by the remarks which your Lordships have made, I cannot say that my difficulty is entirely removed.

But for the great respect with which I regard the opinion of your Lordships, and the great reluctance which I feel to differ on a question of construction of a statute of this kind, which is of extensive application and of practical importance, I should have been rather disposed to take a different view of the 2nd section of this Act; and I should have hesitated in coming to the conclusion that the Magistrates of Rothesay, dealing with premises within the Burgh, and acting in the wide discretion committed to them, have here exceeded their statutory powers. I should have been inclined to think that the Magistrates had power to insert in the certificates a condition that inns, hotels, and public-houses shall be closed at 10 o'clock at night instead of 11 o'clock, and had the power to direct the insertion of such condition within the area of the "particular locality" in question, the same being literally within the Burgh of Rothesay. If the Magistrates could have issued that order, and inserted that condition, in regard to one street or one district in the burgh, or several streets or districts in the burgh, which is scarcely disputed, then I have great difficulty in holding that they could not do the same thing in a larger area, still within the burgh, but including all the public-houses. It rather seems to me that if the limitation of hours was to be enforced at all, —a matter on which there may be difference of opinion, but on which the Magistrates must judge,— then, equality, impartiality, and justice, would be better promoted by the course which they took than by confining the resolution to a few streets. To limit the hours all over the town, and in all the public-houses, may be an extreme or an unwise measure. Some at least may think so. But to limit the hours in one half of the town seems to me to be less just.

The law trusts the Magistrates. The law has committed to them a wide discretion in this matter. I have no doubt that they acted from the best motives, and according to their deliberate judgment. It is not for us to say whether they acted wisely or not. We are not called on to judge—we are not entitled to judge—on this matter. The duty and responsibility rested with them: and in the discharge of that duty, under that responsibility, they have issued the resolution and order now complained of. These are my difficulties.

The judgment of your Lordships settles the question of construction of the statute and the question of the lawfulness or competency of the resolution: and having regard to the provisions in the series of statutes to which your Lordship has adverted in a most instructive commentary, I have not formed an opinion sufficiently clear and decided to justify my dissent from the judgment; accordingly I do not dissent. But I think it right, at the same time, to express shortly and with much diffidence the doubts which I entertain. Nor can I regret the result at which your Lordships have arrived, for I am one of those who feel that not so much by restraint of law as by moral influences and Christian example can the social reformation which these Magistrates desire be effectually promoted.

LORD JERVISWOODE concurred.

The Court pronounced the following interlocutor:—

"Recall the said interlocutor, repell the defences, reduce, decern, and declare in terms of the reductive conclusions of the summons; and decern and ordain the defender John Wilson, as town-clerk of the Magistrates of Rothesay, to delete the word 'ten,' standing at present in each of the certificates granted to the pursuers by the defenders the Magistrates of Rothesay, to denote the hour of closing the pursuers' hotels for the sale of exciseable liquors, and to substitute therefor in each of the said certificates the word 'eleven,' to denote such hour of closing; *quoad ultra*, of consent of the pursuers, assoilzie the defenders, and decern; find the pursuers entitled to expenses; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuers—Watson and R. V. Campbell. Agent—A. Kirk Mackie, S.S.C.

Counsel for Defenders—Solicitor-General (Clark) and Orr Paterson. Agents—J. & A. Peddie, W.S.

*M.*, Clerk.

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*Saturday, June* 21.

## SECOND DIVISION.

[Lord Mackenzie, Ordinary.

### MALCOLM *v.* KIRK.

*Entail—Debts—Alienation—Prohibitive and Irritant Clauses—Act* 1685, *c.* 22—*Act* 11 *and* 12 *Vict. c.* 36.

A deed of entail, otherwise duly fenced with irritant and resolutive clauses, contained certain reservations permitting the contraction of debt, and sale of portions of the estate to pay off the debt thus permitted to be contracted. *Held* that the entail was nevertheless valid and effectual under the Act 1685, c. 32, and that the provisions of Act 11 and 12 Vict. c. 36, consequently did not apply.

This case came up by reclaiming note against the interlocutor of the Lord Ordinary.

The pursuers pleaded—"(1) In respect of the reservations contained in the deed of taillie from the prohibitions thereby imposed, the same does not contain valid or effectual prohibitions against either the contraction of debt, or against sales or alienations, or one or other of them, in terms of the Act 1685, cap. 22. (2) Even assuming that the entail contains the three cardinal prohibitions required by the Act 1685, cap. 22, none of these prohibitions is, or at least one or other of them is not, validly fenced with irritant and resolutive clauses. (3) The entail does not effectually exclude or annul diligence against the estate at the instance of creditors for or in respect of debts contracted by the heirs of entail. (4) The entail being an incomplete and imperfect entail in terms of the Act 1685, cap. 22, is, in virtue of the provisions contained in the Act 11 and 12 Vict. cap. 36, invalid and defective *in toto*, and the pursuer is entitled to decree as concluded for."

