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Earl of Rothes, Jan. 21. 1823, (2. Shaw and Dunlop, No. 130.); Mills *v.* Farmer, (19. Vesey); Saunders on Uses, p. 210.; Lovelass on Wills, p. 191. edit. 1823; Merivale's Reports, vol. 3. p. 17.; 3. Bankton, 8. 45.; 7. Vesey, p. 51.; 1. Brown, p. 179.; 2. ib. p. 229.; Swanson, Rep. 201.; 9. Vesey, 399.; 10. Vesey, p. 538.; 1. Simon and Stewart, p. 69.; Turner's Reports, Ommancy, July 22. 1825.

Respondents' Authorities.—Dirleton, p. 73.; Murray, Nov. 28. 1729, (4075.); Campbell, Dec. 16. 1738, (4076. and Elchies' Dec. No. 14. Mut. Con.); Dick, Jan. 22. 1728, (7446.); Brown, Aug. 3. 1762, (2318.); Buchanan, Dec. 16. 1806, (No. 1. Ap. Service); Hill, Dec. 14. 1824, (3. Shaw and Dunlop, No. 283.): affirmed, House of Lords, April 14. 1826, (2. Wilson and Shaw's Rep. House of Lords, No. 11. p. 80.)

MONCREIFF, WEBSTER, and THOMPSON—A. GORDON,—Solicitors.

No. 18.

Sir HUGH MUNRO, Bart., Appellant.—*D. of Fac. Moncreiff—Sugden.*

GEORGE MUNRO, and Others, Respondents.—*Brougham—Keay.*

Entail.—Held, (affirming the judgment of the Court of Session), 1. That the omission of the words 'for new infeftment' in an entail made in form of a bond and procuratory of resignation, is not fatal to it, the deed being otherwise sufficiently expressed; 2. That a declaration, that in case an heir substitute succeed to another estate requiring the assumption of a name and title inconsistent with those provided by the entail, he shall execute a conveyance of the entailed property to the next heir, subject to the fetters, does not free an heir not taking under such conveyance,—the fetters being held, on a sound construction of the whole clause, to apply to the heirs universally; and, 3. That a declaration that debts and deeds shall be null and void, so far as they affect the estate, is sufficient, without declaring that they shall be null and void as against the contravener.

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1ST DIVISION. Lord Eldin.

SIR HARRY MUNRO, proprietor of the estate of Fowlis, executed, in 1776, a deed of entail, in form of a bond of taillie and procuratory of resignation, whereby he bound and obliged himself, and his heirs whatsoever, to 'make due and lawful resignation of 'all and sundry my lands, &c. in the hands of my immediate law-'ful superiors of the same, to be made, given, granted to myself; 'whom failing, to the said Hugh Munro, my eldest lawful son, 'and the heirs of his body;' whom failing, certain substitutes; 'but with and under the reservations, conditions, provisions, 'restrictions, limitations, clauses irritant and resolutive, powers, 'faculties, and declarations after-mentioned, and no otherwise;' and for that end he constituted procurators 'for me, and in my 'name and behoof, duly and lawfully to resign and surrender,

