as well as a casting vote; and the election of such board shall be notified by the chairman of such respective meetings to the sheriff-clerk within seven days from the date of the same, and the sheriff shall thereafter summon the first meeting of such board for such day and such place as he may fix."

By the 24th section of said Act it is provided—"Each district board shall continue in office for three years, and members thereof shall be eligible for re-election, and vacancies occurring during such period shall be filled up by the board until the next meeting of proprietors, who shall then fill up the same; and the meetings of the upper and lower proprietors respectively for the purpose of each triennial election of not more than three upper proprietors and three lower proprietors respectively shall be called by the clerk."

By the 2d section of the Act 26 and 27 Vict. cap. 50, it was provided that the first meeting of the district board should be held at any time within twenty-one days after the first election of the district board under the last-quoted section.

The district of the river Nairn having been defined and constituted by the bye-law before-mentioned, approved on 30th January, and taking effect on 10th February 1863, the Sheriffs of the counties of Inverness and Nairn thereupon, in terms of the 18th section of said Act, directed the Sheriff-Clerks of these counties to make up a roll of the upper proprietors, and also a roll of the lower proprietors, in the district. This having been done, meetings of these proprietors were held at Nairn on 25th August 1863, when three upper and two lower proprietors were elected members of the district board.

The district board having been duly constituted, met at Nairn on 17th September 1863, and thereafter continued to meet from time to time down to 3d March 1873. It was the duty of the clerk to the board to have called meetings of the upper and lower proprietors respectively, within the statutory period, for the purpose of electing a district board for the next three years, all in terms of the said 24th section of the Salmon Fisheries (Scotland) Act 1862. This, however, was not done, and the district was without a board since 1877.

There was no statutory provision for the case of the lapsing of a board through failure to call a meeting within the three years, and Hugh Fife Ashley Brodie of Brodie and Duncan Forbes of Culloden, two of the proprietors in the district qualified under the 18th section of the Act, with consent and concurrence of the whole other upper and lower proprietors so qualified, now made this application to the Court to have the board reconstituted.

It was stated that "having regard to the importance of the salmon-fishings in the district, to the increasing prevalence of illegal fishing, and the greatly increased facilities for disposing of the fish so caught, the proprietors of salmon-fishings in the district deem it of the utmost importance to their interests that the district board should be reconstituted as soon as possible."

Authority—*Campbells, Petitioners*, March 17, 1883, 10 R. 819.

The Court pronounced this interlocutor:—

"The Lords having considered the petition, Remit to the Sheriffs of the counties of Inverness and Nairn to direct the Sheriff-Clerks of the said counties to make up a roll of the upper proprietors, and also a roll of the lower proprietors, in the district of the river Nairn, in terms of the 18th section of the Salmon Fisheries (Scotland) Act 1862, and Acts amending the same; direct the Sheriff-Clerks to call a meeting of the upper proprietors, and also a meeting of the lower proprietors, at such times and places as the said Sheriffs shall direct, notice of such meeting being given as provided by the Salmon Fisheries (Scotland) Act 1862; grant warrant to and authorise the upper proprietors and lower proprietors present at such separate meetings respectively to elect not more than three of their number to be members of the district board of said district, all in terms of the said 18th section: Find and declare that the members so elected, with the proprietor having the largest amount entered on the valuation roll as the yearly rent or yearly value of fisheries in the said district, shall constitute the district board of the said district, and that the last-mentioned proprietor shall be chairman of the board, and shall have a deliberative as well as a casting vote; grant warrant to and authorise the Sheriff of said county, the Sheriff-Clerk, and the chairman and the respective meetings foresaid respectively to do the acts set forth in the 18th and 22d sections of the said Salmon Fisheries (Scotland) Act 1862, and the 2d section of the Act 26 and 27 Vict. cap. 50, relative to calling and holding the first meeting of a district board, and decern."

Counsel for Petitioners—Forbes. Agents—Skene, Edwards, & Bilton, W.S.

Friday, January 25.

SECOND DIVISION.

(Before Seven Judges.)

[Lord Lee, Ordinary.

WAUCHOPE *v.* WAUCHOPE.

Entail—Fetters—Resolutive Clause—Rutherfurd Act (11 *and* 12 *Vict. c.* 36), *sec.* 43.

An old entail contained clauses prohibiting the heirs of entail from altering the order of succession, selling, or contracting debt. Then followed a sentence containing both an irritant and a resolutive clause, declaring that not only should any deed in contravention of the provisions of the entail be null, "but also the contraveeners and descendants of the contraveeners' bodys, if they be not descended of my body, shall forfeitt and tyne their right to the said estate." An heir of entail in possession, descended from the entailer's body, brought a declarator that the entail was invalid because this clause did not forfeit the right of a contravener who was descended from the entailer's body. *Held* (by a majority of Seven Judges—*diss.* Lord Justice-Clerk, Lord Deas, and Lord Young, and *rev.* judgment of Lord Lee) that this construction of the clause was right and the entail invalid.

The minority and the Lord Ordinary were of opinion that the meaning and effect of the clause was that the forfeiture extended to every contravener, but to himself only if his descendants were also descendants of the entailer's body, and to both himself and his descendants if his descendants were not also descendants of the entailer's body.

Observations on the canon of construction applicable to entails.

Section 43 of the Statute 11 and 12 Vict. cap. 36 (the Rutherfurd Act) enacts 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-substitutes under such tailzie against the heir in possession under the same by reason of any contravention of all or any of the prohibitions.'"

