justice of the claim by careful and sufficient investigation.

The Lord Ordinary on the Bills, having ordered a record to be made up and closed before answer, appointed the trustee to lodge in process a report "stating generally what is the proof upon which he sustained the claim of the respondent Alex. Simpson." On considering this report the Lord Ordinary pronounced the following interlocutor, which has become final :—

Edinburgh, 19th May 1866.—The Lord Ordinary having heard parties' procurators on the report by the trustee, and considered the closed record and productions, recals *hoc statu* the deliverance appealed from, and remits to the trustee to allow the respondent to adduce further evidence in support of his claim, and thereafter to proceed thereon as shall seem just: Finds the respondent liable in expenses, and remits the account to the Auditor to tax and report.

(Signed) DAVID MURE.

Counsel for Appellants—Alex. Moncrieff. Agents White-Millar, & Robson, S.S.C.

Counsel for Claimant—J. H. A. Macdonald. Agent—John Thomson, S.SC.

OUTER HOUSE.

(Before Lord Barcaple.)

LOCALITY OF BARONY PARISH OF GLASGOW.

Locality—Common Agent—Rental. In the election of a common agent in a locality the proven and not the teindable rental of the parish regulates the voting.

At a meeting of the heritors and the agents of the heritors of the Barony Parish of Glasgow, held on the 27th February 1866, for the purpose of naming a person to be suggested to the Lord Ordinary as common agent for conducting the locality of the stipend of the ministers of the first and second charges of the Barony Parish of Glasgow, Mr W. B. Hay, S.S.C., and Mr James M'Knight, W.S., were respectively moved and seconded. A vote having been taken, "the meeting, in consequence of the state and magnitude of the rental, agreed to remit to Mr Logan, the teind clerk, to ascertain which of the two candidates has the majority of votes in the rental, and they further agreed to recommend the said agent to the Lord Ordinary as common agent to conduct the locality." Mr Logan reported to the Lord Ordinary that the rental of the heritors who voted for Mr Hay was £103,814, 11s. 10¾d., and the rental of those who voted for Mr M'Knight was £44,081, 16s. 10d. He therefore came to the conclusion that Mr Hay had a majority of votes over Mr M'Knight of £59,732, 15s. of rental.

Mr Logan further reported as follows:—"It has been pressed upon the clerk that in scrutinising the votes he should have only regarded the *teindable rental*, and had the general rental been adjusted before the heritors were held as confessed, in the manner Mr Stirling Crawford adjusted his separate rental, this position would have been quite correct, but as the general body of the heritors allowed a prepared state and scheme of the rental to be reported by the Lord Ordinary to the Court, whereon the augmentation was pleaded and granted, and whereon an *interim* locality of the stipend must be prepared, it is too late to urge the *teindable* rental as the rule of voting for common agent. Moreover, this question has already been settled not only by express decision but by constant practice since a competition arose in 1821 in the augmentation of the stipend of the parish of St Cuthberts for the common agency, and after minutes of debate, the Court of Teinds pronounced this interlocutor :—

"'*Edinburgh, 7th March* 1821.—The Lords having advised the minute for John Ramsay, and the other minute for John Murray, Find that the proven rental whereupon the augmentation proceeded should regulate the election, and remit to Lord Meadowbank to approve of Mr Ramsay's nomination as common agent, and to do otherwise in the locality as he may think proper, and to report.

(Signed) C. HOPE, *I.P.D.*'

"For the Lord Ordinary's information, the clerk transmits with this report the original papers and interlocutor of Court in the case referred to."

The Lord Ordinary (Barcaple) having considered this report and heard counsel for Mr M'Knight, confirmed Mr Hay as common agent. This was acquiesced in.

Counsel for Mr Hay—John Burnet.

Counsel for Mr M'Knight—David Hall.

HOUSE OF LORDS.

Tuesday, June 12.

HOWDEN *v.* FLEEMING.

(In Court of Session, 3 Macph. 748.)

Entail—Irritant Clause—Validity—Stat. 1685. Held that the words "sicklike as if the same had never been *made*," appended to an irritant clause, were, though not aptly used, unnecessary to the completion of the clause, and not restrictive of it, and therefore that the entail was not ineffectual.

