the lands themselves, or by burdening the samen, for
“ provision of the daughters or other children, with more than
“ the sum of ten thousand merks, in manner above provided, or
“ by granting absolute or irredeemable dispositions for payment
“ of the said provisions or annual rents thereof, or by granting
“ infeftments of annual rent for the said provisions, or by not
“ inserting in every bond, security, or obligation which shall be
“ granted for the sums wherewith they are allowed to provide
“ their younger children the particular clauses and provisions
“ above appointed to be insert therein, or by granting tacks and
“ rentals otherwise than as above, or by contracting debts, except
“ in so far as they are empowered in manner above mentioned,
“ or by doing any other fact or deed, civil or criminal, whereby
“ the said lands may be burdened, evicted, forefaulted, or ad-
“ judged, or by possessing of the said lands by virtue of any other
“ title or right than this present tailzie, infeftments, and convey-
“ ances to follow hereupon, or by not inserting in their several
“ rights and conveyances the hail conditions and irritancies
“ hereof, or by lying out unentered, or by not paying the said
“ casualties of superiority, or other public burdens, whereby the
“ said estate may be anywise adjudged or evicted for the samen,
“ or by not purging of the saids adjudications, at least two years
“ before the legal expire; that then, and in these or in any of
“ these cases, not only all such facts and deeds committed,
“ done, or contracted contrair hereunto, with all that may follow
“ thereon, shall be of themselves void and null and of no force,
“ sicklike as if the samen never had been done, contracted, or
“ committed, in so far as concerns the saids lands and estate above
“ expressed, which, nor no part thereof, shall be anyways affected
“ or burdened therewith, in prejudice of the saids heirs of tailzie
“ and provision above specified, appointed to succeed by virtue
“ of these presents, which are made and granted sub modo, and
“ under the provisions above specified, and no otherways; and
“ also the person or persons so contravening or failing to fulfil
“ the above-written conditions or irritancies, or any of them,
“ shall, for themselves, ipso facto, lose, amit, and forefault their
“ right and interest in the saids lands and estate, and the samen
“ shall become void and extinct, and it shall be lawful for the
“ next heir of tailzie, who would succeed if the contravener were
“ naturally dead, albeit descended of the contravener’s body, to,

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“ purchase and obtain declarators upon the contravention, or
 “ failing to fulfil any of the said provisions and conditions, or to
 “ obtain themselves served and returned, infest and seised in the
 “ said tailzied lands, in the same way as if the contravener were
 “ naturally dead, in respect the right of the said contravener is
 “ hereby declared to be void and extinct as said is, and the right
 “ of succession of the foresaid lands and estate is hereby pro-
 “ vided to devolve and pertain to the next heir of tailzie;
 “ and the person so succeeding, and all the subsequent heirs of
 “ tailzie, shall be liable to the same irritancies. It may no doubt
 “ be inferred, with perfect certainty, both from the foregoing
 “ clauses and from the general tenor of the deed, that it was the
 “ intention of parties to prohibit the contraction of debt. The
 “ memorialist, however, conceives that this has not been effec-
 “ tually done, and he desires to have the advice of counsel on
 “ this point, and also, if such shall be the opinion of counsel, to
 “ be directed as to the steps necessary to be taken by him for
 “ attaining, by means of the contraction of debt, the power of
 “ regulating the succession to the estate. On the other hand,
 “ in the event of the memorialist not adopting such measures as
 “ may be recommended for defeating the entail, or not living to
 “ complete them, he is desirous, so far as in his power, to make
 “ such arrangements as are likely to deprive his successors of the
 “ power of defeating the entail. It has already been mentioned,
 “ that the procuratory of resignation, executed by his grand-
 “ father Sir Hew Cathcart, has not been recorded in the register
 “ of tailzies. On this procuratory all the subsequent titles to the
 “ estate have been founded,—Sir John Cathcart, who first made
 “ up titles under the entail, having resigned the estate in virtue
 “ of this procuratory; and the memorialist has inserted the
 “ series of heirs which it contains in his service, and subsequent
 “ titles. The memorialist is apprehensive, therefore, that unless
 “ it is recorded, some future heir may be enabled to sell the
 “ estate. This he proposes to obviate by having the procuratory
 “ of resignation recorded in the register of tailzies. And if it is
 “ competent to him to impose new restrictions on his successors,
 “ to the effect of prohibiting them from contracting debt, he pro-
 “ poses to do so by executing a supplementary deed.

“ In these circumstances, the memorialist wishes to have the
 “ opinion of counsel, in answer to the following queries:—First,

“ is it the opinion of counsel that the entail contains no proper July 18, 1831.
 “ and effectual prohibition against the contraction of debt?
 “ Second, if such shall be the opinion of counsel, what are the
 “ steps which he ought to adopt for enabling him to accomplish,
 “ as his ultimate object, the power of altering the order of suc-
 “ cession to his estate? In considering this query, it is proper
 “ counsel should be aware that the memorialist has a separate
 “ estate of considerable value, both in land and money, entirely
 “ at his own disposal; and that he has little or no debt, and does
 “ not wish to borrow money to an extent, much less to an extent
 “ approaching to the value of his entailed estate. Counsel is
 “ therefore requested to say, whether a gratuitous bond, or other
 “ obligation, will be sufficient to form a foundation for diligence
 “ to affect the entailed estate? Third, is it advisable that the
 “ memorialist should immediately apply to the Court of Session
 “ for authority to record the procuratory of resignation in the
 “ register of tailzies? Fourth, is it in the power of the memo-
 “ rialist, at present, to remedy any defect in the entail by exe-
 “ cuting a deed strictly prohibiting his successors from contracting
 “ debt, and fortifying such prohibition with irritant and resolute
 “ clauses?”

Mr. Clerk answered:—“ Query 1. The entail contains no
 “ proper and effectual prohibition against the contraction of debt.
 “ Query 2. I doubt whether a gratuitous bond, or other obli-
 “ gation, can afford a sufficient means of affecting the entailed
 “ estate, unless the obligation is absolute, and truly intended to
 “ bind, and actually binding, upon the granter, because the
 “ diligence intended to carry off the entailed estate, proceeding
 “ upon an obligation merely in form, and not binding upon the
 “ granter, would probably be considered as collusive, and of no
 “ effect against the heirs of entail. Therefore I cannot advise
 “ the memorialist to rely upon any such plan. A true debt must
 “ be contracted, whether the obligation is onerous or gratuitous.
 “ An onerous obligation will be most advisable in such a case;
 “ because, though intended merely for the purpose of defeating
 “ the entail, it would nevertheless be a real and true transaction,
 “ just as a sale, where selling is not prohibited, though the entail
 “ may be perfect in other respects, will defeat it, and the heir of
 “ entail, after having sold the estate, may buy it back, and hold
 “ it by a title in fee-simple. It occurs to me that the memo-

July 18, 1831. “ memorialist may, without much difficulty, carry his purpose into
 “ effect. He must no doubt legally contract a debt, and I under-
 “ stand that it must be a very large debt, for it must be equal
 “ to, or larger than, the value of the estate. But I think that
 “ a debt, even to that extent, may be legally contracted without
 “ much trouble or inconvenience either to the memorialist or to
 “ the creditor. A true debt would be contracted by a common
 “ exchange of bills between the memorialist and a friend, upon
 “ which the latter would become creditor to the memorialist for
 “ the bill given to him in exchange, and would be entitled to
 “ adjudge for his security. The passages in the entail relative
 “ to adjudging do not and cannot apply to adjudications for
 “ debt, because the contraction of debt not being prohibited, the
 “ application of these passages is necessarily confined to other
 “ deeds or transactions, upon which adjudication would be com-
 “ petent. But even a direct prohibition against adjudication for
 “ debt would be altogether nugatory in such an entail, because
 “ the contraction of debt being allowed, all its consequences must
 “ necessarily follow. There may be other modes of contracting
 “ debt to a sufficient extent for defeating the entail ; and it sig-
 “ nifies nothing what the mode is, if a true debt to a sufficient
 “ extent shall be contracted. The next step to be taken after
 “ the adjudging is, with all expedition, to pursue a sale of the
 “ estate. I am not aware of any ground upon which that mea-
 “ sure can be opposed. When the estate comes to be sold, it
 “ should be purchased, either by the creditor, or by some other
 “ person, who will reconvey to the memorialist. Query 3. This
 “ is not of much consequence ; but I think it would be proper to
 “ record the procuratory of resignation in the register of tailzies.
 “ Query 4. I consider it to be quite established, that the pro-
 “ prietor of an estate, over which there is a subsisting entail, with
 “ strict clauses of any kind, has no power to make a new entail
 “ of the estate, without previously extinguishing the old entail.

