Tailzie.—Where there is an effectual fetter against the contraction of debt, and adjudging for payment of it, the creditor cannot work out his remedy by taking advantage of a defect in the fetters against selling, by adjudging the lands for payment of his debt, on the pretext that adjudication being a judicial sale, it is not prohibited.

On 15th of June, 1802, General James Inglis Hamilton executed an entail of his lands of Murdostown in favour of James Hamilton and a series of heirs under the following fetters:

“Which disposition and assignation is granted and is to be accepted by the said Captain James Hamilton and his foresaids whom failing the other persons before named and their descendants heirs of this entail with and under the foresaid burden and also with and under the provisions declarations conditions limitations and reservations following and no otherways like as it is hereby provided conditioned and declared that it shall not be leisom or lawful for the said Captain James Hamilton nor his foresaids nor for any other of the other heirs of this entail above-named or their descendants male or female succeeding to the said lands in virtue hereof to burden or affect the same with any debt or sums of money over and above the sum of 8000 merks Scots with which sum they are hereby allowed to burden and affect the same and which sum being once made a burden on the said estate by the said Captain James Hamilton or his foresaids or any other of the...
persons substitutes or their descendants heirs of entail no
more can be laid upon it. And if they do in the contrair all
such debts and deeds and bonds granted for the sums of money
more than the 8000 merks are hereby declared to be void
and null in so far as concerns or may extend against the said
lands of Murdoston and others above written. And if it shall
happen that the said lands be adjudged for payment thereof
from the said Captain James Hamilton or any of his foresaids
or any of the persons before named and their heirs of taillie
or descendants then and in that case the person against whom
the said adjudication shall be obtained or his descendants heirs
of entail shall be bound and obliged to pay the said debt and
relieve the foresaid lands and estate thereof within seven years
after the date of the said adjudication wherein if they fail being
first required thereto by the next heir of entail in presence of
a notary public and witnesses as effeirs and shall suffer an
half-year to elapse thereafter without paying the said debt in
the said adjudication or redeeming the same and freeing and
disburdening the said five-pound land thereof and in that
case the person failing and neglecting so to do shall ipso facto
amit and lose all right they had to the said lands and it shall
be leisom and lawful for the next heir of entail to succeed
thereto as if the contravener were actually dead without pre-
judice however to the said Captain James Hamilton to provide
for any spouse he may have a jointure or annuity out of the
said estate or lands hereby disponed not exceeding 133l. 6s. 8d.
sterling and to his heirs male and the other persons substitutes
and their heirs male to provide an yearly jointure or annuity
to their spouses during their lives of a sum not exceeding eight
hundred merks only. And it is hereby further declared and pro-
vided that the said Captain James Hamilton and his foresaids
nor the persons above-named and their descendants heirs of
this entail shall not sell alienate or dispone the said lands or
any part thereof nor do any fact or deed directly or indirectly

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"whereby the right to the said lands or any part thereof may be evicted from them or the order of succession above set down in any degree changed or altered Nor shall it be lawful to or in their power to sell or dispose of the household furniture and other moveables above assigned and dispensed to them with the lands and to make a part of this entail except the cattle that may be on the ground and such part of the furniture as cannot be preserved from utter decay and perishing nor shall it be lawful to them to cut down or sell the fine growing baron timber upon the estate except what is copse and fir trees as they decay in order to preserve the beauty of the place and if they do in the contrary the person so contravening shall amit and lose all right he had to the said lands and it shall be leisom and lawful for the next heir of entail to succeed thereto as if the contravener were truly dead and likewise it is hereby provided and declared that the said Captain James Hamilton and his heirs-male and the persons before named substitutes and their heirs-male and the husbands of the heirs-female who shall succeed and be married shall bear and use the name and arms of Inglis of Murdoston and if they or any of them shall fail to observe this and the several clauses provisions conditions and declaratiQns before-written then and in that case the person so failing and contravening shall amit and lose the benefit of this present right and disposition and the right of the foresaid lands shall fall accresce and belong to the next heir of entail that would succeed if the said contravener was actually dead."

The succession to the lands opened to Sir Alexander Cochrane, who was infeft in them in July, 1820, under a precept of clare constat from the superior.

Previous to having been so infelt, Sir Alexander Cochrane had granted a bond and disposition in security over the lands for the sum of 8000 merks, the sum allowed by the entail to be borrowed by the heirs.
In the year 1821, Sir Alexander gave the Appellants a bond and mortgage over estates in the West Indies for payment of another sum of £12,000.

