

MARCH 27, 1855.

The Hon. W. H. BRUCE OGILVY and Others, *Appellants*, v. The Right Hon. The EARL OF AIRLIE, *Respondent*.

Entail—Fetters—Reduction—Meaning of word “deeds”—Statute 11 and 12 Vict., c. 36, § 43—*The prohibitions in a deed of entail were against altering the order of succession, against alienation, contracting debt, and “any other act by which the taillie may be hindered.” The irritant clause was “against doing or committing such deeds or contracting such debts.”* Held (affirming judgment), *that the prohibitions against altering the succession, alienation, and sale, were not validly fenced by the irritant and resolute clauses.*¹

The defenders appealed, arguing in their case that the judgment of the Court of Session should be reversed—“Because it proceeded on an erroneous construction of the words of the fettering clauses of the deed of entail, which, when read in an obvious, grammatical, and natural sense, were effectual to support the entail.—*Murray v. Graham*, 6 Bell’s Ap. 441; *Sinclair v. Sinclair*, 3 D. 636; *Lang v. Lang*, M’L. & Rob. 871; *Lumsden v. Lumsden*, 2 Bell’s Ap. 104.”

The respondent answered in his case, that—“neither the prohibition against alienation and sale, nor the prohibition against altering the succession, was validly fenced, in terms of the act 1685.—*L. Wharnclyffe v. Nairne*, 7 Bell’s Ap. 132; *Knight v. Knight*, 5 D. 221.”

Lord Advocate (Moncreiff), and *C. Blackburn*, for appellants.—The general rule of construction as to deeds of entail is not disputed, that where there are two equally grammatical constructions, that which is in favour of freedom from fetters is to be preferred. But it is equally clear that the sense must not be strained in favour of freedom.—*Lumsden v. Lumsden*, 2 Bell’s Ap. 104. Nor is it necessary to refer to authorities, for in questions of construction, unless the words are identical, previous cases can throw little light upon expressions which are peculiar.—*Murray v. Graham*, 6 Bell’s Ap. 441. Hence the cases of *Lang v. Lang*, M’L. & Rob. 871, and *Sinclair v. Sinclair*, 3 D. 636, ought to have little weight; and this case must be considered entirely on its own merits. The words “such deeds,” must, in their natural and obvious sense, refer to all the deeds enumerated in the prohibitive clause, for the word “deed” is one of flexible meaning, and is wide enough to embrace everything which is the subject of prohibition.—*Barclay v. Adam*, 1 Shaw’s Ap. 24. In other parts of the entail the word “deed” is used in this comprehensive sense.

Solicitor-General (Bethell), and *Anderson* Q.C., for respondent.—The words “such deeds,” cannot receive the extended construction contended for by the appellants without violating grammatical rules, and also forgetting, that of two senses which the words may bear, that is to be preferred which is favourable to freedom. The cases of *Murray v. Graham*, 6 Bell’s Ap. 441, and *Lang v. Lang*, M’L. & Rob. 871, were stronger cases than the present, and yet the above rule was adhered to.

LORD CHANCELLOR CRANWORTH.—My Lords, this question is one of a class, of which a great many have been before your Lordships’ House of late years, namely, concerning the construction which your Lordships put, or which the Courts put, or ought to put, upon these irritant and prohibitory clauses; and sometimes the question has arisen upon the other, the resolute clause, but here the question is with respect to the irritant clauses in a deed of Scotch entail.

Now, my Lords, in all these questions it is truly said the point we are to search for is the principle of construction, and when that is ascertained, then all precedents can be of very little use, except in shewing in what way that rule of construction has been acted upon from time to time by the Courts. Now I take the rule to be perfectly clear. If it was supposed that Lord Campbell, in his judgment in this House, or the House itself in adopting that judgment, laid down a rule in the case of *Lumsden v. Lumsden* which had not been previously the rule, I take that to be an entire mistake. No doubt, in construing irritant clauses in these entail deeds, you must, as you do in construing all deeds, look to the whole instrument, and you must not contend that there are doubts if there are doubts. But, on the other hand, I take this to be the course of construction in these cases, that just as in construing acts of parliament imposing penalties, enacting certain acts to be crimes, you construe them strictly, so in construing these irritant clauses you construe them strictly also; and if there be two modes of reading them, in one of which the result is to give effect to the fetters, and in the other the result is not to give effect to

¹ See previous report 15 D. 252; 25 Sc. Jur. 168. S. C. 2 Macq. Ap. 260: 27 Sc. Jur. 348.

the fetters, that which does not give effect to the fetters is the one that is to be presumed to be right, because freedom of alienation and freedom of dealing with property is that which is to be presumed in every case.