In 1698 Andrew Wauchope of Niddrie-Marischall granted a bond of tailzie of his lands of Niddrie-Marischall and others in form of a procuratory of resignation in favour of himself, whom failing to his eldest son and the heirs-male of his body, whom failing to his other sons in their order, and the heirs-male of their bodies respectively, whom failing to certain other heirs. In consequence of the death of his eldest son without issue, Andrew Wauchope in 1710 granted a renewed bond of tailzie also in the form of a procuratory of resignation in favour of William Wauchope, his second (now his eldest) son, and the heirs-male of his body, whom failing the same series of heirs as in the earlier deed, of which this deed was otherwise a transcript throughout. Following the destination, and a condition that the land should be burdened with the provisions already granted by the entailer to his younger childen, came the following clauses —"And lykewayes it is hereby provided and declared that if it shall happen my lands and estate @mentioned through the faillzie of heirs-male to fall to heirs-female, in that caise the eldest heir-female shall alwayes succeed wtout. division, and shall be holden to marry a gentleman of the sirname of Wauchope or of any oyr. sirname, who, and the children to be procreat of such marryages, shall be holden to assume, use, wear, and retaine the sds. sirname of Wauchope, with my proper armes, and if the sds. heirs-females shall be married the time of their succession, they, their husbands, and their children shall be holden and obliged to assume, use, wear, and retaine the said sirname and armes, and if the sds. heirs-female and their husbands and the heirs succeeding to the said estate shall not assume or desist to use and bear the said sirname and armes, then and in that case they, for themselves only if they be descended of my body, and if they be not descended of my body, they and the descendants of their bodies shall amitt and tyne their right and intrest in ye lands, barrony, and oyrs @rehearst, and the same shall pertaine to and be devolved upon, and goe to the nixt person who according to the course of the taillzie, would succeed after the contraveener and the descendants of the contraveener's body. It is also hereby provided that it shall noewayes be leisum nor lawfull to the said William Wauchope, my sone, nor to any oyrs. heirs-male or of taillzie @specifyed at any time coming to alter the order and course of succession appoynted hereby, nor to sell, alienate, or dispone the lands, barrony, or oyrs. @exprest, or any part yrof. either redeemable or under reversion, or to grant woodsets or infeftments of @rent or liferent, or to burden the same with any servitude or oyr. burden, or to sett tacks or rentalls for longer space than during the setter's or receiver's lyfetime, the same not being in diminution of the former rentall, and it is hereby provyded and declared that it shall nowayes be in the power of the sd. William Wauchope, my sone, nor his heirs-male and of taillzie and provision @specifyed, nor any of them, to contract debts or doe any oyr. deed whereby ye lands, barrony, and oyrs @rehearst, or any part yrof. may be apprised, adjudged, or any oyr. manner of way evicted in prejudice of the nixt heir hereby appoynted to succeed, and if the sd. William Wauchope or any oyr of ye heirs-male, or of taillzie and provision @specifyed, shall doe any fact or deed contrair to the provisions @mentioned, either by disponing or by contracting of debt, or dooing any oyr deed contrair to the sds. restrictions, or any of them, then and in yt. case the samine deeds, and all and every one of them, are not only hereby declared to be null and void in themselves, *ipso facto*, without necessity of any declarator, in soe far as concerns ye lands, barrony, and oyrs. @mentioned, soe that they shall not be affected yrwith. in prejudice of the succeeding heirs of taillzie and provision, seeing their presents are granted *sub modo*, and with the provision @specifyed and no oyrways, but also the contraveeners and descendants of the contraveeners' bodys, if they be not descended of my body, shall forfeitt and tyne their right to the said estate, and the same shall belong to the nixt person and his heirs-male who would succeed nixt after the contraveener and the descendants of his body, who shall have right to succeed yrinto. by virtue hereof, ffree from all debts and deeds done and granted or committed by the sds. contraveeners, and it shall be lawfull to the person having right to succeed either to obtaine declarators upon the committing of the sds. clauses irritant, and provision declaring and adjudgeing the lands, barronyes, and oyrs. @written to pertaine to them and their forsds., and decerning and ordaining the supperiors to infeft them thereintill, or to obtain ymselves. served, retoured, infeft, and seased in the lands, barronys, and others @written as heir to the person who died last vest and seased in the samine before the contraveener in respect the contraveener's right will be resolved and extinct from the time of the contravention in the same manner as if the samine hade not been granted, or to use any oyr. way which may be formall and legall for settling and establishing the right yrof. in their person."

In 1811 Andrew Wauchope, the heir then in possession, granted a disposition of taillie to himself in liferent, and his eldest son and the heirs-male of his body in fee, whom failing to his other sons in order and the heirs-male of their bodies respectively. The deed of 1710, however, remained the regulating deed of entail.

In May 1883 Andrew Wauchope, heir of entail in possession, and a descendant of the body of the entailer, raised this action against Andrew Wauchope, Esq., of Airth Castle, David Baird Wauchope, and D. A. Wauchope and G. Wauchope, the two sons of David Baird Wauchope, being the principal substitutes of entail under the destinations in the above deeds called to succeed after him. He concluded for declarator that these three deeds were invalid and ineffectual in terms of the provisions of the 43d section of the Rutherfurd Act above quoted as regarded the prohibitory, irritant, and resolutive clauses therein written or referred to. He made three objections to the validity of the fettering clauses of the entail, only one of which was considered in the Inner House. It was —"The said deeds of entail contain no resolutive clauses directed against heirs of entail who are descended (as the pursuer is descended) of the entailer's body."

The action was defended by the heirs called in the summons, who maintained the validity of the entail.

The pursuer pleaded—"(1) The deeds of entail libelled not being valid and effectual in terms of the Act 1685, cap. 22, on the grounds condescended on, and otherwise, are, in virtue of the provisions of the Act 11 and 12 Vict. cap. 36, invalid and defective *in toto*, and the pursuer is entitled to decree as concluded for. (2) On a sound construction of the said deeds, the pursuer, as being a descendant of the body of the entailer, is not within the scope of the resolutive clauses."

The defenders pleaded—"(2) The deeds libelled being valid and effectual in terms of the Act 1685, cap. 22, and the pursuer falling within the scope of the respective resolutive clauses thereof, the defender is entitled to be assoilzied from the conclusions of the summons with expenses."

The Lord Ordinary (Lee) assoilzied the defenders from the whole conclusions of the summons.

"*Opinion.*—The question in this case is, whether the entail of the lands of Niddrie-Marischall and others is invalid and ineffectual under the 43d section of the Rutherfurd Act.

"By the renewed deed of entail of 1710, which regulates the succession, the lands were conveyed, failing the entailer himself, to William Wauchope, his then eldest son, 'and the heirs-male descending of his body; which failing to James Wauchope, my second son, and the heirs-male descending of his body; which failing' to other sons in their order, and in each case 'the heirs-male descending of his body;' which failing 'to the other heirs-male to be procreate of my own body; which failing to the heirs-male descending of the body of the entailer's brother John; which failing to the only son of a deceased brother James 'and the heirs-male to be procreate of his body; which failing to the heirs-male descending of ye body of the deceast Francis Wauchope, my father brother; which failing to my heirs-male whatsoever; and which all failing, as God forbid, to my heirs and assignees whatsomever.'

"The eldest son William and his issue having failed, the estate devolved upon a son of James Wauchope. The pursuer is a descendant of the body of James Wauchope, and is in possession of the estate in virtue of the tailzied destination.

[*After dealing with the other two objections stated by the pursuer to the validity of the entail*]—"The third objection to the entail is, that the resolutive clause applies only to contraventions by heirs not descended of the entailer's body, and therefore has no application to the pursuer. The clause is as follows—'But also the contraveeners and descendants of the contraveeners' bodys, if they be not descended of my body, shall forfeitt and tyne their right to the said estate, and the same shall belong to the nixt person and his heirs-male who would succeed nixt after the contraveener and the descendants of his body who shall have right to succeed yrinto by virtue hereof, ffree from all debts and deeds done and granted or committed by the sds. contraveneers.' It is contended that the words 'if they be not descended of my body,' apply here to the contraveners as well as to the descendants of contraveners. It is said that the antecedent to 'they' must be the same as the antecedent to the relative 'their' in the clause 'shall forfeit and tyne their right.' It is also urged that the clause of devolution in favour of the heir 'who would succeed nixt after the contraveener and the descendants of his body,' is not reconcileable with a construction which should apply the resolutive clause to contraventions by descendants of the entailer's body, seeing that in any case the descendants of contraveners are only to forfeit their right if the contravener be not descended of the body of the entailer.

