[31st *March* 1835.]

WILLIAM MOREHEAD, Appellant.—*Lushington.*

The Rev. Dr. ROBERT MOREHEAD, and others, Respondents.—*Sir John Campbell — S. A. Murray.*

Entail.— An entailer in his deed of entail, by a clause immediately following the destination, declared that the burthens, reservations, conditions, provisions, restrictions, limitations, and clauses irritant therein-after expressed should be binding on the institute as well as the substitutes; and the prohibitory clauses against selling, burthening, or altering the order of succession were directed against the institute as well as the substitutes; but certain other prohibitory clauses and the whole of the irritant and resolutive clauses were directed against the "heirs of tailzie" only, without mentioning the institute. Held (reversing the decision of the Court of Session) that the entail was ineffectual to prevent the institute from selling the lands and disposing of the price at pleasure.

1ST DIVISION.
Lord Fullerton.

IN the year 1786, William Morehead, Esq., of Herbertshire, (father of the appellant,) executed a deed of entail of the lands and barony of Herbertshire in favour of the appellant (the institute), and a certain series of heirs. Immediately after the destination to the institute and whole heirs of entail, and immediately preceding the various prohibitory, irritant, and resolutive clauses, there was a clause in these terms:—"But "always with and under the express burdens, reserva- "tions, conditions, provisions, restrictions, limitations,

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" and clauses irritant after expressed, which are all " hereby appointed to be inserted in the resignations, " charters, and infeftments to follow hereon, and de- " clared to be binding, not only upon the said William " Morehead, my eldest son, and the heirs male of his " body, and the other heirs substitute to them by this " present tailzie, but also upon my heirs whatsoever, in " case the succession of my said estate shall happen to " devolve upon them, failing the heirs of tailzie above " mentioned."

The deed of entail then contained prohibitions against selling, burthening, and altering the order of succession, which were made expressly applicable to the institute by name and " the other heirs of tailzie." It contained also certain other prohibitions directed only against " the heirs of tailzie above mentioned." The irritant and resolutive clauses were in like manner directed only against the " said heirs of tailzie above " mentioned."

The appellant succeeded to the lands, and made up titles under the entail; and in the month of June 1832 he entered into a minute of sale with his brother, the respondent, by which the appellant, on the one hand, sold to the respondent his estate of Herbertshire, and, on the other hand, the respondent became bound to pay to the appellant the price of 40,000*l.* sterling, by certain instalments, of which the first instalment, being the sum of 2,000*l.*, became due at Lammas 1832.

In order to ascertain whether the appellant had power to sell the estate, the respondent, instead of making payment of the first instalment at the stipulated term, presented a bill of suspension of a threatened charge,

alleging that the appellant, from the peculiar nature of his title, was not in a condition to grant a valid and sufficient disposition of the estate of Herbertshire, either to the respondent or to any other purchaser. It was stated, in substance, that the appellant held the estate of Herbertshire under a settlement of strict entail, executed by his father in the year 1786, and that by that entail the appellant was effectually restrained from altering the order of succession, from contracting debt, and, above all, from selling the estate.

The bill of suspension was passed, and the appellant instituted an action of declarator, directed against all the substitute heirs called to the succession by the deed of entail, and concluding that it should be found that the appellant had right to sell the lands.

These two actions were afterwards conjoined, and the Lord Ordinary (Fullerton) reported them on cases to the First Division of the Court, and issued the following note:—

"The Lord Ordinary has pronounced the above "order, as the course best calculated for expediting the "decision of the cause. But, having considered the "cases for the parties, he may be permitted to express "his opinion, that the pursuer and respondent is en- "titled to judgment in his favour.

"In the first place, it is undeniable that the sub- "stantive and express irritant and resolutive clauses of "the entail are limited to the heirs of tailzie, and do not "affect the institute; and therefore, even if the general "clause founded on by the defenders clearly expressed "an intention to control and extend against the "institute the specific provisions and restrictions, I

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" think that it would be difficult, consistently with the " rules uniformly adopted in this branch of law, to " give effect to such expression of intention. I entertain great doubt, indeed, whether an entailer could, " by a mere general prospective declaration of intention, " render binding upon the institute a clause which he " afterwards expressed in terms clearly, and even " technically, excluding the institute.

" But, secondly, the case of the defenders and suspender here is much weaker than that just supposed; " the general clause in question, in so far as it can be " construed as extending the effect of the specific provisions, clearly does not apply to the institute, but to " the heirs whatsoever. The declaration, that resignation is 'made under the burdens and conditions " 'after expressed,' &c., 'which are hereby appointed " 'to be inserted in the resignations,' &c., and declared " to be 'binding, not only upon the said William " 'Morehead, my eldest son, and the heirs of tailzie,' " but on the heirs whatsoever,—cannot, according to " fair construction, and still less according to the strict " construction, applicable to entails, receive any interpretation, but that the provisions, restrictions, &c. " 'after expressed' are to be binding on William Morehead, and the heirs of tailzie respectively, according " to the terms in which they are expressed, namely, " those including William Morehead, to be binding " against him, and those directed only against the heirs " of tailzie, to be binding only on those heirs of tailzie. " The terms of the declaration, even in the most " favourable point of view for the defenders, could do " no more than raise a presumption that the entailer

" possibly considered the term 'heirs of tailzie' to " include the institute,—a presumption which is con- " fessedly insufficient to supply the defects of the " irritant and resolutive clauses.

" It is hardly necessary to add, that in regard to the " second entail, framed in compliance with the statute, " the same principle must apply, as the statute did no " more than merely provide for the secure operation, " against the institute, of all the provisions and re- " strictions to which he was subjected by the conditions " and restrictions of the original entail."

