[HEARD 4*th*—JUDGMENT 25*th March*, 1850.]

ROBERT BOGLE & Co., Merchants in Glasgow, *Appellants*.

SIR THOMAS JOHN INGLIS COCHRANE, K.C.B., and his Commissioners, *Respondents*.

11 D&BM 9

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 fore- " saids 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 other- " ways likeas 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 Cap- " tain 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 then 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 133*l*. 6*s*. 8*d*.
" 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

"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 furni-"ture and other moveables above assigned and disponed 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 suc-"ceed 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 pro-"visions conditions and declarations 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 contra-"vener 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 infeft, 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*l.*

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 pos-"session, 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, procura-"tories and instruments of resignation, precepts and instru-"ments 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 decerned 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*l.*, 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 objec-
" tions *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 infeft 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 infeft 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 inhabile 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 infeft 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 adju- " dication at their instance against the said Alexander Coch- " rane, 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 division), which ordered the papers to be laid before the other division and the Lords Ordinary, and thereafter, in conformity

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 disponed the lands to any one whomsoever, and was to all purposes proprietor in fee simple. It Baillie *v.* 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.* Cathcàrt, 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 *bonâ 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. Rolt* 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 per-"forming 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 prohibi-"bition 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 rela-"tion 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.