The Appellants brought an action against Sir Alexander for payment of the sum owing upon this last bond, and for adjudication of the lands of Murdostown. In June, 1831, the Appellants obtained decree in that action, adjudging the lands, "and all right, title, and interest, claim of right, property, and possession, petitory or possessory, which the Defender, his authors or predecessors, heirs or successors, has, or may claim, or pretend thereto, particularly the power and faculty competent to the Defender to sell the said lands and others under the disposition and deed of succession granted by the said General James Inglis Hamilton in his favour, dated the 15th day of June 1802, together with all and sundry charters, dispositions, assignations, conveyances, procuratories and instruments of resignation, precepts and instruments of sasine, contracts special and general, services, adjudications, decrees of sale, tacks and rights of teinds, decrees of plat, prorogation, and valuation thereof, and all other writs, evidents, rights, titles, and securities of and concerning the said lands and others, with all reversion of the same, legal or conventional, and decreed and declared, and hereby decern and declare the same to pertain and belong to the Pursuers, their heirs and assignees heritably, for payment and satisfaction to them of the foresaid principal sum of £12,000, and interest thereof from the said 30th day of April, 1830, to the date of this decreet of adjudication, all contained in the bond above narrated, and ordained, and hereby ordain the Pursuers and their foresaids, to be infeft and seized in the lands, rights, and others foresaid so adjudged, to be held by them of the immediate lawful superiors of the same, in the same manner, and as freely in all respects as the Defender, his predecessors and authors,
"held, hold, or might have held the same, reserving all objections contra executionem, and ordains letters of horning," &c.

Upon this decree the Appellants charged the superior of the lands to grant them a charter of adjudication, which he did on 14th January, 1832, and they were infefted upon it on the 24th of the same month.

On the 26th of January, 1832, Sir Alexander Cochrane died, and on the 27th the Appellants recorded their infeftment.

On the 27th February, 1832, the Respondent, the son of Sir Alexander, obtained a precept of clare constat from the superior, upon which he was infefted in the lands as next heir of entail after his father, and his infeftment was recorded on the 2nd of March, 1832.

In May, 1832, the Respondent brought an action against the Appellants, concluding for reduction of the decree and charter of adjudication which had been obtained by them, and their infeftment upon the charter, upon the ground that Sir Alexander Cochrane possessed the lands under the entail of 1802, containing fetters against contracting debt, except to a certain amount; that this power had been exercised and exhausted previously to the contraction of the Appellants' debt, and therefore their adjudication was inhaible and inept, and adjudication of Sir Alexander's supposed power to sell the lands was incompetent, and even if the adjudication had been competent when it was pronounced, it had fallen by the death of Sir Alexander before the power had been exercised by an actual sale of the lands.

The Appellants pleaded in defence, that Sir Alexander Cochrane had power under the entail to sell the lands, and that power had been duly attached and was vested in them by the adjudication, and it was jus tertii to the Respondent when the power might be exercised.

The Lord Ordinary (Cuninghame) upon advising cases for the parties, pronounced the following interlocutor, adding a very long note explanatory of his reasons. "Finds it sufficiently
established, 1. That the late Sir Alexander Cochrane, the
original debtor, and the predecessor of Sir Thomas Cochrane,
Pursuer of the Reduction, was infent in, and possessed the
estate of Murdostown for many years, on a title which left
him the legal right of selling and alienating the lands, and
thus placed the fee thereof at his own absolute disposal. 2d.
That Messrs. Bogle and Company obtained a decree of adjudi-
cation at their instance against the said Alexander Cochr
ane, for a just and onerous cause, but reserving all objections
contra executionem, in the year preceding his death, and when
he was in possession of the estate on the said title. 3d. That
Sir Thomas Cochrane, the Pursuer, has taken up the said
lands and estate of Murdostown upon a retour, as heir of his
father, under the titles whereon the latter possessed the
estate, and thus represents his father in all legal obligations,
which are effectual against the said estate under the titles;
and farther, that he is bound to give effect to all competent
real diligence, used by the Defenders against Sir Alexander
Cochrane, while in possession. 4th. That the Pursuer of the
Reduction has failed to show in this Action, that the said
decree of adjudication was in any respect unfounded in its
grounds, or exceptionable on its legal merits when raised, or
that his predecessor, Sir Alexander Cochrane, could have
successfully opposed the same, if he had survived to abide
the ultimate discussion of the said diligence. On these
grounds, Finds that there are no grounds for now recalling or
rescinding the said decree of adjudication, or for refusing
execution thereof: And therefore repels the Reasons of
Reduction, as hitherto urged, and assoilzies the Defenders,
Messrs. Bogle and Company, from the Action of Reduction
at Sir Thomas Cochrane's instance, and decerns."