The defender pleaded that the entail being complete and unassailable he was entitled to be assoilzied with expenses.

The disposition and deed of taillie in question contains, *inter alia*, a prohibitory clause or prohibi-

condition as to an hour of closing at all; and therefore it is necessary to obtain some practical remedy to obviate that result; and I think the pursuers have suggested a very good form in which to do it. It will be observed that the certificate in this Act, as in all the previous statutes, is made out by the Clerk of the Magistrates. I presume it is the Town Clerk who acts in that matter; but, whoever it is, it is of very little consequence—it is the Clerk who acts in that licensing Court. The Magistrates decide upon who is to have the certificate, and having decided that, the making of the certificate is entirely the work of the Clerk. He writes it, and he appends this docquet, or note, to it—"The above certificate is made out according to the deliverance in the book or register appointed to be kept in terms of the Act of Parliament," and then he signs that as Clerk. Now, I think it is quite competent for us, in rectifying any illegality which has been committed by the Magistrates, and by the Clerk under their order, to order that Clerk to undo that illegality; and therefore I would suggest that, under one of the conclusions of this summons which is specially directed to that subject, the Clerk should be ordered to delete the word "ten" and substitute the word "eleven" in each of these certificates, which will have the complete effect of restoring the pursuers to the condition in which they were entitled to be when they got their certificates.

Lord Deas—I agree with your Lordship that the question whether we have jurisdiction to interfere in this matter depends entirely upon whether the Magistrates have or have not kept within their powers under the statute. If they have exceeded their powers there can be no question of the jurisdiction of this Court to rectify what they have done. I don't think that that question is affected by the fact which was pointed out in the discussion, that the judgment of the Quarter Sessions is not substantively complained of in this action; because what the Quarter Sessions did was simply to dismiss the appeals which were taken to them, leaving the original deliverance, or whatever it may be called, to stand. I may state, also, that I agree with your Lordship as to how the two months are to be reckoned with reference to the conclusion for damages. I think that the action was brought within the two months,—reckoned according to the rule fixed in our practice,—and that therefore there is no incompetency in that conclusion, any more than in the other.

With reference to the question itself, whether the Magistrates, in what they did, went out of or beyond the statute, that at once raises the question whether, under colour of altering the hour during which the hotels and public-houses were to be kept open within a particular locality in the burgh, they did in substance alter the hours as to the whole hotels and inns, &c., within the burgh? I think it is clear enough that the effect of the words which were introduced into the last statute (25 and 26 Vict.), and which were not in the previous statute, viz., the words—"in any particular locality," &c., necessarily is, and probably was, intended to be to prevent the very thing which has been done here, viz., the changing of the hours with reference substantially to a whole county, district, or burgh. I agree with your Lordship that what was done here was substantially to change the hours in the whole burgh of Rothesay. If that could be done in the whole burgh of Rothesay in this way, it might of course equally be done in the whole burgh or city of Glasgow or Edinburgh, and the consequence of that would be, that in one or both of these large cities it might be made imperative to close the whole inns, hotels, and public-houses within the bounds at nine o'clock in place of what is the general regulation, viz.—eleven o'clock at night. It would be very difficult to suppose that it was intended to give a power of that kind. There was, as your Lordship has pointed out, some colour for alleging a power of that kind (although not so intended) under the statute of 16 and 17 Vict., but I cannot see any shadow of ground for holding that there is such a power as that under this statute, which expressly provides that the exception—for it is an exception—which enables the Magistrates to change the hours, shall only apply to a "particular locality" within any county, or district, or burgh. Now, a particular locality within a county, or district, or burgh, cannot possibly be read as the whole county, the whole district, or the whole burgh, and the line in the present case is obviously drawn on purpose, so as to leave out a little bit of the burgh of Rothesay in which there are no public-houses, inns, or hotels, and to take in the whole burgh in which the hotels, inns, and public-houses are situated. Now, that is doing under colour of this proviso a thing which could not be done directly, and which was never meant to be comprehended under it. What the statute does enable the Magistrates of a burgh or the Justices of Peace in a county or district to do is a matter of very considerable difficulty. I think this statute, as happens too often, is not expressed in the clear and distinct manner in which it ought to have been expressed. Words are not unfrequently put into such statutes which the parties who put them in have not considered the precise meaning of, and they leave the Court to find out their meaning. That is imposing on us a hard task, and the observation may not be altogether inapplicable here; for what constitutes a locality requiring other hours than the general hours is not very easy to understand. The locality does not require anything about the matter in any correct sense. Whether it means required by the inhabitants, or whether it means, as is more probable, some such exceptional circumstances or objects, as your Lordship has suggested, it is very difficult to say, and I don't wish to anticipate any questions that may arise by going into that further than is necessary. The thing that I think clear, and the only thing that I at present wish to decide, is, that whatever the Magistrates could do in the burgh of Rothesay under this proviso, they cannot do the thing they did. I further agree with your Lordship as to the terms of the interlocutor we ought to pronounce, and the mode in which this error ought to be corrected.

