

[18th April 1835.]

Lieut. Gen. MATTHEW SHARPE, Appellant.

*Sir John Campbell — Keay.*

CHARLES KIRKPATRICK SHARPE and others, Respondents.

*Entail — Clause.*—Circumstances in which held (reversing the judgment of the Court of Session) that the syntax of the irritant clause of an entail being defective, from a clerical omission which might by possibility have been supplied by other words than those which the context indicated to have been intended to be inserted, the entail was insufficient to prevent the heir in possession from selling or burdening the lands.

MATTHEW SHARPE Esquire of Hoddum executed a deed of entail on the 6th of July 1748, and another on the 7th of March 1754; but as both of these deeds were revoked, it is not necessary to take farther notice of them. He also made a third entail, dated 1st August 1765, which was not revoked, but it was never recorded or followed by infestment. That entail was granted in favour of himself, and the heirs male of his body; whom failing, to the heirs female of his body; whom failing, to Charles Kirkpatrick, only son of Mr. William Kirkpatrick of Elliesland, and to the other substitutes therein mentioned. Charles Kirkpatrick, although related to the entailer, was not his heir-at-law. Without adverting particularly to the different clauses in that deed, it is sufficient to state that the destination, the

subjects conveyed, and the prohibitions and conditions were (with certain trifling variations in the language, which do not bear upon the present question) the same as those in a subsequent deed of entail executed in 1768. The resolute clause was the same in the two deeds; but in the irritant clause of the entail 1765 a few words are inserted which were omitted in the subsequent entail. The irritant clause of that deed was as follows:—“ And upon every contravention which may  
 “ happen, by and through any of my said heirs failing  
 “ to perform all and each of the said conditions and pro-  
 “ visions, and acting contrary to any or all of the restric-  
 “ tions and limitations before written, it is hereby ex-  
 “ pressly provided and declared, that not only my said  
 “ lands and estate shall not be burdened with or liable  
 “ to the debts and deeds, crimes and acts *of the heirs of*  
 “ *taille, as before provided, but also all debts, deeds, and*  
 “ *acts*<sup>1</sup>, contracted, granted, done, or committed, con-  
 “ trary to these conditions and provisions, or restrictions  
 “ and limitations, or to the true intent and meaning of  
 “ these presents, shall be of no force, strength, or effect,  
 “ and ineffectual and unavailable against the other  
 “ heirs of tailzie, and who, as well as the said estate,  
 “ shall be noways burdened therewith, but free there-  
 “ from, in the same manner as if such debts or deeds  
 “ had not been contracted or granted, or such acts,  
 “ omissions, or commissions had never been done or  
 “ happened.”

In this entail of 1765 there is a reserved power of alteration or of sale in favour of the granter or the heirs of his body; “ but declaring that any revocation or

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<sup>1</sup> The words in italics are omitted in the entail 1768.

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“ alteration of these presents shall not be inferred by  
“ legal implications or constructions, but only from  
“ an express writing under my own hand, or under the  
“ hand of the heirs male of my body, recalling this  
“ present deed, or altering the same, in whole or in  
“ part.”

On the 19th December 1768 the entailer executed the other deed of entail alluded to, which was duly recorded in the register of tailzies on the 6th Dec. 1769. It proceeds on the narrative that “ I Matthew  
“ Sharpe of Hoddom, for the better preservation of my  
“ family, and continuance of my estate with my rela-  
“ tions and heirs of taillie after mentioned, do by  
“ these presents, under the conditions, provisions, res-  
“ trictions and limitations, clauses irritant and reso-  
“ lutive, declarations and reservations, after written,  
“ give, grant, and dispone, heritably and irredeemably,  
“ to myself and the heirs male of my body, without  
“ any restriction, limitation, or condition whatever ;  
“ whom failing, to the heirs female of my body, the  
“ eldest heir female always succeeding without division ;  
“ whom failing, to Charles Kirkpatrick, only lawful  
“ son of Mr. William Kirkpatrick of Elliesland,” and the other substitutes therein enumerated, the estate of Hoddom.

The first condition is, that the heirs should bear the name and arms of Sharpe of Hoddom. The next two conditions were, “ that the whole heirs hereby called  
“ to the succession of my estate shall possess and enjoy  
“ the said lands and estate by virtue of this present  
“ taillie, infestments, rights, and conveyances to follow  
“ hereupon, and by no other right or title whatsoever :

“ And with and under this condition also, as it is  
 “ hereby specially provided and declared, that the  
 “ whole heirs foresaid shall be obliged to engross, and  
 “ verbatim insert, the whole foresaid course and order  
 “ of succession, and the several conditions, limitations,  
 “ provisions, irritancies, and others before and after  
 “ mentioned and contained in this present taillie, or  
 “ to be contained in any other deed or writing to be  
 “ hereafter granted by me relative hereto, in the in-  
 “ struments of resignation, charters, services, and re-  
 “ tours, precepts thereon, precepts and instruments of  
 “ sasine, and in all other conveyances of the said lands  
 “ and estate.”

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After setting forth sundry other conditions the deed prohibits any alteration in the order of succession ; and then provides, “ That the whole heirs aforesaid are and  
 “ shall be limited and restrained from selling, alien-  
 “ ating, impignoring, or disposing the said lands and  
 “ estate, or any part thereof, either irredeemably or  
 “ under reversion, and from burdening the same, in  
 “ whole or in part, with debts or sums of money, in-  
 “ feftments of annual rent, or any other servitude or  
 “ burden whatsoever, (excepting only as herein-after  
 “ mentioned,) and from doing or committing any act  
 “ civil or criminal, and granting any deed, directly or  
 “ indirectly, whereby the said lands and estate or any  
 “ part thereof may be affected, apprised, or adjudged,  
 “ forfeited, or become escheat or confiscated, or any  
 “ other manner of way evicted from the said heirs of  
 “ taillie, or this present taillie or order of succession  
 “ prejudged, hurt, or changed.”