'upgive, overgive, and deliver, all and sundry the lands after- July 25. 1828.
'mentioned, &c. in the hands of my immediate lawful superiors
'of the same, or of their commissioners in their names, having
'power to receive resignations, and to grant new infeftments, to
'be made and granted to me, the said Sir Harry Munro, my-
'self; whom failing, to Hugh Munro, my eldest lawful son, and
'the heirs-male of his body; whom failing,' to the substitutes as previously called,—'with and under the several conditions, pro-
'visions, restrictions, limitations, clauses irritant and resolutive,
'powers, faculties, and declarations after-written, and no other-
'wise,—viz. with this condition always, as it is hereby expressly
'provided and declared, that the whole heirs of taillie and sub-
'stitutes, both male and female, particularly and generally above-
'mentioned, and as well general as of taillie, and the descen-
'dants of their bodies so succeeding and enjoying the said lands
'and estate, shall be obliged, in all time from and after their
'succession to the said lands, barony, and others above-men-
'tioned, and also the husbands of the heirs-female so succeeding
'and enjoying the said estate, to assume, use, and bear, and
'constantly retain the surname, arms, and designation of Munro
'of Fowlis: and declaring, as it is hereby expressly provided and
'declared, that in case any of the heirs and substitutes above-
'mentioned, succeeding as above, whether heirs general or of
'taillie, shall happen to succeed to any other title or dignity,
'whereby the surname, arms, and designation of Munro of
'Fowlis might be totally sopited, or succeed to any other taillied
'estate, whereby they may be disabled from carrying the said
'arms, name, and designation of Munro of Fowlis; that then
'and in such case, the heir so succeeding to such title, or accept-
'ing of such taillied estate, shall be bound and obliged respec-
'tively, and from time to time, in all time coming, to denude
'and divest himself or herself of the aforesaid lands, barony,
'teinds, and others above disponed, in favours of the next heir
'of taillie for the time, to whom the said lands and others above-
'mentioned are hereby declared to pertain and belong, but with
'and under the reservations, conditions, provisions, restrictions,
'limitations, clauses irritant and resolutive, powers, faculties,
'and declarations contained in this present right, &c.: And
'with and under this limitation and provision, as it is hereby
'expressly provided and declared, that the lands, barony, teinds,
'and others above resigned, shall not be affected nor burdened
'with, nor subject nor liable to be apprised, adjudged, or any

July 25. 1828. 'ways attached, burdened, or evicted, for or by the debts or 'deeds of any of the heirs aforesaid, or substitutes, whether 'general or of taillie and provision, male or female, before-men- 'tioned, who shall succeed to the same, due or granted prior to 'such succession, or by any debts or deeds which may be con- 'tracted after such succession, as after expressed.' Then it is provided and declared, that it shall not be lawful to nor in the power of any of the said heirs, whether general or of taillie or provision, male or female, to alter the order of succession, sell or burden the lands, or do any other act whereby the taillied lands might be affected, or the bond of taillie, or order of succession, hurt or changed. The whole heirs and substitutes, general and particular, are taken bound to possess the taillied estate by virtue of the taillie, and by no other right or title, and to insert the whole restrictions, limitations, clauses irritant and resolutive, of the taillie, in all the charters, infeftments, &c. to follow thereon. Then follows this irritant and resolutive clause, 'And with and under the irritancy following, as it is hereby ex- 'pressly provided and conditioned, that in case any of the heirs 'general or of taillie, particularly and generally before-mention- 'ed, or the husbands of the heirs-female, shall contravene the 'aforesaid conditions, provisions, restrictions, and limitations, 'and others before expressed, and herein contained, or any of 'them, that is, shall fail or neglect to obey or perform the said 'conditions and provisions, and each of them, or shall act in the 'contrary of the said restrictions or limitations, or any of them, 'that then, or in any of these cases, not only all such acts, facts, 'deeds, and debts contracted, done, or committed contrary 'thereto, or to the true intent and meaning thereof, with all that 'may follow thereon, shall be in themselves void and null, and 'of no avail, force, strength, or effect against the other heirs of 'taillie, and the said lands, barony, and others above-mentioned, '(which or no part thereof shall not be anywise burdened there- 'with), in the same manner as if such debts, deeds, omissions, or 'commissions, had not been contracted, done, or granted, or had 'never happened; but also the person or persons so contraven- 'ing, by failing to obey the said conditions, or acting contrary 'to the said limitations, or any of them, as aforesaid, shall, for 'him or herself allenarly, ipso facto amit, lose, and forfeit all 'right, title, or interest, which he or she hath to or in the said 'taillied lands and estate, and the same shall become void and 'extinct; and the said taillied lands and estate shall devolve,

'accrue, and belong to the next heir of taillie appointed to suc- July 25. 1828.
'ceed, albeit descended of the contravener's own body, and in
'the same manner as if the contravener was naturally dead,'
&c.