Lord Ardmillan—I concur in repelling the pleas urged by the defenders to exclude this action. I think that this action, which is not an appeal or a review, is competent, and not barred by the clauses of limitation (sect. 34 and 35) in the Act 25 and 26 Victoria, cap. 35. On these points I add nothing to what has been already stated.

On the merits—that is, on the construction of the statute—and on the objections to the competency of the resolution by the Magistrates, I have had some difficulty: and though I feel greatly impressed

tory clauses in the following or similar terms, viz.:—"and further, it is hereby expressly provided and declared that it shall not be in the power of the said Margaret Malcolm, nor any of the heirs of tailzie above named, to sell, annalzie, wadsett, delapidate, nor put away any of the lands above mentioned, nor contract debt, nor grant heritable bonds or other rights and securities therefor whereby the said lands or any part thereof may be evicted or adjudged from them in defraud of the other heirs of tailzie above specified, nor yet to alter this present tailzie and order of succession above narrated."

These prohibitions are immediately followed by, and purport to be fenced with, irritant and resolutive clauses in the following or similar terms, viz.:—"Declaring all such deeds not only void and null, but the person so contravening to have amitted and lost all right and title to the foresaid lands and estate, and the same to fall and devolve upon the next member of tailzie hereby appointed to succeed, as if the contravener were naturally dead; and he or she is hereby obliged, upon the said contravention, to denude themselves of the right of the said lands in favour of the said next member of tailzie, wherein, if they fail, the same is to be prosecuted by declarator, adjudication, or other action competent of the law."

Immediately after the said prohibitory, irritant and resolutive clauses, the deed of taillie contains the following reservations therefrom in these terms, viz.:—"Reserving always, notwithstanding of the prohibitory clauses above written, power and liberty to the said Margaret Malcolm, and the other heirs of tailzie above specified, to provide their husbands and wives in suitable liferents, by way of locality, not exceeding the half of the present rent of the estate for the time, and to provide their younger children, beside the heir, with competent provisions, not exceeding two years' rent of the said estate; declaring always that neither the said Margaret Malcolm, nor any of the other heirs of tailzie, shall suffer adjudications nor other real diligence to be led and done against the said lands, or any part thereof, for debts warrantably contracted, at least they shall be holden and obliged to purge and redeem the same two full years before expiring of the legal reversion; wherein, if they failzie, they shall lose their right of the said lands in manner foresaid, and it shall be leisome and lawful to the next member of tailzie to purge and redeem the same, and declare their right to the said estate in manner before prescribed. Providing, nevertheless, that it shall be free and lawful to the said heirs of tailzie, or their foresaids, to sell, annalzie, wadset, burden, wadset or otherwise dispone as much of the said lands and baronies as may, by the price thereof, sufficiently satisfy and pay the debts warrantably contracted in manner foresaid, which shall be resting for the time, with annual rent, until the said heirs of tailzie can validly and legally dispose thereof for that effect; which disposition or other right shall be no ground for incurring the foresaid irritancies any manner of way."

By the Act 11 and 12 Vict., cap. 36, section 43, it is, *inter alia*, enacted, '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; and the estate shall be subject to the deeds and debts of the heir then in possession, and of his successors, as they shall thereafter in order take under such tailzie, and no action of forfeiture shall be competent at the instance of any heir-substitute in such tailzie against the heir in possession under the same, by reason of any contravention of all or any of the prohibitions," &c.

The interlocutor and note reclaimed against were as follows:—

"*Edinburgh*, 20*th July* 1872.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, deed of entail, and process—Finds, declares, and decerns in terms of the conclusions of the libel, and finds no expenses due to either party.

