Agents for Respondents—David Curror, S.S.C., and James Y. Pullar, S.S.C., and R. M. Gloag, London.

*Friday, April 29.*

HAMILTON *v.* HAMILTON.

(*Ante*, vol. vi, p. 111.)

*Entail—Prohibitory, Irritant and Resolutive Clauses,* —11 *and* 12 *Vict.*, c. 36, § 43. *Held,*—affirming the judgment of the First Division,—that, as the irritant and resolutive clauses in a deed of entail, whose fettering clauses were framed upon the principle of enumeration, did not prohibit alteration in the order of succession, the entail was invalid under the 43d section of the Rutherfurd Act, and that even in a question *inter hæredes.*

In this action the Duke of Hamilton, heir in possession of the Hamilton estates and others, sought declarator that the various deeds of entail under which he held these lands were invalid and ineffectual in so far as regarded all the prohibitions and irritant and resolutive clauses therein contained or referred to, and that he was entitled to dispose of the lands at pleasure.

The Lord Ordinary (BARCAPLE) gave judgment in favour of the pursuer, adding this note:—"The Lord Ordinary thinks there is no room for question that the irritant and resolutive clauses do not apply to the prohibition against altering the order of succession. They are clearly framed on the principle of enumeration; and, on the strict principle of construction applicable to the fettering clauses of an entail, it must be held that alteration of the order of succession is not included among the acts of contravention enumerated.

"The defender contends that, assuming the prohibition against altering the order of succession not to be fenced by the irritant and resolutive clauses, the pursuer is not entitled to the declarator of freedom from the whole fetters of the entail which he asks, on the ground of the provision contained in the 43d section of the Rutherfurd Act. The Lord Ordinary must hold that this is not an open question, but that it is settled by a series of judgments both in this Court and in the House of Lords. The defender chiefly relies upon the well established principle that, before the passing of the Rutherfurd Act, the prohibition as to altering the order of succession was effectual at common law *inter hæredes*, though not fenced in terms of the Act 1685. On this ground, he contends that it cannot be held that the entails of the Hamilton estates are to all effects invalid as regards the prohibition against altering the order of succession, and that therefore the condition necessary to the application of the 43d section of the Act does not exist, but the cases of *Dick Cunyngham*, 14 D. 636; *Dewar*, 14 D. 1062; and *Ferguson*, 15 D. 19, are express authorities against that construction of the Statute. It has been authoritatively determined in these and other cases that the terms of the clause are too clear and imperative to admit of any doubt as to the effect which it must receive wherever any one of the three cardinal provisions is not valid in terms of the Act 1685, by compliance with the provisions of that Statute. This is nowhere more distinctly pressed than in the case of *Dempster* in the House of Lords, 3 Macq. 62."

The defender reclaimed to the First Division, but the Court adhered.

The defender appealed.

DEAN OF FACULTY and MELLISH, Q.C., for them LORD ADVOCATE and PEARSON, Q.C., in answer

At advising—

LORD CHELMSFORD—My Lords, two questions arise upon this appeal—first, Whether the irritant and resolutive clauses in the entail of 1693 (with which all the other entails agree) apply to the prohibition against altering the order of succession? and, secondly, 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 against the appellant, one of the heirs of entail?

It is clear that the irritant and 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 shows 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 samen (the lands) may be apprised, adjudged, or evicted from the other substitute 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 follow-

ing 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 *Cunningham*, *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 in the case of *Buchanan* by the defender, that since, in a question *inter hæredes*, the prohibition against altering the order of succession was effectual without any fencing, therefore the Rutherfurd Act did not apply, because there was no 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 ground upon which I did so was rather short sighted, 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*, *Cunningham*, and *Ferguson*."

These cases appear to me to have decided the question. And I will merely add, with reference to the case of *Dempster* v. *Dempster*, that that case at all events decided this, that the Rutherfurd Act is applicable to a question *inter hæredes*. Under these 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 provisions, 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 parties 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 1865? 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 an express prohibition 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* 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 prohibiting 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 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 must undoubtedly apply. 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 it 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.

Agents for Appellants—Tods, Murray & Jameson, W.S., and Connell & Hope, Westminster.

Agents for Respondent—H. & A. Inglis, W.S., and Gregory, Rowcliffes & Co., Bedford Row, London.

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*Friday, May 6.*

SHEPHERD & CO. *v.* BARTHOLOMEW & CO.

(*Ante*, vol. v, p. 595.)