“ Edinburgh, 19th March 1821. Referred to in my opinion,
 “ 13th July 1821.”

Thereafter Mr. Clerk gave the following additional opinion
 on the same memorial :—“ Upon reconsidering the plan of
 “ breaking the entail of Carleton, so as to enable Sir Andrew
 “ Cathcart to settle the estate by a new destination, it appears
 “ that the plan may be completed sufficiently to exclude the

“ present heirs of entail, and to establish a right in the heirs of July 18, 1831.
 “ the new destination, by the measures following, or measures of
 “ a similar nature. The debt may be contracted by exchange
 “ of bills, or other securities. It may be contracted even by
 “ gratuitous obligations; but it seems more advisable to establish
 “ the debt upon onerous considerations. The debt being con-
 “ tracted, adjudication will follow in common form, and it should
 “ be completed by a charter and infeftment. A burden equal
 “ to or beyond the value of the estate being thus created, I
 “ apprehend that Sir Andrew, who had power to contract the
 “ debt, will be under no obligation to discharge in any question
 “ with the heirs of entail. Sir Andrew will have power to let the
 “ adjudication remain a burden upon the entailed estate till the
 “ legal expire, and a right of property is established in the cre-
 “ ditor, which of course may be made irredeemable. The
 “ burden being constituted, Sir Andrew may purchase it from
 “ the creditor, and hold it on his own account, taking an assig-
 “ nation, in place of paying the debt, and taking a discharge and
 “ renunciation. Sir Andrew will then possess the estate upon
 “ the adjudication as his title. It is easy to see, that the same
 “ money that will be paid by Sir Andrew for the adjudication
 “ will be employed by the adjudger in discharging the bill, or
 “ other security which he had given to Sir Andrew. That bill
 “ or security should, in the meantime, be passed by Sir Andrew
 “ to a third party. There seems to be no other management
 “ necessary in making these transactions, but for the purpose of
 “ preventing the debt contracted by Sir Andrew from being
 “ extinguished. When Sir Andrew obtains a sufficient right to
 “ the adjudication, it will be in his power to make a new entail
 “ of the lands, attending only to the nature of the title. It will
 “ probably be necessary to insert some clauses, providing for the
 “ imperfection of a title by adjudication.

“ Edinburgh, 13th July 1821.”

Thereupon Sir Andrew on the 25th of the ensuing September signed, as acceptor, a bill for 150,000*l.* payable ten days after date at the office of Messrs. Donaldson and Ramsay, W. S. Edinburgh, (the men of business of Sir Andrew,) in favour of Quintin Kennedy, a friend of Sir Andrew's, as the drawer, but to whom he was not at the time at all indebted. On the same day Quintin Kennedy accepted in favour of Sir Andrew a bill

July 18, 1831. also for 150,000*l.*, which Sir Andrew indorsed to Major Shaw, (a mutual friend of Sir Andrew and Kennedy,) in whose hands it was deposited and remained.

The bill drawn by Kennedy was protested for nonpayment, and the protest registered in the following October; and thereafter he raised a summons of adjudication for adjudging the whole entailed estates, on payment and security of this debt, and obtained decree of adjudication on the 15th January 1822, no appearance or opposition having been made by Sir Andrew. The decree having been extracted, Kennedy presented a signature of adjudication in Exchequer, and thereupon obtained a charter of adjudication, by which his Majesty, as Prince, disposed, in the usual words of style, “*dilecto nostro Quintin Kennedy de Drumellan, Armigero, ejusque hæredibus et assignatis hæreditarie, sed sub reversione secundum legem,*” the lands and barony of Carleton. The *quæquidem* of the charter correctly narrated the adjudication on which it proceeded. Kennedy was thereafter infeft, and his *sasine* recorded, and he thus completed a feudal title to the principality lands adjudged. The title to other lands, of which Sir Andrew was the superior, was also completed by letters of horning, at Kennedy’s instance, against superiors, and the letters and execution were recorded. Sir Andrew Cathcart thereupon granted a charter of adjudication to Kennedy, “*and his heirs and assignees, heritably, but under reversion, in terms of law,*” of these lands. The *quæquidem* narrated the adjudication in the same terms as in the Crown charter of the Carleton lands. Kennedy was infeft on this charter, and the *sasine* recorded. The *sasines* were recorded on the 11th February. All this having been effected, Kennedy on the 13th of February conveyed the adjudication and the lands adjudged to Sir Andrew. The price is stated at 95,000*l.*, but no money actually was paid down by the party, and the deed was engrossed on a corresponding *ad valorem* stamp. Thereafter the bill for 150,000*l.* in the hands of Major Shaw was delivered to Kennedy and cancelled. The disposition proceeded upon the narrative of the bill and adjudication, and the various steps which had been taken to complete the title to the lands; and it is added, “*and seeing that the said Sir Andrew Cathcart has instantly made payment to me of the sum of 95,000*l.* sterling, as the price of the lands and*

“ other heritages mentioned in the said decree of adjudication, July 18, 1831.
 “ and hereinafter described, with which I hold myself well satis-
 “ fied, and discharge him, his heirs and successors, of the same
 “ for ever.” The dispositive clause is as follows: “ Therefore,
 “ wit ye me, the said Quintin Kennedy, to have sold and
 “ disposed, as I do hereby sell, alienate, and dispoise from me,
 “ my heirs and successors, to and in favour of the said
 “ Sir Andrew Cathcart, and his heirs of line and assignees
 “ whomsoever, heritably and irredeemably, all and whole the
 “ lands and barony of Carleton,” &c. Then follows a descrip-
 tion of the lands, as contained in the decree of adjudication. In
 the procuratory of resignation Kennedy resigns the lands in
 favour “ and for new infeftment of the same, to be made, given,
 “ and granted to the said Sir Andrew Cathcart, and his heirs
 “ of line, and assignees, heritably, in due and competent form.”
 The assignation to the title-deeds contains a special right to the
 decree of adjudication, and there is a clause of warrandice from
 facts and deeds, and an obligation to infeft by double holding
 and precept, in the usual terms. Under these deeds Sir An-
 drew Cathcart completed his title by infeftment in November
 1822, and a charter of confirmation in July following. The
 expense of these proceedings was ultimately charged of and
 paid by Sir Andrew alone. He was in affluent circumstances
 when he accepted the bill in place of Kennedy, who made no
 claim for the difference between its amount and the sum stated
 as the price of the right to the adjudication.

No ostensible change took place in the possession of the
 estates; but Sir Andrew continued to enjoy them, under the
 original titles, until his death on the 13th April 1828. On this
 event a sealed paper was produced by his agent, containing a
 new deed of entail, dated January 29, 1827, by which Sir Andrew
 disposed the whole of the estates in the original entail, together
 with the fee-simple lands which he had himself acquired, to him-
 self and the heirs male of his body, whom failing the heirs female
 of his body, whom failing to John Cathcart of Genoch, a remote
 substitute under the original entail, and postponed John Andrew
 Cathcart, who, on Sir Andrew's death, had it not been for the
 above measures, would have taken the estates, under the original
 entail, to a distant part of the substitution. By this new entail
 Sir Andrew bound himself, and his heirs and successors whom-

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soever, to free and relieve the lands and other heritages thereby disposed, and the heirs named to succeed thereto, from the payment of all the debts and obligations to which he for himself, or representing any of his ancestors, was liable, and also from all claims by which the lands might be evicted from the parties to whom he destined them. The deed also provided, “ That in
 “ the event of my not having rendered my title, under which I
 “ now possess the lands and others specified and contained in
 “ the said decree of adjudication at the instance of the said
 “ Quintin Kennedy against me, irredeemable during my own
 “ life, by decree of declarator of expiry of the legal or other-
 “ wise, then and in that case the heirs-male of my body, and
 “ the other heirs of tailie, substitutes, and successors before
 “ mentioned, shall be obliged, immediately on their succession,
 “ if the time allowed by law for redeeming the said adjudication
 “ shall have expired, and if otherwise, so soon as the time
 “ allowed by law for redeeming the said adjudication shall
 “ expire, and at all events without any unnecessary delay, to
 “ institute a process of declarator of expiry of the legal of the
 “ said adjudication, and such other process or processes as shall
 “ be considered by the Dean of the Faculty of Advocates for
 “ the time to be the most proper for rendering irredeemable the
 “ right and title of the said lands and others, and to obtain a
 “ decree or decrees in such process or processes.”

