GOLLAN, ... APPELLANT.
GOLLAN, ... RESPONDENT.

1863.
July 2nd.

Entail—Erasure.—Case in which (reversing the decree below) the House held that certain words written on an erasure were *not* fatal to a deed of entail.

Per the Lord Chancellor: If words written on an erasure are essential, and if the clause without them is insensible, the clause is void; and if the clause be essential to the deed, the deed also becomes void. But if, after rejecting the words on the erasure, the words which remain are sufficient to enable the Court to give its proper effect to the clause, the clause does not become void.

Per the Lord Chancellor: The proposal to read into the blank words that may destroy the clause is a proposal unsupported by principle or authority.

Per Lord Chelmsford: When an erasure is said to be *in essentialibus*, this must refer to the words which are written in, and not to the words which have been obliterated.

THIS case (which is fully reported in the Second Series) (*a*), raised the question how far the fact that certain words were written on an erasure in the irritant clause of a Scotch deed of entail was a vitiation *in essentialibus*, so as to entitle the heir in possession to a declarator of freedom from the fetters.

The Second Division of the Court of Session (altering Lord *Ardmillan*'s Interlocutor) held that the vitiation was fatal, and pronounced a decree on the 18th June 1862, declaring that the heir of entail in possession was at liberty to deal with the estate as an unlimited

(*a*) Vol. 24, p. 1410.

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fiar, having right to make up a feudal title to the same in fee simple (*a*).

In support of the Appeal to the House, Mr. *Rolt* and Mr. *Neish* contended that the words superinduced should be held *pro non scriptis*, and still the meaning would not be changed. The sentence without the omitted words might not be strictly grammatical, but its import would be clear and unambiguous (*b*).

(*a*) In disposing of the case, the Lord Justice-Clerk said: "The words on erasure are *or of any of;* and they seem to me important words in this clause." Lord Cowan: "It was essential to prohibit the debts and deeds of the heirs and substitutes of tailzie, and this is done only by aid of the superinduced words *or of any of*. The erasure, therefore, is fatal in an essential part of an essential clause." Lord Benholme: "I rather think you are not merely to hold the erased words *pro non scripto*, but further to suppose that some words might have been written originally on the space erased different from those which now appear." Lord Neaves: "It is reasonable to conjecture that the original words were not the same as those now written."

(*b*) The clause was as follows, observing that the controversy turned on the four words, "or of any of," which are in *italics*—as thus: "And it is hereby expressly provided and declared, that all the debts or deeds of the said John Gollan, *or of any of* the said heirs or substitutes of tailzie, contracted, made, or granted, as well before as after their succession to the said lands and estate, in contravention of this present entail, and provisions, conditions, restrictions, and limitations herein contained, and all adjudications or other legal execution and diligence that shall happen to be obtained or used upon the same (excepting as is above excepted), shall not only be void and null, with all that shall follow or may follow thereupon, in so far as they might anywise affect the said lands and estate; but also, the said John Gollan, and the heirs of tailzie respectively upon whose debts and deeds such adjudications have proceeded, shall, ipso facto, lose and forfeit their right and title to the said lands and estate, and the same shall devolve to the next heir of entail in like manner as if the contravener were naturally dead, and that freed and disburdened of the said debts and deeds and adjudications or other diligence deduced thereon; and with and under this provision, that in case the said John Gollan, or any of the said heirs of entail above written, shall incur any of the foresaid irritancies, and that the same is declared by decreet at the instance of the next heir of

Mr. *Anderson* and Mr. *A. Mackintosh* for the Respondents. The inquiry is not exclusively as the words superinduced. The presumption is that the erasure took place after the execution. The operation had a purpose. The original words were clearly not the same as those which now appear in their place. They might have been fatal to the instrument.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*a*):

My Lords, this was an action of declarator brought by the Respondent for the purpose of having it declared that a certain deed of entail of the estate of Gollanfield was defective and invalid in the fencing clauses, and that the Respondent was therefore entitled as unlimited fiar in fee simple. The objection was that the prohibitory and irritant clauses of the deed of entail were erased *in essentialibus*, and that these clauses were therefore void. The *Lord Ordinary* was of opinion that the erasures were not fatal to the entail. But his Interlocutor was reversed by the Lords of the Second Division, who decided that the erasure in the irritant clause was fatal, and that the entail was therefore defective and void.

The rules of the law of Scotland on the subject of erasures in deeds appear to be well settled. Any erasure which is not noticed in the testing clause is presumed to have been made after the execution of the deed. But such an erasure is not necessarily fatal to a deed. The words written on the erasure are

tailzie in being at the time, and that thereafter a nearer heir shall exist or be called to the succession, though descended of the contravener's body, that then, and in that case, the said remoter heir succeeding in consequence of the foresaid contravention, shall be holden and obliged to denude of the right to the foresaid lands and estate in favour of the said nearer heir of tailzie, upon his or her existence; but always with and under the burdens, conditions, limitations, irritant and resolutive clauses above expressed.

(*a*) Lord Westbury.

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taken *pro non scriptis.* If such words are essential to the clause in which they are found, and the clause without them is insensible, the clause is void, and if the clause so avoided be essential to the deed, it follows that the deed also becomes void; but if, after rejecting the words written on the erasure, the words which remain are sufficient to enable the Court to ascertain the meaning of the clause, and to give its proper effect to it, then the words rejected are not indispensable, and the clause does not become void. If the erasure occurs in one of the fencing clauses of a deed of entail, and the words written on the erasure are taken *pro non scriptis*, it is necessary that the remaining words should be a sufficient expression of the proper effect of the clause according to a strict and necessary construction of such remaining words. It is not sufficient that you are able to infer the intention from the words which remain; it is necessary that they should express that intention, and no other. It does not follow that a clause becomes unintelligible by the omission of a word that may be proper for its grammatical construction. The words which remain may still be clearly intelligible, and denote a certain and definite meaning, and that without the implication of any additional word or words.