The deed also contains this restriction :—“ That the

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“ said lands and estate shall noways be affected or  
 “ burdened with, or subjected or liable to be adjudged,  
 “ apprised, or any other way evicted, either in whole  
 “ or in part, for or by the debts and deeds contracted  
 “ or granted by any of the foresaid heirs, whether  
 “ before or after their succession, nor for or by any  
 “ act, civil or criminal, committed and done, or to be  
 “ committed and done, prior or posterior to their suc-  
 “ cession.”

After setting forth various other restrictions and  
 sundry irritancies, the deed contains a resolute clause,  
 providing, “ That in case any of the heirs aforesaid  
 “ shall contravene the other conditions, provisions, re-  
 “ strictions, or limitations before or after mentioned, or  
 “ any of them, that is, shall fail or neglect to implement  
 “ and perform the said other conditions and provisions,  
 “ and each of them, or shall act contrary to the other  
 “ restrictions and limitations, or any of them, that then,  
 “ and in any of these cases, the person or persons so  
 “ contravening by failing to obey the said conditions  
 “ and provisions, or acting contrary to the said restric-  
 “ tions and limitations, or any of them, shall, for him  
 “ or herself, and the heirs descending of his or her  
 “ body respectively, ipso facto amit, lose, and forfeit all  
 “ right, title, and interest which they respectively have  
 “ or shall have to my said lands, and the same shall  
 “ become void and extinct, and my said lands and  
 “ estate shall devolve, accresce, and belong to the next  
 “ heir of taillie appointed to succeed, in the same  
 “ manner as if the contravener and the heirs descend-  
 “ ing of his or her body were all naturally dead.”

Then follows the irritant clause in these words:—

“ And upon every contravention which may happen by  
 “ and through any of the said heirs failing to perform  
 “ all and each of the said conditions and provisions,  
 “ and acting contrary to any or all of the restrictions  
 “ and limitations before written, it is hereby expressly  
 “ provided and declared, that not only my said lands  
 “ and estate shall not be burdened with or liable to  
 “ the debts and deeds, crimes and acts<sup>1</sup>, contracted,  
 “ granted, done, or committed contrary to these con-  
 “ ditions and provisions, or restrictions and limitations,  
 “ or to the true intent and meaning of these presents,  
 “ shall be of no force, strength, or effect, and ineffectual  
 “ and unavailable against the other heirs of tailie, and  
 “ who, as well as the said estate, shall be noways bur-  
 “ dened therewith, but free therefrom, in the same  
 “ manner as if such debts or deeds had not been con-  
 “ tracted or granted, or such deeds, omissions, or com-  
 “ missions had never been done or happened.”

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This deed contains various other clauses, which do not bear upon the present question, and these are followed by this clause of revocation:—“ And I, by  
 “ these presents, revoke and recal all former settle-  
 “ ments made and granted by me of and concerning  
 “ my said lands and estate, or any part thereof, in  
 “ favour of whatever person or persons, and particu-  
 “ larly without prejudice to the said generality, a deed  
 “ of entail and settlement executed by me, of date the  
 “ 6th day of July 1748, and another deed of entail and  
 “ settlement, dated the 7th day of March 1754 years,

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<sup>1</sup> Here the words “ of the heirs of tailie as before provided, but also all debts, deeds, and acts ” in the entail of 1765 are omitted.

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“ in the whole heads, clauses, and contents thereof,  
“ and declare the same to be void and null, and of no  
“ force or effect, in all time coming, as if the same had  
“ never been made or granted.”

Besides the landed estate Matthew Sharpe left some moveable property, which by a deed of the same date with the last entail, and two subsequent trust deeds dated 19th May 1769, he conveyed to trustees, for certain purposes, and particularly that the residue should be applied in the purchase of lands as contiguous to Hoddom as could be procured, which were to be entailed in the same way as that estate. These trustees died, and in consequence Mr. Richard Mackenzie, W. S., was appointed by the Court to the office of judicial factor, for executing the purposes of the trust. In the course of his management some lands were purchased and entailed, in compliance with Matthew Sharpe's directions; and he still held a small unappropriated balance in his hands.

Matthew Sharpe died without heirs of his body; and the first in succession under the destination was Charles Kirkpatrick, the father of General Sharpe the appellant and of Charles Kirkpatrick Sharpe the respondent. Charles Kirkpatrick Sharpe in February 1770 made up his title as heir of tailzie and provision under the recorded entail of 1768. On his death in 1813 his eldest son, General Sharpe, made up his titles under the same entail, and on that title has ever since been in possession of the estate, including the lands contained in the deed of entail executed by Mr. Mackenzie.

Upon these facts an action of declarator was instituted

by the appellant before the Court of Session, concluding in substance that he had an absolute right to the estate, and power to sell or burden it at his pleasure.

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This was resisted by the respondents, who were subsequent heirs of entail. Lord Corehouse on 22d May 1832 pronounced the following interlocutor, and issued the explanatory note attached to it:—“The  
“ Lord Ordinary having considered the revised cases  
“ for the parties, productions, and whole process, finds,  
“ that the tailzies in question are affected with valid  
“ and sufficient irritant and resolute clauses, and  
“ therefore sustains the defences, assoilzies the defen-  
“ ders from the conclusions of the libel, and decerns  
“ under certain reservations, but finds no expences  
“ due.”