"*Note.*—1. The pursuer maintained that the prohibitions against alienation, contraction of debt, and alteration of the order of succession were not fenced with valid, irritant, and resolutive clauses. His contention was that the word 'deeds' in the irritant clause referred only to the granting of heritable bonds or other rights and securities for debt, whereby the estate may be evicted or adjudged—a prohibition which, he says, is separately mentioned in the prohibitory clause. The Lord Ordinary cannot so read the clause. The rule of construction is, that while the prohibitory and irritant clauses of an entail are to be construed strictly, they are at the same time to be construed fairly, giving the words employed, when general, their natural import, especially where that is the meaning the context confers upon them.

"After specifying the prohibitions, which are ample and complete, the deed proceeds as follows:—'Declaring all such deeds not only void and null, but the person so contravening to have amitted and lost all right and title to the foresaid lands and estate, and the same to fall and devolve upon the next member of tailzie.' The word 'deeds' here used is, it is thought, applicable to and includes sales and alienations of the estate, the contracting of debt, the granting of heritable bonds, and other rights or securities therefor, whereby the estate may be evicted or adjudged, and the alteration of the order of succession, which last is the prohibition that immediately precedes the irritant and resolutive clause above quoted. All these deeds are prohibited, the irritant and resolutive clauses being framed on the principle of referring generally to them as the deeds which are prohibited. The word 'deeds' does not occur in the prohibitory clause, and there is nothing to show that it is to be read in a limited sense. On the contrary, the use of the relative 'such'—'such deeds'—also shows that these words are to be read as referring to and including everything done in contravention of the prohibitions. The pursuer's argument on this branch of his case depends, the Lord Ordinary considers, upon a strained and unfair interpretation of the deed. The irritancy is quite general. It is free from ambiguity, and, in the opinion of the Lord Ordinary, clearly applies to all deeds in contravention of the whole prohibitions contained in the preceding clause. Any other reading appears to him to be unreasonable and ungrammatical. The resolutive clause, which

is closely united to the irritant clause, also confirms this view, inasmuch as it declares the person 'so contravening to have amitted and lost all right,'—that is, the person contravening by doing, making, or granting what is prohibited in the prohibitory clause.

"2. The pursuer further pleads that, as the entail is not valid and effectual, in terms of the Act 1685, c. 22, in regard to the prohibitions against sales, alienation, and contraction of debt, in consequence of defects in the deed of entail, it is invalid and ineffectual as regards all the prohibitions, and subject to his debts and deeds, in respect of the enactment to that effect contained in the 43d section of the Ruthurfurd Act.

"In disposing of this plea, it is necessary to keep in view the provisions of the Act 1685, c. 22, concerning tailzies. By that Act it is made lawful to the lieges 'to tailzie their lands and estates, and to substitute aires in their tailzies with such provisions and conditions as they shall think fitt, and to affect the said tailzies with irritant and resolutive clauses, whereby it shall not be lawful to the airs of tailzie to sell, annalzie, or dispone the said lands, or any part thereof, or contract debt, or doe any other deeds whereby the samen may be apprised, adjudged, or evicted from the others substitute in the tailzie, or the succession frustrat or interrupted, declaring all such deeds to be in themselves null and void.'

"But although under this Act it is necessary to a valid entail that the entail shall contain prohibitory, irritant, and resolutive clauses under which sales and alienations of the estate and the contraction of debt thereupon is unlawful, the entail in the present case, after reserving power, notwithstanding the prohibitory clauses, to the heirs of tailzie, to provide their husbands and wives in suitable liferents by way of locality, not exceeding the half of the present rent of the estate for the time, and to provide their younger children beside the heir with competent provisions, not exceeding two years' rent of the estate, expressly provides that it shall be free and lawful to the said heirs of tailzie or their foresaids 'to sell, annalzie, wadset, burden, or otherwise dispone as much of the said lands and baronies as may by the price thereof sufficiently satisfy and pay the debts warrantably contracted in manner foresaid, which shall be resting for the time, with annual rent until the said heirs of tailzie can validly and legally dispose thereof for that effect, which disposition or other right shall be no ground for incurring the foresaid irritancies any manner of way.'