The Respondent reclaimed to the Inner House (1st divi-

sion), which ordered the papers to be laid before the other
division and the Lords Ordinary, and thereafter, in conformity
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with the opinions of a majority of the consulted Judges of 7 to 2, the Court pronounced the following interlocutor, which was the subject of the appeal:—"In conformity with the opinions of the majority of the whole Judges, alter the interlocutor of the Lord Ordinary reclaimed against; Sustain the Reasons of Reduction, and reduce, decern, and declare in terms of the reductive conclusions of the libel."

Mr. Turner and Mr. Inglis for the Appellants. I. The only prohibition, in regard to contracting debt, is that the heirs shall not "burden or affect" the lands with sums beyond 8000 merks. This does not amount to a prohibition against contracting debt by personal obligation, but is confined to preventing the creation of a real debt or security over the lands; for whatever might be the effect of these expressions to prevent the contraction of debt, whether by real or personal security, did they stand alone, the context plainly shows that creation of real security was the only subject of prohibition, for the permission to "burden or affect" the lands with the specified sum of 8000 merks, and the declaration that that sum being "made a burden," no more "can be laid" upon the lands, cannot be regarded, according to the known use of these terms in law language, as having reference to anything but the creation of a real security, which would be complete in itself to affect or burden the lands. Accordingly, there is no mention in the irritant clause which immediately follows this prohibition of contraction of debt, of adjudications which might be led for attaching the lands in respect of personal debts contracted. The clause sets out with saying that "such debts," i.e., debts secured by bond or real security so as to burden or affect the lands, shall be null; and then continues, that if the lands shall be adjudged for payment "thereof," i.e., of the debts so secured, the heir shall be bound to purge the adjudication, otherwise he shall
lose his right. There is therefore neither prohibition, resolution, nor irritancy directed against the contraction of debt generally; and even if the prohibition and irritancy should be held to have reference to debts generally, there is no irritancy of adjudications which may be led for payment of them, nor is there any resolution of the right of the heir contracting the debt. All that is done is to declare that the heir shall redeem the adjudication for payment of the debt or lose his right; there is therefore only a resolution in case of the adjudication not being redeemed, but none in case of the debt being contracted.

II. The entail contains a prohibition against sale and alienation, and a resolution of the right of the heir contravening; but there is nothing to irritate the right of the contravener. The scheme of the deed is to make every prohibition perfect by itself. Accordingly, the prohibition against debt is followed by a resolution and an irritancy, such as it is, confined to debt alone; then comes this prohibition against sale and alienation, followed by a resolution also confined to them alone. Sale being thus disposed of, there follows a new provision as to using the arms of the entailer, followed by its resolution. That resolution has the words, "and the several clauses, provisions, conditions, and declarations before written." It may be argued that these expressions have reference to all the previous prohibitions, and so give a resolution applicable both to sale and alienation, and to debt. But to give them such an application would be opposed to the general scope of the deed, which, as already observed, is to make each prohibition perfect by itself; and is opposed by this circumstance, that the provision as to the use of arms, which immediately precedes the words in question, is directed not to the general heirs under the deed, but to a particular class of them. The conveyance by the deed is to James Hamilton, and the heirs, "male or female," of his body, and to the heirs, "male or female," of several of the substitutes; but
this provision is directed to James Hamilton and his "heirs " male," and the "heirs male" of the other substitutes, and " the husbands of the heirs female."

III. There being no irritancy of sale or alienation, Sir Alexander Cochrane had in him *jus disponendi*, the great test of property. He might gratuitously, or for a price, have disposed the lands to any one whomsoever, and was to all purposes proprietor in fee simple. It Baillie Clark, 23rd February, 1809, 15 F. C. 211, a man infeft in liferent only, with a reserved power to sell and dispone, was held to be owner in fee simple; and in Dickson v. Dickson, *Mor.* 4,267, a bond taken to a father in liferent, and his son in fee, with power to the father to "uplift " and discharge," was found to belong to the father; and in Wilson v. Glen, where infeftment was taken to husband and wife, and longest liver of them, two in conjunct fee and liferent for her liferent use allenarly, and their son *nominatim*, his heirs and assignees in fee, with a reserved power of disposal to the father, the fee was found to be in the father in respect of the reserved power. If then Sir Alexander had the power to sell, his creditors must have a power to attach that right in him; otherwise the singular anomaly would be sanctioned of a person enjoying a fee which he could alienate voluntarily, but which his creditors could not attach. Whatever the debtor can convey, the law will attach.