“ Note.—That the omission in the irritant clause in  
“ this entail is merely clerical appears obvious from  
“ the structure of the sentence, which is altogether  
“ ungrammatical, in consequence of the nominative in  
“ the second member being wanting. It is first  
“ declared, that not only the lands shall not be bur-  
“ dened with or liable for the debts and deeds, crimes  
“ and acts, contracted, granted, done, or committed in  
“ contravention. Here the syntax is interrupted; then  
“ follows, ‘ shall be of no force, strength, or effect, and  
“ ‘ ineffectual and unavailable against the other heirs  
“ ‘ of tailzie, and who, as well as the said lands, shall  
“ ‘ be nowise burdened therewith, but free therefrom,  
“ ‘ in the same manner as if such debts or deeds had  
“ ‘ not been contracted or granted, or such deeds,  
“ ‘ omissions, or commissions, had never been done nor  
“ ‘ happened;’ coupling the effect of the relative



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“ adverbs ‘therewith’ and ‘therefrom’, which neces-  
 “ sarily refer to the omitted nominative, with the effect  
 “ of the relative pronoun ‘such,’ which connects that  
 “ nominative with the words that follow, it is a plain,  
 “ if not indeed a necessary inference, that the acts of  
 “ contravention mentioned at the commencement of the  
 “ sentence, and repeated at the close, constitute that  
 “ nominative, and are those which are declared to be  
 “ of ‘no force, strength, or effect.’ To supply omis-  
 “ sions in a deed by conjectures however plausible,  
 “ or deductions however clear, with regard to the  
 “ intentions of the maker, is very different from re-  
 “ storing the syntax of the deed, defective in con-  
 “ sequence of a clerical error, by means of a reference  
 “ to the context itself; the first is at variance with the  
 “ principles of construction applied to all deeds stricti  
 “ juris, and with peculiar rigour to entails; but the  
 “ second is consistent with those principles, and was  
 “ admitted by this Court and the House of Lords in  
 “ the case of Munro of Fowlis, cited by the defenders.  
 “ In that case as in this, the irritant clause was un-  
 “ grammatical, and, without amendment, unintelligible,  
 “ the syntax being broken by a clerical omission. The  
 “ entailer appointed the lands to be resigned into the  
 “ hands of the superior or his commissioners, ‘to be  
 “ ‘made and granted to me, whom failing, to Hugh  
 “ ‘Munro,’ &c. The words, ‘for new infeftments,’  
 “ were omitted. It was pleaded by the defenders, in  
 “ the declarator brought for setting aside the deed,  
 “ that the clause as it stood was correct, because the  
 “ lands were resigned into the hands of the superior to  
 “ be granted. But that plea was obviously untenable,

“ because they were resigned ‘ to be made and granted ;’  
 “ and although the superior could grant the lands, he  
 “ could not make them. That, therefore, which was to  
 “ be made and granted was something not named or  
 “ expressed, but which the Court supplied by intend-  
 “ ment from the context, namely ‘ for new infeftments.’  
 “ It is said that the omission in the present case might,  
 “ perhaps, have been debts and deeds, or debts and  
 “ crimes, or debts only, and if such words were inserted,  
 “ the irritant clause would still be defective ; but the  
 “ same argument might have been used in the Fowlis  
 “ case. The lands might have been resigned, not for  
 “ new infeftment, but for a lease, a wadset, or some  
 “ other grant which would not have constituted an  
 “ effectual tailzie. But the context in that case, as in  
 “ this, excluded all such gratuitous suppositions. Con-  
 “ struction by inference was carried still farther in the  
 “ Roxburgh case, where the words ‘ heirs male’ in the  
 “ destination were read, ‘ heirs male of the body,’  
 “ although the syntax was correct without that inter-  
 “ polation, and the context gave very little assistance  
 “ in its support.”

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Against this interlocutor a reclaiming note was pre-  
 sented by the appellant ; and a counter note was also  
 presented by the respondents in so far as they were found  
 not entitled to expences. The Court (First Division),  
 on 3d July 1832, pronounced this interlocutor : —  
 “ The lords having advised this note, and heard  
 “ counsel for the parties, adhere to the interlocutor  
 “ of the Lord Ordinary in so far as his lordship  
 “ thereby sustains the defences and assoilzies the  
 “ defenders ; but alter the same in so far as his lord-

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“ ship finds no expences due, and find the pursuer  
“ liable to the defender, Charles Kirkpatrick Sharpe  
“ esq., in the expences incurred by him, and remit  
“ the account thereof to the auditor of court to tax the  
“ same and to report.”

General Sharpe appealed.<sup>1</sup>

*Appellant.*—It is essential to every effectual entail, under the statute 1685, chap. 22, that it contain a clause explicitly declaring the acts done in contravention of it to be void and null. No acts or deeds done by an heir of entail can be irritated or annulled by force of the entail unless they are expressly enumerated in the declaration of nullity which is contained in the irritant clause; and consequently no prohibition can, without such enumeration, be rendered effectual to debar the heir in possession from doing or granting the acts or deeds prohibited.

The deed of entail executed in 1768 does not contain an effectual irritant clause in terms of the statute; it does not declare the acts of contravention of the heirs of taillie to be null and void. It has been admitted on all hands, that the clause, as it stands in the entail and in the investitures, is absolutely unintelligible, and that, in order to extract from it any meaning whatever, a material change must be made upon its structure, and important words must be supplied.

But the principle of construction which is applicable to deeds of entail, is, that they are *strictissimi juris*.

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<sup>1</sup> S., D., & B. 751.

No restraint, though evidently intended by the maker, nor any prohibition or irritancy, is to be raised against an heir of entail, from implication or inference ; so that if any clause should be omitted (perhaps per incuriam), which by the established form is made use of in creating a limitation, the Court does not interpose or supply the defect.<sup>1</sup> Numerous well-known cases have occurred, in which effect has been denied to the most obvious intention of the granter.

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It is impossible to say that the words requisite to restore the grammatical construction can be ascertained with certainty. Parties may indulge in plausible conjectures ; but still there are many forms of expression by each of which sense might be restored to the passage, and yet its legal effect be infinitely varied. It seems to be thought that all dubiety is removed by the context, and that the four words enumerated there (“ debts, deeds, crimes, and acts ”) ought to form the nominative in the second branch of the clause. Yet it is quite certain that if even one only of those four words (“ debts,” for example,) had been inserted as that nominative it would have been impossible for the Court to have inserted any other word, however apparent the intention of the granter might be deemed ; and it is not a little remarkable that not only do the two respondents differ entirely in their ideas regarding the words which are wanting, but when the respondent, Mr. Sharpe, seeks to point out in what way the chasm should be filled up he actually omits one of the four

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<sup>1</sup> Sandford on Entails, Ed. 1822. p. 158. and Ersk. B. 3. tit. 8.

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words (“crimes”) which are contained in the context. Quomodo constat that any other of those four words might not as well have been left out?