"Under this deed the heir in possession may sell, alienate, or burden as much of the estate as may by the price pay the debts contracted under the power to grant provisions to widows and children to the extent authorised by the entail, which shall be due at the time, with the annual rent or interest thereof, until the heirs of tailzie can dispose of as much of the estate as may be necessary for that effect. In short, the fetters of the entail are not complete against sales, alienation, or contraction of debt, but are invalid and ineffectual, and the heirs, as fee simple proprietors, to that extent can, for debts due in respect of provisions granted to widows and children to the amount authorised by the deed, and the annual rent thereof, sell, alienate, and burden the estate, the rule of law being that heirs of entail are fee-simple proprietors, and have full power over the entailed estate, except in so far as they are fettered. In the exercise of this right the heirs of entail can sell any part of the estate, even the mansion-house, offices, and policies, and in course of time, as they may sell not only for provisions, but for the annual rent thereof, the whole estate may be sold and alienated. There are no clauses in the entail restricting the granting of provisions by subsequent heirs until those granted by previous heirs had been paid, or declaring that the provisions shall only affect the rents and not the fee, and the only provision besides those already noticed is, that the heirs of entail shall not suffer adjudication or other real diligence to be led against the estate for these debts, at least they shall purge and redeem the same two years before the expiry of the legal reversion. This they may do by selling or disponing as much of the estate as will pay the provision, debts, and annual rents.

"The question is new and attended with difficulty. The Lord Ordinary has carefully considered the able and full argument of counsel, and the numerous cases cited at the debate, and he is humbly of opinion that, as the entail in the present case is not complete, and valid, and effectual in terms of the Act 1685, c. 22, in regard to prohibitions against alienation and the contraction of debt, it is, in respect of the provisions of the 43d section of the Rutherfurd Act, invalid and effectual as regards all the prohibitions.

"The defenders maintain that, as by the 21st section of the Rutherfurd Act the heir in possession liable to pay or provide for provisions to younger children granted by former heirs is empowered to charge them upon the fee and rents of the estate, other than the mansion-house, offices, and policies, by granting bond and disposition in security for the same, with all the usual clauses of such a deed, the provisions in the present entail to a similar effect cannot be held as invalidating it. But there is a great difference between powers conferred upon heirs of entail by statute, and rights excepted or reserved in a deed of entail. The former do not invalidate the entail; but under the latter the fetters of the entail are not applied by the entailer, and the entail is consequently not valid or effectual in terms of the Act 1685, c. 22."

The defenders having reclaimed, the case came up before their Lordships of the Second Division, who, on 15th March 1873, pronounced the following interlocutor:—"The Lords appoint this cause to be heard before the Judges of this Division, with the addition of three Judges of the First Division," &c.

The cause was debated before seven Judges.

At advising—

LORD PRESIDENT—The question which has been argued before us relates to the validity of the entail of Balbadie. The pursuer of the action is the heir in possession, and he concludes for declarator that that entail is and shall be deemed and taken to be invalid and ineffectual in regard to all the prohibitions therein contained against sales and alienation, the contraction of debt, and alteration of the order of succession, in terms of the provisions in the 43d section of the Act 11 and 12 Vict. c. 36, and that the pursuer is entitled to hold, and holds, the foresaid lands and others above described, or such part thereof as belongs to him as heir of entail foresaid, free from the prohibitions, conditions, and provisions contained in the said

deed of tailzie, with full power to sell and alienate, &c.