The Court, on the 2d July 1833, pronounced the following interlocutor:—" The Lords having advised " this cause, and heard counsel for the parties in the " process of declarator, sustain the defences, assoilzie " the defenders, and decern; and in the suspension " suspend the charge simpliciter, and decern." [1]

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[1] 11 S., D., & B., 863. The following notes of the opinions delivered in the Court of Session were laid before the House:—

Lord Balgray.—" The parties here are highly respectable, and the " action, I feel assured, would not have been brought but for some proper " and important object. I wish that we could come to the same result " here as in the last case, which we have just now decided, (case of " Elibank v. Murray.) But, my Lords, we must take the case as it " stands, and try it upon its own peculiar merits. By the Act 1685, " every entailer may express his own deed of entail in any way. There " are no technical clauses which are required to be taken in a certain order, " or any express form of words in which the clauses are to be expressed. " The entailer may write his own entail, and use his own language. We " must look to the intention. It is necessary to consider what is clear in " point of intention; and for that purpose we must take the whole deed " together. It may be read as a single sentence. The entailer, if I may say " so, may begin at the end, and his object will be attained, if he only com- " ply with the provisions of the act, by inserting clauses to the effect which " the act authorizes and requires, without regard to any set form of words. " The whole dubiety in the case rests upon this, that in some clauses the " institute is bound, and that in others the institute is not bound. But

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Against the above interlocutor William Morehead appealed.-

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Appellant.—The irritant and resolutive clauses, of which the proper operation is to make the prohibitions effectual, do not reach or affect the appellant, who is the institute of entail. This proposition is undeniable, and has been so enounced by the Lord Ordinary; neither is it possible to question it either with reference to acknowledged rules of legal construction, or to the application which these rules have received through a long series and a great variety of cases. Entails are strictissimi

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" then in this dubiety I refer to the clause which follows immediately after " the destination. It is a general and comprehensive clause, in which the " entailer declares, that the whole 'burdens, reservations, conditions, " 'restrictions, limitations, and clauses irritant after expressed, which are " 'all hereby appointed to be inserted in the resignations, charters, and " 'infeftments to follow hereupon,' shall be 'binding, not only upon the said " 'William Morehead, my eldest son, and the heirs male of his body, and " 'the other heirs substitute to them by this present tailzie, but also upon " 'my heirs whatsoever, in case the succession of my said estate shall happen " 'to devolve upon them, failing the heirs of tailzie above mentioned.' Now, " I think that this is a general declaration affecting all the parties called " to the succession, the institute as well as the substitutes, and that the " declaration is put in at the proper place of the deed. The only difficulty " in the case lies here, that in the different prohibitory clauses some of the " prohibitions are made effectual against the institute, and others are not. " But I am afraid that this will not do; that it will not entitle us to re- " fuse effect to the entail,—we are bound to look to the entailer's inten- " tion,—we must give effect to his words in the way which he has used " them. And as the provisions of the entail are expressed in broad and " general terms, and are comprehensive enough to embrace all the parties " called to the succession, I am, on this general ground, and without " entering into particulars, for supporting the entail."

Lord Craigie.—" The declaration of the entailer is quite general in its " terms. It clearly applies to all the different parties called to the suc- " cession. The entail must therefore stand."

Lord Gillies.—" I am of the same opinion."

Lord President.—" I agree. We suspend the letters and sustain the " defences."

juris, and are subject to the most rigorous construction; and the law will not, as in the interpretation of other and more favoured instruments, lend itself, by straining construction, to aid the views of an entailer: on the contrary, to make his intention effectual, he must express himself in words so clear and explicit, so unequivocal in the meaning and import, as to leave no choice, and to control the law, and force the reception of that which, while it is admitted to be within the power of an entailer, is odious to the law, as being contrary to the natural rights and reasonable enjoyment of property, and adverse to the best and most obvious interests of society. In all cases where the question, how far there was a valid imposition of fetters, has arisen, the fullest effect has been given to these principles of construction. In the case of Duntreath, this House overruled the decision pronounced by the Court of Session; and declared that the appellant being fiar or disponee, and not an heir of tailzie, ought not by implication from other parts of the entail to be construed to be within the prohibitory, irritant, and resolutive clauses, laid only upon heirs of tailzie; and effect has been given to it in many subsequent cases, turning precisely upon the question whether a prohibition directed against heirs of entail simply was to be extended so as to comprehend the institute; and the answer ever since has been, that, whatever the entailer may have intended, he had not by unequivocal and controlling expressions effected his purpose, the institute not being an heir, and the heirs being the persons, so far as regarded the terms used, who alone were fettered.

It is impossible to contend that the general clause, on which the respondents found, can extend the prohibitory,

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irritant, and resolutive clauses against the institute, further than they are expressly carried by these clauses themselves; because, in the first place, that general clause receives in any view full effect according to the acknowledged construction of such instruments, applicando singula singulis, and holding obligatory against the institute, heirs of entail, and heirs whatsoever respectively, the various conditions which are by the subsequent clauses imposed separately upon these different classes; and secondly, if that clause was meant to impose fetters at all, it was only meant so to operate against the heirs whatsoever of the entailer; and at all events, as regarded the institute, amounted to nothing but an intimation of what the entailer understood himself to have effected; which intimation, if erroneous in itself, would not alter the effect of the prohibitory, irritant, and resolutive clauses; nor carry them further than was warranted by the just and legal construction of the terms in which they were expressed.

In no view of the case can the general clause referred to be considered effectual to make the fetters of entail attach to the appellant as institute; for that clause refers to the irritant clause only, and not to the resolutive clause, which last, equally with the irritant clause, is essential to the validity of the entail. Unless the three clauses concur there is no effectual entail, and a want or imperfection in the resolutive clause, as was found in the case of Tillicoultry, is just as fatal to the validity of the entail as the want of an irritant clause or defect in the prohibitions.[1]

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[1] *Appellant's Authorities.* — Erskine, 14 Feb. 1758; Edmonstone of Duntreath, 24 Nov. 1769, (Mor. 4409); Gordon and Lindsay, 8 July

