Now this, as I have stated already, is a mere question of construction; there is no question of law in the case at all. The law is plain and undisputed, and the construction, I think, can hardly be denied. The Lord Advocate contended, that you were to refer to the antecedent subject granted. But it is impossible to do that, because you are obliged to come to the conclusion, that the cow's pasturage is to enure through the tack, because the tenant is to have the benefit of it by virtue of his tack. That is, of course, during the tack. The antecedent subjects are granted only to take effect for short periods of years, the dominant tenement is let for 99 years, and then the words to which I have referred are immediately succeeded by the clause of warrandice, by which the company warrants the tack, that is, the things which had been previously granted for 99 years renewable for ever. It is therefore abundantly proved, that the cow's pasturage was granted for the longer period of time. It is granted to accompany the tack, and is a part of the tack.

Now, with regard to the other matters, it is unnecessary to enter into them. Because when you take the regulations and the entries in the books of the Society, you find, that it was the very principle of the lease which was then being constituted without a written agreement, merely by entries in the books of the lessors, that every inhabitant, that is, every holder of a town lot, should be entitled by virtue of that lot to a cow's pasturage on the moor. And, accordingly, starting with that, you have plainly expressed in the regulations the right, in respect of which the holder of a town lot was to enjoy the cow's pasturage, just as if it had been contained in the instrument, the language being "together with the right of grazing a cow during the summer season." The two things, therefore, are identical, they are governed by the same consideration, and I think, therefore, that both of them are valid as against the present appellant, and that the conclusion of the Court below must be affirmed, and the appeal dismissed with costs.

LORD COLONSAY.—My Lords, I concur in the opinion expressed in the First Division of the Court below. I think, that the argument that was maintained for a time, that this lease as a whole was away from and foreign to the protection of the Statute of 1449, is untenable. It is a lease for 99 years, and the condition of its being renewable is one, which may, or may not, be hereafter discussed. This is a building lease granted for 99 years, for the formation of a town of this kind, and it is impossible to say, that it is incompetent to attach to that lease the right of cutting peat or the right of grazing a cow. I see no difficulty whatever in attaching this right of grazing as an adjunct to it, especially looking to the object which the Society had in view in granting these tacks. Then it comes to be a question of construction, whether the clause as to a cow's grazing is here intended to be a sort of adjunct to the building lease, or an adjunct to those other things which immediately precede it. You cannot attach it to them. They are separate and independent things, each having its own period of endurance. If you were to cut these things out of the lease, or to strike the pen through them, and to read the lease continuously, it is quite clear, that this "Moreover" clause must apply to the building lease. I have therefore no hesitation in thinking, that the conclusion of the Court below is quite right.

Interlocutors of the Court of Session affirmed, and appeal dismissed with costs.

Appellant's Agents, James Dalgleish, W.S.; William Robertson, Westminster.—*Respondents' Agents*, D. Curror, S.S.C.; J. Y. Puller, S.S.C.; R. M. Gloag, Westminster.

APRIL 29, 1870.

LORD CHARLES G. A. HAMILTON, *Appellant*, v. DUKE OF HAMILTON, *Respondent.*

Entail—Prohibition—Irritant and Resolutive Clause—Rutherfurd Act, § 43—*A deed of entail contained the three usual prohibitions, but in the irritant and resolutive clauses there was no express clause covering the prohibition against altering the succession.*

HELD (affirming judgment), *That the deed of entail was annulled by the Rutherfurd Act*, § 43, *for the Rutherfurd Act, in questions* inter hæredes, *as well as between strangers, annuls a deed of entail which prohibits altering the order of succession, if there is no irritant and resolutive clause applicable; and such a prohibition was ineffectual at common law against onerous deeds of the heir in possession.*

SEMBLE, *The prohibition against alienating does not include a prohibition against altering the order of succession, which latter prohibition must be specific.*[1]

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[1] See previous report 7 Macph. 139: 41 Sc. Jur. 77. S. C. L. R. 2 Sc. Ap. 12: 8 Macph. H. L. 48; 42 Sc. Jur. 396.