The grounds upon which this action is based are distinctly enough stated in the pursuer's pleas, but these pleas have not all been dealt with in the argument before us. On the contrary, the sole ground upon which the pursuer has maintained in the course of that argument that the entail is invalid, is that which is contained in the first plea, taken in connection with the fourth. There are, therefore, obviously questions in this case which cannot be at present disposed of. Whether the pursuer intends to insist upon the 2d and 3d pleas as separate grounds of action we have not been made aware, but it is necessary that I should state very distinctly that we have no intention at present to dispose of these pleas, having heard no argument upon the subject. The first plea in law is "In respect of the reservations contained in the deed of tailzie from the prohibitions thereby imposed, the same does not contain valid or effectual prohibitions against either the contraction of debt, or against sales or alienations, or one or other of them, in terms of the Act 1685, c. 22." And the 4th plea, following out that objection, maintains that the entail, being incomplete and imperfect in terms of the Act 1685, is invalid and defective *in toto*, in virtue of the provisions contained in the Act 11 and 12 Vict. The objection to the validity of the entail is thus made to depend entirely upon the reservations from the prohibitions; and the clause which contains these reservations is to be found on p. 7 of the printed deed. It is to be assumed, of course, that all the cardinal prohibitions are well and effectually inserted in this deed, and that these have been duly fenced with irritant and resolutive clauses. But, that being done, the entailer proceeds thus,—(*His Lordship quoted the reservation clause of the deed of entail, as above narrated*). The Lord Ordinary is of opinion that the effect of these reservations is to destroy or neutralise the prohibitions against sales and alienations, and the prohibition against the contraction of debt. But I cannot help thinking that his Lordship is under some misapprehension as to the precise effect of these reservations, for he says in his note, "Under this deed, the heir in possession may sell, alienate, or burden as much of the estate as may, by the price, pay the debts contracted under the power to grant provisions to widows and children to the extent authorised by the entail, which shall be due at the time, with the annual rent or interest thereof, until the heirs of tailzie can dispose of as much of the estate as may be necessary for that effect." Now, here his Lordship is obviously under the impression that the power of sale may be exercised to a larger extent than is, in reality, permitted by the deed. The provisions to widows can never be the cause of a sale of a part of the estate at all, because that provision is to be made by way of locality only. A locality is not a debt, and there is no provision made for converting it into a debt. It is an appropriation of a particular part of the lands to the widow in liferent. That does not permanently alienate any part of the estate, nor is it in any proper sense a contraction of debt. But, at all events, it is impossible, under this clause of reservation, that an heir of entail could be permitted to alienate any part of the estate for the purpose of satisfying the claim of the widow under a locality deed. The power of sale is confined entirely to debts which are contracted for the purpose of making provisions to younger children to the extent—to each family of younger children—of two years' rents of the estate. That is the full extent of it. The Lord Ordinary says further, "In the exercise of this right, the heir of entail can sell any part of the estate, even the mansion-house, offices, and policies; and, in course of time, as they may sell not only for the provisions, but for the annual rent thereof, the whole estate may be sold and alienated." Now, his Lordship is here again under a mistake, because, in the exercise of such a power as this, the heir in possession would never be permitted to sell the mansion-house, offices, or policies. The practice in this respect is quite accurately stated by Mr Sandford in his book upon Entails, at p. 385, where he says, "When the deed of entail contains a power of sale for the purpose of paying off the provisions to younger children, burdening the entailed estate, the heir in possession must execute it under the authority of the Court of Session. Upon a petition presented to them for that purpose, the Court will authorise a sale of certain parts of the entailed lands, and appoint a trustee in order to carry the same into effect, who is responsible, as under the statutes, for redeeming the land-tax, &c., that the purchase money be properly applied." It is quite plain, therefore, that the heir of entail, proposing to exercise this power, must come to the Court to have the portion of the estate that is to be sold selected and appointed by judicial authority. Neither am I very much moved by the suggestion of his Lordship that, in the exercise of this power the whole estate may be sold and alienated within any short period of time. This entail was made in the year 1725, and we are not informed that the estate has yet disappeared, notwithstanding the lapse of a century and a-half. And, therefore, the effect of the reservation, practically, is certainly not what the Lord Ordinary attributes to it. But, although his Lordship has certainly ascribed far greater effect to this clause than is really due to it, the question is still an important one, and very well worthy of consideration, whether this reservation does not so neutralise or derogate from the cardinal prohibitions of the statute as to invalidate the entail. I can quite understand that there might be such reservations as would make the prohibitions of the entail practically of no avail at all, and enable one heir of entail, or it may be two or three heirs of entail in succession, entirely to dilapidate the whole estate; and a very serious question would then arise, whether that was an entail under the Act 1685 at all, or whether it was not a deed unworthy of the name of an entail, although taking in some respects the form of the statutory provision. Is this a case of that kind? Does the reservation from the provisions go that length?

Now, in determining whether this is a valid entail under the Act 1685, I cannot but go back, in recollection, to a great many deeds of entail which we have seen, and a great many cases which have been decided prior to the passing of the Entail Amendment Act, in which there is permission to contract debt and to sell portions of the estate for the purpose of paying off the debt thus permitted to be contracted; and I am not aware that prior to the passing of the Entail Amendment Act in 1848 it ever was doubted that these were valid and effectual entails under the Act 1685. It is quite unnecessary to particularise cases, but there is a

case that was quoted in the course of the argument — *Howden* v. *Porterfield* — which is a very good example in point, where not only was there a power to contract debt for the purpose of paying younger children's provisions, but also a power to contract debt to the extent of 6000 merks beyond, provided the debt was never allowed to exceed that. Now, that certainly, although the question was not directly raised, was held to be a perfectly valid and effectual entail under the statute 1685. And the question decided there was that the permitted debt, or the debt which the entail allowed the heirs to contract during the subsistence and currency of the destination, was exactly in the same position as entailer's debt; and if it be dealt with exactly in the same way as entailer's debt, that only goes to show more clearly that the permission to contract that debt would constitute no objection to the validity of the entail under the statute 1685, because a man may make a good entail under the statute 1685, though he may be deeply in debt. It is not a very prudent thing to do, but if he has the land he can convey it to a certain series of heirs, and he can subject it to fetters; it may be very much in vain, because his creditors may afterwards carry it off from the heirs of entail, but that would not prevent the entail from being otherwise effectual under the Act 1685. Indeed, my lords, it appears to me quite idle to expatiate upon this farther, because a partial relaxation of any of the cardinal prohibitions under the Act 1685 has never been held to invalidate an entail.