"I think it must be conceded that if the resolutive clause be applicable to all contraveners, there is inaccuracy and defect in the expression of the clause devolving the estate upon the next heir. And my only difficulty in the case has been to make sure that there is no ambiguity in the opening words of the clause, for if there were, the words of devolution might be founded on as explaining and limiting the scope of the resolutive clause. A similar inaccuracy of expression, however, appears in the clause at the foot of p. 18 and top of p. 19 [*the clause relating to a contravention of the provision in the entail relating to the use of the surname and arms of the entailer, which clause is quoted above*], where there is no ambiguity about the application of the special resolutive clause, and if the present resolutive clause be unambiguous in its application to all contraventions, an error in the expression of the clause devolving the estate on the next heir will not in my opinion create a defect in the resolutive clause.

"The solution of the difficulties raised by the pursuer seem to me to depend upon the question, What is the class of contraventions referred to in the clause commencing 'but also?' In answering that question I think that the clause must be read in connection with the irritant clause to which it is appended, and so reading it, I think it not doubtful that all contraventions, whether by contraveners descended of the entailer's body, or by those not descended from him, are struck

at. On a reasonable and even strict construction of the clause, I think that it sufficiently declares that all contraveners shall forfeit and tyne their right to the estate, and that their right shall also be forfeited by their descendants if they be not descended of the entailer's body. There being therefore, in my opinion, no ambiguity in the clause resolving the right of the contraveners, I cannot find that it is defective by reason of defect or inaccuracy in the subsequent declaration as to who is next to succeed to the estate.

"The result is, on the whole, that I repel all the objections, and assoilzie the defenders from the conclusions of the action."

The pursuer reclaimed.

Their Lordships of the Second Division having heard counsel on the reclaiming-note "in respect of the difficulty and importance of the question," appointed the cause to be argued before them and three Judges of the First Division.

Argued for pursuer—The resolutive clause was ineffectual as against descendants of the body of the entailer. The saving clause, "if they be not descended of my body," applied to "contraveeners and descendants of contraveeners' bodys," and the clause therefore did not strike at a contravener who was a descendant of the entailer's body. This appeared from an analysis of the whole resolutive clause. In the expression "their rights" the pronoun "their" had for antecedent both "contraveeners" and "descendants of the contraveeners' bodys." If this were so, then the "they" preceding in the saving clause must have the same antecedent. "Their right" —in the singular—meant the right, one and indivisible, of the contravening *stirps*. All this was shown by the terms of the clause of devolution immediately following. Devolution could not be from a contravener to his descendants, but must always be to a new *stirps* — *Bruce* 4 Paton's App. 231. In short, the construction contended for was (1) natural and grammatical, (2) the only natural and grammatical one, (3) the only one consistent with the clause of devolution. The rule of strict construction of entails which prevailed before the Rutherfurd Act — *Graham* v. *Murray*, January 21, 1848, 10 D. 380, *per* Lord Cunninghame, 388, and Lord Moncreiff, 396—was not relaxed by the operation of that Act—*Earl of Airlie* v. *Ogilvy*, December 16, 1852, 15 D. 252, *per* Lord Rutherfurd, 355; *Jamieson* v. *Campbell*, January 25, 1853, 15 D. 336, *per* Lord Rutherfurd, 338; *Lumsden* v. *Lumsden*, 2 Bell's App. 104; *Earl Kintore* v. *Lord Inverurie*, 4 Macq. 520; *Speirs* v. *Speirs' Trustees*, June 14, 1878, 5 R. 923, *per* Lord Mure, 929; *Wallace* v. *Wallace's Trustees* (*Auchinvole* case), June 10, 1880, 7 R. 902. There was no suggestion in any of the authorities—early or recent—that an entail was to be construed on principles like those applied to a will. The only suggestion in that direction was that of Lord Corehouse in the case of *Speid*, February 21, 1837, 15 S. 622, and it had not been followed.

Replied for the defenders—"They" had for antecedent "descendants of the contraveeners' bodys" only, not "contraveeners and descendants," &c. The article "the" before descendants, which was found in the earlier deed, and which had apparently dropped out of this one by mere clerical inadvertence, was of importance on this reading, and it was legitimate on the present principle of the construction of entails to appeal to it. But even leaving out the "the" his reading was the most technical as well as natural and grammatical one. There was no ambiguity in it, and till you had such—the presumption being always that the maker intended to make a good entail—there was no room for an appeal to rules determining between two competing constructions —*Auchinvole* case (*supra cit.*), *per* Lord Justice-Clerk. The defender's construction was enough to satisfy the "they;" the opposing one gave more than the necessary effect to it, which was contrary to sound rules of construction. The devolution clause was not part of the resolutive clause proper, and could not be read to qualify the resolutive clause more directly than any other part of the deed. If in this clause there were read in "said" before "descendants" all ambiguity ceased. But be it that the devolution clause was somewhat hazy, it was no part of the fetters, and the entail would stand without it. Further, granting the clause to be ambiguous as it stood, the ambiguity was cleared up by reference to another part of the deed. There was a resolutive clause attached to the requirement that the heir in possession should use the entailer's name and arms, which expressed without any ambiguity the reading he desired to put on this clause. Such an interpretation from within the four corners of the deed was to be preferred to an extraneous and conjectural one. But further, the old rule of strict construction was now modified by the progress of entail law, which had so altered the conditions of entails that the *ratio* of the rule had vanished. That rule was founded on the unwillingness of the Court to keep up the detrimental effect of entails on the commerce of land referred to by Lord Stair (ii. 3, 58), not on any unwillingness of the Court to support an entail, even an old entail, as all that it now is is a reasonable family settlement. This argument, which applied more or less from the time of the Rutherfurd Act, was now, since the recent Act of 1882 (secs. 13 and 18), conclusive. The provisions of that Act had removed all the remaining reasons of hostility to entails. The interests of commerce and public policy no longer drove the Court into a malignant straining of the words of the deed in favour of freedom from the fetters of an entail.

At advising—

Lord President—Three objections have been stated by the pursuer, the heir of entail in possession, to the validity of this entail. But under the remit from the Second Division of the Court, we have heard counsel only on the third of these objections, which concerns the meaning and effect of the resolutive clause, and upon that objection only we are now to give judgment.