This was an appeal from interlocutors of 20th March and 20th November 1868. In 1867 the Duke of Hamilton raised an action of declarator against the next heirs of entail entitled to succeed to certain lands, concluding, that the deeds of entail were invalid and ineffectual, and that he had power to sell and dispose of the same at discretion. The pursuer, as heir in possession, held various lands, lordships, and baronies under a deed of tailzie dated in 1693, and recorded in the Register of Entails. The prohibitions were against demitting the honours, against selling or charging the lands, against contracting debt, and against altering the order of succession. Irritant and resolutive clauses were as follows :—" And if he or they or any of them should contravene, or do in the contrary of any point of the aforesaid provisions, either by demitting or resigning the title, honours, and dignity of Duke of Hamilton, or making any alteration in the course of succession of the said title, honour, and dignity, or by selling, annailzieing, or disponing the foresaid lands, and estate, or any part thereof, heritably and irredeemably, or grant wadsets, or infeftments of annual rent or yearly duties furth thereof, or contract debt, or do any other deed, civil or criminal, whereby the said lands and estate or any part thereof may be evicted, apprised, or adjudged, or anyways burdened and affected, or become caduciary, escheat, forfeited, or confiscated, that then, and in these cases, or any of them, not only shall all these deeds and debts be void and null of themselves, and no ways binding or obligatory to infer any action or execution personal or real against the next heir of tailzie, or the foresaid estate, nor anyways burden nor affect the said estate or any part thereof, but also the persons contravening, if they be descended of our bodies, shall forfeit, amit, and tyne all right, title, and interest they have or can pretend to the foresaid lands and estate, honour, and dignity, *ipso facto*, and that for themselves only." The Duke alleged, that in the above irritant and resolutive clauses there was no admission of any clause against the altering the order of succession ; and, therefore, there was nothing to prevent the application of the 43d section of the Rutherfurd Act, which enacted, that if a deed of entail was defective in any of the prohibitions, it should be deemed ineffectual as regards all the prohibitions, and the estate should be subject to the deeds and debts of the heir then in possession. On these grounds, the Duke claimed the right to sell and dispose of the lands included in the above entail. The defenders (the next heirs of entail) contended, that the deed of entail was not defective. The Lord Ordinary, and afterwards the First Division, unanimously held, that the deed of entail was bad, and no longer binding on the Duke. The heirs of entail now appealed against that decision.

The *Dean of Faculty* (Gordon), and *Mellish* Q.C., for the appellants.—The question is, if it is not to be reasonably implied from the irritant and resolutive clauses, that the prohibition against altering the order of succession was included. In such a case general words are sufficient, and no technical specific words are essential. The clauses began with the words " if he contravene any part of the foresaid provisions,'' and these cover everything. So the words " annailzie or dispone " imply altering the order of succession. So the words " all acts whereby the lands may be burdened and affected'' imply a prohibition of altering the succession. Words less strong have been held sufficient—*Lord Strathnaver* v. *Duke of Douglas*, M. 15,373 ; *Ure* v. *E. Crawford*, M. 4315 ; *Monypenny* v. *Campbell*, M'L. & Rob. Ap. 898. But even assuming the prohibition against altering the order of succession not sufficiently fenced, still the Rutherfurd Act annuls only those entails which are defective in some point which required the protection of the Act 1685, c. 22. This particular prohibition was good at common law irrespective of the Entail Act, at least in questions *inter hæredes*—*Carrick* v. *Buchanans*, 3 Bell's Ap. 342 ; *per* LORD WESTBURY in *Lindsay* v. *Oswald*, L. R. 1 Sc. Ap. 99, *ante*, p. 1432. That law was not altered by the Rutherfurd Act, 11 and 12 Vict. c. 36, § 43—*Norton* v. *Stirling*, 14 D. 944. There are some decisions to the contrary, but these are erroneous, or do not apply to the present point, namely, *Baillie* v. *Baillie*, 12 D. 1220 ; *Boswell* v. *Boswell*, 14 D. 378 ; *Menzies* v. *Menzies*, 14 D. 522 ; *Cunyngham* v. *Cunyngham*, 14 D. 636 ; *Dewar*, 14 D. 1062 ; *Ferguson*, 15 D. 19 ; *Scott*, 18 D. 168. In *Cochrane* v. *Bailie*, 2 Macq. Ap. 529, *ante*, p. 685, this point did not arise ; in *White* v. *Dempster*, *ante*, p. 708 ; 3 Macq. Ap. 62, there were other grounds on which that decision went.