This case, therefore, is essentially different from those cases in which a clerical error or omission is of such a description that it can be supplied only in one way, and in no other. Such was the case of Munro of Fowlis. There, in a mere phrase of fixed style, certain well-known technical words were omitted. The lands were directed to be resigned “in the hands of my immediate  
“lawful superiors of the same, or of their commis-  
“sioners having power to receive resignations and to  
“grant new infeftments [for new infeftment<sup>1</sup>], to be  
“made and granted to me the said Sir Harry Munro,  
“myself, whom failing,” &c. The Lord Ordinary has held, that the present case ought to be regulated by the decision in the case of Fowlis, because it was there as doubtful and uncertain in what way the hiatus was to be supplied, as in the present case. “The lands” (it is remarked by his lordship) “might have been resigned,  
“not for new infeftment, but for a lease or wadset, or  
“some other grant which would not have constituted  
“an effectual taillie.” But the supposition that the resignation could possibly have been made, not for new infeftment, but for any such grant or right as a lease, is altogether and absolutely excluded. Not only is it the invariable purpose and end of resignation in favorem into the hands of a feudal superior that the grant be renewed by infeftment, and not only were the persons to whom resignation might be made as the commissioners of the superior expressly required to

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<sup>1</sup> These three words omitted.

possess the powers of granting new infeftment, but the whole provisions of the deed have direct reference to the heirs of entail making up their title by charter and seisin, and in no other way. The supposition, therefore, that the resignation might have been intended to be made, not for new infeftment, but for some such right as a lease, was altogether excluded in the case of Fowlis, and there was no ground for the slightest doubt or uncertainty as to the only possible way in which the error could be corrected. But to supply the defect in the present case it is a matter of mere conjecture; and in determining what words ought to be inserted (which has not been done by the Court below) this House must discriminate between various methods differing in their legal effects, but each of them capable of being supported by arguments equally plausible. In this respect the present case essentially differs from that of Fowlis; and indeed the judgment appealed from has stretched the fixed principles of construction much farther, in order to invest this deed with effectual fetters, than has ever yet been done in favour of entails.<sup>1</sup>

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*Respondents.*—From the irritant clause, as it stands, it clearly appears, that what in one member of that clause are declared to be “of no force, strength, or effect, and ineffectual and unavailable,” consist of all and each of those very debts and deeds, crimes and acts, which are prohibited in the other clauses of the entail.

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<sup>1</sup> *Appellant's Authorities.*—Mitchelson v. Atkinson, 15 June 1831, (9 S., D., & B. 741); Dick v. Drysdale, 14 Jan. 1812, (F. C.); Elliot v. Pott, 16 March 1814, (F. C.); Robertson Barclay v. Adam, 18 May 1821, (1 Shaw's App. Cases, 24); 3 Ersk. B. tit. 8. s. 29.

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The main ground upon which this entail is now attacked, is, that that branch of the irritant clause which contains the above declaration does not set forth that those things which are thus to have no force, strength, or effect, &c., are those debts and deeds, crimes and acts, which are prohibited in the deed. The irritant clause, independent altogether of this member of it, would completely satisfy all that is required by the statute 1685, and consequently would be effectual even although that clause itself did not afford the means of supplying the nominative of this one branch of it. But this irritant clause itself furnishes the materials for supplying this omission. It will be observed that this omission occurs only in that member of the irritant clause in which the deeds of contravention were intended to be declared inept against the heirs of entail themselves. But on the one hand this declaration is immediately preceded by that member of the clause, which declares these deeds of contravention inept against the estate itself; and on the other hand it is immediately followed by another member of the clause declaring the extent to which the heirs personally, as well as the estate itself, were thus to be exempted from the effect of such deeds of contravention; and in both of these the prohibited debts and deeds, crimes and acts, are mentioned in such a manner as shows clearly that they are the very things which, in that part of the irritant clause now under consideration, are declared to be “of no force, strength, or effect, and ineffectual and “unavailable,” against the heirs of entail.

Thus, in the immediately preceding member of the clause, after stating that this irritancy was to come into operation upon every contravention which might happen

by any heir, either “omitting” each of the conditions imposed upon him, or “doing or committing” any or all of those things which he was restricted from doing, the entail proceeds to declare that these prohibited debts, deeds, crimes, and acts should be inept so far as regards the estate itself; and what deserves attention is, that these prohibited debts, deeds, crimes, and acts are spoken of in such a manner as to show that, in this very clause itself, more than one declaration is to be made regarding them, and that they are to form the subject, not only of this declaration, in reference to the estate itself, but likewise of the next declaration as to the heirs of entail themselves; for the entail declares that “not only my said lands and estate shall not be burdened with or liable to the debts and deeds, crimes and acts” therein set forth. By thus prefixing the words “not only” to this declaration, he clearly indicated that some other declaration was to follow in the next member of the sentence regarding these same debts, deeds, crimes, and acts of which he was speaking; and accordingly in that next member of the clause he proceeds to state the consequences of such contraventions in reference to the other heirs of entail personally, by declaring that what is spoken of shall be of no force, strength, or effect, &c., “against the other heirs of tailzie;” and the subject of this declaration, (although omitted to be expressly repeated in this member of the sentence,) consisted of those very prohibited debts, deeds, crimes, and acts which the entail had previously announced as the subject of this as well as of the immediately preceding one.

So, in the immediately following branch of the

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irritant clause, these prohibited debts, deeds, acts, and crimes, whether of omission or of commission, are again spoken of in such a manner as shows clearly that they also formed the subject of the declaration as to the heirs of entail; this subsequent branch of the clause contains the explanation as to the extent to which this irritancy was to operate against the prohibited debts and deeds, crimes and acts, in reference both to the heirs of entail themselves, and to the estate itself, by declaring that the one as well as the other “shall be  
“ noways burdened therewith, but free therefrom, in  
“ the same manner as if such debts or deeds had not  
“ been contracted, or such deeds, omissions, or com-  
“ missions had never been done nor happened.” There is nothing wanting in this branch of the sentence. The nominative of it is expressly stated to consist both of the heirs of entail and of the entailed estate itself; and it is declared that neither of these should be burdened with, but that both should be free from, what had formed the subject of the declaration in the immediately preceding member of the clause. Thus the subjects of these two declarations in the sentence are completely identified, so that whatever points out the one, points out the other; and then the common subject of both these declarations is pointed out clearly by the explanation embodied in this last one, showing that it consisted of precisely the same prohibited debts or deeds, omissions or commissions, which had formed the subject also of all the other members of the clause.

