[16*th August* 1839.]

(Appeal from the Court of Session, Scotland.)

(No. 34.) ALEXANDER MONYPENNY, W. S., Trustee under the Settlements of the late David Steuart Erskine, Earl of Buchan, Appellant.

[*Pemberton—Cowan.*]

WILLIAM CAMPBELL, of No. 9, Great St. Helens, London, Son of John Campbell, deceased, and his Administrator, and DONALD HORNE and JAMES ROSE, W. S., Mandatories of said William Campbell, Respondents.

[*Lord Advocate (Rutherfurd)—Knight Bruce—MacDowall.*]

Entail (Prohibitory Clause)—The following words, in the prohibitory clause of a deed of entail, were inserted immediately subsequent to prohibitions against selling and contracting debt, &c., viz. " or to do any other fact or deed " in prejudice of the said taillie, and of the persons above " named, and their foresaids." Held (affirming the judgment of the Court of Session,) that they were sufficient to prevent an alteration of the succession.

Question—Whether it is necessary to fence with irritant and resolutive clauses a prohibitory clause against altering the order of succession? (See p. 909.)

1ST DIVISION.

Lord Ordinary Cuninghame.

THE late Earl of Buchan was infeft in the estate of Strathbrock under a deed of entail, dated 4th November 1664. The deed of entail contains, inter alia,

the following clauses: — " It shall noways be leisome " nor lawful to any of the heirs of taillie and provi- " sion above specified to sell, dispone, and wadsett the " lands, baronie, and others above written, or any part " thereof, or any annual rents or yearly duties to be " uplifted furth of the samen, or to set tacks thereof " for longer space than their own lifetime, or to contract " debt for which the samen may be apprised or ad- " judged, or to do any other fact or deed in prejudice " of the said taillie, and of the persons above named, " and their foresaids; and if any heir of taillie and " provision above specified shall in any time coming " failzie herein, or do any thing contrair to this my " destination and appointment, then and in that case " the person or persons sua failzieing and doing in the " contrair hereof, and the heirs of their bodies, shall " amit and lose their right and haill benefit to this " present bond of provision and infeftment following " hereon, and of the haill lands, baronie, and others " above written, and the samen shall in all time there- " after pertain, belong, and accress to the next person " for the time who, by and in virtue of the said tailzie " and provision, would have succeeded to the said lands " and estate, failing the saids persons, contraveners, " and the heirs of their bodies, and all dispositions and " deeds whatsomever made or done contrair to the said " provision and destination, with all that shall follow " thereon, shall be ipso facto void and null, without " any declarator, and shall noways affect nor burden " the said lands, baronie, and others above written, or " any part thereof, as if the same had never been done, " with and upon the whilks reservations, reversions, " provisions, and conditions respectively above men-

MONYPENNY v. CAMPBELL and others.

16th Aug. 1839.

Statement.

"tioned, I have made and granted thir presents and no "otherways."

On 12th June 1822 the late Earl of Buchan executed a trust conveyance, inter alia, of said estate, in favour of the appellant, with a view to exclude his Lordship's nephew, the present Earl, from the rights accruing to him as next heir of entail. The respondents, creditors of the present Earl, having regularly adjudged his Lordship's power and faculty, brought an action, founded on their adjudication, of reduction, inter alia, of said trust deed, as being ultra vires of the granter, in which they called the present Earl and the appellant as defenders. The present Earl of Buchan did not appear as a defender in the Court of Session. The record being closed upon summons and defences, the Lord Ordinary, on 11th July 1837, pronounced the following interlocutor:—"The Lord Ordinary having considered the record, "and heard counsel thereon, 1mo; In respect of the "decision of the Court on 9th February 1837, in an "action at the instance of Mrs. Susan Rowe against "the same defender[1], and in reference to the original "tailzie of the estates now libelled on, finds that the "said tailzie contains an effectual prohibition against "frustrating the order of succession which the late "Earl of Buchan could not gratuitously contravene. "2do, Finds that the disposition executed by the late "David Earl of Buchan, on 20th January 1819[2], and

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[1] The Court had previously pronounced judgment to the same effect in an action at the instance of this party, which was withdrawn from a supposed defect in her title. (See 15 D., B., & M., 500.)

[2] The disposition here referred to was a disposition and procuratory of resignation, on which titles were made up by the late Earl in fee simple before he executed the trust deed; these titles were also brought under reduction.