Now, my Lords, that being the canon which has influenced the Courts in the construction of clauses in this sort of deeds of entail, the question is—How is that rule to be applied to the present case?

My Lords, there are, as it has been pointed out, three prohibitions. I had taken a note of six prohibitions, but I am willing to adopt that which was suggested by the Solicitor-General, and convert them into four. The first prohibition is against altering the course of succession; the second is against alienating or mortgaging; then, I had put it thirdly, against granting a rent or other yearly duties or feu tacks; and, fourthly, against granting leases. But the Solicitor-General classed them together, which is, perhaps, the more scientific way of doing it. The second prohibition, therefore, is against alienating or encumbering; the third, against contracting debts or granting bonds; and the fourth, in general terms, against doing or committing “any other fact or deed, civil or criminal, by which the aforesaid land and estate, or any part or portion thereof, may be apprized, adjudged, evicted, or forfeited from them or any of them, or whereby the order of succession, in the terms of the tailzie above mentioned, may be in anywise hindered, diverted, frustrated, or interrupted.” These are the four prohibitions: and then follows that which gives rise to the present question, viz., the irritant clause, which is:—“And in case it shall happen the said Mr. John Ogilvy, or the heirs male of tailzie and provision fore-said, to do and commit such deeds or contract such debts, the same are hereby declared to be void.” Now, what is it that is there declared to be void? Does that make void the deed of alienation, or does it not? That is the simple question.

Now, my Lords, it is said that, consistently with the case of *Lumsden v. Lumsden*, you must read the whole together, and then, reading the whole together, you must take the word “deeds” to apply to any deed of alienation, or any other deed whatsoever. But, my Lords, I think that that is not only not necessary, but I agree with the learned Judges in the Court of Session in thinking, that it is not the most natural mode of dealing with the terms of the clause. What is prohibited on the subject of deeds, is doing and committing any such deeds, or contracting such debts. Now that is a very strange expression. You have no mention of deeds throughout the whole of the prohibitory clauses, till you come to the final clause, which excludes alienation, because it is “do or commit any other fact or deed.” When, however, I see that the expression, “doing or committing any other fact or deed,” is immediately followed by an irritant clause to the effect, that if it shall happen that the heirs shall do and commit any such deeds, the same are hereby declared to be void, I think I must understand that to have specific reference to the doing or committing of such deeds as are mentioned in the prohibitory clause, which is found immediately preceding.

My Lords, that was the view which was taken by the Judges of the Court of Session, and that view appears to me to be in conformity with all the authorities which bear upon the point. Without going through the whole of them, as they have been gone through so often of late years, I will just revert to two or three, which seem to me to shew clearly, that the view taken by the learned Judges in the Court of Session was the correct view.

In the case of *Barclay v. Adam*, just as in this case, the prohibition was against selling, alienating, and so on, in the first place; and, in the next place, against contracting debts, or doing any deeds whereby forfeiture might arise. Then the irritant clause was—“all which deeds, debts, and contractions are declared null and void.” Now there, as here, it might be said, that, reading the whole together, we cannot but suppose that, in all probability, the maker of this deed intended, in the irritant clause, that the prohibitions in the former part of the deed should be completely fenced. Probably he did not know the effect of the words which he was using. But the question is—What is the meaning of these words, “all which deeds, debts, and contractions are declared null and void?” Did they extend to deeds whereby the estate was alienated? The Courts held that they did not, but that they only referred to the immediate antecedent. It appears to me that it is extremely difficult indeed to distinguish that case from the present case.

Then there was the case of *Lang v. Lang*, which came before this House about 15 years ago. In that case the prohibition was in the same way against selling and contracting debts, and, as here, against doing or committing an act or deed by which forfeiture should be incurred. Then the irritant clause was—“If they do in the contrary,” (that would cover everything,) “it is declared that all such debts and deeds shall be void;” and the House held, in conformity I think with what the Court of Session had decided, but whether in conformity or not I do not quite recollect, that although the irritant clause began—“If they do in the contrary”—that is, if they do any of those things in the contrary, yet inasmuch as it went on to say—“it is declared that all such deeds and debts shall be void,” the meaning was—if they do in the contrary in respect of any such deeds or debts, and that consequently the irritant clause only applied to the latter member of the sentence, viz., the doing or committing any act or deed whereby forfeiture should be incurred.