Sir R. Palmer Q.C., and *Anderson* Q.C., for the respondent.—This case is concluded by the authorities. It is not correct to say, that a prohibition against altering the order of succession was good at common law, for that doctrine did not apply in case of onerous deeds, and in *Carrick* v. *Buchanan* the decision had reference only to gratuitous deeds. This qualification makes all the difference. Before the Rutherfurd Act 1848, it was necessary, in order to defend the deed, to hit the blot, that is to say, to do the very thing which the deed did not effectually prevent ; but now the deed is bad *in toto*, unless all the three prohibitions are good in terms of the Act 1685—*Menzies*, 14 D. 522 ; *Cunyngham*, 14 D. 636 ; *Dewar*, 14 D. 1062 ; *Ferguson*, 15 D. 19 ; *Scott*, 18 D. 168. This very point has been already decided by the House—*Cochrane* v. *Baillie*, 2 Macq. Ap. 529, *ante*, p. 685 ; *White* v. *Dempster*, 3 Macq. Ap. 62, *ante*, p. 708.

LORD CHELMSFORD.—My Lords, two questions arise upon this appeal, *1st*, whether the irritant and resolutive clauses in the entail of 1693 (with which all the entails agree) apply to the prohibition against altering the order of succession ; and *2dly*, if not, whether the respondent,

the pursuer in the action, is entitled to a declarator of freedom from the whole of the entail under the 43d section of the Rutherfurd Act as against the appellant, one of the heirs of entail.

It is clear that the irritant and the resolutive clauses do not apply in terms to the prohibition against altering the order of succession. But it is said, that this prohibition may be treated as superfluous, because there are other words in the prohibitory clause which include it, and to which the irritant and resolutive clauses are applicable. I do not think, however, that this argument is well founded. There are three prohibitions which have been called the cardinal prohibitions in entails, and which are quite distinct from each other, viz. against alienation, against contracting debts, and against altering the order of succession. I think that the prohibition against altering the order of succession ought to be specific, and that even if it would be included in a prohibition against alienation, (which it does not appear to me that it would,) the distinct and separate mention of it shews, that it was not intended to be so included in this entail.

The alteration of the order of succession being specifically prohibited, it is not covered by the irritant and resolutive clauses, which are framed upon the principle of enumeration, *i.e.* of repeating all the specific acts forbidden by the prohibitory clause.

With regard to the second question, as to the effect of the Rutherfurd Act upon an entail where the prohibition against altering the order of succession is not fenced with irritant and resolutive clauses, it was argued for the appellant, that before the passing of the Rutherfurd Act the prohibition as to altering the order of succession was effectual at common law, though not fenced in terms of the Act of 1685; and that, therefore, the condition necessary to the application of the Act of 1685 does not exist. This argument was addressed both to the Lord Ordinary and to the Court of Session, but was not allowed to prevail.

By the Act of 1685 persons are empowered "to tailzie their lands and estates, and to substitute heirs in their tailzies, with such provisions and conditions as they shall think fit, and to affect the said tailzies with irritant and resolutive clauses, whereby it shall not be lawful to the heirs of tailzie" (amongst other things) "to do any deed whereby the tailzie may be apprised, adjudged, or evicted from other substitutes in the tailzie, or the succession frustrate or interrupted, declaring all such deeds to be in themselves null and void."

Then by the 43d section of the Rutherfurd Act, it is provided, that where any tailzie shall not be valid and effectual in terms of the said recited Act of the Scottish Parliament, passed in the year 1685, in regard to the prohibitions against alienation and contraction of debt, and alteration of the order of succession in consequence of defects either of the original deed of entail, or of the investiture following thereon, but shall be invalid and ineffectual as regards any one of such prohibitions, then, and in that case, such tailzie shall be deemed and taken, from and after the passing of this Act, to be invalid and ineffectual as regards all the prohibitions. Now, a tailzie under the Act of 1685 is not valid and effectual to frustrate or interrupt the succession, unless it is affected with irritant and resolutive clauses. And therefore, the entail in question, being invalid and ineffectual as regards this prohibition, is invalid and ineffectual as to all.

That the Rutherfurd Act applies to questions *inter hæredes* has been considered to be the settled law in Scotland for some years, according to the cases of *Cunyngham*, *Ferguson*, and *Dewar*, mentioned in the Lord Ordinary's note.

The authority of these cases is in my opinion very much strengthened by the fact, that Lord Ivory originally doubted the propriety of the decisions, apparently on the ground, that *Carrick* v. *Buchanan*, had decided that a gratuitous deed altering the order of succession is void in a question *inter hæredes* without regard to the question whether the entail was sufficiently fenced under the Act of 1685. But in the subsequent case of *Scott* (18 D. 168) he entirely changed his opinion, and said, "a plea was attempted to be raised on the case of *Buchanan* by the defender, that since, in a question *inter hæredes*, the prohibition against altering the order of the succession was effectual without any fencing, therefore the Rutherfurd Act did not apply, because there was not a defect, in that view of the case, in the prohibitive clause. That is a view of the case that at one time, your Lordships may remember, I had occasion several times to bring before the Court, and to support. But I came to be of opinion, that the grounds upon which I did so were rather shortsighted, inasmuch as Lord Fullerton explained, that it does not necessarily follow, that the deed altering the order of succession is a gratuitous deed. It may be an onerous deed, and it may be embodied in a marriage contract, the most onerous of all contracts; and that being so, it was a case in which fencing was as necessary to protect the altering the order of succession as in any other of the prohibitions, and therefore, however strongly I may have been inclined to doubt at first, I now acquiesce entirely in the judgment of the Court in the cases of *Dewar*, *Cunyngham*, and *Ferguson*."