Sir Harry died in 1791. His eldest son, Sir Hugh, served heir of taillie to him on the 13th of May of the same year,—executed the procuratory in the taillie,—and obtained a Crown charter in terms of the deed, containing the following quæquidem clause:—
'Quæquidem terræ baroniæ, decimæ, aliaque suprascript. per-
'prius hæreditarie pertinuerunt ad dict. Dominum Henricum
'Munro,' &c. 'per illum ejusque legitimos procuratores, ejus
'nomine ad hunc effectum specialiter constitut. virtute procura-
'toriæ resignationis antea et postea mentionat. super diem et
'datam præsentium, debite et legitime resignatæ fuerunt in
'manibus dicti Domini Capitalis Baronis pro seipso ac in nomine
'remanen. Baronum Nostri dict. Scaccarii, tanquam in manibus
'Nostri immediati legitimi superioris earund. pure et simpliciter
'per fustim et baculum uti moris est in favorem et pro novo in-
'feofamento earund. dict. Domino Hugoni Munro, et hæredibus
'masculis ex ejus corpore, quibus deficien. aliis hæredibus talliæ
'et provisionis supra mentionat. secundum ordinem successionis
'supra specificat. faciend. et concedend.; sed cum et sub sin-
'gulis conditionibus, provisionibus, restrictionibus, limitationibus,
'clausulis irritan. et resolutivis, potestatibus, facultatibus, et
'declarationibus, reservationibus, aliisque supra mentionat. et non
'aliter; idque virtute et secundum procuratoriam resignationis
'et talliæ dict. terrarum baroniæ decimarum aliorumque prædict.,
'concess. per dict. Dominum Henricum Munro,' &c. In virtue of this Crown charter he took infeftment and entered into possession of the estate. Conceiving that he was not bound by the fetters, he raised, in 1824, an action of declarator, subsuming, 'that, in consequence of the death of Sir Harry, the
'succession to the lands, and barony, and others, devolved on the
'pursuer, and belonged to him as proprietor: that he had right
'to the lands, barony, and others, as absolute and unlimited fiar,
'and was entitled to sell, dispose of, and burden them, to alter
'the order of succession, and exercise every other act of owner-
'ship regarding them, as fully and freely as if the deed of entail
'had never been made or granted;' and concluding that 'it ought
'and should be found and declared, by decree of the Lords of
'our Council and Session, that the pursuer is the absolute and
'unlimited fiar or proprietor of the lands, barony, and others
'before-mentioned, and that the reservations, conditions, pro-

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'visions, restrictions, limitations, prohibitions, clauses irritant 'and resolutive, powers, faculties, and declarations, contained in 'the said deed of entail, do not in any way affect him, or limit 'his right to the said lands, barony, and others before described; 'and that the pursuer is entitled to sell, alienate, and dispone the 'said lands and others, to burden and affect the same with debt, 'to alter, vary, and change the order and course of succession 'as contained in the said deed of entail to the said subjects, and 'to exercise every act of ownership, and to do all acts, facts, and 'deeds, and to contract debts, as fully and freely as if the said 'deed of entail had never been made and granted; and that all 'such acts, facts, deeds, and debts contracted, done, or commit-'ted by the pursuer, contrary to the aforesaid conditions, pro-'visions, restrictions, limitations, prohibitions, and other clauses 'before specified, shall be as valid and effectual, and of as much 'avail, force, strength, and effect, as if the said deed of entail 'had not been made or executed,' &c. The Lord Ordinary repelled the defences, (the substance of which will be found in the argument of the respondents); but the Court (15th February 1826) altered, and assoilzied the defenders, but found no expenses due.*

Sir Hugh Munro appealed.