In construing a clause in a deed of entail I think the Court are bound to consider the entire grammatical sentence in which the words creating the difficulty occur. Sometimes the whole prohibitions and irritant and resolutive clauses are embraced in one sentence. In other cases several sentences are used to express the prohibitions and the consequences of violating them. In the present case the statement of the prohibitions is contained in two sentences, one containing the prohibition against altering the order

of succession and the prohibition against sales and alienations, the other containing the prohibition against contracting debt. The irritant and resolutive clauses are embraced in one sentence, and to that sentence therefore the attention of the Court must, I think, be directed, and to a great extent confined in determining its constructions.

The sentence reads thus—"And if the said William Wauchope or any others of the heirs-male or of tailzie and provision above specified shall do any fact or deed contrair to the provisions above mentioned, either by disponing or by contracting of debt, or doing any other deed contrair to the said restrictions or any of them, then and in that case the samyn deeds, and all and every one of them, are *not only* hereby declared to be null and void in themselves *ipso facto.*" Then follow a number of words which are quite superfluous as regards the object of the clause, and do not affect its grammatical construction, after which the sentence continues—"*but also* the contraveeners and descendants of the contraveeners' bodys, if they be not descended of my body, shall forfeit and tyne their right to the estate, and the same shall belong to the nixt person and his heirs-male who would succeed nixt after the contraveeners and the descendants of his body, who shall have right to succeed thereunto by virtue hereof free from all debts and deeds done and granted or committed by the said contraveeners."

The pursuer contends that the true construction of this resolutive clause commencing with the words *but also* is, that no contravener shall forfeit his right to the estate either for himself or his descendants unless he and they be not descended of the entailer's body. The defenders contend that every contravener is to forfeit, but to forfeit for himself only, if his descendants are also descendants of the entailer's body, and to forfeit for himself and his descendants, if his descendants are not also descendants of the entailer's body.

Both constructions are perfectly intelligible. According to the first, the entailer provides, that in the event of any of the descendants of his body contravening any of the prohibitions, their debts and deeds shall be null, but they shall not forfeit the estate; while in the event of heirs *not* descended of his body contravening, not only shall their deeds be null, but they shall forfeit for themselves and their descendants. According to the second construction, all contraveners shall forfeit, but only for themselves if their descendants are also descendants of the entailer's body.

The question is not, what is the probable intention of the entailer, but what has he said? The subject of the proposition is—"The contraveeners and descendants of their bodys;" the predicate is, "shall forfeit and tyne their right;" and the condition of the forfeiture is, "if they be not descended of my body." What right has the Court to say that the subject of this proposition is not one but two, and that the condition applies only to one part of the subject, and not to the whole? "Contraveeners and descendants of the contraveeners' bodys" suggests only a single collective nominative. It might be different if there had been any words of disjunctive meaning and effect, as if he had said "not only the contraveners but also their descendants." There might then have been room to argue that the condition applied only to the second and immediately preceding nominative. But "contraveeners and descendants of their bodys" is a compact and inseparable nominative. Even the omission of the definite article before descendants contributes to exclude the possibility of separation.

Another reason readily occurs for refusing to limit the application of the words "if they be not descended of my body" to the descendants of the contravener's body; for if the descendants of the contravener's body are not descended of the entailer's body, no more is the contravener, and if they are descended of the entailer's body in the the male line, so also must be the contravener. The contravener and his descendants are thus necessarily tied together in any question regarding their descent from the entailer.

It seems to me impossible, according to the grammatical construction of the sentence, to hold that in any case a contravener is to forfeit for himself only, or that any descendant of the entailer's body is to forfeit at all. The remaining words of the sentence also fortify this conclusion. The right being forfeited, it is provided that the estate shall belong "to the nixt person and his heirs-male who would succeed nixt after the contravener and the descendants of his body." This declaration as to the devolution of the estate, though it is no necessary part of the resolutive clause, may be legitimately appealed to for purposes of construction, because it forms part of the same sentence which contains the resolutive clause, and it declares the effect of the resolution or forfeiture. Now this declaration applies in express terms to every case of forfeiture, and presupposes, as the only event in which there is to be a devolution, that there has been a forfeiture of a contravener and the descendants of his body.

Reference was made in argument to an earlier part of the deed in which the obligation to bear the name and arms of Wauchope is fenced with a separate resolutive clause, which is represented as expressing in distinct terms the same meaning which the defender desires to affix to the clause under consideration of the Court. The argument of the defenders is that where one resolutive clause is clearly expressed, the other being ambiguous must be construed to mean the same thing. To this argument various answers may be made.

1. I doubt whether the reference to the earlier resolutive clause is legitimate in construing the fetters of an entail.

2. The earlier clause appears by contrast to show clearly that the two clauses were not intended to mean the same thing.

3. The clause under construction, as construed by the defenders, does not mean the same thing as the earlier resolutive clause, but something materially different.

The main resolutive clause as construed by the defender means that the contravener shall forfeit for himself only if his descendants are descendants of the body of the entailer, though the defender was himself not descended of the entailer's body—a case which might very well occur if the contravener were the descendant of a brother of the entailer, and married a female descendant of the entailer's body, and had children by her; for the

expression "if they be not descended of my body" makes no distinction between male and female descent. But the earlier resolutive clause provides that the contraveners "for themselves only if they be not descended of my body, and if they be descended of my body, they and the descendants of their bodies shall amytt and tyne," &c. Here the extent of the forfeiture is confined to one generation, or as including descendants, is made to depend on whether the contravener is or is not descended of the entailer's body, while in the other and proper resolutive clause, as construed by the defenders, the extent of the forfeiture depends on whether the descendants of the contravener's body are or are not descendants of the entailer's body. By no ingenuity of construction can the two clauses be made to operate precisely the same effect—a result which deprives their arguments of any force, even if it be admissible otherwise.

For these reasons I am of opinion that the true grammatical construction of the resolutive clause is that it applies to no descendant of the entailer's body, and that the opposite construction maintained by the defenders is strained, unnatural, and ungrammatical. It seems to be assumed throughout by the defenders that the result of this grammatical construction is necessarily to defeat the obvious intention of the entailer. The intention ascribed to him is to make an effectual and complete entail. But even with such an intention present to his mind, the entailer might believe he was securing his object, though he exempted the descendants of his own body from forfeiture or contravention, having effectually provided that the deeds of contravention should be null and void. Or he may have had so great a favour for the heirs-male of his body that he was willing to run the risk of his entail being defeated rather than subject any of them to forfeiture. It is therefore by no means clear that the true grammatical construction of the resolutive clause is inconsistent with the intention of the entailer.