This was an appeal from an interlocutor pronounced by the Second Division of the Court of Session in an action of declarator at the instance of Lady Hawarden, in whose right the respondent now is, against the appellant Mr James Howden, accountant in Edinburgh, trustee upon the sequestrated estate of the Right Honourable John, fourteenth Baron Elphinstone, now deceased, and others. The object of the action was to establish by decree of declarator the validity of certain deeds of entail, and the right of Lady Hawarden, in virtue of them, to the lands of Wigtown, Waterhead, and Cumbernauld. The appellant maintained that the late Baron Elphinstone was proprietor in fee-simple of these lands, which were therefore liable for the payment of his debts. He objects to the deeds of entail on the grounds—first, that the word "*made*" used in the irritant clause with reference to debts is a *nomen juris*, and applies to debts contracted by deed only; second, that if it has not that limited application the word "*concessa*" used in a subsequent title had reference to grants by deed only, and that therefore the requirements of the Act of 1685 had not been complied with; third, that the original entail was invalid, inasmuch as the resolutive clause did not provide that on a contravention the next heir should have power to make up a title to the lands without representing the contravener.

The deed provides that in case any of the heirs mentioned, other than heirs-male of his body, or of the body of Mr Charles Fleeming, should happen to succeed to the peerage, they should be bound and obliged immediately to denude themselves of all right, title, and interest to the estate, which should thenceforth *ipso facto* accrue and

devolve upon his next heir of tailzie, sicklike as if the person so succeeding were naturally dead. The prohibitory clause declares that it shall noways be lawful to the heirs of tailzie to sell, annailzie, dispone, redeemably or irredeemably, dilapidate, or put away the said lands, or any part thereof, for whatever cause or occasion, either onerous or gratuitous, &c. ; and that it shall not be lawful to any of them to contract or ontake debts thereupon, or to grant wadsets thereof, or annual rents or annuities furth of the same ; nor to do any other fact or deed whatsomever, directly, or indirectly, whereby the said lands, or any part thereof, may be adjudged, apprised, or otherwise affected, burdened, or evicted, except allenarly, in so far as thereby specially reserved. The irritant clause declares that if any of the heirs of tailzie should happen to contravene the provisions and limitations contained in the deed, then and in that case all such *acts and deeds of contravention* should not only be null and void to all intents and purposes, "sicklike as if the same had never been made," but also that the heirs so contravening should *ipso facto* amit and lose the estate. The entail remained a personal right during the lifetime of Earl John, who, dying without heirs-male of his body, was succeeded in 1744 by his brother Charles Fleeming, who possessed the estate under the entail, but made up no title. He also dying without heirs-male of his body, was succeeded in 1747 by Lady Clementina Fleeming, the only child of Earl John. She made up her title by serving heir of tailzie and provision in general to her father in terms of the deed of entail, and by expeding a Crown charter of resignation upon the procuratory in the bond of tailzie, and taking infeftment thereon. This charter, and the instrument of sasine following thereon, repeats the whole conditions, provisions, and clauses irritant and resolutive of the entail. The irritant clause is, however, expressed thus:—It is said that in the event of contravention, "tunc et in eo casu omnia talia acta et facta contraventionis per presentes declarantur vacua et nulla ad omnes intentus et proposita eodem modeo ac si eadem nunquam fuerant concessa."

The appellant pleaded that the deeds of entail were ineffectual, in respect that the irritant clause in them did not apply to or embrace the prohibition against the contracting of debt.

The Lord Ordinary (Kinloch) held that the objections to the entails were not well founded, and he therefore found and declared in terms of the conclusions of the summons ; and the Inner House, upon reclaiming note, affirmed his decision. Mr Howden thereupon presented this appeal.

The ATTORNEY-GENERAL (Sir R. Palmer) and ROLT, Q.C., for the appellant, contended that the word "made" could have no application to the contraction of debt, and referred to Sharpe *v.* Sharpe, 10 S. 747, and 1 S. and M'L. 594; Munro, 4 S. 467, and 3 W. & S. 144 ; Lumsden *v.* Lumsden (Auchindoir case), 2 Bell's Appeals, 115 ; Ogilvy *v.* the Earl of Airlie, 2 Macqueen, 271, and other cases to show that the word "made" applied to written instruments only. He also referred to Johnson's Dictionary.