And such I conceive to be the case with the clause of irritancy in the present deed of entail after the words written on the erasure in that clause are rejected. For if the words "or of any of" (which are the words written on the erasure) be struck out, and a comma (that is, a pause in the delivery) added after the words "the said heirs," the clause is intelligible and distinct, if not also strictly grammatical.

It was objected in the Court below that the words "the said heirs" might mean the heirs collectively. But this seems to be negatived by the words "the

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said," which must mean "the heirs herein-before mentioned in the dispositive clause." And "the said heirs" must therefore mean "the respective and successive heirs as they take under the substitution contained in the dispositive clause."

But if this construction be not adopted, the words of the clause as they remain after the rejection of the words on the erasure necessarily involve and therefore warrant the implication of the word "or" after the words "the said John Gollan," which word "or" may be implied upon the authority of *Sharpe* v. *Sharpe*, decided by this House in 1835, and mentioned by the *Lord Ordinary* in the note of his Interlocutor.

My Lords, with respect to the contention of the Respondent that he has a right to read into the blank left by the rejection of the words on the erasure any words whatever, however inconsistent with the rest of the clause, for the purpose of destroying it, such a proposition is, in my judgment, unsupported either by principle or authority.

I am therefore of opinion that the erasure in the clause of irritancy is not *in essentialibus*, and that the rejected words, though possibly required by the strict rules of grammar, are not absolutely necessary for ascertaining the meaning of the clause, even according to that strict construction which is applicable to the fencing clauses of a deed of entail. I must therefore advise your Lordships to reverse the Interlocutor of the Inner House, and to adhere to and affirm the Interlocutor of the *Lord Ordinary*. On the reclaiming note I think that the parties agree that the reclaiming note should be refused without expenses, and therefore I advise your Lordships not to give to the Appellant the expenses of the reclaiming note of the Court of Session.

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Lord CHELMSFORD:

My Lords, the law of Scotland with respect to the alteration of deeds after execution appears to be less strict than the law of England. In this country, if a deed after execution is erased or altered in a material part, it is avoided, and this is the case even if the erasure or alteration is made in an immaterial part by the party who is entitled to the benefit of it, though it is otherwise if made by the party who is bound by the deed or by a stranger. By the Scotch law a mere erasure is not sufficient to vitiate a deed. Where words in a deed are upon an erasure, the presumption is that they were written after the parties and witnesses signed the deed. But the deed does not on that account become void. The only consequence is that the words must be taken *pro non scriptis*. If the words are essential to the clause, the clause is considered to form no part of the deed. When an erasure is said to be *in essentialibus*, this must refer to the words that are written in, and not to those which have been obliterated. For as to what particular words were previously in the deed no presumption is admissible. The supplying conjectural words is called by one of the learned Judges of the Court of Session "a malignant construction," and is supposed by him to have been supplied in the decision in Boswell's case (*a*). It ought, however, rather to be called "a malignant conjecture" for the purpose of destroying the deed. Now, although clauses in a deed of entail are to receive a strict construction in favour of freedom, no presumption ought to be made against them.

The question then is, whether the words written in erasures are essential to the clauses in which they are found. I pass by the alteration in the words "to

(*a*) 31st January 1858; 14 Second Series, 378.

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nnovate," because the clause may stand very well without them, and I confine myself to the erasure in the irritant clause. Are the words "or of any of" necessary to the clause? Do they so far alter its meaning as that the irritancy would have a different effect if they were omitted? Suppose the clause to be read without these words it will run thus: "All the debts or deeds of the said John Gollan, the said heirs or substitutes of tailzie contracted," &c.

Now there can be no doubt that the description "heirs of tailzie" would extend to all or any of the heirs, and would therefore, *ex vi termini*, be equivalent to the expression "or of any of" such heirs. By the omission of those words the grammatical construction would be a little impaired, but the meaning being obvious, there is nothing in any of the authorities to prevent the Court adding words which without altering the sense would express it more accurately. It may as properly be said in Scotch as in English law that "*Falsa grammatica non vitiat chartam.*"

In the case of *Sharpe* v. *Sharpe*, my noble and learned friend Lord *Brougham* put various instances of omissions being supplied for the purpose of completing the obvious meaning of a sentence. A very small addition only would be requisite in this case, supposing the word "substitutes" is taken to be synonymous with "heirs." If it is not, nothing would be required to be added to give the sentence an intelligible meaning and a grammatical construction.

I agree with my noble and learned friend on the woolsack, that the *Lord Ordinary* was correct in his opinion, that the alterations were not fatal to the deed, and that the Interlocutor of the Court of Session, finding that the irritant clause of the deed of tailzie is vitiated and erased *in substantialibus*, is wrong, and ought to be reversed. I ought to mention

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that my noble and learned friend Lord *Brougham*, at the close of the argument, did not appear to concur in the opinions which have been just expressed by my noble and learned friend and myself. I have not had an opportunity of ascertaining what his final opinion is, and therefore am unable to state it.

With respect to the expenses of the reclaiming note, I entirely agree with the view of my noble and learned friend.

Interlocutor appealed from reversed, and Interlocutor of the Lord Ordinary affirmed.