" also the trust disposition executed by the said Earl in " favour of the defender, Mr. Alexander Monypenny " and others, dated 12th June 1822, are contrary both " to the prohibitory and irritant clauses of the original " tailzie of Strathbrock, libelled on, and that the charters " and sasines following on these deeds, or either of them, " cannot have more force or effect than their warrants. " Therefore reduces, decerns and declares in terms of " the libel: Finds the defender quà trustee liable in " expenses, and remits the account thereof, when " lodged, to the auditor to tax and report. Six words " delete before signing."

Statement.

The appellant reclaimed to the First Division of the Court, when the following judgment was pronounced:—

Judgment of Court, 22d Dec. 1837.

" The Lords having considered this note, and heard " counsel, adhere to the interlocutor reclaimed against, " so far as relates to the lands and barony of Strath- " brock, and with this qualification, refuse the prayer " of the note. Of new, find expenses due, and remit to " the auditor to tax the account thereof, and to report."

Appellant.—There is no valid and effectual prohibition against altering the order of succession. The cases of Earlshall, Blairhall, Craigievar, Argaty, Eastfield, and Burdsyards completely establish this proposition.[1] The case of Lochbuy[2] cannot be reconciled with these decisions, of which the cases of Eastfield, Earlshall, Blairhall, and Burdsyards were subsequently decided.

Appellant's Argument.

The case of Roxburghe[2] differs essentially from the present. In that case it will be remarked, there is a

[1] See ante, p. 879. [2] See ante, p. 881.

MONYPENNY v. CAMPBELL and others.

16th Aug. 1839.

Appellant's Argument.

complete separation and disjunction of the concluding part of the prohibitory clause from all that precedes it, by the words "nor zitt" marking in a definite manner the introduction of some new and different thing from what had gone before. There is a special thing prohibited in addition to what is previously prohibited, and that too in a separate clause disjoined from what goes before by the words "nor zitt," namely, the doing any thing in hurt or prejudice of the foresaid taillie and succession, in haill or in part. The thing which is substantively prohibited from being done, is, the hurting or prejudicing the foresaid taillie or succession; this, it was held, was as strong as if the clause had prohibited any thing by which the succession might be frustrated or interrupted. The clause, construing it strictly, and referring to the statute as a guide for what is requisite, is a clause, 1st. Against selling; 2d. Against contracting debt; 3d. Against doing any deed whereby the estate may be apprised, adjudged, or evicted; and 4th. Against hurting and prejudicing the order of succession. The last part is not left indefinite, so that if it stood by itself it might be said to refer to selling or contracting debt, or any other act by which the taillie might be prejudiced; it is not expressed in general words; it is so expressed, as, when perused, to impress on the mind, that a different class of things is prohibited from what had previously been made the subject of prohibition. It is directed against deeds done to the hurt and prejudice of the succession, deeds frustrating or interrupting the succession, just as the preceding portion of the clause is directed against selling, contracting debt, &c. It is a prohibition against altering the order of succession, not indeed in these words, (which is not necessary, there

being no voces signatæ required to be used,) but in words which express in clear and appropriate terms that particular mode of disappointing or depriving the heirs substitute of their right to the entailed estate. Applying these observations to the prohibitory clause in the Strathbrock entail, it will be seen at once it contains no effectual prohibition against altering the order of succession. The concluding part of the clause is not separated from the prior parts of it by any properly disjunctive words, as in the case of Roxburghe. It commences with "or," an appropriate introduction to what is merely to render what preceded more comprehensive, by reaching every indirect or possible form in which the taillie, or the persons above named and their foresaids, might be prejudiced by a contravention of the preceding prohibitions; and, accordingly, there is not a single word used which does not admit of, and naturally suggest, that construction. There is no word used that suggests to the mind some other specific class of acts by which the taillie and the heirs called might be prejudiced; on the contrary, in the concluding part of the clause there are only general words,—there is no particular act or class of acts set forth as prohibited,—there is nothing more than what forms an appropriate sequence, introduced for the purpose of more effectually securing the taillie, and the persons before named, against the classes of prohibited acts previously enumerated.

But, again, it is an undoubted rule, in construing the fetters of an entail, that if the words used be susceptible of two interpretations, that is to be adopted which is against the fetters. Now, there is this further essential difference between the Roxburghe case and the present. In the Roxburghe case the words are

MONYPENNY v. CAMPBELL and others.