Respondents.—No verba solemnia are requisite in entails, nor is any given arrangement of the clauses essential; it is enough that there are sufficient prohibitions duly fortified by irritant and resolutive clauses. It is admitted by the appellant that these clauses in this deed are sufficient in themselves, and affect the heirs of entail, and the only question raised is, whether they apply to the institute. But immediately before introducing these clauses, the entailer makes an express provision, declaring each and all of them to be binding, not only upon the said William Morehead (the institute), but also on other parties; no room therefore is left to argue as to any ulterior intention in framing this general clause. Apparently the entailer had designed to extend the fetters to his heirs whatsoever; but whatever else he had intended, the act of applying the whole prohibitory, irritant, and resolutive clauses to the institute is what he has expressly performed, and this entail is, therefore, effectual against the appellant, who is the institute. The present is distinguishable from the Duntreath and other similar cases relied upon by the appellant, in which the institute was held not to be bound, (notwithstanding the plainest implied intention to the contrary,) in this respect, that in the present there is a great deal

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1776, (Mor. 15,462); Menzies v. Menzies, 25 June 1785, (Mor. 15,436); Sandford on Entails, 141—143; Miller v. Cathcart, 12 Feb. 1799, (Mor. 15,471); Steel v. Steel, 12 May 1814, affirmed in House of Lords 24 June 1817, (F. C. and Dow's Reports, vol. v. p. 62); and see preceding case of Elibank v. Murray; Dick v. Drysdale, 14 Jan. 1812, (F. C.); Bruce v. Bruce, 15 Jan. 1799, (Mor. 15,539); Barclay v. Adams, 18 May 1821, (1 Shaw's Appeal Cases, p. 24); Hope Vere v. Hope, 12 Feb. 1828, (6 S. & D.); Sandford on Entails, 141.

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more than mere implication of an intention to bind the institute. In addition to such implication as appearing from the other clauses in the deed, there is the following clause, not merely directly implying, but expressing in very plain terms an intention to bind the institute, and declaring him to be bound accordingly :—" But always " with and under the express burdens, reservations, " conditions, provisions, restrictions, limitations, and " clauses irritant after expressed, which are all hereby " appointed to be inserted in the resignations, charters, " and infeftments to follow hereon, and declared to be " binding, not only upon the said William Morehead, " my eldest son, and the heirs male of his body, and " the other heirs substitute to them by this present " tailzie, but also upon my heirs whatsoever, in case " the succession of my said estate shall happen to " devolve upon them, failing the heirs of tailzie above " mentioned."

The appellant contends for a rule of construction which has been otherwise rejected as applicable to deeds of entail, viz. to construe according to implied intention rather than according to the words actually made use of; because, whatever was the intention, the words of the clause certainly declare the restrictions, &c. to be binding " upon the said William Morehead," as well as upon the other parties mentioned. With respect to intention it is plain that it was one of the express objects of this clause to bind the institute. The framer of the deed probably knew that in going through the details of the different prohibitory, irritant, and resolutive clauses there might be occasional oversights as to the institute, (which practice has shown so often to

occur,) and that very nice questions had often arisen as to whether the institute was sufficiently included in the fetters or not; and therefore it must have been for the express purpose of avoiding those questions that this previous declaration was introduced; and having made that general declaration, the entailer was less anxious as to the precision with which the after clauses were in that respect framed.

The expressions "not only upon the said William "Morehead, &c., but also upon my heirs whatsoever," must be read in the same way as if they had stood—"both upon the said William Morehead, &c., and also "upon my heirs whatsoever."

It cannot be successfully contended that there is an absolute impossibility, from mere priority of place, to frame a preliminary declaration in such a form as to control or extend the subsequent irritant and resolutive clauses in the manner contended for. The question might indeed be different, if these subsequent clauses contained any positive provision directly in the face of such preliminary declaration; and where there was no other means of getting rid of the difficulty, the maxim posteriora derogant prioribus might certainly apply. But, in the present case, the subsequent clauses contain no positive provision in the face of the previous preliminary declaration; there is nothing irreconcileable betwixt them. At the very most, the strict legal interpretation of the terms made use of in framing the subsequent clauses is not of itself sufficient to include all the parties to whom that previous preliminary declaration had declared they should be applicable. Neither could a preliminary declaration of this description ever be

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expected to contain an express recognition of the supposed defect. Such a declaration is evidently not framed with a view to any certain and known defect, but ob majorem cautelam, in case of any accidental and unforeseen omission or oversight in the details of the subsequent clauses, such as has actually occurred. If there had been no such accidental omission or oversight, then the preliminary declaration would not have been necessary to have been brought into play at all; but when there turns out to have been such an oversight, it is just one of the cases contemplated for applying the declaration; and, as formerly noticed, there being no verba solemnia requisite to be made use of, if the meaning of the declaration is sufficiently plain, effect must necessarily be given to it.

LORD BROUGHAM. — This case comes before your Lordships by appeal from the First Division of the Court of Session, sustaining the defences and assoilzing the defender in an action of declarator brought by the appellant and pursuer, and suspending the charge simpliciter in the suspension brought by the respondents. The action of declarator was brought to have the rights of Mr. Morehead the appellant declared to sell or alienate the estates comprehended in a deed of entail of the estate of Herbertshire, executed by his father in November 1786, and in which he was made institute or disponee. The suspension was brought by the respondents, purchasers of those estates, on the ground that the appellant, in consequence of the entail, could not make a good title to them. The two actions were conjoined, and indeed they wholly turn upon the same question, viz. whether or not the in-

stitute is validly fettered by the restrictions of the Herbertshire entail? To this question I am now to address myself; and I do so with the more solicitude that I differ with the Court below, having arrived at a conclusion opposite to that which those very learned judges unanimously came to. It is a great comfort to reflect that I have spared no pains in obtaining whatever light I could upon the subject. I know that I have very diligently examined it, and that the opinion which I have formed is consistent with all my former impressions upon the general question. I have also the satisfaction of finding that the Lord Ordinary took the same view of it; and I may add, that I have the less reluctance in recommending a reversal of the judgment, because I really entertain no doubt upon the point. It is needless to observe how extremely important all cases of this description are; they constitute the law of Scotch entail, much more to be derived from the course of judicial decision than from the statute 1686, in which we shall vainly look for the canons that are now held to govern this important subject. No examination of that act, nor any commentary upon its provisions, would ever enable a person to discover what the rules are that regulate the dispositions of real estate, and fix the limits within which and the modes by which perpetuities may be created in its enjoyment and descent; nor can we survey without some satisfaction the extraordinary uniformity which marks this long course of decisions. There is no branch of the Scotch law more regular, fixed, and systematic,—none in laying down which the Courts have less wavered in their determinations. The law itself may be an unfortunate one,—the Courts may have originally admitted