Since the entailer himself has thus afforded the materials for completing the syntax, by what is set forth in the context, and indeed in the other parts

of this very clause itself, the clause is as effectual as if the syntax of this branch of it had been quite entire. The law upon this subject was established both by the Court of Session and by the House of Lords in the case of Munro of Fowlis, as well as previously in the Roxburgh case; and accordingly, in the Court below, the appellant never ventured to call in question the doctrine upon this subject in the note issued by Lord Corehouse, and confirmed by the Inner House; and as the entail is not challenged in this action upon any ground other than this alleged defect in the irritant clause, the judgment of the Court below is well founded.

But the clause (independent altogether of that member of it the syntax of which is defective,) is a complete irritant clause in terms of law, and quite sufficient to satisfy the requirement of the statute 1685.<sup>1</sup>

LORD BROUCHAM.—My Lords, the question which this appeal has brought before your Lordships is one of great importance for the value of the property which depends upon its decision, but of much greater, in my opinion, in regard to the point of law which it involves. The decree of the Court below sanctions a principle of

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<sup>1</sup> *Respondents' Authorities.*—Gordon Cumming, 29 July 1761, (Mor. 15,513); Roxburgh Case, June 1827, (Mor. App. to Tailzie, Nos. 13. & 14.); Stobbs, 19 May 1803, (Mor. 15,542); 2 Black. Comm. 379; Bridgm. Jud. 435, s. 22.; Dormer v. Packhurst, (3 Atk. 135; 1 Stra. 1105); Bagshaw v. Spencer, (2 Atk. 570); Doran v. Ross, (3 Bro. C. C. 27); Douglas and Co. v. Glassford, 14 Nov. 1823, (F. C. 2 S. & D. 487); Syme v. Ronaldson Dickson, 27 Feb. 1799, (Mor. 15,473); Munro of Fowlis, 15 Feb. 1826, (4 S. & D. 467; affirmed, 3 W. & S. 344); Newhall, 23 May 1823, (F. C.); Cappedrae, 10 June 1823, (F. C.); Watson v. Blair, 16 Nov. 1831, (10 S., D., & B. 12); Nesbet, 10 June 1823, (2 S. & D. 381).

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construction which may be of extensive application to deeds of the same kind—tailzies of Scotch estates; but if it is a sound one, this principle must be applicable to the construction of all instruments,—nay, more so in every other case than in the case of tailzies, which are well known to be, of all conveyances, those which the law regards with the most scrupulous jealousy, and interprets with the most rigorous strictness; nor is there in the question itself, considered in some points of view, any thing peculiar to the law of Scotland; and the authority of this decision could, if sanctioned by your Lordships, never be confined, nor its influence restricted, to Scotch cases. Indeed, as I know of no English instrument whatever, the construction of which is so confined within strict technical rules, I can fancy no parallel case arising in this country in which the present decision of your Lordships might not be applied *à fortiori*. If we allow a provision so essential as an irritant clause in a Scotch tailzie, where constructive intention goes for nothing, to be supplied by conjectural criticism (I can give it no other name), with what boundless licence should we not be armed in dealing with an English will, where nothing but the intention of the testator is to be regarded! Pressed by such considerations, and the acknowledged difficulty of supporting the decision below, upon the reasons there given in its favour, my Lord Chief Justice, who first heard the cause, directed that it might be argued again by one counsel of a side, and his Lordship was pleased to desire my assistance on the second hearing; I have accordingly anxiously considered the question at issue; I have attended the second hearing, and I have come to a clear and unhesitating opinion, that the decree below cannot stand. As

it was pronounced by all the judges of the Division before which it came, my profound respect for so high an authority naturally made me pause before I differed irreconcilably with their Lordships; and the same feeling induces me now to state at length the reasons upon which my own judgment has been formed.

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The Hoddam entail is framed carefully and artificially by professional men, who plainly well knew the nature of the instrument they were constructing; and it is as regular and full in all its parts as a deed of tailzie can well be, except, perhaps, that the institute is left free from all fetters, which could hardly be intended, as he (the disponent) was only a cousin. After the dispositive and destination clauses, and the usual conditions as to bearing name and arms, possessing under the entail, and so forth, there follow, in distinct order, the prohibitory clauses, against which nothing can be said, and of which the last is to forbid the estate being burdened by or in consequence of any debt, deed, or act, criminal or civil, of the heirs of tailzie, which it proceeds to declare shall not burden or affect the estate, that being, as it were, the form of the prohibition:—“ And with and  
“ under the restriction and limitation, as it is hereby  
“ expressly conditioned and provided, that the said  
“ lands and estate shall in nowise be affected or bur-  
“ dened with, or subjected or liable to be adjudged,  
“ apprized, or in any other way evicted, either in whole  
“ or in part, for or by the debts or deeds contracted or  
“ granted by any of the foresaid heirs, whether before  
“ or after their succession, nor for or by any act, civil  
“ or criminal, committed and done, or to be committed  
“ and done, prior or posterior to their succession.” Then come the irritant clauses, the first of which is what we