Lord WESTBURY—To make a fault is bad English, but "to make a mistake" is perfectly good. What is the meaning of "act of omission," an expression which occurs so frequently? Can there be an act of omission?

The ATTORNEY-GENERAL said he quite understood his Lordship's observation, which also went to show the invalidity of the entail.

Lord WESTBURY—It would be very hard, however, that the language of these deeds should not receive its common interpretation. Besides, if the clause in which the word "made" is used be merely surplusage, does not the maxim *utile per inutile non vitiatur* apply?

The ATTORNEY-GENERAL said his contention was the clause was not surplusage. In the second place, he submitted that the word "*concessa*" used in the investiture as a translation of the word "made," showed that the latter was intended to be used in the granting of deeds only ; or that, at all events, "*concessa*" had itself that limited meaning. In the third place, the resolutive clause was defective in not providing in terms of the Act of 1685 that on a contravention the next heir should have power to make up a title to the lands without representing the contravener.

The LORD CHANCELLOR—The Act empowers him to do so, and no provision to that effect is necessary in the deed.

The ATTORNEY-GENERAL said he saw that the proposition did not meet with any favour from their Lordships, and he would therefore not press it.

ANDERSON, Q.C., Sir HUGH CAIRNS, Q.C., and G. H. PATTISON (of the Scotch bar), for the respondent, were not called upon.

The LORD CHANCELLOR (Cranworth)—My Lords, it is perfectly true that upon very intelligible grounds the Courts of Scotland and this House have always construed deeds of entail very strictly, so as to give no encouragement to that which is to fetter the common and ordinary circulation of property. And if deeds can be fairly so construed as not to create an entail, the Courts in Scotland and this House (which is for these purposes the same as a Court in Scotland) will not only be not astute to further the object of the creation of the estate tail, but will be (so to speak) perhaps rather astute in finding such a construction as shall defeat it. It is, however, true (as was pointed out by Lord Brougham in one of the cases to which we have been referred) that the construction which is here sought to be set is not only contrary to the ordinary rules of construction, but it is contrary to that which we know must have been the intention of the settlor ; for when a person creates an entail, of course he means it to have effect. And therefore when you find out words to show that it is not to have effect, you are defeating his intention. And although the rule of construction in favour of the free circulation of property has been for a long time adopted and acted upon, it must not be a rule that is to lead courts of justice and this House to pretend to see doubts and difficulties where there are none, and to put a construction upon the words which no person looking at them, and unaware of this rule of construction, could possibly for a moment entertain. Now, let us see what the point is here. It lies in the narrowest compass. The entail created has, *in gremio*, the three ordinary prohibitions, a prohibition against alienation, a prohibition against diverting the ordinary course of descent chalked out in the deed, and a prohibition against incurring debts, whereby the lands might in future get into the hands of creditors ; and then follows this irritant clause, "And further providing that if it shall happen any of the heirs of tailzie above mentioned to contravene the provisions and limitations above-written, or any of them," that is, if the heirs of entail shall either do the positive act of alienating, or the positive act of diverting the course of succession, or the negative act (as I read it) of incurring debts whereby the lands might (as we

should say in this country) be taken in execution, "then and in that case all such acts and deeds of contravention," words that clearly include acts of omission as well as commission (if it be said that omission is not an *act*, I would appeal to the very language I have used, "acts of omission," which is a very common expression)—"then and in that case all such acts and deeds of contravention are not only hereby declared to be void and null to all intents and purposes" (then just leave out the few following words and proceed), "but also the heir so contravening shall *ipso facto* amit, lose, and tine all right to the said lands and estate," &c. Now, what are the words that are said to create the doubt? They are these—"sicklike as if the same had never been made." Now, it is said that an act of *omission* cannot be *made*; and that therefore you must so construe these words as to confine them to acts of commission, which, although not very accurately, we may say are acts "made." To this there are two answers which are perfectly satisfactory to my mind, namely, first, that inasmuch as the words are "sicklike as if the same had never been made," and inasmuch as the word "same" applies to all the deeds and acts of contravention specified, and those deeds and acts include acts of omission as well as of commission, if the word "made" is not aptly used it is only that the party who prepared the deed has used a word incautiously that does not include everything that was intended. But I do not think that signifies at all, for if it applies only to acts and deeds properly so called, then I say, upon ordinary principles it must be read *reddendo singulos singulis*, that is, if there is any contravention, then the estate is to go over, the party is to lose the estate, such acts being void to all intents and purposes, "sicklike as if the same had never been made;" that is, as if the deed from which the contravention has arisen had never been done. And this latter construction applies exactly as well to the subsequent Latin instrument, the deed of investiture, as it does to the original deed of entail. Whether the Lord Ordinary arrived at the conclusion to which he came upon right grounds it is not material to inquire; but I think there is not the least doubt that the Lord Ordinary and the Court of Session both arrived at the proper conclusion, and therefore I have no hesitation in moving your Lordships to affirm the interlocutors appealed from.