John Cathcart of Genoch having made up titles under the new entail, Sir John Andrew Cathcart, the heir entitled under the original entail to succeed to Sir Andrew, and who had made up titles, accordingly raised an action of reduction, concluding for reduction of the 150,000*l.* acceptance, on which the adjudication had been led—the decree of adjudication—the horning against superiors—the charters of adjudication, &c., including each subsequent deed in the above-mentioned progress of suits, and the new deed of entail, except in relation to the lands which had belonged to Sir Andrew in fee-simple.

The Lord Ordinary (8th December 1829) found, “ That the
 “ deed of marriage contract and entail, of date the 6th and
 “ 25th July 1717, confirmed by the procuratory of resignation
 “ of date 17th August 1722, both narrated in the summons and
 “ condescendence, does not contain any general prohibition duly
 “ expressed in the prohibitory clause, whereby it is declared not

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“ to be lawful to the heirs of tailzie to contract debts by which
 “ the estate may be adjudged or evicted, and that this defect in
 “ the prohibitory clause is not supplied by any implication from
 “ other parts of the deed: Finds, that if a true debt had been
 “ contracted by the late Sir Andrew Cathcart, and an adjudica-
 “ tion proceeding thereon had been bonâ fide completed by the
 “ creditor, the said Sir Andrew Cathcart might not have been
 “ barred from afterwards acquiring the title by adjudication, so
 “ constituted in the person of the creditor, or from keeping up
 “ that title in his own person, and disposing thereof, in respect
 “ that the defect of this entail is in the prohibitory clause, and
 “ that the heirs were not laid under any obligation not to con-
 “ tract debt; but finds, that upon the facts admitted in the
 “ record, or fully proved by the writings produced, it is estab-
 “ lished that there was no true or real debt contracted by the
 “ said Sir Andrew Cathcart, as between him and Mr. Quintin
 “ Kennedy, the alleged creditor in the sum mentioned, at whose
 “ instance the adjudication called for to be reduced proceeded,
 “ and that the bill for 150,000*l.* granted by the said Sir Andrew
 “ Cathcart in favour of the said Quintin Kennedy—the counter-
 “ bill for the like sum granted by the said Quintin Kennedy in
 “ favour of the said Sir Andrew Cathcart—the adjudication
 “ thereafter deduced by the said Quintin Kennedy—and the dis-
 “ position and assignation by him in favour of the said Sir An-
 “ drew Cathcart, and the titles completed thereon,—were all and
 “ each of them fictitious and collusive, being neither intended to
 “ constitute, nor in effect constituting, any real adjudication of
 “ the estate for a debt truly and bonâ fide contracted: Finds,
 “ that by the said entail the heirs of tailzie are effectually pro-
 “ hibited ‘ to alter, innovate, or change this present tailzie and
 “ order of succession:’ Finds that the various writs and pro-
 “ ceedings called for in the summons being altogether fictitious
 “ and collusive, in so far as they appear to originate in debt con-
 “ tracted by the said Sir Andrew Cathcart, do in fact import an
 “ attempt directly to alter the order of succession to the said
 “ estate, in violation of the express prohibition of the entail,
 “ under colour of a feigned adjudication for debt: Finds, that
 “ the last plea in law stated for the defender, founded on the
 “ obligation laid by the said Sir Andrew Cathcart, on all his
 “ heirs and representatives to give effect to his new entail, and to

July 18, 1831. “relieve the estate of the adjudication, necessarily depends for its
 “validity on the previous plea in regard to the reality and legal
 “efficacy of the said title by adjudication to create a true and
 “valid burden on the estate, and that it would otherwise amount
 “to a plea that the deceased could impose a binding obligation
 “on the heirs of tailzie to give effect to a direct alteration of the
 “succession, in contravention of the entail: Therefore repels the
 “defences, and reduces, decerns, and declares, in terms of the
 “conclusions of the libel, but finds no expences due.”—“*Note.*
 “Where there is a defect in the prohibitory clause of an entail
 “in any of the three great points of prohibition, the entail may
 “be rendered unavailing to the substitute heirs; but the act not
 “prohibited must be truly and actually done. In the present
 “case, the Lord Ordinary is satisfied that it was not done.
 “The findings of the interlocutor are intended to exhaust the
 “pleas in law.”

The defender reclaimed against the findings of the interlocutor generally, and prayed the Court “to recal that interlocutor, to
 “repel the reasons of reduction, assoilzie the petitioner (de-
 “fender), and find him entitled to expenses.”

The pursuer, on the other hand, reclaimed against the inter-
 locutor, in so far as it “finds that the deed of marriage contract
 “and entail, of date the 6th and 25th July 1717, confirmed by
 “the procuratory of resignation, of date 17th August 1722,
 “both narrated in the summons and condescendence, does not
 “contain any general prohibition duly expressed in the pro-
 “hibitory clause, whereby it is declared not to be lawful to the
 “heirs of tailzie to contract debts, by which the estate may be
 “adjudged or evicted, and that this defect in the prohibitory
 “clause is not supplied by any implication from other parts of
 “the deed;” and in so far as it “finds, that if a true debt had
 “been contracted by the late Sir Andrew Cathcart, and an
 “adjudication proceeding thereon had been bonâ fide completed
 “by the creditor, the said Sir Andrew Cathcart might not have
 “been barred from afterwards acquiring the title by adjudica-
 “tion, so constituted in the person of the creditor, or from
 “keeping up that title in his own person, and disposing thereof,
 “in respect that the defect of this entail is in the prohibitory
 “clause, and that the heirs were not laid under any obligation
 “not to contract debt.” And the pursuer prayed the Court

to find, in terms of the conclusions of the libel, that the said deeds did contain an effectual prohibition against the contraction of debt. But the Court, holding that it was unnecessary to enter on the question involved in the two first findings of the interlocutor of the Lord Ordinary, the other findings being quite sufficient for the decision of the question betwixt the parties, refused the desire of the defender's note, and adhered to the interlocutor of the Lord Ordinary complained of, under the qualification expressed in the interlocutor of the Court of the same date, upon advising the note given in for the pursuers: And further, the Lords repelled the first plea in law stated for the defender. The interlocutor by the Court, upon the reclaiming note for the pursuers, was—"In respect it is proved that there was no just or true debt contracted by Sir Andrew Cathcart to Mr. Kennedy, as found in the Lord Ordinary's interlocutor, and adhered to in the judgment of the Court of this date, upon advising the separate reclaiming note for the defender; find it unnecessary to take into consideration, or to decide the question involved in the two first findings of the interlocutor now complained of by Sir John Andrew Cathcart, and adhere to the Lord Ordinary's interlocutor, in so far as it finds no expences due to either party."

The defender appealed against the Lord Ordinary's interlocutor, except in so far as it finds that the marriage contract and procuratory of resignation do not contain any effectual prohibition against the contraction of debt by which the estate may be adjudged or evicted, and against the interlocutor of the Inner House.

Immediately on the death of Sir Andrew and the production of the new entail, an arrangement, about the full extent and meaning, however, of which, parties differed, was entered into, by the compulsory powers whereof a person was authorized to take charge of the estates for the benefit of all concerned; the defender endeavouring to intromit with the rents, on the ground that he was in possession, as a good title. The pursuer petitioned the Court to sequester the entailed estates, and appoint a factor to uplift the rents; and their Lordships (11th February 1829) sequestered the lands and estates, and appointed William Johnston judicial factor thereon. Against this inter-

July 18, 1831. locutor also the defender appealed; but it is unnecessary to take notice of the arguments in support of the appeal, as the discussion at the bar of the House of Lords was confined to the questions in the reduction.