These cases appear to me to have decided the question, and I will merely add, with reference to the case of *White* v. *Dempster*, that that case at all events decided this, that the Rutherfurd Act is applicable to a question *inter hæredes*. Under the circumstances I submit to your Lordships, that the interlocutor ought to be affirmed, and the appeal dismissed with costs.

Lord Westbury.—My Lords, I think it plain, on looking at the 43d section of the

Rutherfurd Act, that if an entail be ineffectual with respect to any of its prohibitions, it was intended that the whole of that entail should be altogether invalid and null. And the words are so universal, so utterly free from any species of exception, that the enactment must apply as between all parties, that is, as well between persons taking under the entail, and strangers claiming under an act which is not sufficiently prohibited, as between the heirs of entail taking under the instrument.

The criterion to which the Rutherfurd Act refers is this, whether an entail be complete and perfect under the Act of 1685. Applying that test, it declares that if it be not perfect with reference to that Statute, it may be deemed imperfect altogether.

The question then, that arises, is simply this: Is this entail capable of bearing the test of the application of the Act of 1685. Now the vice in the entail, the defect struck at, is the circumstance, that the prohibitory clause which is directed in terms against an alteration in the order of succession is not fenced by proper irritant and resolutive clauses.

Some attempt was made to shew, that the irritant and resolutive clauses might be made by construction large enough to include and express prohibitions against the alteration of the order of succession. But if we were to listen to those arguments we should have to reverse a great number of authorities, that have been long established and acted upon in the law of Scotland. It is quite sufficient to refer to the very luminous judgment given by LORD BROUGHAM in the case of *Lang* v. *Lang*, M'L. & R. 893, to prove that the present attempt to make by construction the irritant clause sufficient to cover a prohibition against altering the order of succession is entirely met by the arguments in that judgment, and is shewn to be utterly inconsistent with the established law of entail in Scotland.

Then, my Lords, the ingenuity of the counsel for the appellant resorted to this argument: It was said, that it cannot be invalid, according to the terms of the Statute, because a clause prohibiting the alteration of the order of succession is good at common law, and did not require the aid of the fencing of the irritant and resolutive clauses. But upon an examination of the Statute it is true that the prohibitive clause would be good as against a gratuitous deed altering the order of succession, but it would not be good as against an onerous deed altering the order of succession, and it is impossible, therefore, to say that the prohibitory clause found in this deed of entail is supported by the doctrine of the common law, and did not require the aid of the protection of the irritant and resolutive clauses.

The result, therefore, is, that you have here a prohibitory clause which in point of fact, unless it be protected by the irritant and resolutive clauses, would be insufficient to control onerous deeds altering the order of succession. You have therefore a vice in the entail. It does not come up to the requisitions of the Statute of 1685. And therefore the Rutherfurd Act undoubtedly applies. I think the intent and object of the Rutherfurd Act are quite plain upon its language, and I should prefer to rest on the interpretation of that language without going into the decisions which have been given upon it, but the decisions that have taken place upon the Rutherfurd Act have adopted that interpretation.

On these grounds I think it is quite clear, that the judgment of the Court below is right, and the conclusion must follow, that this appeal must be dismissed with costs.

LORD COLONSAY.—My Lords, I do not think that it is necessary to add anything to the observations which have been made. The case has appeared to me to be very clear, following the course of reasoning which has been expressed by my noble and learned friend who has just spoken. That is the course of reasoning which appeared to me, in more than one decision of the Court below, to be conclusive upon this point, and I adhere to the opinion which I expressed in those reported cases as well as to the judgment pronounced in this case.

Interlocutors affirmed, and appeal dismissed with costs.

Appellant's Agents, Tods, Murray, and Jamieson, W.S.; Connell and Hope, Westminster.—*Respondent's Agents*, H. and A. Inglis, W.S.; Gregory, Rowcliffe, and Rawle, Bedford Row, London.