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great refinements in expounding it,—in some principles declared by them we may find caprice,—for others we may be at a loss to discover the reason; but at least, the greatest of all errors, and the worst of all mischiefs, the jus vagum et incognitum is not to be charged upon the system; for example, upon the subject of the disponee's freedom or subjection, which is the branch of the law of entail now before us, the whole current of authority is quite uniform, great as the variety of the circumstances has of necessity been, in which the different decisions have been pronounced. For nearly a century past you will only find a single instance in which that current has been turned aside, and then the deviation was but momentary—between 1769, when the Court, in the Duntreath case, departed from the strict rule, and 1771, when your Lordships restored it upon appeal. This uniformity and certainty afford us some satisfaction, in regarding a branch of our jurisprudence, not surely the most to be praised in other respects, and may be in some sort considered as of a redeeming quality to the evils of the Scotch entail system; at all events, it inculcates the expediency of maintaining the same uniformity and certainty with unabated severity, until the wisdom of the legislature shall see fit to interpose. I shall begin with attentively examining the provisions of the settlement in question; upon these, ofcourse, the whole argument turns.

I. The entailer dispones to the appellant, William Morehead, and of course the institute; he then gives to William Morehead's heirs male of his body, and a variety of other substitutes, and lastly to his own heirs and assignees whatsoever, the eldest heir female taking

always without division. Then comes the usual general clause, which in many instruments of this kind closes the designation of heirs, and introduces the fetters or clauses of restriction, and which has, by constant decision and by all authority, been held to have no substantive effect whatever, but merely to be a connecting link between the one and the other part of the deed,—"always with "and under the express burdens, reservations, conditions, "provisions, limitations, and clauses irritant after ex-"pressed;" and if this clause had here stopped, no question could ever have been raised, for it would have had simply no effect at all in binding any of the formerly named persons with the fetters afterwards imposed, any more than if it had not occurred in the instrument. But it proceeds, "which (provisions and clauses) are all "hereby appointed to be inserted in the resignations, "charters, and infeftments to follow hereupon, and de-"clared" (that is to say, I think, in all fairness of construction, "and *are hereby* declared") "to be binding, "not only upon the said William Morehead, my eldest "son, and the heirs male of his body, and the other "heirs substitute to them by this present tailzie, but also "upon my heirs whatsoever in case the succession of my "said estate shall happen to devolve upon them, failing "the heirs of tailzie above mentioned." Next follow the clauses themselves; and it is of the last importance to observe, that in some of these the institute is expressly named, and in others not at all, nor ever in any manner of way referred to. First of all there are six prohibitions, or rather directions of things to be done and to be avoided. 1. The taking of the name and arms is enjoined to the heirs of tailzie only, without any mention

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either of the institute or the heirs general. 2. The prohibition to alter the order of succession is laid on the institute and heirs of tailzie, "substitutes or successors above mentioned," which might be contended to include heirs general, though of this I should have great doubt. 3. The prohibition to sell, dispone, wadset, or impignorate, is directed in like manner against the institute, heirs of tailzie, and successors. 4. The prohibition of suffering feu-duties and teinds to remain unpaid extends only to heirs of tailzie above mentioned. 5. The prohibition of suffering adjudication or eviction is also confined to heirs of tailzie. 6. The direction to possess on the title of the entail alone is confined to the same heirs of tailzie. Thus, then, as far as the present question goes, the institute is fettered by a prohibition to sell, burden, and alter the order of succession. Next follow the irritant and resolutive clauses. The former makes void all acts in contravention of the prohibitions "done "by the said heirs of tailzie above mentioned," without any reference to the institute; and the latter declares, that "the person so contravening," that is, the "above-"mentioned heir of tailzie so contravening," shall forfeit and amit his right. A declaration immediately follows, that the forfeiture incurred by "the heir in possession "contravening" shall not be purgeable; and then follow certain exceptions, or rather enabling clauses, the two first of which only are material to our present purpose. By one of them "the whole heirs of tailzie above "specified" are allowed to jointure as far as one third of the rent; by the other, the "said heirs of tailzie "above mentioned" are allowed to give younger children portions not exceeding three years' income. It is there-

fore quite clear, that if the fencing clauses stood alone, and were only connected with the dispositive clause, and the designation of heirs by the usual general words, "but always under the clauses here after written," the institute would be free; for he is only under a simple prohibition, and his acts of contravention are not declared void, neither is his right declared forfeited in case he contravene. The nullities and the forfeiture are directed against the heirs of tailzie alone, and touch not the disponee. But the connecting or general clause, which closes the destination and introduces the restrictions, varies from the ordinary form of such clauses; and it is upon this variety alone that the judgment of the Court below has been rested, both by the respondent at your Lordships' bar and by the learned judges who pronounced the decree. Let us examine it therefore narrowly; and, first, let us look at its purpose, that is, at whatever purpose it may have different from the common purpose of connecting the parts of the deed,—the purpose which all such clauses ordinarily have. The additional or special purpose here,—what may be called the extra purpose, — seems clearly to be, the comprehending under those clauses the heirs general, whom he had introduced at the close of the destinations. This is plain; because the structure of the sentence shows it, and because those heirs are not afterwards mentioned. The structure of the sentence is, "that the "clauses shall be binding not only upon William "Morehead and the other heirs of tailzie, but also "upon the heirs whatsoever, should those heirs of tailzie "fail." It is not, that the clauses are declared binding, first upon the institute, and then on the nominatim sub-