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should in England call a shifting use, the second a good resolute clause; and the next the irritant clause, or clause of nullity, on which the present question arises. It begins with an apparent reference to the last of the prohibitions or restrictions which I have already cited, and its intent was apparently (we must needs always speak conjecturally when the maker of an instrument has not fully explained himself,)—apparently to add something to what he had already done. He says, “and upon  
“ every contravention which may happen, by and  
“ through any of my said heirs failing to perform all  
“ and each of the said conditions and provisions, and  
“ acting contrary to any or all of the restrictions and  
“ limitations before written, it is hereby expressly pro-  
“ vided and declared, that not only my said lands and  
“ estate shall not be burdened with or liable to the  
“ debts and deeds, crimes and acts, contracted, granted,  
“ done, or committed contrary to these conditions and  
“ provisions or restrictions and limitations, or to the  
“ true intent and meaning of these presents, shall be of  
“ no force, strength, or effect, and ineffectual and un-  
“ available against the other heirs of tailzie, and who,  
“ as well as the said estate, shall be no ways burdened  
“ therewith, but free therefrom, in the same manner  
“ as if such debts or deeds had not been contracted or  
“ granted, or such deeds, omissions, or commissions had  
“ never been done or happened.” In this clause the words following “not only” seem to refer to the former clause, the last prohibition or restriction; and it seems to have been intended to say, that not only this should take place which had already been provided, but something else—something further not yet provided for. No such clause, however, nor link of a clause, connected with any

particle “but” occurs; and it is said that this, and the want of grammar, or, more properly, of sense, which appears, there being a verb without a nominative case, namely, “shall be of no force,” shows some words to be omitted which the maker of the instrument had intended to insert; nor have we any occasion to doubt that this observation is correct; the collocation and the defect of grammar, or rather sense, plainly show it. I will go a step farther, and admit that if those omitted words had been immaterial, except towards completing a sense which was plain, obvious, and indisputable without them, no one could deny the propriety of supplying them, or maintain that any risk would attend the suppletory operation. If, then, the words which do appear are plainly sufficient to show the meaning of the whole, and if there can be no doubt that one, and but one, set of words has been left out,—if it is certain that the words to be supplied are of one kind, and can be of none other,—if that one only meaning could by possibility have prevailed, and been the sense intended to be expressed,—I have no hesitation in admitting, that according to every rule of construction we should have been at liberty to intend that meaning and supply those words. The whole question here is (an omission being allowed to have been made) what is the thing omitted? If the thing inserted made it perfectly certain what the thing omitted was,—that it must have been one precise thing, and could have been by no possibility any other thing,—then doubtless the case would be clear, and we should be called upon to supply the admitted defect, by taking in the matter known or ascertained to have been omitted. Suppose, for example, that there had been a nominative case, but part of the verb

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had been omitted; or the nominative and verb both had appeared, but the patronymic particle had been dropt, as thus: — “All such acts shall of no force and effect,” or even “all such acts of no force and effect,” or “all such acts shall be no force and effect,” we could safely, because certainly, have supplied “be,” or even “shall be,” in the one case, and “of” in the other; but this is not the present omission, nor any thing like it; all that we see is, from the defect of grammar, that something is left out. What is it? Nothing less than the nominative—the whole matter. Of the three constituent parts of any proposition, this is truly, if not the most important, at least one as important as either of the others, and far more so than one of them; those, then, are the nominative or objective—that which declares of what thing it is that you are about to predicate,—the subjective, or thing to be predicated,—and the connective or verb, which may be said, in a sense, to predicate, but which in truth is only auxiliary to the predication, by connecting the thing predicated with the object of which it is so predicated. There needs no further illustration to show the importance of that which is in this case left out. By the thing predicated being here nullity, and by the verb or connective “shall be” (which is really of little comparative importance), we see that nullity was intended to be predicated of something; but that is all we see, and we are left to conjecture that most important point,—what it is of which nullity was to be predicated. I think this sufficiently shows the materiality of the omission. If, again, we leave out the words “shall be,” then there may be a nominative or objective; but we have no subjective, and nothing effectually pre-

dicated, as I shall in the sequel show. Nevertheless, I will go one step farther, and admit that, if from the rest of the sentence it had plainly appeared what this object or nominative was,—that the thing of which nullity was predicated was necessarily one thing, and could not by possibility be any other, (I cannot easily figure to myself such a case, but had one existed,) I will agree that then we might have been authorized to supply the omission. Is that the case here, or rather is not the very reverse most manifestly this case? See only how many different nominatives may be inserted, all of which equally tally with the precedent part of the sentence, fit into the general frame of the deed, and complete the grammatical structure. “Such debts” will do; it will make the clause quite sensible and perfect in grammar, and yet leave it quite imperfect as a fencing clause; or “such deeds,” or “such acts,” (which would only mean criminal acts). Then, what right have we to choose one insertion rather than any of the others; or what right have we to supply, as the Court below has done, “all such deeds, debts, and acts,” or “all such “contraventions whatsoever?” This is assuming that we know these, and none other, to be the very words omitted,—that we knew the things expressed by these words, and no other things whatsoever, to be the things which it was intended to declare and to make null. Probability—conjecture—guess—may lead us to think thus, but we have no right at all to use such helps. Dr. Bentley would possibly have inserted such words with little hesitation, even had he found all the codices left them out; but courts of law, how fair so ever may seem the reason for concluding that the thing omitted was of

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one kind rather than any other, cannot allow themselves to act upon such reasoning, unless the things inserted make the implication necessary, and not conjectural. The only warrant for intendment with us is the sense actually expressed. Let us, after all, only consider why it is that we are rather called upon to insert these words, “all such contraventions,” than those words of lesser scope and comprehension, “all such debts,” or “all such acts.” There is really no reason whatever for the preference but one: this insertion makes the clause a complete irritancy, and the deed a perfect tailzie. But what right have we to make it such, — to elect the course of intendment or implication, which will completely fence and enforce the prohibitions, in preference to any one of the several courses which will leave those prohibitions unprotected and ineffectual? After all, it comes to this, that our choice is guided by the assumption that the framer of the deed intended to make it perfect, and not to leave it inoperative, — to fence his prohibitions, and not to leave them bare. But this assumption is quite gratuitous, and one which we have no right whatever to make, — a proposition which I need hardly stop to demonstrate. If we had any right to go upon such ground, every Scotch tailzie, how imperfect soever, would be completed in a trice; the Duntreath case, and those on which it rested, as well as all it has so justly given rise to, would at once be overthrown; for who ever doubted that the intention of the maker of all those tailzies was to fetter the disponee as well as, nay, even more than the heirs of tailzie? The Tillycoultrie case, and all that class, would in like manner be subverted; for no one ever supposed that he who had