Then, my Lords, the latter case of *Lumsden v. Lumsden* was supposed, in some respect, to have shaken the authority of those prior cases, though, as I have already stated, I think it did no such thing. In that case there was a prohibition against selling or contracting debts, or doing any other act, civil or criminal, whereby forfeiture should be incurred. Then, contrary to what I believe is the usual form in these deeds, the resolute clause preceded the irritant clause. I suppose that makes no difference in the effect of the clause, but it does precede it. Then, after having stated that if any of those acts were done, the title of the parties should come to an end, the irritant clause proceeded—"and if any of these acts are done, all the debts and deeds of the said heirs, made or granted before or after their succession, shall be null and void." But the language of the prohibitory clause in that case was not at all the same as it is here. There was nothing to which you could impute debts and deeds, if you applied it at all to what preceded, that did not govern the whole, and therefore you have not that to guide you in respect of the construction of the word "deeds" in that case which you have in the other cases, viz., that it is coupled only with the expressions found in that last member of the prohibitory part of the deed, which prohibits the committing or doing any other fact or deed whereby forfeiture should be incurred.

Another case cited, that of *Anstruther v. Anstruther*, which occurred in the same session of parliament, and was reported in the same volume, is open to the same observation, viz., that there was no mention of deeds at all, except as might be implied in the terms of the prohibition against alienation. Consequently, when it says that all deeds shall be void, it must refer to those deeds whereby any of those objects were effected.

My Lords, under these circumstances, I have no hesitation in at once moving your Lordships to affirm the judgment of the Court of Session.

LORD ST. LEONARDS.—My Lords, I entirely concur in the opinion which has just been expressed by my noble and learned friend. I consider this case altogether concluded by the authorities; and I confess that I have never been able to entertain the slightest doubt upon it, from the first moment that it was opened. It is not the rule, that in a Scotch entail you may not give to the words their natural import; but the rule is, that if words are used in an ambiguous or uncertain sense, you cannot fix upon them a sense which will take from them the freedom which the other part of the entail may have given. It stands as a rule by itself. It is not a general rule of construction applicable to all cases. And, therefore, to argue a case of this sort upon the mere general rules which are applied to general cases, is really profitless, because we are bound now by the rule established in Scotland, and by this House, as the law of Scotland; and I must say, that nothing could be more unjust as regards the Courts of Scotland than first of all to coerce them, as this House has done, to establish a certain rule, and then, when they act upon that rule, to turn round upon them, and find fault with the construction which this House itself, by its decisions, has forced upon the Courts of Scotland.

Now, my Lords, let us look at the cases of *Lang v. Lang*, and *Murray v. Murray*, which have been so often referred to, and which have been most relied upon. It is mere pedantry to go through all the cases now; it was very important some short time ago, but it is no longer important. Let us take the last two cases, and let us begin with the case of *Murray v. Murray*. It is supposed that that is the case which authorizes this appeal; but it really does not touch this appeal. The first prohibition in that case was against selling, alienating, or disposing, and afterwards in the irritant clause the word "selling" was dropped; and it is perfectly clear, that unless that was used as a particular term standing by itself, and admitting of a particular construction, the word "alienating" of itself would include the word selling; and therefore, when the party had said, I will prohibit you from selling or alienating, and if you do alienate, such and such will be the consequence, surely it comprehended that which was an alienation, although it could not be particularly named as an act of sale; and this House most wisely, in my judgment, relied upon that circumstance, as giving a construction to the whole instrument. And, therefore, I do not consider that case as at all touching the point which is now before your Lordships.

Now, my Lords, if we look at the case of *Lang v. Lang*, I think it will shew us, as nearly as anything can do, what the construction is in these singular cases. In that case the decision of the Court of Session was reversed upon both points, both upon the prohibitory clause and also upon the irritant and resolute clauses; and the words no doubt begin in a way which would rather lead you to suppose that it would hit the case—"That it shall at no rate be allowable to the said Gabriel Lang, my son, nor any of the substitutes above named, called to the succession of the lands and others before conveyed, to sell off, or dispose upon any part of the lands and subjects before transmitted, nor to contract debt, or do any other deed whereby the said lands and subjects may be adjudged or evicted from the succeeding members of entail, or their hopes of succession thereto in any measure evaded; and if they do in the contrary, (certainly these are strong words, which would seem to embody the whole of the preceding prohibitions,) it is declared, in the first place, that all such debts and deeds shall be intrinsically void and null," and so on. But these words, which would seem to embrace all the prohibitions in the deed, were held to be contracted and cut down and explained by the subsequent words, "that all such

debts and deeds shall be intrinsically void and null. That case, therefore, decided this—that if the prohibition extends to the three points, alienation, altering the succession, and so on, and debts, and then you confine your irritant clause to the same words as are in the prohibition, it shall not extend beyond the precise words which are used in the prohibitive; and even those words which preceded the word “debts,” and so on, were not to admit of their general sense, so as to include all the prohibitions.