16th Aug. 1839.

Appellant's Argument.

"apprized, adjudged, or evicted." The word "evicted" is omitted in the present case. There are other ways by which an estate may be affected indirectly besides apprizing or adjudication: e. g., an estate may be evicted for feudal delinquencies, and accordingly the statute expressly declares it necessary to provide against such eviction, and uses the very word which is used in the Roxburghe case. Coupling this consideration with the further consideration that the words in the latter clause in the present case are not, as in the Roxburghe case, "in prejudice of the succession," but simply "in prejudice of the taillie," it is clear that the words used in the present case may apply at least as aptly to acts of eviction as to acts of alteration of the succession. In this question, then, which is one of freedom, it necessarily follows, according to the rule above stated, that the words must be so applied as to give such freedom. In reality the appellant does not require the aid of this rule in favour of freedom, because it seems to follow as matter of course, that if the conveyancer had been instructed to prevent alteration of the succession, as well as the indirect methods of affecting or prejudicing the taillie, he would have added the expression used in the Roxburghe case, which clearly must have become a noted precedent in conveyancing at the time this entail was framed.

In the second place, the irritant clause in the entail of Strathbrock is defective; the whole entail is thereby rendered inoperative, and so it was competent to the truster to settle the estate in any way he thought proper. It will be observed, that by the irritant clause it is provided, "that all dispositions and deeds whatsoever "made or done contrair to the said provision and

Appellant's Argument.

"destination, with all that shall follow thereon, shall be "ipso facto void and null." The appellant apprehends that this clause is clearly defective from uncertainty. Suppose the words, "and destination," had been omitted, there would no doubt be a voidance declared of all dispositions and deeds made or done contrary to the said provision, but then the question at once arises, what provision? The irritant clause refers to the prohibitory clause. Its object is to irritate the deeds done in contravention thereof, but the prohibitory clause contains various provisions. It contains a provision against selling, disponing, and wadsetting, — a provision against letting leases exceeding a certain limited duration, — a provision against contracting debt; and, according to the argument of the respondents (which the appellant here assumes to be well founded, for otherwise he has no interest to inquire into the validity of the irritant clause), a provision against altering the order of succession. Now, to which of these does the word "provision" apply? It is evidently impossible to answer; but then it may be said, that the term "provision" applies to the whole of the prohibitory clause, to every thing therein provided, and that consequently there is a complete irritancy declared of all dispositions and deeds in contravention of any of the prior prohibitions. This plea the appellant humbly conceives not to be tenable; but it seems unnecessary to go into any argument, either in refutation of it, or in support of the appellant's objection to the clause in respect of uncertainty, because the same question occurred very lately in the case of Speid[1], where the

[1] 21st Feb. 1837, 15 D., B., & M., 618.

MONYPENNY v. CAMPBELL and others.

16th Aug. 1839.

Appellant's Argument.

whole law upon the point was fully considered in reference to an irritant clause conceived in terms so nearly resembling the present, so far as regards that point, that it is clear the judgment in it must be taken as a direct precedent in the present case. It has, however, been said that all dispositions are here declared to be null and void; that the deeds under reduction are dispositions, and that, all such deeds at least, are effectually irritated. But in this remark it seems to be overlooked that the dispositions which are declared to be null and void are dispositions "contrair to the said "provision." This being the case, the question cannot in the slightest degree turn upon the word "dispo-"sition," but must evidently rest entirely upon the legal import of the word "provision;" and if that word is not definite and precise in its application,—if it cannot be held to apply to all the prohibited acts of selling, contracting debt, and altering the order of succession, nor to any of them in particular, it is obvious, the word "dispositions" is of no more definite signification, and that the same uncertainty exists as to it, that is, whether it points at dispositions of sale, dispositions in security, or dispositions directly altering the order of succession.

But again, if the word "destination," which is also used, has any definite meaning, and could apply directly to any one prohibition, it could only be to a prohibition against altering the order of succession, supposing the entail to have contained such a prohibition. As regards other prohibitions it is liable to the same objection of ambiguity and uncertainty as the word "provision." Therefore, it follows, that at all events the irritant clause is ineffectual, in so far as respects selling or contracting debt. If, however, the irritant clause be either wholly

defective, or would apply only to the prohibition against altering the order of succession, then, upon the authority of the cases of Hoddom[1] and Speid, the deeds under reduction are unchallengeable, because the necessary result of these cases is, that an entail defective in one particular is ineffectual in all other respects.