But supposing this to be so, and even supposing that both the competing constructions are equally admissible according to the rules of grammar and the ordinary canons of construction applicable to deeds of settlement or testamentary instruments, we are here construing the fetters of an entail, and without carrying the principle of strict contribution too far, or adopting the extreme views which at one time prevailed, there is a rule well established in many recent cases which on the most favourable view is quite fatal to the defender's contention. That rule is nowhere better stated than in Lord Campbell's judgment in *Lumsden* v. *Lumsden*—"If an expression in an entail admits of two meanings, both equally technical, grammatical, and intelligible, that construction must be adopted which destroys the entail rather than that which supports it."

No doubt this rule of construction would not avail the pursuer if we were to listen favourably to another argument which the defender very earnestly pressed on our attention. The argument is, that in consequence of recent statutes relaxing to a great extent the fetters of existing entails, the rule of strict construction is no longer applicable to such instruments. But I am of opinion that as the pursuer is undoubtedly struggling to free himself from fetters imposed on him by an ancestor upwards of 150 years ago, and to convert the estate into a fee-simple estate in his person, both the rule of strict construction and the reason of the rule are applicable to the fettering clauses of this entail.

I am for giving effect to the third objection maintained by the pursuer, and declaring the entail invalid.

Lord Justice-Clerk—I agree with the Lord Ordinary both in the result of his judgment and in the reasons he has given for it. But as the case is important, and as I understand the majority of your Lordships are of a different opinion, I shall shortly explain the grounds of my own.

The only question arising under this bond of tailzie on which we have requested the assistance of your Lordships of the First Division relates to the meaning and efficacy of the resolutive clause contained in it. In considering this question, therefore, I assume that both the prohibitory and irritant clauses are sufficiently expressed.

According to the structure of the fettering clauses of the entail the irritant and the resolutive clauses form together one sentence, following a style not unusual at its date. The antecedent prohibitions are imposed on all the heirs called in the destination. Of that there can be no doubt. Then the irritant clause, proceeding upon the hypothesis of any of these heirs contravening the conditions and provisions above enjoined or prohibited, provides that "not only" shall the deeds of the contravening heirs be in themselves null and void and ineffectual against the lands, "but also"—and here follow the words in dispute—"the contraveeners and descendants of the contraveeners' bodys if they be not descended of my body shall forfeit and tyne their right" to the estate.

Taking these words as they stand, they do not appear to me to be in any respect of ambiguous import, and read according to their natural meaning and their actual collocation, convey a simple, reasonable, and consistent sense. The whole clause purports to provide for the results of those same acts of contravention which had been previously irritated and annulled by whomsoever of the heirs called they might be done. These are the persons who are styled "contraveeners" in the words I have quoted. But the clause proceeds to enlarge the resolutive words beyond those of the irritant clause by extending the effect of contravention beyond the contravener himself, and involving the descendants of a contravening heir in the forfeiture, but in one case only—namely, in the event of the direct line of the entailer's descendants having failed, "and descendants of contraveeners' bodys, if they be not descended of my body."

I read these words as constituting a parenthesis between the word "contraveeners" and the words "shall forfeit and tyne," because I think that such is the true and indeed the only grammatical construction of the words. The conditional "if" must, in accurate construction, be referred to the provision immediately antecedent, unless the subject-matter or the context otherwise indicate. This rule would all the more regulate this parenthetical and elliptical provision that it deals with

a matter entirely different from any of the words which precede it, the effect being to extend the penalties of contravention from peccant contraveners to their innocent descendants. The reason also of the limitation attached to this additional penalty adds force to this view, for one can easily understand that the entailer, intending to enlarge his resolutive words by including the unoffending descendants of contravening heirs in the penalties of contravention, should limit that rather stringent consequence to those not descended from himself.

Such, I think, is the manifest meaning of the words here used. That they will bear this meaning without the slightest alteration of syntax or expression is not doubtful, and if this be their meaning the resolutive clause is complete. But it is maintained that the words may also be read as conveying in addition a far wider and entirely different sense from that which alone I deduce from them, and that by attaching the parenthetical condition, not only to the provision immediately antecedent, but also to the words "the contraveneers," the effect would be to liberate all the descendants of the entailer from the resolutive provision by express exemption.

I have already explained why I think, as a matter of purely grammatical construction, this is not admissible. But it is unnecessary to elaborate this view, because while it is true that with some violence done to purely grammatical accuracy the syntax might admit of this reading, the meaning thereby elicited from the words is manifestly not that which the maker of the instrument designed to convey by the words he used, as the provisions of the instrument clearly show.

My opinion on this question proceeds entirely on the ground that the attempt to attach the condition of non-descent from the entailer to the words resolving the right of the contravener cannot stand for a moment alongside the clear and unambiguous words of the prohibitory and irritant clauses. Indeed the descendants of the entailer were the persons against whom the prohibitions and irritancies were mainly directed; the succession of the other members of the destination was a remote contingency. We are now asked to affirm the proposition that the entailer, after directing his prohibitions against those disponees who were his immediate descendants, and carefully irritating and annulling all their deeds of contravention, intended by using these words to liberate them entirely from the consequences of these acts. At least it is said his words will bear that construction grammatically, and if it be even doubtful whether that may not have been his meaning we are bound on the principle of strict construction to give effect to that interpretation of them.

I am not of that opinion. I think the condition in dispute admits only of one rational meaning, and was intended for a definite and intelligible object, and one in which the contravening heirs themselves were not concerned; that it is not doubtful in the least, but is perfectly certain from the words of this instrument, that the entailer did not mean to liberate his descendants from the consequences of their own contravention, and that the words in question do not refer to that matter. And I further think that the principle of strict construction, rightly apprehended, has no operation in varying these results.

The rule of strict construction is only a presumption of intention or canon of inference which when applied to doubtful or ambiguous words in the fetters of a strict entail will turn the balance of construction in favour of the liberty of the disponee from restraint. If the words used admit of two interpretations, both being reasonably probable, a court of law will presume in favour of that which leaves the heir of entail free. I say "reasonably probable," not necessarily equally probable; but they both must present a meaning which may not unreasonably be assumed to have been designed by the entailer when he used the words. But the presumption of intention must yield to proved intention. If of the two interpretations one is entirely consonant to the words, the subject-matter, and the tenor of the instrument, while the other, although grammatically possible, is opposed to any conceivable intention of the entailer, and is repugnant to his clear words, there is nothing left to be construed, and the alleged meaning becomes the fruit, not of construction, but of perversion.

I do not propose to go over the well-trodden ground of the cases on the strict construction of entails, because I think none of them have any application to the present case, and at the best all of them depend on the special words of the entail on which they arose, turning sometimes on the narrowest distinctions. But this case is a novel form of a very old question. The entail is not challenged on the head of defective enumeration like the *Tillicoultry* case, or of defective reference like the case of *Overton*, or of defective expression or omission, for the words of the resolutive clause are quite well chosen and quite sufficient. This is a claim for a specific exemption said to be superadded to the admitted provision. I think it proved by the words, the context, and the tenor of the instrument that the claim is utterly unfounded, and that the words of the context not only do not support it but are irreconcileable with it.