Lord CHELMSFORD—My Lords, the words "sicklike as if the same had never been made" are in my opinion not explanatory or interpretative, but merely emphatic; and if you give a qualifying and restrictive sense to these words, then, although it is perfectly clear that acts as well as deeds of contravention were intended to be rendered null and void, you would have to strike the word "acts" entirely out of the irritant clause. The question is so very clearly put by the Lord Justice-Clerk that I can only adopt his language in expressing the same opinion. His Lordship says—"It rather appears to me that the words 'sicklike as if the same had never been made' are not only surplusage, quite unnecessary to the completion of the irritant clause, or to working out or explaining its meaning, but that the addition is neither intended, nor, according to the grammatical structure of the sentence, is it calculated to restrict what goes before it. I am well aware that it may not have been intended to restrict what goes before, and still it may have that effect according to the construction which is given to deeds of entail. But I think it is neither intended, nor, according to the proper grammatical structure of the sentence, is it calculated to have that effect. A declaration of irritancy which is followed by such words as "in so far as" would be very different, because a sentence introduced by the words "in so far as" clearly imports a limitation of what goes before. And in like manner, if you were to say that all acts and deeds "are to be irritated to this effect that," you would then limit what goes before by that which follows. But I think the true purpose of the words "sicklike as if" is not to limit what goes before, but that it is an attempt to expound by an illustration the meaning of that which goes before." That is very clearly expressed. I entirely agree with it, and I think your Lordships ought to affirm the decision of the Court below.

Lord WESTBURY—My Lords, I have nothing to add to the judgments of the Court of Session. I think those judgments are extremely satisfactory, and that both the Lord Ordinary and the Judges of the Second Division have arrived at the right interpretation of the language of this entail.

Interlocutors affirmed and appeal dismissed with costs.

Agents for Appellant — Scott, Moncrieff, & Dalgety, W.S., and Connell & Hope, London.

Agents for Respondent—Thos. Ranken, S.S.C., and Tatham & Procter, London.

Friday, July 13.

BICKET *v.* MORRIS *et uxor.*

(In Court of Session, 2 Macph. 1082.)

Property—Running Water—Common Interest—Building in alveo—*Acquiescence.* (1) A proprietor on the bank of a running stream is not entitled to make an erection in the *alveus* which causes an obstruction to the current, and an adjacent proprietor may obtain interdict or removal of the erection without alleging or proving immediate damage; (2) circumstances in which held that a plea of acquiescence was not well founded.

Process—Appeal to House of Lords—Competency. In a case which was one of the class appropriated to the Jury Court by the Judicature Act, but in which the proof had been of consent taken on commission, an appeal to the House of Lords held competent, in respect the respondents had themselves reclaimed from the Lord Ordinary to the Inner House, and were thus barred from objecting to the competency.

This was an appeal from an interlocutor of the Second Division of the Court of Session. The parties are proprietors of premises in Kilmarnock, both of which front the Water of Kilmarnock, those of the appellant being on the north bank, and those of the respondent on the south. Prior to the year 1860 there were, amongst other tenements on the north bank of the water, one belonging to the appellant Mr Bicket, another occupied as a cooperage, and another known as "Miller's House," which latter was the highest up the bank, and extended some three or four feet into the river beyond the adjoining tenements mentioned. In that year Mr Bicket contemplated purchasing the ground occupied as a cooperage, pulling down the old buildings which occupied it, and erecting new ones. He alleges that the back wall of the cooperage, which was in a very ruinous condition, had a very broad foundation—extending into the