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stitutes, and then on the heirs general, which would far more distinctly have indicated the intention of binding both institute, substitutes, and heirs general; but that the clauses are substantively declared to be binding on the heirs general; and their effect on the institute and substitutes is as it were referred to in passing — is assumed—is recited and not enacted—is mentioned narratively and not operatively. The entailer seems to assume that he had otherwise bound the institute, and is here binding the heirs general in the same way as he had elsewhere bound him. Now, it is admitted on all hands that a supposition of this kind goes for nothing; and that the maker of an instrument of this description does not bind any one, or effect any purpose whatever, by merely referring to something which is in itself ineffectual, and by giving us to understand that he supposed he had executed his intention. He must do as well as mean to do; he must perform what he intended. I have mentioned another reason for holding the general clause to be directed towards the heirs general: it is, that nowhere in the subsequent parts of the deed do we find them referred to. The institute and substitutes are struck at by some of the clauses, the substitutes alone by others, heirs general by none; nor can they be brought by construction within any of the expressions used, unless we give that extensive meaning to the word "successors," in the second and third prohibitions, where alone it occurs,—a stretching of the sense which I consider as somewhat violent. That the object of the entailer was such as I have been stating, is further rendered probable by the circumstance, that heirs general were determined not to be struck at by the restrictive clauses

in Sir T. Kennedy's case, decided in 1760[1],—a circumstance probably known to the framers of the present entail. On the whole, I have no doubt that the object of the general clause in this deed, I mean the object of the peculiar addition which is here made to the words ordinarily found in such clauses, is not to make the fetters bind the institute, but to fix them upon the heirs general; and this is the first position on which I rest my opinion. But this is by no means the only ground, nor the firmest foundation of it. I proceed to observe, that even if we take the clause as having a primary and a substantive application to the institute, William Morehead, it is not easy to give it a larger operation than the usual general and connecting clause, "with and under the restrictions "following." If an entailer calls to the succession a series of heirs, after disponing to a given person, and if he then says, "with and under," &c., he may be said to direct that both the disponee and the heirs before named should alike take under the restrictions that follow; yet we all know that no such sense is ever given to the clause. The institute is held to take under such restrictions as are directed afterwards against him, and the substitutes to take under the restraints levelled at them. This is clear and uncontested. Then, how much farther does a clause like the one now under construction carry the obligations? The mere collocation of the clause, viz., its coming immediately after the series of persons designated, and the manner in which it connects them with the ensuing parts of the deed, the fetters, is surely as strong to connect and to bind them all, institute and

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[1] Earl of March v. Sir T. Kennedy, 27 Feb. 1760, (Mor. 15,412.)

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substitutes, as the merely specifying both the one and the other in the way here pursued. If I say "A., B., "and C. shall take my estate in succession, but with "and under the following restrictions," I may by those words fetter all the three, or I may not; but certainly I fetter them as effectually by those words merely, as if I added, what is truly a tautology or repetition after the word restrictions, "which I hereby declare to be binding "upon the said A., B., and C." The clause means exactly the same thing without as it does with this addition; for the provision that A., B., and C. shall take under the restrictions, is exactly synonymous with the declaration that those restrictions shall be binding on A., B., and C. Apply this to the clause in question, and you will see that nothing is really added to the force of the first and usual portion of the clause by the addition which forms the only peculiarity of this case. William Morehead had been named before, just as specifically as he is in the addition to the clause, nay, more specifically, and consequently he was connected with the restrictions, just as much by the words "with and under the restrictions "following," as he could be by the additional declaration, that these restrictions should bind him. But it is admitted on all hands, that the words "with and under "these restrictions" would not have touched him at all. Then it follows, that a repetition of those words, in a somewhat different form, in the same clause cannot touch him. The second position, therefore, on which I rest my opinion is, that the special addition made to the usual connecting clause, even taking it to be a declaration substantively directed against the institute, and not by way of recital only, has no effect at all beyond what

the position and the structure of the usual clause has, and does not carry the operation of that clause further. But the reason why those general words have no binding effect in the common case deserves to be regarded, and it raises another and yet more conclusive argument in favour of the judgment which I am recommending to your Lordships. It is not because we reject the clause, but because we give it a flexible and equivocal construction, that it is inoperative. When A., B., and C. are designated as taking, and when it is added that they are to take, with and under the following restrictions, we hold that each is to take under the restrictions directed against him, and not that each is to take under all the restrictions; nor can any rule of construction be more natural, more reasonable, or more safe. For surely it is much more likely that when we come to the particulars, we should find the intention distinctly expressed than in the general introduction; it is much less likely to beget mistakes, if we go to the most special mention of the matter; and it is much more likely, that when a change is made in the manner of mentioning persons or things there should be a reason for this,—a meaning in this variation. The entailer says, let A., B., and C. take successively, but under the following restrictions, that B. and C. shall bear the name and arms; that A., B., and C. shall be forbidden to alter the order of succession; that A., B.,and C. shall be forbidden to sell or burden; that B. and C. shall forfeit, if they do sell or burden; and that B. and C. shall commit void acts if they do sell or burden. Have we any right to suppose that A. was omitted in the first and two last of these provisions, and inserted in the second, third, and fifth, without any mean-

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ing at all? Is it not a much more safe thing to suppose that three of the restrictions were intended to affect him with the others, and three to affect the others only? and this when there is no necessary contradiction between the particular and the general clauses. For the general clause is perfectly sensible and consistent with itself, if we read it so as to make it consistent with the special clauses; that is, if we suppose it only to mean, that all the three, A., B., and C., take under the restrictions to be afterwards imposed upon them severally. In this entail the general or connecting clause mentions the institute with the substitutes. In four of the six prohibitions and directions the substitutes alone are referred to; the institute is only joined with them in two; and in neither of the clauses, irritant and resolutive, is the institute mentioned at all. It is unnecessary to inquire what might have been the effect of the general clause in question, had all the prohibitory, irritant, and resolutive clauses been directed against the heirs of tailzie alone. The present case is widely different from that. In thus referring from the generality of the connecting clause to the particularity of the clauses which do really execute the intention, we are not only justified by the express reference which the connecting clause bears to those particular provisions, but by the general rules of construction; one of these is, that generals shall be construed with regard to particulars to which they refer: so we constantly take extensive words in a restricted sense by reference to specific enumerations which precede or follow. Another rule is, that where two references are made to the same subject matter, and the one is more flexible than the other, we construe both together, and