carefully, and indeed effectually, tied up his heirs of entail from altering the order of succession in any particular, or from burdening the estate, or affecting it in any manner of way, intended to allow of its being sold the day after his decease. But in truth, if the supposed purpose of making the entail complete is allowed to guide us in any case, there is at once an end of all the law of entail, as far as construction goes, nay, an end of it altogether; for the total omission of an irritant clause, or a resolute, or both, becomes immaterial, especially if a single fragment of each, such as “with” and “and under this further irritancy, that is to say,” is found on the face of the deed; nay, all that a person seised of an estate in fee simple would have to do, in order effectually to entail it, would be to set forth the parcels, and declare the series of heirs, and then to add his direction, that a valid entail of such estate should be understood as constituted in their favour. I need hardly stop to remark, that a like latitude of construction would overturn our whole law of executory devises in England. No one, in construing such a devise, ever had a moment’s doubt of the testator’s meaning, or supposed that he intended to give nothing at all to the devisee over; consequently no limitation over could be held too remote, and in all such provisions we should be called upon to supply the words, “living at the death,” for the purpose of effectuating the intention. Yet absurd as this position appears, there is really no other conceivable ground for supplying the words, as the Court below has here done, — no other reason can be given for saying that the nominative left out is, “all such contraventions,” rather than many

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other things which can be readily named, except that those larger and more comprehensive words make the irritancy effectual and the conveyance complete. The reason which I have thus given appears to me quite decisive against the decree, and leaves no necessity for further examination of the case, unless we are bound by authority, which I shall immediately consider; yet I shall so far continue my argument as to dispose of another construction, ingeniously suggested, and of another ground upon which the decree below has been rested here, though not there. The construction is this: the words “shall be of no force, strength, or effect, and ineffectual and unavailable,” are rejected as nonsense, for want of grammar, or rather of a verb, (for want of grammar is a phrase very incorrectly used throughout this argument, that defect being always immaterial where there is any intelligible sense expressed,) and then we are desired to read what remains; but first, there is another member of the sentence also to be got rid of, viz. “not only,” for else the sense is still quite imperfect. But suppose this further objection waived, and then we read the whole residue, there is an insuperable objection to thus proceeding with the sentence; the words you leave out are closely connected with those you suffer to stand; and you have no right at all to connect the words “against the other heirs of tailzie” with what the maker of the deed never thought of connecting them with, viz. “the estate shall not be burdened with acts and deeds;” he only said that something (he did not tell what) “shall not be effectual against the heirs of tailzie.” What possible right can we have, because he said, that against those heirs of

tailzie a certain thing not mentioned should be null, to make him say that against those heirs of tailzie the estate should not be burdened, when he has never said one word as to the effect of those burdens upon those heirs? No further argument needs be held to make us reject at once this construction; nay, even if we are allowed so to read the clause, it is still useless, unless we assume the truth of the proposition I am next to deal with, and for which the former assumption, were we at liberty to make it, would only clear the way. It is contended that the clause is, after all, and as it stands, a complete irritancy, and that in substance and effect it declares all acts and deeds in contravention null and void; if so, there is an end of the question. But the first difficulty which we have here to get over is, to understand how, if it be a complete irritancy, the learned judges of the Court below should have been driven to the very forced kind of construction, by supplying words which alone they resort to in support of their decree, when, without any such violence to the instrument as it stands, they might so easily have accomplished the same purpose, and supported their position. Here is a sufficient irritancy, by the respondents' present argument, and as the clause stands it is said to be enough; but yet the learned judges held it quite inoperative, unless another limb was added, and that indeed rather a head than any other member; for it is the nominative or object concerning which the proposition is to treat. Surely we must suppose that those learned persons had a very clear opinion that the clause, as it stood, was any thing rather than a perfect irritancy, when they had recourse to this device of

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conjectural construction; and in a case like the present I should certainly hold it most perilous for your Lordships to sustain the judgment below upon a ground never relied upon by the judges, after rejecting all the grounds they had taken. But in case it should still be said that the decree may stand, though upon other reasons than were assigned by those who pronounced it, I feel bound to state that I clearly perceive why no Scotch lawyer ever thought of resting the argument for the entail upon any such view as is now pressed upon us. The law is, that in order to make the tailzie effectual, not only to prohibit and resolve, that is, forfeit in the contravener, but also declare null the thing done in contravention of the prohibition, there must be a declaration of nullity, sometimes called irritancy; but that word is also used for the clause of forfeiture, and sometimes it is used to designate both the fencing clauses together. But a nullity must in some way be declared, and it must be declared in precise and distinct terms; and though not in one set technical phrase, yet it must be declared with such precision that you read it as in the deed, and do not merely gather it by intendment. Nor have you any right whatever to say that the nullity exists, because things are stated which imply a nullity, or things which would follow from that nullity have been declared. Thus, observe the other kinds of prohibition: it would not be a valid prohibition to sell, annailzie, or dispone, were an entail to forbid "making any title to any disponee;" and yet no one so tied up could effectually sell. So it clearly is not a prohibition to sell, if you only prohibit altering the order of succession, or doing any thing

whereby the estate may be adjudged or evicted ; and yet an estate may be adjudged or evicted by the purchaser, if it be sold ; and if it be sold, the order of succession is altered with a vengeance. So here, if the acts or deeds done be null, it will follow that they cannot burden the estate, or affect the succeeding heir of tailzie. But this is not the same thing with declaring the acts or deeds null in themselves ; it is a declaration that certain things shall not have any effect against the estate or the heirs of tailzie ; it is different from a declaration, that those things shall be in themselves null and void. Those same things done by a lunatic,—his committing treason, or making a conveyance, would not burden or affect the estate ; and yet we could hardly say the acts, till impeached and tried, were null. The nullity supposed to be declared might be possibly held satisfied by application to this particular case ; but the nullity must be such as will plainly appear on the record to third parties,—those parties for whose safety the whole entail law, from the statute, perhaps from the Stormont case downward, is framed. If there had been a declaration, that the things done in contravention should neither burden the estate, nor prejudice the heirs of tailzie, and that they should not avail any purchaser, creditor, or other singular successor, the case would have stood far better for the argument I am now dealing with, and yet I should have held even that a defective nullity. As it stands, the defect is more glaring ; indeed, the nullity is only at best one declared against “ the validity of the “ things done to burden the estate, or make it liable to “ those acts.” How is this a general nullity ? How does it affect a sale ? It declares the estate free from