Now, my Lords, let us just see how this very singular rule of construction applies to the case now before your Lordships. The prohibition is here in the usual form, against any act which would break the succession or burden the estate; and then comes a particular prohibition against incurring debts. Then come these words after the prohibition against incurring debts:—“Nor to do or commit any other fact or deed, civil or criminal, by which the foresaid lands and estate, or any part or portion thereof, may be apprized, adjudged, evicted, or forefaulted, from them or any of them, or whereby the order of succession, in the terms of the tailzie above mentioned, may be anywise hindered, diverted, frustrated, or interrupted.” Now, let us stop there for a moment, and ask what this last clause means. It is not, “to do or commit any other fact or deed, civil or criminal, by which the foresaid lands shall be forefaulted.” These words are in contradistinction to the first words of the prohibition against acts which shall alter the succession, and so on, for these are deeds in the technical sense of the words. You will find that explained very satisfactorily by Lord Cunninghame in the judgment, in these words:—“I conceive the present to be a clear case upon the authorities, which must be respected in the decision. The legal construction of the term ‘facts and deeds’ in irritant clauses, when in immediate connection and juxtaposition with the same words in the close of the prohibitory clauses, referring to facts and deeds, civil or criminal, by which the lands may be apprized or evicted, &c., has been so often construed to apply only to political and criminal forfeitures, that a different interpretation, comprehending all the antecedent branches of the prohibitory clauses, is now out of the question.” Those words, therefore, evidently mean something totally distinct from the execution of a deed in the sense of an instrument. This clause is “to do or commit a fact or deed”—that is, to do a thing or an act which shall lead to forfeiture; and it really does not embrace, in that sense, anything in the shape of a deed when we are using the term in the sense of a legal instrument. Then that is followed by the irritant clause:—“And in case it shall happen the said Mr. John Ogilvy, who is the institute, or the heirs male of tailzie and provision foresaid, to do and commit any such deeds.” To what deed does that refer? Why the last prohibition is—“if they shall do or commit any other fact or deed, civil or criminal.” And further, the words here used, “in case it shall happen that he shall do and commit any such deeds, or contract such debts,” seem to sustain this view. Now, there you have at once a clear distinction drawn by the framer of this instrument between doing a deed, civil or criminal, which should amount to the destruction of the entail, and the question of a deed caused by contract or by the dealings of the person taking under the entail, and so credited as to be a burden upon the estate. They are put, therefore, in clear contradistinction the one to the other.

Then, my Lords, what is this clause? Why, it is impossible, in my apprehension, that there can be any doubt about the construction of it; because the irritant and resolute clauses, instead of beginning in the order in which you find the acts in the prohibition, which begins with altering the succession, and so on, are so framed as to take up the last act, namely, the doing or committing any fact or deed, “which would be those deeds to which I have referred, which would lead to a forfeiture, civil or criminal, or contract such debts.” Where do you find that in the prohibition? Why, immediately before the last clause prohibiting the doing or committing any other fact or deed, civil or criminal; so that, instead of beginning with the things prohibited in the order in which you find them in the prohibitory clause, this clause takes up the last act prohibited, goes back to the one immediately preceding it, and there stops. And therefore the prohibitions, being numbered one, two, three, four, they prohibit number four—they go back to number three, and they prohibit that; and they forget, or do not mean to prohibit, number two and number one.

The result therefore is, that not only, according to its true construction, but, clearly and unquestionably, according to the construction established by this House in regard to Scotch instruments of this nature, this is a case which admits, in my apprehension, of not a particle of doubt. This is an appeal which I think ought not to have been brought after the decision which had been come to; and therefore I entirely concur with my noble and learned friend in advising your Lordships to dismiss this appeal with costs.

Interlocutor affirmed, with costs.

Appellants' Agent, George Wedderburn, W.S. — Respondent's Agents, J. and W. R. Kernack, W.S.