make the flexible expression bend to suit the more reluctant phrase. A third is (and it is of most immediate application here, and may indeed be held as having a sovereign virtue in dealing with the provisions of a Scotch tailzie,) that where there are two different parts of an instrument, and mention is made in them both of the same matter, we are rather to seek the intention of the maker in that part whose proper office it is to deal with that matter than in the other part, where it occurs incidentally, if not out of its proper place. The appropriate place for imposing the fetters is the fencing clauses; these fetters are foreign to the general or connecting clause: therefore, we naturally go to the fencing clauses in order to ascertain what is forbidden or enjoined, and to whom the prohibition or command is addressed; and we there find, that against the substitutes the whole prohibitions, irritancies, and forfeitures are pointed, but only two of the prohibitions against the institute. This, then, forms the third ground of my opinion; namely, that the general mention of William Morehead and the substitutes in the special declaration of the connecting clause, even supposing it to be operatively directed against them as well as against the heirs general, must be construed along with the specific frame of the restrictive clauses, and means only that William Morehead shall take under the restrictions which are thereafter to be directed against him, and the substitutes under the restrictions directed against them. It may be further observed on this entail, that it would be extremely difficult under the general clause to give the institute the benefit of the powers, so as to enable him either to jointure his wife or make provision for his younger children. Those powers are most

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expressly given to the heirs of tailzie in terms. The general clause has not one word which refers to power directly, and only one which can be stretched so as to include a power, viz., "provisions," which coming after the words "but always with and under," in the company of such words as "burdens, reservations, conditions, restrictions, limitations, and clauses irritant," must surely be taken to mean provisions of a restraining and not of an enabling nature. But even if we could suppose a power included under this term, it occurs in the ordinary part of the clause; and in that special part where the institute is named the declaration is, that he and the substitutes are to be bound and not enabled by what follows; therefore, were the institute under the fetters of the entail, he, the disponee, and principal object of bounty, would be tied up from giving any jointure and providing for any younger child. I know not that, after the reasons which I have given, it is worth while to add, that in no part of this deed can we find William Morehead spoken of as an heir of tailzie, or an heir, in the way not unusual in other entails; and which, nevertheless, has not been held of any avail, except to show that the maker of the deed laboured under a mistake as to what he had really effected. The entailer here never says,—"William Morehead and my other "heirs of tailzie," but "William Morehead and the heirs "male of his body, and the other heirs substitute." This only serves to show that circumstances are wanting here, which in other cases have been dwelt upon, though without success, as evincing the entailer's meaning; whatever he meant goes for nothing, unless he validly executed his intention. I have already said, that it is

quite unnecessary for the present purpose to determine what would be the effect of a connecting clause like the one here inserted, if no mention were made of the institute in any of the restricting clauses. Some argument might be raised on the special mention of the institute; and it might perhaps be argued, that there could be nothing done applicando singula singulis. Upon the face of this argument, and upon the question whether it is reconcileable to the rule in the Duntreath case, I desire to be understood as giving no opinion either way; but I can have no doubt whatever, that a general clause might be so framed as to connect the institute with the fetters, even if in some of the fencing clauses he was named, and in some left out. Thus, if the entailer were to say that he desires it to be understood, that wherever he has bound the substitute he means the institute to be equally bound; or, if he were, by a very slight variation of the clause now under consideration, to say that he declares each of the clauses which follow to be binding upon the institute as well as upon the substitutes, there can be no doubt that this would extend the fetters, and would not be within the rule in the Duntreath case; for it would not be bringing in the disponee "by implication "from other parts of the deed, within the clauses,"—it would not be implication, but direct and inevitable construction; and it could hardly be said to be inferring any thing from other parts of the deed, inasmuch as a clause of the frame I have supposed would in truth be a part of the fencing clauses, from its structure and import. But nothing can be less like such a clause than the one we have here to deal with; and yet I am convinced that the Court below assumed this clause to be exactly like the one I have been supposing.

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II. A reference to the authorities confirms the view which I have taken of this case, while I do not think it possible to maintain the decision of the Court below, if those former resolutions are law. In the Findrassie case, Leslie v. Leslie [1], there were some strong circumstances to bring the institute within the fetters as a preliminary declaration, before the destination, that the object of the deed was to call the heirs of the maker's body and heirs of tailzie, with and upon the provisions, faculties, restrictions, and irritancies "after specified," the eldest son being the institute; and the institute had in fact obtained, without dispute, the possession of the personal estate under a gift, in which he was only described as heir of tailzie; yet no mention of him occurring in the restrictive clauses, he was held unfettered. Erskine v. Balfour Hay (the Randieston case) [2] is not marked by any peculiarity, and only merits notice as wholly irreconcileable with the decision in the Court below on the Duntreath case, and as showing that your Lordships, under the advice of the illustrious judge who then advised you in judicial matters, laid down no new rule, and stretched no old one, when you reversed that decree. Indeed, the Findrassie case was stronger, and the Randieston case as strong as the Duntreath.[3] The Duntreath case, however, deserves some further consideration, with a view to the present. I conceive that it is calculated to give a very useful light for guiding us here; and that circumstances fully stronger

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[1] 5th Dec. 1752. Elchies, No. 49, voce Tailzie.
[2] 14th Feb. 1758. Mor. 4406.
[3] Edmonstone v. Edmonstone, 24th Nov. 1769. Mor. 4409.