Appellant's Argument.

Respondents.—The present case is identical with that of Roxburghe; the entail in each of them is conceived in terms which announce a distinct and explicit prohibition to alter the succession, and this being so, it is utterly unimportant that the disjunctive used in the one case is "nor yet" and that in the other "or." The omission of the word "evicted" might afford an argument, if the act under consideration had fallen under the denomination of acts alluded to on the other side. Whatever may be its effect as to such an act, when the point comes to be considered it is obvious that the Roxburghe case has clearly fixed the application of the subsequent prohibition to an alteration of the succession which may be effected without eviction.

Respondents Argument.

It is altogether contrary to the law, as hitherto known in Scotland, to say, that an entail defective in one particular is altogether defective.[2] The irritant clause in the present case is sufficiently applicable to alterations of the succession, if irritant clauses were necessary for this purpose. In order, however, to prevent alterations of the succession, as distinguished from the statutory acts which may indirectly have that effect, irritant

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[1] 3d July 1832, reversed 18th April 1835; 1 Sh. & M'Lean's Appeal Cases, p. 594; Lords Journals, vol. 67. p. 114.

[2] Cathcart, 5 Wilson & Shaw, 315.

MONYPENNY v. CAMPBELL and others.

16th Aug. 1839.

clauses are not required. A prohibitory clause alone is necessary to authorize reduction of gratuitous or mortis causâ deeds, such as are here in question.[1]

Respondents Argument.

The judgment in the case of Hoddom[2] as regards this point was drawn up per incuriam, and is not authorized by the opinion delivered in this House when that cause was heard.[3]

Ld. Chancellor's Speech.

LORD CHANCELLOR.—What I have already said in the case of Lang v. Lang, nearly exhausts the first part of this case, namely, as to the effect of the prohibition against altering the order of succession.

There was but one different ground on which it was attempted to distinguish this case from the Roxburghe case, and that was, that the prohibition in the Roxburghe case, besides contracting debt, included the case of forfeiture for feudal delinquencies, which it was said was not so in the present case. Now, supposing the word "evict," which is used in the Roxburghe case, to apply to acts creating forfeiture, it does not follow that there are not words sufficient in the clause in the present case to entitle us to give the same construction in both; I cannot entertain a doubt as to the expressions

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[1] Erskine, b. iii. tit. viii. sec. 23. [2] See ante, p. 907.

[3] The LORD CHANCELLOR here intimated that he considered the error in drawing up the judgment to have arisen from the report of the speech, i. e. that in the following sentence (1 Sh. & M'L., p. 626.) viz. "to "reverse the decree in this case, and declaring the entail insufficient to "prevent the heirs of entail from selling, disponing, burdening, &c. in "terms of the conclusions of the summons," the term, "&c.," introduced into the speech, had led to the insertion of the declaration in the judgment, extendiug over all the conclusions of the summons.

LORD BROUGHAM subsequently stated that it was by no means his intention the House should, in the Hoddom case, decide more than that there was no irritant clause in the entail, valeat quantum.

in the two cases being so substantially the same as to require the same decision.

Assuming then that there is an effectual prohibition against altering the succession, an objection was taken that there are not proper irritant and resolutive clauses applicable to such prohibition, to which it was answered that in cases of simple destination such clauses are not required; be that as it may, I think it clear that in this case there are such clauses sufficiently applicable to the purpose. The term "deed" is only to be found in the prohibition against altering the succession; the resolutive clause applies to any thing done "contrair to this "my destination and appointment," and that which is avoided or declared null is "all dispositions and deeds "whatsomever made or done contrair to the said pro-"vision and destination." If, therefore, clauses irritant and resolutive against altering the order of succession are necessary, they are, I think, to be found in this entail. The question is not here, as in the case of Lang, whether there are clauses properly fencing the other prohibited acts. I think, therefore, that, upon the points raised, the interlocutors appealed from are correct, and that these interlocutors should be affirmed, and the appeal dismissed with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant 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 further ordered, That unless the costs, certified as aforesaid, shall be paid to the party

MONYPENNY v. CAMPBELL and others.

16th Aug. 1839.

entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be 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.

RICHARDSON and CONNELL—DEANS and DUNLOP, Solicitors.