Appellant.—1. The deed of entail is drawn in the form of a procuratory of resignation; but from the manner in which it is expressed, there is no warrant for any new title to be granted by the superior in favour of the heirs of entail. The deed does not state what the superior is to give to the heirs. The granter, no doubt, binds himself to resign the lands, and to resign them in the hands of his lawful superiors; but he has not said what is to become of them after they are so resigned. The words, 'for 'new infeftment,' have been left out, and this omission leaves the instrument as completely ineffective to the purpose of creating or obtaining a title by new infeftment from the superior, as if there had been no obligation to resign at all. It is no answer to say, that this may have been a clerical error; for this is a question concerning the conveyance of a land estate,—a question on a title of property—on an act of technical conveyancing; and the inquiry must be, not what Sir Harry intended to do, but what he did.

2. The prohibitory, irritant, and resolutive clauses in this deed, or the clauses intended to be of this nature, are so expressed in

* 4. Shaw and Dunlop, No. 306.

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the connexion in which they stand, as to be altogether inoperative, in as far as the appellant's title can be affected. Deeds of this description must be strictly construed. But although it is declared by the irritant clause, that all acts, facts, deeds, and debts contracted or committed contrary to the terms of the entail, were to be in themselves void and null; yet there is no declaration that they shall be so against the contravener, a declaration essential by the statute 1685, c. 22. No doubt the entailer has declared, that the heirs and substitutes succeeding to any other title or estate, whereby the surname, arms, and designation of Munro of Fowlis might be totally sopited, should grant conveyances to the next substitute in the order of the entail, and that in these conveyances there should be inserted all the fetters of the entail; still this insuperable defect exists, that these fetters were not declared to affect the right, either of the pursuer, or any other of the heirs who should not so happen to succeed to any such title or estate. This cannot be rectified by picking out phrases in posterior clauses that seem to have relation to all the heirs; for this is not a mode of construction permitted in entails: and besides, the posterior clauses only could apply, under the operation of the event of an heir denuding, in consequence of his succession to a title or dignity. The respondents contend, that the general clause brought, or rather was intended to bring, the heirs succeeding, after a case of denuding, under the prohibitions and irritant clauses following. But the question is, whether, without doubt or ambiguity—in language apt, definite, precise, and clearly connected—the fetters are imposed in the manner contended for by the respondents. If it were no more than confessed that the clause fairly admits of two meanings—nay, if the deed is so framed, that the Court cannot, without commentary and reasonings derived from the style and form of other entails, determine with certainty, not merely the intention to restrain in a sufficient manner, but the technical precision of the restraining clauses—the very statement of this as the nature of the case, would be, on every principle of law, fatal to the sufficiency of the entail. But the case is stronger; for the respondent can only reach this conclusion by violating every principle applicable to the fair construction of deeds.

3. The irritant clause in the entail, or what was intended to be an irritant clause, is not so expressed as to annul onerous deeds done, or debts contracted in contravention of the prohibitory clause. They are not declared null ab initio, but only against the other heir of entail, and the said lands. They should,

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to give effect to the irritant clause, have been declared in themselves null and void.

Respondents.—The objection to the form of the procuratory rests on a mere clerical error, and does not invalidate the deed; for, as the clause is expressed, there are words sufficient to warrant the resignation of the lands in terms of the procuratory.—'To give and grant infeftment of the lands,' and 'to give and 'grant the lands,' are, in an instrument of this kind, completely synonymous; and on accepting a resignation from his vassal, a superior would be as effectually tied down by the one set of words as by the other. Besides, the expressions which follow, although elliptical, import the granting of new infeftment in favour of the resigner and the heirs called. But the objection is inadmissible in the present action. The appellant executed this very procuratory, and holds the estate by that title. The very charter he accepts from the Crown sets forth, that the lands were 'duly and lawfully resigned,' &c. A declarator, therefore, was quite out of place, even if the appellant had not, by homologation, abandoned the objection.