Of course these views necessarily proceed on the assumption that in construing this instrument, or any part of it, I am entitled to consider all its provisions. Although I think the phraseology of the clause indicates with sufficient clearness its real meaning, it might have been more difficult to show the utter futility of the proposed reading if we were debarred from reading the first part of this sentence, which contains the irritant words, or from referring to the prohibitory words in order to ascertain what a contravener means. But there could be no ground for any such contention. Evidence drawn from the rest of the instrument merely to show that the entailer meant to make the fetters complete, if no sufficient words are used, is of course unavailing. But this patent truism is sometimes used to cover a proposition which is as fallacious as the other is true —that the intention which the entailer designed to express by the words which he has used may may not be legitimately gathered from other parts of the instrument. I find this matter very satisfactorily treated by Lord Jeffrey in the *Valleyfield* case (*Baird Preston*, 7 D. 305), where he says at p. 331—"I may begin, however, by saying that I can by no means recognise it as a just exemplification of that principle" (of strict construction)

"to hold that in determining the true meaning of the fettering clauses of an entail we should never be permitted to go beyond the words of these clauses themselves, or even that we should always confine ourselves to the context or to words occurring in the same sentence or connection. On the contrary, I hold that it is undoubtedly competent to go for this purpose to all the words and clauses of the deed which relate to the same matters, and especially to such of them as bear directly on the words we are called upon to interpret, though always no doubt under this qualification or proviso, that the meaning so to be made out must be made out clearly and unequivocally, and that the result of the whole taken together must be something more than a mere preponderance of probability, or even a moral conviction, that fetters and restraint were intended. The intention to fetter, in short, and to fetter in a particular manner, must always be clearly made out both from the expressions actually found in the body of the deed. But if it is once so made out it is not, as I think, to be defeated either by a strained and unnatural interpretation of the operative words themselves, or by sticking obstinately to them as they actually stand, and wilfully refusing to look at the other clauses or expressions in the deed which may fix unequivocally the sense truly put on them by the entailer. Thus far, I believe," says Lord Jeffrey, "all persons looking judicially at the subject will now be found to agree." If this was so forty years ago, I think we may safely follow it now.

If, then, in conformity with this view we read not only the fettering clauses, but the whole of the provisions of this bond of tailzie, we find in a preceding clause an illustration of the entailer's reason for introducing the disputed words which cannot be resisted. He has a provision directed to the assumption of the name and arms of Wauchope, and this he fences by a separate resolutive clause in the following terms:—"And if the said heirs-female and their husbands, and the heirs succeeding to the estate, shall either not assume, or desist to use and bear, the said surname and arms, then in that case they, for themselves only if they be descended of my body, and if they be not descended of my body, they and the descendants of their bodies, shall amit and tyne their right to the lands," &c.

It is impossible to resist the light which this clause throws on that now in dispute. The latter is a replica of the former, elliptical and abbreviated no doubt, but intended to serve and perfectly adapted to serve the same end. If descent from the entailer was not to liberate the contravener in the first case, what rational ground could there be for believing that it was meant to liberate him in the second?

The clause of devolution has been appealed to in aid of the pursuer's contention, but it can give it no support. It is an executory clause intended to give effect to the resolution of the offender's right by the words which precede it, but it cannot in any way control or affect them. It forms no part of the fetters, and the omismission from its terms of the exemption of such descendants of a contravener as were descendants of the entailer can as little deprive them of that right as the clause itself can be invoked in support of the exemption of the actual contraveners.

Lord Deas—This is an action at the instance of the heir of entail in possession of the estate of Niddrie-Marischall to have the entail of that estate declared invalid, on the ground of various alleged objections which were condescended on, but the only objection insisted on at the hearing before the Seven Judges, and which we have to consider, is that which is stated thus in the pursuer's condescendence—"The said deeds of entail contain no resolutive clauses directed against heirs of entail who are descended, as the pursuer is, of the entailer's body;" and which in his second plea-in-law is thus expressed—"On a sound construction of the said deed the pursuer, as being a descendant of the body of the entailer, is not within the scope of the resolutive clauses."

There is more than one deed of entail, substantially to the same effect, but I understand the parties are agreed that the terms of the entail may be taken to be those in the deed of 1710. It is a deed in the form of a procuratory of resignation for resigning the lands in favour of the granter, Andrew Wauchope of that day, himself, and failing him by decease to Alexander Wauchope, then his eldest son, and the heirs-male descending of his body, which failing to his other heirs of taillie and provision therein aftermentioned, "according to the order and substitution specified, always under the reservations, provisions, conditions, qualifications, and clauses irritant underwritten." These last words are important—1st, Because they are in the dispositive clause; 2d, because they are between that clause and the destination; 3d, because they stamp a character upon all the prohibitory, irritant, and resolutive clauses which follow afterwards.

Here I wish to say, in the outset, that while I do not doubt the applicability to entails of the rule of strict construction, I have just as little doubt that before we can be entitled to construe the particular entail either by one rule or another we must have the structure of the deed and all its clauses before us, so that the whole context of any disputed or doubtful word or passage may be read in order to throw light upon the true construction and real significancy of such word or passage as used and intended by the maker of the deed.

Lord Ivory thought this rule better established at the date (January 1845) when he reported the *Valleyfield* case to the First Division of the Court than it had been at the date of the *Ardovie* case (*Speid*, February 21, 1837, 15 S. 618), and that this went to account for the difference between the decisions in the two cases. But however that may have been, I venture to think that whoever will take the trouble to trace the *Valleyfield* case from its commencement to its close will be satisfied that the rule as expressed in Lord Ivory's note is now at all events thoroughly established, and received full effect in the opinions of the majority of the whole Judges of this Court, and was sanctioned by the judgment of the House of Lords. I do not find that judgment reported except very shortly in the 17th volume of the Scottish Jurist, but having been one of the counsel for the appellant, and present when the judgment of affirmance was delivered by Lord Campbell, who presided, there can be no doubt that such was the result.

In the *Valleyfield* entail the three statutory pro-

hibitions against sale, contractions of debt, and alterations of the order of succession, were each introduced by the words "and providing," "and further providing, as it is hereby provided and declared" (and so on). The irritant and resolutive clauses which follow immediately after these three prohibitions were introduced by the words, "which provision immediately above-written, if any of the forenamed persons or heirs-male or female, hereby appointed to succeed to the said lands and estate, shall happen to contravene, they shall not only lose and amitt the right of succession thereto, and the same shall accresce and belong to the next heir of tailzie and provision appointed to succeed to the person contravener though descended of the contravener's body, *ipso facto*, without the necessity of a declarator, but also all such facts, deeds, debts, and obligements in contravention of the foresaid provision are hereby declared, *ipso facto*, void and null, and shall no ways" be obligatory upon subsequent heirs of tailzie and provision who are hereby appointed to succeed and have right to enjoy the said estate free of the burden of such deeds, debts," &c.