Appellant.—A deed conveying heritage is not effectual as an entail, unless it be framed in strict conformity to the act 1685, allowing entails under certain conditions; and if not so framed, the party favoured and his heirs are entitled to enjoy, dispose of and burden the property at pleasure, as proprietors thereof in fee-simple. By the feudal law no vassal had a right to make an entail of his lands. The charter by his superior regulated the succession of the vassal, and he could not substitute any person in the place of those heirs whom the superior had selected to be in their order his vassals. But in the progress of society important changes took place. The first step was to allow the creditors of the vassal to attach his lands, as a satisfaction for the debts due to them; and the superior was bound by statute to receive such creditors as his vassals, on payment of a fine or composition to compensate for this departure from the order of succession which had been laid down by him. After this vassals were allowed to alienate their lands on payment of a similar fine to the superior; because, after adjudication for debt was permitted, the vassal, when he intended an entire alienation, could easily effect his purpose by receiving the price as a loan; in virtue of which the purchaser could, in the character of creditor, adjudge the lands and compel the superior to receive him as his vassal. The last step in the progress was to allow the vassal to alter the order of succession prescribed in his charter, and this was a natural consequence of the preceding changes, or rather was comprehended under the general right of alienation. Thus vassals came at length to have vested in them the full right of property, the *jus utendi, fruendi, libereque disponendi*. But after vassals had thus become truly proprietors of their lands, they became desirous of limiting the rights of their successors. This led to what is properly called an entail, that is, the destination of an estate under certain restraints and provisions. These were not only negative, but positive; but, as their main object was to prevent the estate from being carried away from the heirs called to the succession, they were chiefly

of a prohibitory nature, and hence the clause containing them July 18, 1831.
 has usually been termed the prohibitory clause. Such restraints, however, were ineffectual at common law, because they are incompatible with the right of property. Various devices were employed in order to give that efficacy to entails which the common law denied them; and at last, after many unsuccessful expedients, it was conceived that the prohibitory clause in entails might be strengthened by irritant and resolute clauses, providing that, if the heir in possession should alienate or burden the estate with debt, or alter the order of succession, not only his deeds should be null and void, but he himself should forfeit his right to the estate in favour of the next heir of entail. The efficacy of such a deed was put to the test in 1662 in the case of Stormont. The entail was there sustained, but the decision passed with difficulty, the Court being nearly divided, nor has it ever been regarded as an authority of weight. In 1685, however, the legislature interfered; and if the statute had not given sanction to entails at common law, they could not have stood. They are the mere creatures of that statute. But to constitute a valid statutory entail, the deed must contain certain specific, prohibitory, irritant, and resolute clauses. It is not enough that an entail contain some prohibitions and conditions, guarded by irritancies and resolutions of right; but among these there must be provisions that it “shall not be lawful to the
 “heirs of tailzie to sell, annailzie, or dispone the said lands, or
 “any part thereof, or contract debt, or do any other deed
 “whereby the samen may be apprised, adjudged, or evicted
 “from the other substitutes in the tailzie, or the succession frus-
 “trate or interrupted.” An entail wanting any of these prohibitions imperatively enjoined and enumerated in the statute would not be an entail in terms of the statute, and cannot receive validity or support from the statute; at common law it has no sanction. The deed, therefore, while it carries the estate to the parties who are favoured by it, does not impose those restraints which the law acknowledges, and of necessity the estate descends as an unlimited fee, and the result is that the appellant’s author possessed in fee-simple.

Lord Chancellor.—If you are quitting your argument upon the point that a defect in one particular affects the deed in all others,

July 18, 1831. and makes the whole entail void, will you permit me to ask you whether you have any cases to quote for that position?

Dr. Lushington.—I do not know that I have any decisions to cite, my Lord.

Lord Chancellor.—I thought not ; it is a doctrine of 1831.

(2.) The procuratory of resignation in 1722 is the fundamental title of both parties ; * it however could only have effect

* The appellant's argument on the procuratory of resignation is founded on the following progress of titles. By the contract of marriage the destination of the estates was to and in favour of " John Cathcart, and the heirs-male to be procreate of the marriage betwixt the said Mrs. Catherine Dundas and him ; which failing, his heirs-male of any other lawful marriage ; which failing, to the heirs-male to be procreate of the said Sir Hugh Cathcart his own body ; which failing, John Cathcart, eldest son of the deceased Andrew Cathcart, brother-german of the said Sir Hugh, and the heirs-male of his body ; which failing, Andrew Cathcart, his second son, and the heirs-male of his body ; which failing, Hugh Cathcart, his third son, and the heirs-male of his body ; which failing, the heirs-female to be procreate of the said John Cathcart, (then younger of Carleton,) of this or any other marriage ; which failing, the heirs-female to be procreate of the said Sir Hugh his own body ; which failing, John Cathcart of Genoch, and the heirs-male of his body ; which failing, the heirs-female of the said deceased Andrew Cathcart his body ;—all which failing, the said Sir Hugh Cathcart, his nearest and lawful heirs whatsoever." The contract, however, specially provided and declared, that Sir Hugh Cathcart should have full power and liberty " to alter or innovate this present tailzie and order of succession above exprest, except in so far as concerns the said John Cathcart, and the heirs-male or female of this present marriage, to whose prejudice he is hereby bound and obliged to make no alteration." The contract was recorded in the register of tailzies. Sir Hugh Cathcart exercised the reserved power by executing, in 1722, a procuratory of resignation. This deed proceeds on the narrative of the destination in the contract of marriage, and the reserved power to alter and innovate the same, and his resolution " in some part to alter the order of succession contained in the said contract of marriage and taillie, without hurt or prejudice to the said taillie as to any other points not hereby expressly altered. He grants authority to resign the lands in favours and for new infestment of the samen, to be given and granted to the said John Cathcart, my son, and the heirs-male to be procreat of his body ; which faillicing, to the heirs-male of the body of me the said Sir Hugh Cathcart ; which faillicing, to Margaret Cathcart, eldest daughter procreat betwixt the said John Cathcart, my son, and the said deceast Mrs. Catherine Dundas, and the heirs-male of the said Margaret Cathcart her body ; which faillicing, to Ann Cathcart, second daughter procreat betwixt the said John Cathcart and Mrs. Catherine Dundas, and the heirs-male of her body ; which faillicing, to Andrew Cathcart, second son of the deceast Andrew Cathcart, merchant in Glasgow, my brother, and the heirs-male of his body ; which faillicing, to Hugh Cathcart, third son of the said Andrew Cathcart, my

as an entail if it was executed and completed in terms of law ; but it was not. For although the act 1685, authorizing

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“ brother, and the heirs-male of the said Hugh’s body ; which faillieing, to the
 “ nearest heirs-female, without division, of the said John Cathcart, my son, his body ;
 “ which faillieing, to the eldest heir-female to be procreat of the body of me the said
 “ Sir Hugh Cathcart ; which faillieing, to John Cathcart of Genoch, and the heirs-
 “ male of his body ; all which faillieing, to me the said Sir Hugh Cathcart my
 “ nearest and lawful heirs and assignees whatsomever.” The procuratory contains a
 warrant for recording it in the register of tailzies, but it was not recorded. It did
 not specify the limitations, conditions, and provisions enjoined by the marriage con-
 tract ; it merely provided that the lands shall be holden “ with and under the
 “ powers, faculties, reservations, limitations, burdens, irritancies, and provisions in
 “ favour of or burdening the heirs of taillie named in the said contract, which I
 “ appoint to be held as expressly repeated in this present nomination as a part thereof,
 “ and to be insert in the charter and infestments to follow hereupon, and to affect,
 “ restrict, limit, burden, and enable the heirs mentioned in this present nomination
 “ and procuratory, in the same way as they were to have affected, restricted, limited,
 “ burdened, and enabled the heirs of taillie contained in the substitution insert in
 “ the said contract of marriage.” Farther, it contained a new condition and irritancy
 which was not in the contract of marriage, namely, “ that in case, by failure of
 “ heirs-male of my said son’s body, my said lands and estate shall devolve upon the
 “ said Margaret or Ann Cathcarts, my said son’s daughters, and the heirs-male of
 “ their bodys, that the said heirs-male, as well as the other heirs-female, who may
 “ succeed by virtue of this nomination, be obliged to assume and use the name and
 “ arms of Cathcart, and title of Carleton, otherwise their right shall be irritat, and
 “ the estate devolve upon the next heir who would succeed, if they were naturally
 “ dead.” John Cathcart younger did not make up any title after his father’s death,
 but possessed the estate, during his own life, merely as apparent heir of Sir Hugh
 Cathcart. After the death of his first wife, Catherine Dundas, he entered into a
 second marriage, by which he had several sons. He died in 1759, and was succeeded by
 his eldest son, also named John, who, in 1765, expedie a general service “ as nearest and
 “ lawful heir-male of the body of John Cathcart his father, and as such, nearest and
 “ lawful heir of tailzie and provision to him, in terms of a contract of marriage entered
 “ into between him, with consent of Sir Hugh Cathcart of Carleton, Bart., his
 “ father, on the one part, and Mrs. Catherine Dundas, daughter of Robert Dundas
 “ of Arniston, one of the Senators of the College of Justice, with consent of her
 “ father, on the other part, dated 6th and 25th July 1717 ; as also in terms of a
 “ procuratory of resignation granted by the said deceased Hugh Cathcart, in relation
 “ to said contract of marriage, dated 17th August 1722.” He then, in 1765,
 resigned the lands of Carleton, and others held of the Prince, on the above procu-
 ratory of resignation, and expedie a charter of resignation in favour of himself and the
 other heirs called to the succession by the said procuratory, and on this charter was
 infest. Having acquired from the superiority of the lands of Waterhead and Killo-
 chan, he made up his title to the dominium utile of these lands by resigning in
 1768 upon the procuratory of resignation, and the retour of his service, for new in-
 festment, in favour of himself and the other heirs of tailzie called to the succession in
 the order prescribed by that procuratory ; and he thereafter, of the same date, granted
 a charter of resignation in favour of myself and the other heirs of tailzie called to the