*Bill—Renewal—Security.* For some years A supplied cotton, on the order of C, for the firms of C & Co. and B & Co., C distributing the cotton between the firms as he chose, and A being at liberty to draw bills on either firm for the price. A sued B & Co. on two bills accepted by them. They defended, on the ground that these bills had been superseded by a renewal bill accepted by C & Co., on whose estate A had already ranked for the amount of the renewal bill. The House of Lords *affirmed* the decision of the First Division, which sustained the defence, and held, after a proof, that in the circumstances A was not entitled to retain the two original bills as an additional security for the price.

The pursuers, who are merchants in Manchester, sued the defenders, merchants in Glasgow, for £4085, 1s. 9d., being the amount of two bills, one for £1706, 5s. 4d., dated 27th December 1864, and the other for £2378, 16s. 5d., dated 2d January 1865. In January 1867 the Court allowed the defenders a proof *prout de jure* of their averment that these bills had been superseded and extinguished. A proof was taken; and thereafter the Lord Ordinary (JERVISWOODE) pronounced an interlocutor finding "That, for some time prior to the raising of the present action, the pursuers on the one hand, and the defenders on the other hand, were engaged in a series of transactions, in the course of which the pursuers were in the habit of purchasing cotton on commission for the firms of John Bartholomew & Company (the defenders) and of John & Robert Cogan, merchants, Glasgow, of both of which firms Mr Robert Cogan and Mr Robert O Cogan were members: Finds that the said Mr Robert Cogan took the active management of the finance department of both of the said firms: Finds that, prior to the year 1865, the orders for the said purchases of cotton were made by, and the cotton so purchased invoiced to, the said firm of John and Robert Cogan, for behoof of their own firm, and also of that of the defenders, to be allocated according to the requirements of the said respective firms for the time: Finds that the pursuers drew bills from time to time on both of the said firms for the price of the cotton so purchased by them: Finds that such bills were not so drawn by the pursuers on said firms of John Bartholomew & Company and John & Robert Cogan, with special reference or in precise relation to the quantity of cotton which was actually allocated to each firm, but as a matter of mutual convenience, and having regard to the position of their respective pecuniary obligations and transactions at the time: Finds that, on the above footing, when the bills now sued on fell due, and were not retired by the defenders, the sums contained therein were included in a new bill, drawn by the pursuers upon, and accepted by, the said firm of John & Robert Cogan, for £5571, 8s. 7d., and bearing date 25th March 1865: And finds that the pursuers ranked on the bankrupt estate of the said John & Robert Cogan, and accepted a composition for the said bill for £5571, 8s. 7d., including therein the sums now sued for." His Lordship therefore sustained the defences, and assoilzied the defenders.

On the pursuers' reclaiming to the First Division the Court adhered.

The pursuers appealed.

ANDERSON, Q.C., MELLISH, Q.C., and JORDAN for them.

LORD ADVOCATE and PEARSON, Q.C., in answer.

At advising—

The LORD CHANCELLOR said it would be unnecessary to trouble the respondents. In this case the appellants complained of certain interlocutors of the Court of Session. The respondents carried on business in Glasgow, and were sued for payment of two bills of exchange which had been given in the course of dealing between them and the appellants and another firm of Cogan & Co., relating to the purchase of cotton. The interlocutors complained of were divisible into two sets—one of which related to the mode of proof, and the other to the merits of the case. The appellants had been in the habit of dealing with the other two firms, of buying cotton for them on the order and directions of Cogan. Cogan had ordered large quantities of cotton from time to time, to be purchased partly on account of the firm of Cogan & Co., and partly on account of Bartholomew & Co.; and the appellants drew bills on these two firms, apportioning the amount of the respective bills as they thought fit, or according to specific directions; but part of the dealing was liable only on its own bills. At the time of the present bills being drawn and accepted, there had been numerous transactions and a series of bills passing between the parties. When the bills became due, the appellants, assenting to the course of dealing, drew new bills, altering the apportionment of the sums payable by the representative firms; and the question was whether those new bills were intended to be, and were treated by the parties concerned as, substituted securities for the old bills then falling due. The first question related to the mode of proof, and the appellant contended that the only mode of proving that the old bills were discharged was by writ or oath of the appellant. It was not necessary in the present case to go into the rule of law on the subject, for if any writing was necessary, then there was such writing in the present case; but on a view of the whole facts and circumstances, it was very clear that the old bills were intended to be superseded and withdrawn when the new bills were accepted. The appellants relied upon the circumstance that the old bills were not given up to the debtor and cancelled; but, however that might be, the parties certainly did not intend that these bills should remain in operation after the new bills were made. The Court of Session therefore have taken that view; the judgment was right; and this appeal must be dismissed with costs.

LORD WESTBURY concurred, and said there could be no reasonable doubt upon the facts of the case. At the time the bills now sued upon fell due one of the Glasgow firms owed about £8000, and the