Lady Baird Preston sold the estate to an onerous purchaser, and brought an action of declarator to try the validity of the entail. The objection taken to it of course was, that while there were three substantive provisions or prohibitions, the irritant and resolutive clauses were applied only to the last of them, which was the prohibition against altering the order of succession, or if that could be doubted, then that it was uncertain to which of them they applied, which was said to be equally fatal to the deed.

It did not admit of doubt that "which provision" in the singular, more especially when particularised as "which provision immediately above written," might rationally enough be read in the way contended for by Lady Baird Preston, so much so that a minority of the whole Court were of opinion to the close that they ought to be so construed, and that the pursuer was entitled to succeed; but the plea that prevailed in this Court and the House of Lords was that when read by the light afforded by the rest of the deed, "which provision" in the singular was shown to have been used by the entailer to signify the whole provisions or prohibitions in the deed.

After this decision it can obviously no longer be affirmed absolutely that wherever a word or passage in an entail admits, without any strained construction, of two meanings we must prefer the meaning which is against fetters and in favour of freedom.

The Lord Ordinary says in his note in the present case—"The solution of the difficulties raised by the pursuer seems to me to depend upon the question, What is the class of contraventions referred to in the clause commencing 'but also?' In answering that question" (his Lordship further says) "I think the clause must be read in connection with the irritant clause to which it is appended, and so reading it, I think it not doubtful that all contraventions, whether by contraveners descended of the entailer's body or by these not descended from him, are struck at. On a reasonable and even strict construction of the clause, I think it sufficiently declares that all contraveners shall forfeit and tyne their right to the estate, and that their right shall also be forfeited by their descendants if they be not descended of the entailer's body."

I agree with the Lord Ordinary in holding that the resolutive clause must be read in connection with the irritant clause, not only according to the rule settled in the *Valleyfield* case, but likewise by the special structure of this deed, which links the resolutive clause to the irritant clause by the emphatic words "but also." I likewise entirely agree also with the construction the Lord Ordinary puts on the words "if they be not descended of my body." These words naturally connect with the words "descendants of the contraveeners' bodys," and import, as the Lord Ordinary observes, the additional forfeiture of these descendants if they (that is, the decendants) be not descended of the entailer's body.

That this is the true meaning and real significancy of the words as used by the entailer, becomes, I think, still clearer when, instead of merely reading the resolutive clause in connection with the irritant clause, we read both these clauses in what would be their still more natural sequence in the deed, thus:—"It is also hereby provided that it shall noewayes be leisum nor lawfull to the said William Wauchope, my sone, nor to any oyrs. heirs-male or of taillzie above specified, at any time coming, to alter the order and course of succession appoynted hereby, nor to sell, allienate, or dispone the lands, barrony, and others above exprest, or any part thereof, either irredeemably or under reversion, or to grant wadsets or infeftments, annual rents, or liferent, or to burden the same with any servitude or other burden, or to set tacks or rentalls for longer space than during the setter's or receiver's lyfetime, the same not being in diminution of the former rentall; and it is hereby provyded and declared that it shall nowayes be in the power of the sd. William Wauchope, my sone, nor his heirs-male and of taillzie and provision above specified, nor any of them, to contract debts or doe any other deed whereby ye lands, barrony, and others above rehearst, or any part thereof, may be apprised, adjudged, or any other manner of way evicted in prejudice of the nixt heir hereby appointed to succeed, and if the said William Wauchope or any other of the heirs-male or of taillzie and provision above specified shall doe any fact or deed contrair to the provisions above mentioned, either by disponing or by contracting of debt, or dooing any other deed contrairs to the sds. restrictions or any of them, then and in yt. case the samine deeds, and all and every one of them, are not only hereby declared to be null and void in themselves *ipso facto* without necessity of any declarator in soe far as concerns ye lands, barrony, and others above mentioned, so that they shall not be affected therewith in prejudice of the succeeding heirs of taillzie and provision seeing thir presents are granted *sub modo* and with the provision above specified and noe oyrways, but also the contraveeners if they be not descended of my body shall forfeit and tyne their right to the said estate, and the same shall belong to the nixt person and his heirs-male who would succeed nixt after the contraveener and the descendents of his body, who shall have right to succeed yrinto by virtue hereof ffree from all debts and deeds done and granted or committed by the sds. contraveeners."

There is one consideration which of itself I think sufficient, even if there were no other, to show that the entailer used the disputed words in the resolutive clause in the sense and with the application stated by the Lord Ordinary, and not as declaring descendants of his own body not to be affected by that clause; and that consideration is the fact that in the portion of the deed which follows the conditions as to the name and arms, and terminates with the word "contraveeners," and which I have just now read, all the fetters and sanctions of the entail are expressly directed against William Wauchope, his eldest son and heir, which it cannot be supposed he would have done if the meaning he intended to convey by other words he was using in the same breath in the same passage was that remoter descendants of his body might contravene without any forfeiture of the estate whatever. Assuming that the words might possibly be read either way, I think it conclusively appears from the deed itself in what sense the entailer used them, and that is the sense to be adopted. My opinion is that the entail is quite good.

Lord Shand—Your Lordship having been good enough to communicate to me your opinion, I have only to say that I entirely concur in that opinion, and have nothing to add.

Lord Young—I concur with the Lord Justice-Clerk.

Lord Craighill—In consequence of what passed on the subject in the course of the discussion before the Seven Judges, I think it right to say that notwithstanding the passing of the Entail (Scotland) Act 1882 (45 and 46 Vict. cap 53), entails are in my opinion still by the law of Scotland as they were before, *strictissimi juris*, and in a question affecting their validity they must be construed according to the rules which hitherto have been recognised in its determination. The statute just mentioned has relaxed the fetters in important particulars, but there is nothing in any of the enactments calculated to show expressly or by implication that the rules by which such deeds had been in use to be construed were varied or to any extent relaxed. Had this been otherwise there would have been reasonable ground for surprise, because the purpose of the Act was to confer powers, and to create rights which were not previously possessed by heirs of entail or their creditors, and not to introduce a change in the law—for a fixed principle of interpretation is a part of the law affecting entails—whereby entails, which if challenged previously must have been held ineffectual, were by virtue of a new rule of construction to be held to be valid. The purpose was not to make bad entails good, but to limit the consequences flowing from those which were good. The effect of the doctrine contended for may well be illustrated by the circumstances of the present case. Should the pursuer succeed he will become fee-simple proprietor of his estate, and so be able to deal with it in every way without the consent of, and without rendering compensation to, a subsequent heir; but should he fail in consequence of the application of the new canon, which has been suggested, the operation of the entail will be continued, and escape from the fetters, as these now remain, will be possible only if indemnification be rendered to a subsequent heir. Such a result would involve something like inconsistency in the policy of recent legislation, and this consideration is of itself sufficient to prove that the suggested relaxation cannot reasonably be regarded as an implication of any or of all of the enactments of the recent statute.