July 18, 1831. tailzies, expressly declares, “ that such tailzies shall only be
 “ allowed in which the foresaid irritant and resolute clauses
 “ are insert in the procuratories of resignation, charters, pre-
 “ cepts, and instruments of seisin, &c.” the procuratory of resig-
 nation 1722 does not contain any prohibition, or irritant or
 resolute clause, except that which relates to the name and arms
 of Cathcart of Carleton. The reference to the powers, faculties,
 reservations, limitations, burdens, irritancies, and provisions in
 favour of or burdening the heirs of tailzie named in the contract

succession by Sir Hugh's procuratory, upon which he was infeft. Under these titles he possessed the estates till his death in 1783. Having died without heirs of his body, he was succeeded in his estate by his immediate younger brother, Sir Andrew Cathcart (the appellant's author), who was served heir in special, as heir male of tailzie and provision to his brother, in the lands and barony of Carleton, but with and under the “ provisions, conditions, limitations, clauses irritant and resolute, contained in
 “ the contract of marriage between the deceased Sir John Cathcart of Carleton, Bart.,
 “ (father of the said Sir Andrew Cathcart, therein designed John Cathcart younger
 “ of Carleton,) with consent of Sir Hugh Cathcart his father, on the one part, and
 “ Mrs. Catherine Dundas, daughter of Robert Dundas of Arniston, one of the
 “ Senators of the College of Justice, with consent of her said father, on the other
 “ part, dated 6th and 15th July 1717, and in a procuratory of resignation granted
 “ by the said Sir Hugh Cathcart relative to said contract, dated 17th August 1722.”
 Upon the retour of his service, Sir Andrew obtained a precept from Chancery, and was infeft, and having made up titles to the Crown superiorities of the lands of Waterhead and Killochan, he granted a precept of clare constat in favour of himself, and the other heirs of tailzie called to the succession by Sir Hugh Cathcart's procuratory, upon which he was infeft. The respondent is descended from Hugh Cathcart, the youngest son of Andrew Cathcart, who was called to the succession by the procuratory of resignation on the failure of Margaret and Anne Cathcart, and the respective heirs-male of their bodies, and of Andrew Cathcart, second son of the respondent's ancestor Andrew Cathcart, and the heirs-male of his body. In 1828 he expedie a general service, which has been retoured to Chancery, as “ propinquior et legitimus hæres
 “ talliæ et provisionis dict. quondam Domini Andrea Cathcart de Carleton, nepotis
 “ fratris ejus abavi, in terminis syngraphiæ talliæ executæ per dict. Hugonem Cath-
 “ cart, quam content. in contractum maritaggi fact. inter, &c.; ac etiam in terminis
 “ procuratoriæ resignationis per dict. Dominum Hugonem Cathcart in favorem dict.
 “ Domini Joannis Cathcart, ejus filii, aliorumque personarum postea mentionat. de
 “ data decimo septimo die mensis Augusti anno millesimo septingentesimo et vige-
 “ simo secundo, recordat. in libris Sessionis quarto die mensis Octobris anno mille-
 “ simo septingentesimo sexagesimo octavo. Per quam syngrapham talliæ primam
 “ mentionat. dict. Dominus Hugo Cathcart resignavit terras aliasque inibi mentionat,
 “ &c. et per quam procuratoriam resignationis supra mentionat. dict. Dominus Hugo
 “ Cathcart, virtute potestatum reservatarum illi per dict. syngrapham talliæ, in
 “ tantum mutavit destinationem particulariter antea script. quam vocare tam hæredes
 “ talliæ proxime post dict. Joannem Cathcart, filium ejus, hæredes masculos ex
 “ corpore ejus dict. filii; quibus deficient. &c.”

of marriage, which are appointed to be held, as expressly repeated in the procuratory of resignation as a part thereof, is not due compliance with the absolute and unqualified statutory enactment of actual insertion. A Court which should sustain an entail defective in these respects would, in fact, usurp a legislative power. But even if a mere reference was sufficient, the procuratory, not having been recorded in the register of tailzies, could have no effect to prevent the proprietor, holding under such a title, from exercising every right which belongs to proprietors in fee-simple. July 18, 1831.

Lord Chancellor.—I take it that argument would be very good against singular successors, in reference to a sale made by a person in whose favour the succession had been altered; but how does it apply here? Your difficulty all along is, that the party seeking to take advantage of this is Sir Andrew Cathcart, the man who himself alters the order of succession. It is in respect to him that the question arises; can he unfetter himself by this contrivance? Your argument is, that there is a defect of registration; suppose it to be so, that applies only to third parties—how does it apply inter hæredes?

Dr. Lushington.—The distinction between heirs and strangers, in relation to entails, is not authorized by the act 1685, which, on the contrary, declares, that only on the due observance of the prescribed requisites, an entail shall be effectual against heirs, as well as creditors and singular successors. No doubt the Court of Session has sometimes made a distinction; but their decisions proceeded on the erroneous notion that, though an entail be not executed in terms of the statute, its provisions and conditions nevertheless create a jus crediti in favour of the substitutes, which the heir in possession cannot disappoint by any voluntary deed. This notion, however, has been exploded by the judgment in the Ascog case. There the Court of Session, holding that the substitutes had a jus crediti, decided in their favour. But this House reversed their decision; and thus, in substance, determined that the distinction between heirs and strangers was without foundation.

(3.) The marriage contract, and the subsequent procuratory of resignation, do not constitute an effectual entail in terms of the statute, inasmuch as they do not contain a prohibition against contracting debt, by which the estate may be appraised, adjudged, or evicted; and therefore Sir Andrew Cathcart enjoyed

July 18, 1891. the rights and powers of a proprietor in fee-simple, and could alienate the estate, alter the order of succession, or grant obligations, whether gratuitous or onerous, by which the estate might be apprised, evicted, or adjudged.

(4.) Even if the defect in the entail were not sufficient to invalidate the contract 1717 as an entail, yet, in consequence of that defect, Sir Andrew Cathcart, being entitled to contract debt, did exercise his right by contracting a just and true debt to Quintin Kennedy; and the said debt having been so contracted was a sufficient ground for the adjudication of the estate by Kennedy; and the adjudication, and the titles following thereon, having ultimately vested the same in Sir Andrew Cathcart, he had a right to execute the entail now brought under reduction. The question then arises, whether, at the date of the adjudication, a debt was truly owing by Sir Andrew Cathcart to Mr. Kennedy? Now, when Kennedy accepted and delivered a bill to Sir Andrew for a sum equal to that in the bill by Sir Andrew to him, he gave full value for the latter, and by consequence he was a legal creditor of Sir Andrew for its amount. The circumstance that there was an exchange of bills did not detract from the *jus crediti* vested in each of the parties by the transaction. In what are termed cross-bills the bills do not mutually extinguish each other, but each bill constitutes a debt due by the acceptor to the opposite party. Each may indeed be the subject of compensation or set-off in certain cases, but each subsists as a distinct debt till compensation or set-off be judicially pleaded and sustained. Assuming, then, that a just and true debt was constituted by Sir Andrew's acceptance, Kennedy, as the drawer and holder of the bill, was entitled to attach the real and personal estate of his debtor by the ordinary forms of diligence; and, in particular, as the entail of Carleton was defective, because it did not contain an effectual prohibition against contracting debt, Mr. Kennedy was entitled to adjudge that estate. This was accordingly done by him, and he completed an unexceptionable feudal title to the lands which he had adjudged.