But, then, we come to the question, What is the effect of the 43d section of the Entail Amendment Act? And we approach the construction of that section with this, I think, quite settled, that independent of the Entail Amendments Act, this is a valid entail under the Act 1685. Now, what does that section enact? It provides, "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; and the estate shall be subject to the deeds and debts of the heir then in possession," &c. Now, what is the kind of invalidity that is here contemplated and expressed? It is invalidity in consequence of defects either of the original deed of entail or of the investiture following thereon. The natural construction of these words appear to me to be that it includes, and includes only, objections either to one of the prohibitions, that it is imperfectly expressed, or omitted, or in some way blundered, or that it is not duly fenced with irritant and resolutive clauses. And, if that be the meaning of the first part of this section, which regards the prohibitions taken cumulatively, what shall we say is the meaning of the words which follow, "but shall be invalid and ineffectual as regards any one of such prohibitions." Plainly the true construction must be "shall be, as regards any one of such prohibitions, invalid and ineffectual, in consequence of defects either of the original deed of entail, or of the investiture following thereon." Now, is this such an entail? Is this entail invalid under the Act 1685, in consequence of defects in any one of the prohibitions? My answer to that question is decidedly in the negative. There is no defect at all. The prohibitions are perfectly good, and are well fenced; and it is a good entail, therefore, under the Act 1685. If it were to be said that a defect, "as regards any one of such prohibitions," may mean a relaxation of any one of the prohibitions, I answer at once that that is not the true construction of the words. I think it is a total invalidity of one of the prohibitions that is to lead to the result here contemplated. And this construction is confirmed and fortified when we consider what was the well-known mischief intended to be remedied by this enactment. When there was a defect in one of the prohibitions of a deed of entail,—say, for example, in the prohibition against the contraction of debt,—the heir of entail was entitled to contract debt, and could do it effectually, but he could not sell the estate. And that was undoubtedly a very unfavourable position in which to place both the heir and the estate. Again, take the case (which occurred in the case of *Boyle* v. *Cochrane)* that there is a defect in the prohibition against sale, but no defect in the prohibition against the contraction of debt, the heir of entail is fee-simple so far that he can sell the estate whenever he likes, but his creditors cannot touch it. And that, certainly, is a very anomalous position also, and one hardly contemplated, one would say, by the Act 1685, the policy of which was to exclude both creditors and purchasers, and not one without the other. But still, as the law stood before the passing of the Entail Amendment Act, that was the effect of a defect in one of the prohibitions. Now, it was to remedy that, I apprehend, that the 43d section was enacted, and it can, in that point of view, apply only to a case in which the heir in possession is absolutely free as regards one of the prohibitions. But what I have said on the construction of the 43d section must not be understood as weakening what I said before as to the possibility of an entail being so destroyed by exceptions and reservations as substantially to leave no valid or effectual prohibitions, although they may be there in point of form; because, although that might not fall under the very words of the 43d section, I apprehend that such an entail as that would be invalid under the Act 1685. Therefore, upon the whole matter, I have come to the conclusion, and I must say without any difficulty, that the Lord Ordinary's interlocutor is wrong, and that the defenders are entitled to absolvitor in so far as regards that portion of the case which has been argued before us.

Lord Justice-Clerk—I entirely concur in the views that your Lordship has expressed, and I have nothing to add. I think it necessary only to say that, although the reference of this case to the seven Judges is general in its terms, the point which we intended to have argued, and which has been argued in consequence of our intimation to the counsel, is confined entirely to the first plea-in-law. In regard to the other matters we had a very full argument; but I would suggest to your Lordships that our interlocutor, which we shall pronounce in the Second Division, should be to repel the first plea-in-law, to assoilzie from the conclusions of the summons so far as founded thereon, and *quoad ultra* continue the cause.

The other Judges concurred without any further observations, and the following interlocutor was pronounced:—

"Recall the interlocutor of the Lord Ordinary submitted to review, assoilzie the defenders from the whole conclusions of the summons, and decern; find the defenders entitled to expenses, and remit to the Auditor to tax the same and to report."

Counsel for Pursuer and Respondent—Solicitor-General (Clark) Q.C., and Duncan. Agents—Tait & Crichton, W.S.

Counsel for Defender and Reclaimer—Watson & Muirhead. Agent—A. Stevenson, W.S.

*R.*, Clerk.