for binding the institute were to be found in that celebrated question than exist in the one before us. A. Edmonstone, the disponee, was the entailer's eldest son; and the entail being in pursuance of a marriage settlement made in 1716 (as we learn from the appellant's case in your Lordships volume for 1771), he was properly heir of provision as well as institute. All the resolutive clauses were directed against heirs of tailzie only, except two; that Archibald Edmonstone, and the other heirs of entail above named, should perform the obligations by which the entailer was bound; and that any of the heirs of tailzie and provision above mentioned (which might seem to include the institute) were to forfeit, if they did any act by which the estate might be evicted. But what is very material, and must be allowed to be at the least as strong as the special direction in the connecting clause here, the obligation to infeft Archibald Edmonstone the disponee, and other heirs of tailzie, is to do so under the prohibitory, irritant, and resolutive clauses of the deed; and the procuratory of resignation to the same disponee by name, and the other heirs of tailzie, is also with and under the conditions, prohibitory, irritant, and resolutive clauses; and last of all, a portion of 40,000 merks is provided to the entailer's younger children, to be paid by the heirs of tailzie only. Independent of the construction treating the institute as an heir of tailzie, indicated by the use of the word other (which we have not in the present case), there are here intimations of the intention to fetter him, and even acts done for that purpose, which do not occur in the case at bar. I mention the case of Wellwood, for the purpose of noting the great inaccuracy that has crept into the report, as given in the

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Faculty Collection, the second time that entail came in question, viz., Wellwood v. Preston, 31st May 1797.[1] The abstract by the learned reporter states, that the clauses were directed against the institute and the other heirs of entail, and it is so copied into the Dictionary and other books. Not only is it quite impossible that any such entail could have been held inoperative against the institute, but on referring to the former decision on the same instrument, Wellwood v. Wellwood, in February 1791[2], we find that there was no reference to the institute in the restricting clauses. It is unnecessary to mention the Elibank case[3], so recently before your Lordships, and decided in the Court below on the same day[4] with the present. But that of Baldastard,—Steel v. Steel, which was decided by Lord Eldon[5] after much consideration, and which I recollect excited great attention both at the bar and from your Lordships, was a strong decision on the principles which govern this branch of the law. The connecting clause was very full,—"under "conditions and irritant and resolutive clauses, in all "time coming, to be observed by all and every heirs "and substitutes above named." Every person and heir male and female who should succeed was to take the name and arms; the said heirs and members of tailzie were to possess only under this title; none of the said heirs were to alter the order of succession, or lease for more than nineteen years; the said heirs and members of tailzie were forbidden to sell; the whole heirs and members of tailzie aforesaid were to perform all that was

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[1] Mor. 15,466. [2] Mor. 15,463. [3] Ante, p. 1.
[4] 12 May 1814, (F. C.) [5] 27 June 1817. 5 Dow, 73.

directed, on pain of forfeiture, and the acts contravening to be void; and George Steel, the disponee, or the other heirs and members of tailzie, were burthened with an annuity to a woman, and were in the same terms (heirs and members of tailzie) directed to apply for registration. The intention of the entailer was here quite clear, and that he considered he had fettered the institute under the title of a member of tailzie. Indeed, high authority has used the very same language, even the maker of the act 1686, Sir George Mackenzie, speaking of a proprietor in Scotland, says, "he tailzies his lands in favour "of a certain person who is called the institute, or first "member of tailzie, whom failing, to the rest who are "called substitutes, institute and substitute being terms "borrowed from the civil law, and expressed by us in the "first, second, and third members of tailzie;" and Lord Kaimes in the Dictionary sanctions the same form of expression, calling the institute first member. It must therefore be admitted that Steel v. Steel is a strong case, and that possibly the leading view of institute and heir, which appears to have governed the former decisions, did not so necessarily apply here,—I mean the consideration that the institute is a purchaser or disponee taking by singular title and not by inheritance, and making up his titles as purchaser and not by service, while all the others are heirs in reality as well as name, and succeed to their seisin by service. Lord Eldon, however, held these considerations of no avail where he found "mem-"bers" used together with "heirs," and he disregarded the use of the expression members of tailzie by Sir George Mackenzie, observing that the act 1686 itself only touches the institute, and only allows him to be

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fettered by employing the word heir; so that he considered the Duntreath case as going very far, inasmuch as the institute, unless he can be called an heir for certain purposes, seems not to come within the Entail Act at all. I have already observed, that I do not go along with this remark on the Duntreath case, which only agrees with all that went before it. The case of Miller v. Cathcart, which occurred in February 1799[1], is material to our present purpose, chiefly because it shows that the clearest indication of the entailer's sense of what he had done in the restrictive clauses,—nay, an express statement that he had done what he did not do in those clauses—is altogether inoperative, and has no power to extend the restrictions actually imposed. For in that case the deed says,—and almost says it in the clauses themselves, that "notwithstanding the conditions, limitations, and "restrictions put upon J. Taylor, institute, and the "other aforesaid heirs of tailzie, any one of them suc-"ceeding shall have power to alter the entail for the "purpose of continuing it in case the heir apparent "should be affected with mental incapacity." In the present case, according to the view I take of the special declaration, on which every thing turns, the reference to the disponee is only a statement of what the entailer understood himself to have done, or rather to intend doing, in the restrictive clauses. There remains to be mentioned the case of Syme v. Ronaldson Dickson[2], which was decided against the institute, but in circumstances widely different from those of the present ques-

[1] Mor. 15,471.

[2] 27 Feb. 1799. Mor. 15,473.

tion,—circumstances which supported as they called for that determination. The prohibitions are general against J. Ronaldson the disponee, and the other heirs of tailzie; and the eighth of the clauses expressly provides, that "if the said son," (that is, the disponee,) "or any of the heirs of tailzie appointed to succeed to "him," (thus keeping the distinction of institute and substitute plainly and accurately in view,) "shall fail or "contravene by contracting debt," (and then follows a repetition or specification of the prohibited acts,) "then "and in either of these cases the person or persons "heirs of tailzie aforesaid so contravening shall forfeit." This clause is free from all doubt; for the whole is one sentence, and the proposition is of course related to and governed by the condition,—"if the institute or substi-"tutes contravene," then the person or persons so contravening shall forfeit; that is, the person, whether institute or substitute, before named in the same sentence. No one can doubt that "person" means both institute and substitute previously mentioned; and to have held that it did not include the institute, merely because the entailer adds "heirs of tailzie aforesaid," as if a disponee were an heir of tailzie, (the only conceivable ground of disputing the application of the fetters to the institute,) would be neither more nor less than holding that a person having done a certain thing by apt and sufficient words should be held not to have done it, because he afterwards uses words which show that he could give the person a wrong name, towards whom he had effectually done the thing. It would, moreover, be a most violent supposition to assume that any one could write such nonsense as this: If A. or B. shall do so and so, then B. doing so shall

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forfeit. That case may well stand then with the Findrassie and Duntreath cases, and all the rest, and has no bearing upon the present question. However, I hesitate not to say, that having to the full as clear an opinion that the present case has been wrong decided, as that the case of Syme v. Ronaldson Dickson is right, and holding it quite impossible to maintain the decision here without breaking in upon the whole current of authority, if driven to choose between affirming this decree and questioning that, I should, however reluctantly, recommend to your Lordships to adopt the latter alternative.