The appellants are not bound to inquire into the ultimate object of Sir Andrew Cathcart; his immediate intention was to constitute a just and true debt. He did so, and that is enough. Restraints in entails are infringements on the right of property;

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and every heir is justified in freeing himself, if he can legitimately, from these restraints, and placing himself in the situation and with all the rights of a proprietor in fee-simple. If there be no prohibition against selling, it cannot be doubted that the heir may make a valid sale, either for a price instantly paid, or, which is not unusual in sales, secured by an heritable bond over the property sold, granted by the buyer. It is equally clear that, after such sale has been completed, the heir may repurchase exactly at the same price,—discharging, where it had not been actually paid, the security granted for it. He will then be the proprietor in fee-simple; and it will not affect the validity of the transaction that the purpose of the heir from the beginning was to repurchase, and afterwards settle the estate on persons more favoured by him than those who had been appointed to succeed by the entail. So, if there be no prohibition to alter the order of succession, the heir may alter it, and immediately afterwards sell the estate, or burden it with debt. It is absurd to say that such acts are frauds against the entail, for there can be no fraud in recovering the unqualified use and disposal of property by such means as an entailer has left open to the heirs of entail. When an heir professes to do one thing, and in reality does something different, that may perhaps be termed a fraud; at least, the act done must be judged of as it is, and not as what it pretends to be. When an heir, prohibited to alienate, but permitted to feu, gives away the whole estate by deeds professing to be feu-rights, these are alienations, and so are affected by the prohibition in the entail; but if a man is not prohibited to sell or to contract debt, the sale or contraction of debt is actually what it professes to be, and therefore is effectual, although the heir may have an ulterior object in view after he has made the sale or contracted the debt. In the Ascog case nothing could be plainer than the intention of the heir in possession to defeat the intentions of the entailer; yet the heir was successful in defeating these intentions, and that although the question was not with creditors, but inter hæredes, thus showing that the distinction between questions with creditor and heirs is altogether unfounded.

Lord Chancellor.—I think the Ascog case would go thus far. Suppose, there being no effectual prohibitory clause, Sir Andrew had contracted debt with a bonâ fide lender by a bonâ fide security,

July 18, 1831. to the amount of 100,000*l.*, that bonâ fide lender of the money would have had a right to lead an adjudication, and to bring the estate to a judicial sale, and Sir Andrew, according to the Ascog case, would not have been compellable to reinvest the money in the purchase of other estates. But suppose, instead of a bonâ fide creditor, the transaction is with this Quintin Kennedy, which is another name for Sir Andrew himself, what is the effect of the act so done? The thing is all moonshine. That is the view a lawyer will be apt to take of the question, and that will keep it quite wide of the Ascog case. My view of this case is, that there is no debt contracted, but merely the semblance of a contract, of the most collusive description, for the purpose of doing that which is prohibited—namely, altering the order of succession.

Respondents.—(1.) The doctrine that a contract or deed conveying heritage, and importing to be an entail, is ineffectual, unless it be framed in strict conformity to all the provisions of the Act 1685, and if not so framed, the party favoured by such deed is entitled to enjoy, dispose of, and burden the property at pleasure, as proprietor thereof in fee-simple, has no foundation on the statute, and is totally unknown in the law and practice of the law of Scotland.* It was only in a question with creditors that doubts were entertained of the validity of entails at common law, but it never was disputed that among heirs the deed was valid and effectual. The statute itself, which authorizes entails, “with such provisions and conditions as they (His Majesty’s subjects) shall think fit,” puts an end to the question; accordingly, our books are full of authorities, cases, and decisions which could not have occurred had the appellant a shadow of support for his reading. The whole argument is an ingenious trifling with the settled law of Scotland. The case of Ascog neither supports the doctrine that an entail defective in one point is inoperative in all, or that the distinction between questions with creditors and with heirs inter se has been departed from; on the contrary, the successful party in that case maintained that the Ascog entail was complete in itself, and that there was no

* The respondents alleged that the appellants had not, although it was their first plea in law, ventured to open it to the Court below; but had, on adjusting the terms of the interlocutor of the Court, moved the Court to add to their judgment, “and further, the Lords repel the first plea in law stated for the defender,” in order that it might be competent to discuss the point in the House of Lords.

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ground for assuming that the maker meant it to be otherwise than it was; and the sale was held good and the claim of damages refused, not because the distinction between claims of creditors and heirs inter se was held untenable, but because the heir had done what was permitted. If so, he did that which no other heir could complain of. Here the heir has not done that which he was permitted, or rather not forbid, to do—contracting debt; but he did what was prohibited and restrained by resolute and irritant clauses—altering the succession. In saying so, we have assumed, but without conceding, that there is in the present entail no effectual prohibition against selling.

Lord Chancellor.—It is quite unnecessary to enter into argument on that point. The Court below have withdrawn from it. I incline, on the whole, to think that there is no effectual prohibition to contract debt.

(2.) The argument maintained on the procuratory of resignation is unfounded. The reserved power to alter could not affect John Cathcart, and the heirs male or female of his marriage; as far as related to them, the fetters were articulate and directly imposed, and the tailzie itself was registered. The titles were made up on both deeds, because Sir Andrew and the respondent were heirs, both under the marriage contract and the procuratory of resignation; but so far as regarded the heir of the marriage, the contract alone would have been sufficient for the completion of the title. It would have been in vain for any third party to contend that Sir Andrew's titles were completed under an unrecorded entail, simply because the charter had been expedite, not only on the recorded marriage contract, but on the unrecorded procuratory. So far as regards the heirs of the marriage, that procuratory was of no consequence. Beyond all doubt the respondent is entitled to ascribe the investiture under which his predecessors possessed; and he now claims, to that deed, which in the first place formed de facto the foundation of the titles to the estates, and which, secondly, as being recorded, was the deed under which the heirs of the marriage were peculiarly bound to possess. The question might have stood in a different situation with any party in whose favour the succession opened after the line of destination in the procuratory came to diverge from that

July 18, 1831. in the contract, and who, being exclusively heir under the procuratory, could not refer his title to the marriage contract as a recorded deed of entail, or maintain that the investiture, so far as he was concerned, depended upon the marriage contract. In that case the point might have been stirred as to the effect inter hæredes of an unrecorded entail. But there can be no such question here, because the destination in the marriage contract, as distinct from that in the procuratory, still subsists, and is the ruling destination. This would have been plain enough in a question with strangers, but it seems indisputable with parties who are equally and in the same position heirs under the marriage contract. How can one of these heirs thus taking under the marriage contract, or any person in his right, maintain that the entail has not been validly recorded, notwithstanding that the marriage contract was recorded merely because the procuratory of resignation was not registered—a deed granted not on alteration, but in aid of the marriage contract, and which never was intended to affect the heirs of the marriage. The marriage contract is the investiture of the heirs of the marriage, and the rights of these heirs are independent of the recording or non-recording of the procuratory. As to the procuratory merely referring to the prohibitions in the contract, that can be of no consequence, until it be shown that the party raising the point is heir under the procuratory, and not under the contract.

(3.) The respondents are advised that there is a valid restraint in the entail against contracting debt, but it is unnecessary to go into that point.

(4.) In fact there was no sale here, only a simulate, colourable, and collusive contrivance to effect a change in the order of succession. No real debt ever was contracted by Sir Andrew to Kennedy, and none was ever meant to be contracted. They never for a single instant stood in the relation of debtor and creditor to each other. It is indisputable entail law that an heir in possession, even where an entail is defective in regard to any of the prohibitions, can be defeated merely by doing that precise thing which is not effectually prohibited. It is not enough that he does what in its ultimate effect may be equivalent to what he is not prohibited from doing; he cannot simulate do

what is expressly prohibited, under the pretence or colour of doing what is permitted or not prohibited. This doctrine forms the basis of the decision as to the Roxburgh feus. July 18, 1831.

Lord Chancellor.—In that case there was a power to feu, and the heir in possession feued all except the mansion house and forty-seven acres. If he had feued but half the estate, there would have been a great deal of difficulty in setting the deed aside.

Lord Advocate.—The judgment proceeded on the ground that it was impossible to disguise the fact, that the whole was a colourable and simulate decree to reach an alteration of the succession by affecting to do what was permitted in relation to a mere act of feuing; but this the law would not permit.

Lord Chancellor.—The way in which the Roxburgh case applies is this :—Here is a permission to contract debts; we will go the length of saying, here is an express power to contract debts; but there is a prohibition, by a valid and effectual clause, to alter the order of succession. Then there is a collusive proceeding, which is nothing like contracting debt, but, under the pretended execution of the power to contract debts, something is done to alter the order of succession. In the Roxburgh case there were all the usual clauses of prohibition to contract debt, to alter the order of succession, and to sell, alienate, and dispoise, and those were duly fenced by irritant and resolute clauses. But there was a power to grant feus and tacks; and the heir of entail, pretending to grant feus and tacks, had feued out 16 lots of the estate, constituting, in fact, the whole estate, except 47 acres and the capital mansion. Then it was asked there, as I ask here, shall that be said to be such a granting of feus as brings it within the powers of the entail? for if it is not such a granting of feus as you are entitled under the entail to make, you come under the strict clauses, irritant and resolute, which fence the prohibition to sell, alienate, and dispoise, and though you may call this a feu, we call it an alienation: that was the argument. Now, here the one party calls this contracting a debt; on the other side, it is called an alteration of the order of succession. One calls it a contracting of debt, which he is not precluded from doing; the other calls it an alteration of the succession, which he is precluded from doing. The analogy of the case is the Roxburgh prohibition to sell, excepting out of it the power of feuing. The power of feuing stands in the same relation there with the liberty to contract debt here; and you cannot put this stronger. You cannot, I think, maintain

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that it is so strong. If the author of this deed had said, "I hereby authorize my heirs of entail, one after another, to contract debt," that would make it precisely the same as the Roxburgh feus; but the question is, whether, under the pretence of doing that, you may do what you are prohibited from doing, namely, alter the order of succession? In the Roxburgh case it was stated, that they could not, under the power to feu, do that which they were prohibited from doing, namely, sell. The question here is, whether, under pretence of contracting debt, you can alter the order of succession?