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*Tuesday, June 24.*

## SECOND DIVISION.

[Lord Ormidale, Ordinary.

### M'WILLIAM *v.* RONEY.

*Annuity—Intention—Term of payment.*

Where an annuity was left in the following terms:—"to my servant, Mary Roney or Rennie, who has served me long, faithfully, and well, an annuity of £30 sterling, to be secured to her by purchasing the said annuity from Government, or from some respectable insurance office, in the discretion of the said Robert M'William and James M'William, and to be payable half-yearly, and also to pay to her £10 for mournings, and as a provision till the first half-year's annuity shall be received by her." *Held* that the annuitant was entitled to the annuity *a morte testatoris*.

The question in dispute in this suit was whether the pursuer was entitled to an annuity left her by her master *a morte testatoris*, and it arose under the following circumstances. The late John M'William, solicitor at Stranraer, died on 16th November 1870. The following clause occurred in his will—"to my servant, Mary Roney or Rennie, who has served me long, faithfully, and well, an annuity of £30 sterling, to be secured to her by purchasing the said annuity from Government, or from some respectable insurance office, in the discretion of the said Robert M'William and James M'William, and to be payable half-yearly, and also to pay to her £10 for mournings, and as a provision till the first half-year's annuity shall be received by her." The defenders, the executors of the testator, averred that they had made payment to the pursuer of the sum of £10 referred to in the bequest in her favour, and that on 4th July 1871 they purchased a Government annuity in the pursuer's name of £30, payable half-yearly. The price was £410, 5s. 11d. It began to run from 5th April 1871, and the first half-year became due in October 1871. In addition, before the action was raised they made her an offer of £12, 10s., being amount of the annuity from 18th May 1871 to 5th October 1871.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 30th January* 1873.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, decerns and ordains the defenders, on obtaining from the pursuer the requisite discharge, to deliver to her the document constituting the Government annuity in her favour, No. 10 of process; as also to make payment to the pursuer of the sum of £11, 13s. 5d., being the amount of the annuity to which she was entitled for the period from the 14th of November 1870, when the testator died, to the 5th of April 1871, when said Government annuity commenced to run, with interest thereof at the rate of 5 per cent. per annum from said 5th of April 1871 till paid: Finds the pursuer entitled to expenses,—reserving the question whether there should be any and what modification, until the auditor's report has been seen; allows an account of these expenses to be lodged, and remits it when lodged to the auditor to tax and report.

"*Note.*—The Lord Ordinary has felt this case to be one of some nicety and difficulty, and he is not surprised that the defenders should have hesitated to comply with the pursuer's demands without judicial authority. He cannot doubt that they have acted throughout in good faith.

"The disputed question is, whether the pursuer was, under the disposition and settlement of her late master Mr M'William, entitled to the annuity of £30 left to her by him, *a morte testatoris*, that is to say, from the 14th of November 1870, or whether it was to commence only nearly half a-year thereafter.

"The will of the testator contains no express direction on this point; but from the nature and object of the bequest, as well as the description of the recipient, the Lord Ordinary thinks it must be held to have been his intention that the annuity should commence to run as from his death. The additional bequest of '£10 for mournings, and as a provision till the first half-year's annuity shall be received by her,' was most probably meant as something to keep her in the meantime from actual want, and so may be fairly considered as leading towards the conclusion at which the Lord Ordinary has arrived, rather than otherwise.

"The Lord Ordinary is not aware of any Scotch precedent exactly in point. In the case, however, of *Cruickshank* v. *Sandeman*, Feb. 16, 1842, 5 D. 643, Lord Jeffrey observed, in regard to an annuity not expressly fixed as to the date of its commencement, that the granter of it was to be held to have given it 'from the time the breath left his body.' And in England it seems to be a settled rule that an annuity given by will commences immediately after the testator's death (2 Williams on Executors, 1288, and Roper on Legacies, vol. i, 872, and vol. ii, 1245 and 1344). In the case also of *Houghton* v. *Franklin* (1 Sim. and Stu. p. 390), it was decided that an annuity given by will, with a direction that it should be paid monthly, the first payment must be made at the end of a month after the testator's death—the Vice-Chancellor (Sir John Leach) remarking, that 'as a will speaks at the death of a testator, it must be intended that the payment of an annual sum given by it is to commence from that period, unless there be some circumstances or expression in the will to control that intention.'

"It appears that in the present case the defenders have secured for the pursuer a Government life annuity, commencing as from the 5th of April 1871, which it was stated by her counsel at the debate she was willing to accept, provided she also got payment of an equivalent in money, being £11, 13s. 5d. for the prior period; and for this sum, besides delivery of the document constituting