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debt or wadsets, but not free from the effects of sale. Suppose a sale,—is that declared void and unavailable to the purchaser, by merely saying that the estate shall not be burdened? If so, sale is implied in all clauses which relate to burdening or making liable; but this never yet was argued. The last of the prohibitions before the irritancies is larger than this, for it says “affected” as well as “burdened;” this says only “burdened” and “liable,” which refer to encumbering and not selling. It was ingeniously contended for the respondent, that acts and deeds could only have force in one of two ways, either by affecting the estate, or by binding the heirs of tailzie succeeding to it as owners in their order, and that the clause, as it stands, declares that neither the estate nor the heirs shall be affected by any acts of contravention. But this is not true; the clause only says, the estate shall not be burdened or made liable in consequence of things done, and that the heirs shall be free therefrom, that is, from the debts, deeds, crimes, and acts. This is clearly a very different thing from saying, that the estate and the heirs of tailzie shall in no manner of way be affected by any thing, whether by sale or by mortgage, done in contravention; it refers to one class of contraventions, and to one only, viz. encumbering or burdening; the words go no further in any part of the clause. And after all, this argument which I have been answering assumes that we have a right to leave out the words “not only,” and “shall be,” &c., and to tack on the following words, “against the other heirs,” which the clause connects with one set of words, to another set quite separate, the impossibility of which tacking I have before shown.

It remains only that I advert to the authorities, and these need not detain us. No one pretends that any case is directly in point,—that any authority is to be found in the books for the kind of construction by implication here propounded,—while all the general principles, laid down and recognized by the uniform course of decision upon the law of entail, are most repugnant to any such course. The Fowlis case, decided here<sup>1</sup> as well as below, is plainly distinguishable from this. Indeed, except that there was an omission in both deeds, there is no other resemblance between the two tailzies,—the clauses were complete; but in the resignation the entailer directed the lands to be resigned into the hands of the superior, not “for new infeftment,” but “to be made and granted to me and others,” and the Court and your Lordships supplied “for new infeftment.” But first, the “new infeftment” supplied of necessity followed from the resignation expressed, and the new series of heirs specified, beginning with the resigner himself; next, there was literally, and without supplying any thing, enough to accomplish the intent, rejecting only “made” as surplusage. Thus it stood that the lands were resigned into the superior’s hands, “to be made and granted” to him and others. Lord Corehouse indeed denies this reading of “granted,” because “made” does not apply he thinks to a grant of lands; it may nowever be read “made over and granted.” Is the supplying “over,” in that case, any thing like supplying the whole thing to be declared null in the present case of Hoddum? However, I take leave to deny that there is

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<sup>1</sup> Munro v. Munro, 25th July 1828, 3 W. & S. 344.



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any harm in rejecting “made” altogether as inapplicable to the conveyance of lands, while “granted,” the most appropriate word of all we know for such a purpose, was actually in the clause. With respect to the other authorities: The Roxburgh case really has no kind of application. In Langston v. Langston, your Lordships and the Court of Common Pleas held that a limitation to the second, third, fourth, and “other sons” included the eldest, not because you supplied the line, which had in point of fact been omitted in engrossing from the draft, (for that fact you had no right to know any thing of,) but because the words “other sons” do literally include the eldest; and though generally used for younger sons not specified, those words are so used only, because generally the first son is specified, in which case “other” must mean the younger. There was, moreover, in that instrument a charge by way of term for the daughters; and had the first son not been included, the absurdity would have followed of an estate being limited to A., burdened with a charge in A.’s favour,—a kind of argument quite applicable to the case of a will, but which never could have found a place in any discussion arising on the clauses of a Scotch tailzie. For these reasons, I have no hesitation in recommending your Lordships to reverse the decree in this case, and declaring the entail insufficient to prevent the heirs of tailzie from selling, disposing, burdening, &c., in terms of the conclusions of the summons, and to remit to the Court of Session to proceed further therein. My Lords, it is very satisfactory to know that the learned Chief Justice of the Court of King’s Bench, with whom I heard the second argument in this case,

agrees entirely in the views I have taken, and that the Lord Chief Baron, who, though not now present, attended the second argument, also concurs generally in the views I have taken the liberty of stating. And, my Lords, it is a great satisfaction to reflect, that for the third time in this case the decisions of your Lordships House preserve the Scotch law entire. I refer to the decision in 1770 of the Duntreath case by Lord Mansfield; the judgment which your Lordships pronounced very lately in the Herbertshire case; and the case now before your Lordships; and I have no manner of doubt that the candour and learning, as well as acuteness of the learned judges in the Court below, will induce them to receive these reasons (which I have thought it right to put into an authentic shape) in good part, and that they will upon this occasion come to the opinion to which they have in former cases come, that though our decision overrules their decree, yet it is framed according to the principles of the law of Scotland, adheres to the law, and supports the law, not permitting it to be altered by judicial construction. If it is to be altered, it must be done by authority of the legislature. I am far from saying that no change is required; but I am very clear that it is not to be made by any court other than the High Court of Parliament.

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LORD DENMAN.—My Lords, I think it proper to say, that having on the first hearing of this case felt doubts, those doubts have been completely removed by the subsequent argument. My noble and learned friend has most fully expressed my opinions; and entirely agreeing

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in the view he has taken, I do not think it necessary to trouble your Lordships by recapitulating the reasons which have been so ably stated by him.

The House of Lords ordered and adjudged, That the several interlocutors complained of in the said appeal be, and the same are hereby reversed: And it is further ordered, That the said cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment.

RICHARDSON and CONNELL—SPOTTISWOODE and  
ROBERTSON,—Solicitors.