My Lords, in this case, which has been very fully argued at your Lordship's bar, one or two points have been made on the part of the appellant, I might almost say for the first time. The great value of the property, which appears from the amount of the bills given in these simulated transactions, also confers importance on the case, but it is chiefly in regard to those points that I am to trouble your Lordships with a few words; for I hold it the bounden duty of your Lordships in all cases to take most special care, that, if desperate points should be mooted as tenable, no countenance shall be given to them, as if they were only doubtful, especially where important principles being drawn into groundless and unreasonable doubt, may tend to multiply litigation, and to shake the titles of property. Your Lordships will at once perceive I allude more especially to that which has been brought forward, for the first time to my knowledge, as even a matter of juridical exercitation—namely, that if an entail shall be aptly conceived in all but one respect, but with an inept clause, either of prohibition to sell, or of prohibition to contract debt, or prohibition to alter the order of succession, all the other parts of that instrument, be they ever so technically framed—be the fetters ever so accurately and effectually imposed by the deed—not only the defective portion of the entail, but the whole becomes a nullity. My Lords, I asked the learned counsel whether he had any cases to cite on that point. He candidly said he had not. I might have asked if there were any authority from text writers, or an obiter dictum of any one among the many Judges who have sat in the Court of Session when it was most numerously composed, and when (I speak it with all respect to that Court) obiter dicta of an ill-considered description were far more frequent than they have of late years been; or whether, among the records of that Court, in any period of its history, there can be found any colour or countenance whatever for a doctrine so strange and pregnant with peril. I should have asked in vain; I have also searched the books myself. The result is, that I can find nothing to give any countenance or colour for the doctrine; and that I may now, especially after the candid admission of the learned counsel who opened the point, state

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to your Lordships that there are no cases nor any authorities for that most fanciful construction of the act of 1685, and I feel at the present moment as much difficulty as I did at the beginning to conceive how it was possible that such a doctrine should receive any sanction even from arguments at the bar. My Lords, it is unnecessary for me to enter into the *vexata questio*, whether, previous to the statute, an entail was good as against singular successors. The Stormont case set up an entail as against singular successors, and that case was followed by others during the interval of about three-and-twenty years which elapsed previous to the date of the Entail Act. The authority of the decision, and the practice of conveyancers, seem to have established a common law of entail in Scotland, good against singular successors. Neither will I enter into that cognate and equally *vexata questio*, of how far the act of 1685 is declaratory and how far enactive; or, being enactive, (as I think it cannot, in one direction or the other, be doubted that it is,) whether we are to regard it as a restraining or an enabling act. The inclination of my opinion (but I speak with the greatest deference, and I should speak with much greater doubt and hesitation, were it not for the most respected authority of such a lawyer and conveyancer as my Lord Braxfield,) is, that the statute was rather to be regarded as enabling persons to entail, with a certainty of making their entails effectual against purchasers for valuable consideration, provided certain statutory requisites, as the price of obtaining this benefit of the statute, were complied with;—in other words, that the act means to settle the question of right to entail, but to restrain the right, so far as to lay down the conditions upon which men might use it. This becomes now matter rather of curious inquiry than of any practical consequence to the entail law, as whatever may have been the state of the law prior to the statute, and whether it be taken in the one sense or the other, it is clear, at all events, that since this statute entails must, in order to be good against singular successors, comply with the statutory provisions. But, my Lords, I take it, that the whole current of the decisions negatives the other propositions which have been contended for, not only the parent proposition I have glanced at, but the doctrine springing out of it—that if void against creditors, and other singular successors, the entail is also, and therefore, and to the same degree, invalid as amongst the heirs of entail, and *intra familiam*, as on behalf of one substitute against another; for in the Ascog case, undoubtedly, the Court construed an invalid prohibition to sell as an understood or implied permission to sell; and though, in that case, the House felt, during the whole of the argument and judgment, the impossibility of enforcing what was demanded to be so great, that

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been adverting to has been here raised, you will find, in the first place, that it expressly begins with stating, that it shall be lawful to the liege subjects of the king to tailzie their lands, and affect them with clauses, and so forth, according, or “as they shall think fit,” clearly showing, if any such words were wanting to show, or any arguments to prove, that the entailers were not tied down by any particular enumeration of clauses which follow. But next—be it declaratory or enactive—be it enabling or restraining—I entirely accede to the view taken on the part of the respondent, that the sound construction of the act is that which makes it give the measure of the entailing power, and indicates the point to which men may go in fettering their property, saying, “Up to this point you may affect your entails by irritant and resolute clauses, whereby you may prevent alienation and contracting debt, or doing any other act whereby the order of succession may be altered. Up to this point the King’s subjects may affect their lands with the fetters of an entail, but they shall be confined to this extent.” They are not bound to go the whole of that length whether they desire it or not; because it is a groundless construction to say that what follows, namely, that you must insert in the register of tailzies, as well as in the progress of the title, the aforesaid fetters, or it shall be void at once as *inter hæredes*, means that you must insert all the kinds of prohibitions. It can only mean, what indeed it says,—that whatever prohibition you put in—whatever you elect to insert in your entail, you must insert in the records, otherwise your prohibitions shall not be effectual against singular successors, in order that the creditor may have notice, in order that the lender of the money may have notice, in order that the purchaser may have notice; consequently the act requires a notification to affect singular successors, and no procuratory of resignation, or other instrument, shall be valid to affect singular successors, unless the whole of those clauses, with such prohibitions as you choose to make, fenced with the irritant clauses, shall, one after another, be fully inserted in the new register of tailzies, as well as in the old register, so as to have the effect of giving notice; that is the only sound construction of the statute. My Lords, I am not here called upon to enter into the argument which might raise some doubt how far a man can very effectually entail his estate, without inserting all the three kinds of prohibition. I am not called upon to deal with that, as I shall presently show. I doubt, indeed, whether a man can effectually, in point of fact, prohibit any one of those acts being done without prohibiting all; because so many loopholes are left for doing that indirectly which he has prohibited doing directly, that I doubt whether, without the insertion of every one of the three prohibitions, there can;

July 18, 1831. de facto, be constituted an effectual fetter on the dealing with property. A single remark will illustrate this:—Suppose I entail my estate to prevent selling, and fence that with the proper clauses;—suppose I entail it also to the effect of not contracting debts, and fence it also with the clauses—if I say nothing about altering the order of succession, it is difficult to see how I can effectually prevent its being sold, or being carried away from the heirs,—to give to whom alone was the subject of the instrument,—without also prohibiting the altering the order of succession. In like manner, which brings us to the present case, I do not exactly see how a person can effectually prevent the order of succession being altered if he does not effectually prevent contracting debt, because, if I leave that wide, and only prohibit sale and disposition, and altering the order of succession, a person may covertly, and by ingenious devices—as the law says, “by subtle shifts and devices,”—so contract debt, (that is, bonâ fide contract debt,) that the estate by adjudication shall be carried away, provided that is done so as not to be a direct altering of the course of succession, or a selling and disposing. Therefore I do not think it is very far from the truth to maintain, that a person cannot, in point of fact, effectually entail his land, as the Scotch law stands, unless he inserts all the prohibitions in the deed. But, my Lords, with this question we are not called upon to deal; for admitting, on the one hand, that this entail does not effectually prohibit the contracting of debt, it is admitted equally on the other hand that it effectually prohibits sale, and that it effectually prohibits the altering the course of succession; and while the entail contains those clauses there can be no sale, no alteration of the order of succession, but in consequence of the contracting debt. What then has a man a right to do under it? He has a right to contract debt; and if he contracts debt, though it may lead indirectly and mediately to alter the course of succession, which is the subject of effectual prohibition, yet it has that effect only, because the entailer did not stop up that hole—because he allowed his heir of entail to contract debt, and by not preventing that he opened a door for the frustration of his main object. That I admit to be a very feasible process; but then, my Lords, it can only be accomplished by doing what the party has a right to do,—it can be only by doing that which the ineffectual prohibition left open to him, namely, contracting debt,—that the course of succession can be altered. He must really and not simulately contract debt, in order to enable him to accomplish that object, of altering the order of succession. The question then in this case is, has he or not really contracted debt? My Lords, it will not do to call it a contracting of debt, merely because it was clothed in the outward forms of that opera-