Next, the appellant maintains, that the prohibitory, irritant, and resolutive clauses do not affect him; and that the present deed is not in itself an entail under irritant and resolutive clauses, but merely an injunction, that an entail of that kind shall be made in a certain event, which event, he says, has not yet arrived. But when the deed is carefully perused, the construction attempted to be forced on very clear words, becomes palpably untenable; for the deed of entail destines the lands to a series of heirs, with complete and effectual prohibitory, irritant, and resolutive clauses, directed in express terms against the whole heirs and substitutes called by the deed, and the appellant among the number. There is no doubt that fetters must be clearly expressed, and they have here been so. It is the appellant who would get quit of the fetters upon a bare problematical possibility, and apply rules of interpretation which have no authority in law. The respondents only demand a reading according to the ordinary rules of law and grammar. They neither rest their case on implication nor presumed intention, but on the obvious and legal meaning of the words themselves.

Then, as to the irritant clause, the objection is equally groundless. The Act 1685 does not require that the prohibited acts and deeds shall be declared null and void against the contravener himself, but that the deeds are 'in themselves null and void.' No doubt, the acts and deeds are, in the present case, declared

to be of 'no avail, force, or effect, &c. against the other heirs 'of taillie;' but it does not from thence follow, that there is not a declaration of nullity against the contravener himself, even if that declaration should be necessary, which it is not. July 25. 1828.

The House of Lords ordered and adjudged, 'that the appeal 'be dismissed, and the interlocutor complained of affirmed.'

LORD CHANCELLOR.—My Lords, There is another case which was argued some time since at your Lordships' Bar, the case of Munro against Munro. This case turns upon the construction of a Scotch deed of entail. Objections were made in point of form to the procuratory of resignation, and also to the irritant and resolutive clauses of the deed. I attended minutely to the arguments on both sides at the time they were advanced. I have since looked into the case with great care and attention, and have read the instrument over and over again, and bestowed very considerable attention upon it; and have also looked into all the authorities cited at the Bar which appear to bear upon the case; and keeping, at the same time, in mind, the principle applicable to instruments of the kind, that they are to be strictly construed—keeping that in mind, and looking at the instrument, after the best consideration I have been able to give to it, I am bound to say, that I feel no reasonable doubt with respect to the construction of it. Without, therefore, going into the arguments upon the subject, which might occupy your Lordships a considerable time, and would not be very intelligible unless the instrument were before you, I should recommend to your Lordships that the judgment of the Court below be affirmed.

Appellant's Authorities.—Henderson, June 10. 1795, (4489.); Ross, July 4. 1809, (F. C.); Robertson, Feb. 16. 1816, (F. C.); Rowand, June 30. 1824, (3. Shaw and Dunlop, 141.); 3. Ersk. Inst. 8. 29.; Edmonstone, Nov. 24. 1769, and House of Lords, April 15. 1771, (4409.); 2. Bank. Inst. 149.; Bell's Cases, 188.; Erskines, Feb. 14. 1758, (15,461.); Gordon, July 8. 1777, (15,462.); Wellwood, Feb. 23. 1791, (15,463.), and May 31. 1797, (15,466.); Marchioness Titchfield, May 22. 1798, (15,467.); and House of Lords, Jan. 20. 1800; Miller, Feb. 12. 1799, (15,471.); Brown, May 25. 1808, (19. App. Taillie); Henderson, Nov. 21. 1815, (F. C.); Syme, Feb. 27. 1799, (15,473.); and House of Lords, April 26. 1803, (No. 1. App. Tailzie); Bruce, Jan. 15. 1799, (15,539.); Dalziel, May 30. 1809, (F. C.); Mowat, Feb. 6. 1823, (2. Shaw and Dunlop, No. 170.); Dick, Jan. 14. 1812, (F. C.); Adam, May 18. 1821, (1. Shaw's App. Cases, No. 8.); Hope's Minor Practics, 404. 407.; 3. Mack. 8. 3.

Respondents' Authorities.—Syme, Feb. 27. 1799, (15,473. and House of Lords, April 26. 1803, 5. App. Taillie); Steele, May 12. 1814, (F. C.); Douglas, Nov. 14. 1823, (3. Shaw and Dunlop, No. 476).

MONCREIFF, WEBSTER, and THOMPSON—RICHARDSON and CONNELL,—Solicitors.