III. I have only now, in closing my argument, to take notice of the reasons given by the learned judges in the Court below, and I regret that we find so scanty a report of them. I can gather Lord Fullerton's view of the argument, which, though short and general, does not very materially differ from my own; but the reasons which conducted Lord Balgray and his learned brethren to their conclusions I nowhere can find. There appears to be an argument in what Lord Balgray is made to state, but when looked at it turns out to be merely the announcement of a conclusion—an opinion,—an opinion certainly entitled to the greatest deference, but not sufficient to support itself, when, being appealed from, the whole question in the Court above is, whether that opinion was well or ill founded; and we are compelled to inquire, not what the learned judges below thought and decided, but upon what grounds they did so. With all that Lord Balgray lays down in general terms as to the law of entail I go along. That an entail is not a technical deed,—that any one may make his own tailzie without professional aid,—that he may bind his successors in his own words

without any technical or fixed form of expression,—in all this I agree; but then I also agree with his Lordship in holding it quite clear that there must be in the deed, though it matters not in what place, "these concurring "requisites,—the actual imposition of the requisite pro- "hibitions, irritancies, and resolutions." This being the admitted ground of the decision to be made, his Lordship says, that "keeping it in view, he apprehends the pre- "sent entail cannot be impeached." But as that is exactly the question,—the only point in dispute, we desiderate the reason why his Lordship considers that the acknowledged principles support the entail; in other words, we ask, where in the deed can we find the "actual imposition" of fetters on the disponee? His Lordship answers this essential question by saying, that we find the imposition in the general clause, which he then very correctly recites. Now, this is only shifting the essential question; for there being no doubt whatever that the fetters are, if at all, imposed by the connecting clause, the real point is, whether or not that clause does impose them on the institute? How is his Lordship represented as dealing with—as arguing that point? All he says is this: "By this clause the entailer "appears to me to apply each and all of the clauses "expressly to the institute as well as to the substitute;" but this is not giving a reason, it is only giving an answer to the question. The question is, has the general clause imposed the fetters; and if it has, why do you hold that opinion? And Lord Balgray answers, "It "has imponed the fetters," and gives no reason why he holds it to have done so. He adds, indeed, that a cause of hesitation with him is the insertion of the institute's name in some of the restrictive clauses, and not in

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others. No doubt this is the main argument against the opinion delivered by his Lordship. Then how does he answer this argument? He overrules it,—he decides against it, but he does not put it down by any reasoning at all. He only says, "I am afraid this is not enough "to free the institute." But that is the whole question. Is this or not enough to free the institute, is exactly the question now before your Lordships, and then before the Court below. What ground does the learned judge assign for apprehending that the decision must be against the institute? He merely repeats once more, without any reason at all, the proposition that "the general clause "reaches the whole that follows, and applies the whole "to the institute as well as substitute, making the entail "good against him as well as against them." Now that is exactly the matter in dispute between the parties; and when one of these gives us a reason for holding that you ought to determine in his favour, that the fencing clauses sometimes omit and sometimes insert the institute's name, it is, most assuredly, not enough to reply by merely repeating the proposition that you had decided against that party; thus answering his argument against your opinion by simply repeating that opinion in the same words. The question is, has the entailer fettered the institute? You say he has; the institute gives his reason for holding he has not. You meet his argument by repeating, "the entailer has fettered the institute." I desire to be understood as making no complaint against the learned judge for not having argued the question; a judge's office is, first of all, to decide; and no one has any right to cavil at him, if he gives a distinct determination on the matters before him, merely because he assigns no reasons. But where his decision is to be

considered upon appeal, the only weight which it can have is that due to the reasons it rests upon; and the party in whose favour it is given cannot support it by merely showing that the learned judge six times over gave the same opinion in different words. It may be a very good decision for the judge, but it is nothing of an argument for the party. The other learned judges merely concurred in Lord Balgray's opinion, and gave no reasons. Your Lordships are thus relieved from the difficulty which might have encumbered this case, had any reasons been assigned by the learned judges in the Court below for the decision which they pronounced; and for the reasons and upon the grounds which I have stated at great, but I think not at unnecessary, length, I humbly move your Lordships that the interlocutor appealed from be reversed. I should, in regard to the importance of the question, have wished to add a declaration, that no general words referring to a disponee and to heirs of tailzie can fetter the disponee if the restrictive clauses do not directly apply to the disponee, and if the general words taken together with the particular clauses are capable of a construction which does not necessarily comprehend the disponee within the latter by force of the former. As, however, your Lordships may observe, that this position goes beyond the exigency of the present case, (although I have a clear opinion upon it,) I do not recommend its being added to the order of reversal, which will simply stand thus: Reverse; decern for the pursuer in the declarator; and in the suspension find the letters orderly proceeded.

The House of Lords accordingly ordered and adjudged, "That the interlocutor complained of in the said appeal be, "and the same is hereby reversed: And it is further ordered,

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" That the cause be remitted back to the First Division of " the Court of Session, with instructions that in the process " of declarator they do find and declare in terms of the several " conclusions of the libel, and decern; and that in the process " of suspension they do find the letters orderly proceeded " in, and decern."

S. B. JACKSON — RICHARDSON and CONNELL,— Solicitors.