tion. When your Lordships find a person setting up a mere man of straw to give a bill for 150,000*l.* while he himself gives a counter security in another bill to the same amount—when you see that the custody of the instrument is the very reverse of that which it must be if the transaction were real—when you observe that the agent for the heir of entail and the pretended borrower is the person employed in conducting the whole of this operation, and not only the first part of this operation, but the last, namely, the adjudication which grew out of it, and was granted upon it, and the assignment of the same,—when Quintin Kennedy enters in the first act of the farce, gives his bill, and then retires, and never appears again throughout, but the whole of the scene is filled up and the whole of the parts sustained by and at the expence, not of Quintin Kennedy, but of the pretended borrower, and of him alone,—can your Lordships entertain the shadow of a doubt, that, even if Sir Andrew had proceeded to the final close of the drama, and had had a judicial sale gone through, it would have been still all his act; although he, being wary or sparing of his money, as well as abundant in his artifices, did not choose to go to the expence of the sale, though his counsel, Mr. Clerk, advised him to do it? In such circumstances as these, can your Lordships entertain a doubt that this is nothing like contracting debt—that it is only an attempt to give to the operation, which he was tied up from performing, the colour and appearance of the operation which he was allowed to perform, without any thing of substance—without any thing like contracting debt—without any debt—without any thing like debt;—and all for the express purpose, which the course of the proceedings clearly points out to have presided over the whole intention of the party contriving it—that of obtaining an adjudication nominally to Quintin Kennedy, but in reality to himself, the contravening heir of entail? Can your Lordships doubt that such was the purpose and intention of this party, and that, under colour of doing that which he was entitled to do, if there was no effectual prohibition, namely, contracting debt, he was attempting to do that which he was effectually prohibited from doing, namely, altering the order of succession? Such, my Lords, is the view which I take of this case—the view which was taken in the Court below. I have not the shadow of a doubt in my mind that the decision of the Court below is perfectly right, and that it ought to be affirmed; but I shall not, in this case, move your Lordships to give any costs.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

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Lord Chancellor.—My Lords, the case of sequestration stands in some respects on the same grounds as the one just decided. I have read the papers in the sequestration, and have considered the case. It has not been argued on either side, for it was unnecessary. When I look at the bargain made—when I look at the arrangement on which the one party appears to have acted—and when I look at the resiling, to use the language of the Scotch law, of the other party, in breaking the compact about interim possession, without any change of circumstances,—I am disposed to think, that in this case the conduct of the present appellant is not so free from blame as it may have been in the mooting, and even bringing up by appeal before your Lordships, the main question. My Lords, the fate of the sequestration case, as regards the merits, is not merely decided by the decision your Lordships have come to upon the action of reduction, but it is decided by the course of events, namely, by the possession about to be given to the party shown rightfully entitled. The only question remaining is, with respect to costs; and I own I can see no cause for bringing this appeal, whether the appellant was right or wrong in the case of the reduction. I do not think he is the more justified in bringing this appeal here if he was right than if he was wrong, for, in the very nature of the thing, the whole must needs have been at an end before this appeal could be discussed before your Lordships. If even we had taken up the sequestration first, and reversed the decision upon that, there could have been only a few days possession on which the decision could have attached. Under those circumstances I think a more groundless and ill-advised proceeding I have not often witnessed than bringing this appeal; and I have no hesitation, therefore, in proposing to your Lordships to affirm the judgment of the Court below with costs; I shall submit 150*l.*; and I would take the opportunity of giving this intimation, that if more appeals like this are brought, I shall feel it my duty to move your Lordships to give, in such cases, 300*l.* costs.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed, with 150*l.* costs.

Appellant's Authorities.—2 Stair, 3, 58; Hope's Minor Practicks, tit. 16; Drummond, 15th July 1636 (Mor. 4302); Bryson, 22d January 1760 (Mor. 15,511); Lord Ankerville, 8th August 1787 (Mor. 7010); Lockhart, 11th June 1811 (Fac. Coll. xvi. 279, No. 81); Hamilton, 3d March 1815 (Fac. Coll. xviii. 302, No. 69); 3 Dow's Reports, p. 183; Craik, 29th January 1735 (Mor. 4313); Lord Strathnaver, 2d February 1728 (Mor. 15,373); Urc, 17th July 1756 (Mor. 4315); Willison, 8th December 1724; Campbell's Heirs, 17th June 1746 (Mor. 6554); Stewart, 8th July 1789 (Mor. 15,535);

Billers, 1st May 1739; Craigie and Stewart's Reports, p. 255; Nairne, 13th May 1796 (Mor. 2597); Gordon, 1st December 1757 (Mor. 11,161); and Ker, 15th February 1758 (Mor. 15,551). July 18, 1831.

Respondents' Authorities.—Dunbar, 14th November 1815, not reported; Roxburgh Feus, November and December 1813; 2 Dow's Reports, p. 149, 229; Ronaldson, 27th February 1799; Innes, 23d June 1807 (Fac. Coll. xiii. 643, No. 285, Ap. 1. Tailzie, No. 13); Hope's Minor Practicks, tit. 16; M'Kenzie on Tailzies, II. 488; 3 Stair, 3, 59; 3 Ersk. 8, 28; 2 Bank. 3, 139; Kames' Elucidations, p. 356; Earl of Callender, 20th July 1687 (Mor. Dec. 16,476); Wallace, 8th February 1693; Fountainhall, I. p. 556. Young, 8th December 1705 (Mor. Dec. 15,487); and 25th January 1705 (Mor. Dec. 4319); Craig, 29th January 1735 (Mor. Dec. 4313); Ure, 17th July 1750 (Mor. Dec. 4315); Lady Reidheugh, 11th March 1707 (Mor. Dec. 15,489); Craig's Creditors, 15th June 1712 (Mor. Dec. 15,494), reversed on appeal; Robertson's Cases, p. 110; Richard, 5th April 1734; 1 Craigie and Stewart's Appeal Cases, p. 143, Gardner, 27th January 1744 (Mor. Dec. 15,501); Campbell, 17th June 1746 (Mor. Dec. 15,505); Hepburn's Creditors, 8th February 1758 (Mor. Dec. 15,507); Sinclair, 8th November 1749 (Mor. Dec. 15,382); Lockhart, 27th January 1761 (Mor. Dec. 12,345); Kempt, 28th January 1779 (Mor. Dec. 15,528); Bruce, 15th January 1779 (Mor. Dec. 15,539); Cunningham, 5th August 1778 (Mor. Dec. 15,526); Stewart, 8th July 1789 (Mor. Dec. 15,535); Brown, 25th May 1808 (F. C. xiv. 153, No. 43, Ap. 1, Tailzie, No. 19); Henderson, 21st November 1815 (F. C.); Oliphant, 7th June 1816 (F. C.); Grant, 9th March 1826; Gibson, 24th November 1795 (Mor. 15,869); Ross, 7th March 1795; 5 Brown's Sup. V. p. 909; Menzies, 25th June 1785 (Mor. Dec. 15,436); Douglas, 5th December 1804; Meldrum, 29th June 1827 (5 S. D. 857); Earl of Fife, 7th March 1828 (6 S. D. 698); Ascog Case, 23d Feb. 1827, (5 S. D. 418,) reversed 16th July 1830 (4 W. S. 196); 3 Ersk. 8, 30; Haggarts, December 19, 1820 (F. C.); M'Kenzie, 23d May 1823 (2 S. D. 293); Nisbet, 10th June 1823 (2 S. D. 339).

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL,
—Solicitors.

MAGISTRATES of DINGWALL and others, Appellants.—*Lord* No. 26.
Advocate (Jeffrey)—Lushington.

HONORABLE MRS. HAY M'KENZIE, with concurrence of His
Majesty's Advocate, Respondent.

Breach of interdict—Fishing.—Circumstances in which (affirming the judgment of the Court of Session with a qualification) an interdict was renewed against fishing in part of a river, and although no prayer to that effect was contained in the petition of complaint.

In 1825, Mrs. Hay M'Kenzie, as heritable proprietrix of the fishings in the river Conon, brought an action against the Ma- July 11, 1831.
1st DIVISION.