The question which has been sent for the decision of the Seven Judges is, whether the resolutive clause has been so framed as to resolve the right of an heir in possession, happening to be a descendant of the entailer's body, by whom any of the prohibitions of the entail have been contravened. If this result has not been unambiguously provided for the entail must be held to be bad, for the law upon the subject is that given by Lord Campbell when delivering his opinion in *Lumsden* v. *Lumsden*, August 18, 1843 (Bell's H. of L. Cases, ii. 104). His words are—"There is no doubt that by the law of Scotland entails are *strictissimi juris*, that the prohibitory, irritant, and resolutive clauses must be complete and perfect in themselves, and that they cannot be supported by implication or probability or mere general intention not distinctly expressed. But the law of Scotland does allow entails if the entailer, by language taken in its grammatical, natural, and usual sense, prohibits the institute and heirs from altering the succession, from alienating and from burdening the estate with debt, declares all acts and deeds in contravention of the prohibitions void, and provides that, the contravener forfeiting his right, the next heir-substitute shall succeed. This meaning must be clearly and unequivocally expressed, but for that purpose no *voces signatæ*, no *verba solennia* are required; and any language is sufficient which does not admit of doubt or ambiguity."

Thus instructed as to the law, I cannot avoid coming to the conclusion that the present entail is bad, inasmuch as the resolutive clause is not clearly and unambiguously expressed, there being, as I think, one reading by which the operation of the resolutive clause is restricted to contraveners not descendants of the entailer's body, as grammatical, as natural, and as consistent with the ordinary use of the words as a different reading by which the rights of contraveners who are descendants of the entailer's body would also be forfeited by contravention. On this occasion there is no dispute as to the sense of any particular word. Every word in the part of the clause—the reading of which is in controversy—both parties allow is to be taken in its natural and usual sense. The collocation of the words is the source of the difficulty. What is the antecedent to "they" occurring in the second line of the resolutive clause? Does it include "the contraveners" as well as "descendants of the contraveners' body?" This is the question for determination. Plain to me it is that, grammatically, the former are as much as the latter parts of this antecedent. No doubt the words "descendants of the contravener's body" are nearer to the "they" for which an antecedent is required than the words "the contraveners," but the nearer and the more remote are coupled together by the word "and," so that the separation of the one set from the other must be justified by another consideration than grammatical accuracy, pro-

priety, or necessity. The truth is that the reading insisted on by the defenders was suggested not by any grammatical rule, but by the necessity of the case. Those interested to support the entail knew that unless the words "the contraveners" were separated from the words "if they be not descended from my body" the entail must be defective in a cardinal point, and consequently their view of the clause came to be something like a foregone conclusion. But even their construction, whatever be its recommendation, does not obviate ambiguity. There is another reading equally consistent with the grammatical, natural, and usual sense of the words, and this, as the language required for the sufficient expression of a resolutive clause as of a prohibitory or irritant clause, "must not admit of doubt or ambiguity," is enough for the case of the pursuer. Had it been necessary to show that the reading which I have adopted was the more probable of two possible readings, I would have pointed to the circumstance that the word "their" which occurs in the following line confessedly requires for its antecedent in part, if the efficacy of the clause is to be maintained, the words "the contraveners," placed as they relatively are in the clause, it seems improbable that there should be one antecedent to the word "their" and another to the word "they." And in this consequently there is a reason, should it not be counteracted by other considerations, for preferring the more comprehensive to the more restricted antecedent to the word "they."

Two other suggestions, however, have been thrown out on which it is proper that a word should be said. One is, that of the two readings which are consistent with the grammatical, natural, and usual sense of the words, that by which the efficacy of the entail is supported, is the one which on the ground of presumed intention ought to be adopted. But this reason for preference is opposed to the law as laid down by Lord Campbell (*Lumsden*, 2 Bell (H. of L.) p. 104), and it is as obviously opposed to the doctrine presented by Lord Rutherfurd in giving judgment in the case of *Jamieson* v. *Campbell*, January 25, 1853, 15 D. 336. At p. 338 he says—"The recent cases in the House of Lords have modified, or at least differently expressed, the rule laid down by Lord Corehouse in the case of *Speid* v. *Speid*, February 21, 1837, and it would now seem to be the rule that where there is ambiguity, the construction shall be for freedom and against fetters, yet the ambiguity must be found, not in a forced or strained construction, but giving to the words used their natural and grammatical meaning." Here the ambiguity is found, not in a forced or strained construction, but in the natural and grammatical meaning of the words. Had there been a rule that difficulties in the interpretation of words, or in the construction of sentences, could be removed by a reference to the presumed desire of the maker that all should be construed in the way necessary for a good entail, comparatively few of the decisions by which entails have been found bad could or would have been pronounced. The presumed intention of the maker gathered from the provisions of the deed governs the interpretation of wills. But not intention only, but the thing expressed, as that may be ascertained according to the grammatical, natural, and usual sense of the words employed, governs the interpretation of an entail. All this, however, is not inconsistent with a second suggestion, offered on the part of the defenders, that where a word or a passage has a meaning impressed upon it either by the immediate context or by the material provisions of the deed, that shall be taken to be the true meaning of the word or passage as employed in the entail. The case of *Murray*, decided in the House of Lords, May 3, 1849, and the *Valleyfield* case, which was decided in the House of Lords, but is fully reported only as a Court of Session case, January 28, 1845, 7 D. 305, are full warrant for such a proposition. But to the present case they have no application. There is no dispute as to the meaning of a word, and even were it to be held that in ordinary circumstances an ambiguous resolutive clause was to be construed on the ground of presumed intention in the way requisite for the efficacy of an entail, that on the present occasion would not be enough, because the matter is not left for inference or presumption, the maker of the entail having by the clause of devolution, which is connected with the resolutive clause, and is in truth a part of that clause, grammatically considered, shown that the rights of contraveners any more than the rights of descendants of contraveners' bodies were not to be forfeited by contravention, if the contraveners happened to be descendants of the entailer.

For these reasons, I am of opinion that the objection urged by the pursuer against the sufficiency of the resolutive clause of this entail, which is the only matter submitted to the consideration of the Seven Judges, ought to be sustained.

Lord Rutherfurd Clark—I am also of opinion that the resolutive clause is bad.

The Court pronounced this interlocutor:—

"The Lords . . . in conformity with the opinion of the whole Judges present at the hearing, Recal the interlocutor reclaimed against, and find and declare and decern in terms of the conclusions of the action."

Counsel for Pursuer (Reclaimer) — Mackintosh — Pearson Agents — Mackenzie & Black, W.S.

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