[**Lord Chancellor.**—In the circumstances, the creditor never looked to the estate. There is no hardship upon him.]

It certainly is against the common law to allow an absolute control over property, and at the same time exempt it from liability to payment of the owner's debts.

[**Lord Chancellor.**—The law has been relaxed lately no doubt. But formerly there were few instances in which a creditor could attach his debtor's property.]

But the creditor could, by pressure, force the debtor to sell. In Kemp v. Watt, *Mor.* 15,528, Lord Braxfield said, "As in this
"case the heir of entail may sell, the creditors may force him to "sell." In Baillie v. Carmichael, Mor. 15,500, a personal creditor of the heir in possession was held entitled to make his debt effectual against the estate, because there was no irritancy of the debt. In Cathcart v. Cathcart, where a sale was defeated, the act was simulate, to defeat a prohibition against altering the order of succession; and the difference between that and a bona fide sale was carefully guarded against by the Lord Chancellor.

It is no doubt true, that all real debts through which the lands may be adjudged, are irritated, but the debt here was purely personal; and the effect of adjudging for payment is neither more nor less than to sell judicially for payment—it is a judicial alienation by way of sale, 1 Bell's Illustra., 705 and 718. If the heir could sell voluntarily, the sale made for him by the Court should multo magis be effectual, for it rests on the same foundation as a voluntary sale. The operation of adjudication is to transfer to the creditor every right that was in the debtor. It is immaterial therefore that Sir Alexander Cochrane had died before the power of sale was executed for him, because before his death the right to make the sale had been transferred by the adjudications which compelled the exercise of the jus disponendi. This may be said to be a round about away of getting rid of the prohibition against selling, but that won't avail; in Oliphant v. Scott, 8 Sh. 985, a lease, specially prohibited, was nevertheless sustained, because there was a warrandice in it which went to make a debt against the heir, and there was an imperfection in the fetters against contracting debt. No doubt an heir cannot do a thing well prohibited, because there is another thing which is defectively prohibited, but he may do the act defectively prohibited, and so perhaps come to do the act effectively prohibited.

Mr. Bethell and Mr. Roll for the Respondent, cited on the first point Adam v. Farquharson, 3 Bell's App., 295; Lindsay
v. Earl of Aboyne, 3 Bell's App., 254; and upon the third point, Stair iii. 2, 8; Grindlay v. Drysdale, 11 Sh. 896; Anderson v. Nasmyth, Mor. 10,676; Brown v. Bower, Mor. 5,440; M'Kenzie v. Ross and Co., Mor. 275; Landale v. Carmichael, Mor., 305; Ramsay v. Brownlee, Kilk. 3.

Lord Brougham.—My Lords, This was a case which was heard immediately after the last, and some of the points proceeding upon somewhat similar grounds, we postponed the judgments in the one case until we should hear the other. I entirely agree with my noble and learned friend in the opinion he has given, and will not go further into the case than by reading the statement of his reasons, which expresses my opinion most clearly and decidedly. We postponed this case just as we did the other, in order that there might be no doubt whatever upon our minds afterwards, although we had little or no hesitation at the time. My noble and learned friend says—

"Lord Moncrieff has so plainly and distinctly, and with such consequential brevity, expressed the opinion I have formed in this case, that I should, perhaps, be best performing my duty by declaring my adherence to what he has so expressed, and it is not my intention to do much more. I cannot, however, but observe upon the great evil of having points long since decided, and properly considered as part of the law, opened upon new discussions, and argued upon the principles which led to such decision. Great litigation and expense are uselessly incurred, and much of the valuable time of the Court consumed; but, above all, that practice leads to an apparent uncertainty in the law itself. These observations appear to me to apply to several of the points discussed in these papers. I cannot consider it a matter open for discussion that an entail, failing to effectuate its object as to some of the matters intended to be prohibited
"and guarded against, therefore fails as to others. It is true that, indirectly, the others may be affected by the failure of one, and an heir, not effectually prevented from selling, may be induced, by the pressure of creditors, to destroy the entail by the exercise of such a power. But that leaves untouched the protection of the entail as against the acts of the creditors themselves. Is was said, indeed, that an adjudgment by a creditor was, in fact, a sale, but if that could be maintained, that particular mode of sale is effectually prohibited and guarded against. That the contracting a debt which is permitted to affect the land is prohibited, cannot, I think, be open to doubt. And if so, that particular act, whether it be called selling or not, is effectually guarded against by the irritant and resolutive clauses. It is, however, impossible, in my opinion, to maintain the proposition that the act of the creditor is a selling within the meaning of that word, as used in this entail. I am, for these, amongst other reasons, of opinion that the intercolutor appealed from ought to be affirmed, with costs."

I have, therefore, to move your Lordships that this interlocutor be affirmed, with costs.

The opinion of Lord Moncrieff referred to, was in these terms:

"There are certain points which must be taken to be clear:—

1. The prohibition to burden with debts is a good prohibition against contracting debts which can affect the estate. All the cases, Nisbett, Burden, Vernor, show this, &c. &c. &c.

2. The prohibition is effectually secured by irritant and resolutive clauses.

3. Though there is a defect in the irritant clause in relation to the prohibition to sell, that does not affect the validity of the perfect restraint against debts. The case of Vernor is conclusive on this, and was decided on solid grounds.

4. If debts are effectually prohibited, it is not necessary
"that there should be a special clause irritating adjudications on " them. If the debts are annulled, the adjudication on them " must be null also. It is the very point of the nullity.

"5. It is perfectly clear to me, that the clauses obliging the " heir to purge any adjudication led, by paying the debt, relate " only to the debt of 8000 merks. It is so by the words simply " read; and is clearly so by the necessary and only meaning.

"6. The only question remaining is—Is adjudication equi-
" valent to a sale? I am clear that it is not. Whatever the " old apprising may have been in theory, I am clear that a " decree of general adjudication in modern law is no more than " pignus prætorium,—a step of diligence, which only creates a " security for debt. It is not the act of the debtor, but a " security taken by the act of the law. The debt remains " unpaid. The security may be abandoned, and other remedies " taken. The debtor is still the vassal. Even Erskine's doctrine, " taken with his qualifications, does not give a different result. " The other authorities are clear; such as President Campbell— " Eskgrove—Bell—Hume, and all the late cases, particularly " Drysdale, Mackenzie, &c. The cases as to special points,— " Interest—Prescription—are easily explained, though perhaps " not consistent in principle. But they do not alter the fixed " general rule. They arose from an unwillingness in the Court " to disturb such special matters which had been fixed in " practice.

"It is not necessary to resolve the supposed case of " sequestration. There is an erroneous assumption throughout " the argument, that where there is a defect in the irritant " or resolutive clause, the heir possesses in fee-simple. It is " not so: From the statutory defect, a sale made is effectual " to a third party purchaser. But correctly, the heir has no " right to sell, in violation of the prohibition. The Court has " repeatedly refused to entertain a declarator, to have it found " that he has even power to sell, unless a real sale has been
"actually made. If it were otherwise—that the power is
absolutely vested, and may be carried by sequestration as
part of the debtor's estate, this must now be competent
even after his death. But it will scarcely be maintained, that
the possibility of making an effectual sale, (for it is not pro-
perly a power,) could be taken up either by adjudication or
sequestration after a man's death.

"It has been decided, that creditors cannot force an heir in
possession to alter the succession, though that is not effec-
tually prohibited. This case is even stronger. And here the
very statement is, that Sir Alexander Cochrane refused to sell.
"I am therefore of opinion that the interlocutor of the Lord
Ordinary ought to be altered, and decree of reduction pro-
nounced in terms of the libel."

It is Ordered and Adjudged, That the said petition and appeal be,
and is hereby dismissed this House, and that the said interlocutor
therein complained of, be, and the same is hereby affirmed: And it is
further Ordered, That the Appellants do pay or cause to be paid to the
said Respondents the costs incurred in respect of the said appeal, the
amount thereof to be certified by the Clerk-Assistant: And it is also
further Ordered, That unless the costs, certified as aforesaid, shall be
paid to the party or parties entitled to the same within one calendar
month from the date of the certificate thereof, the cause shall be and
is hereby remitted back to the Court of Session in Scotland, or to the
Lord Ordinary officiating on the Bills during the vacation, to issue
such summary process or diligence for the recovery of such costs, as
shall be lawful and necessary.

DUNLOP and HOPE—RICHARDSON, CONNELL and LOCH.