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unless satisfied on the subject, that his debt was one of those which the bond provided to be paid in full, and his consent to the recall, in consequence of this assurance, were sufficient to support his claim. And it is no answer to this to say that Mr. Gordon's actings were unauthorized, because, as trustee, the respondents were bound to look upon him as acting for the creditors.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellant, *W. Adamson, David Williamson.*

For Respondent, *Wm. Alexander, John Clerk.*

NOTE.—Unreported in the Court of Session.

ROBERT SCOTT MONCRIEFF, Esq., . *Appellant;*
WM. CUNNINGHAM, Esq. of Bonnington, *Respondent.*

House of Lords, 20th July 1804.

ENTAIL—FETTERS—RESOLUTIVE CLAUSE—SALES.—In the entail of the estate of Bonnington, there were perfect prohibitory and irritant clauses against the sale of the estate; but the resolutive clause, which contained an enumeration of the acts which were to be deemed a contravention of the entail, did not mention sales;—held that the entail was not good to protect against the sale of the estate.

The question here was, whether the entail of Bonnington, in possession of the respondent, was sufficiently protected against sales of the estate? And whether the sales made by him of part of the estate to King and Gibson, in the belief that the entail did not validly protect against sales, were good and effectual? In an action raised by the respondent to have it found that the sales were effectual, the appellant was called as a party, being the next substitute after the death of the respondent and his two sisters, neither of whom had any issue.

The entail contained the following prohibitory clause, declaring that it should not be lawful "to sell, annailzie, dispone, dilapidate or put away, the foresaid lands and estate, or any part or portion thereof, nor to innovate or infringe this tailzie and order of succession hereby made by me, nor to contract debts, nor do any other fact or

" deed, civil or criminal, of omission or commission, whereby " the said lands and estate may be any wise apprised, evict- " ed, or forfaulted frae them, or any otherwise affected in " prejudice or defraud of the subsequent heirs of tailzie " and provision foresaid *successive*, according to the order " and substitution above mentioned." Then followed this irritant clause: " Whilk haill debts and deeds so to be " contracted, done, or omitted by them, in prejudice or de- " fraud, as said is, are not only hereby declared void and " null, *ipso facto*, be way of exception or reply, without any " necessity of declarator to follow thereupon, in so far as " the same may burden and affect the said estate." Then follows the resolutive clause, upon which the present question is raised; " but also it is hereby provided and declared, " that the said heirs of tailzie who shall contravene and in- " cur the said clauses irritant, or any of them, either by not " bearing, assuming, using, and carrying the said name and " arms of *Cunningham*, or be the saids heirs *female* not " marrying a gentleman of the name, or who shall assume " the name, and bear and carry the same sirname and arms " in manner respective forward, or who shall break or inno- " vate the said tailzie, or contract debts, or commit any " other fact or deed of omission or commission, whereby " the said lands and estate may be evicted, or anywise af- " fected in manner foresaid, that then, and in any of the " said cases, the said persons so contravening shall forfeit, " amit, and tyne their right and succession to foresaid lands " and estate; and all infeftments, and pretended rights " thereof, in their persons shall from thenceforth become " extinct, void and null."

The respondent maintained, that though there were clear and sufficient fetters against selling in the prohibitory and irritant clauses, yet that the above resolutive clause did not sufficiently protect against sales, and therefore that the entail was ineffectual against sales of the estate.

The appellant, on the other hand, contended that this was a sufficient resolutive clause, resolving the right of the heir, on his committing " any other fact or deed of *omission* or " *commission*, whereby the said lands may be evicted, *or* " *anywise affected in manner foresaid.*" That selling was just an act of " *commission*," and when this was taken in connection with " *in manner foresaid*," there is an immediate reference made to the clause immediately preceding,

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in which the prohibitions against selling, &c. are sufficiently distinct.

The Court, on report of Lord Craig, Ordinary, pronounced this interlocutor:—"Find that the dispositions libelled "by the pursuer, are valid and effectual to the purchasers, "and decern and declare accordingly."

Against this interlocutor the present appeal was brought.

Pleaded for the Appellant.—Admitting that entails are to be strictly interpreted, and that their restrictions are not to be extended by implication, yet being authorized by the act 1685, they ought to receive a fair interpretation. The words in the resolutive clause of this entail are sufficient, upon such fair interpretation, to bar a sale of the estate; for though they have considerable similarity to the words of the resolutive clause in the case of Tillicoultry, yet it is submitted, that the difference of expression which has been noticed, does fully justify a different result.

Ante p. 231.

Pleaded for the Respondent.—The limitations are not to be extended, by inference or implication, beyond what is contained in the entail itself; this is a rule universally admitted, in the construction of all entails, in the law of Scotland; it is even received in questions betwixt heirs of entail themselves, who are personally bound by every limitation the entailer may have thought fit to impose upon them, as the condition of their holding the estate. Much more where the limitations are directed against third parties, as in a prohibition to sell or contract debt; in order to render these effectual against third parties, it is absolutely necessary these limitations shall be accompanied by fit irritant and resolutive clauses, in terms of the act 1685, c. 22; and unless this be done, the estate cannot be secured from sale, however express and clear the prohibitory clause may be. In the present case, the resolutive clause omits to strike at or enumerate sales among the acts therein mentioned, which brings the present case precisely within that of Tillicoultry, where such an omission proved fatal to the entail, in terms of the decision of the Court of Session, affirmed in the House of Lords. The resolutive clause is essentially in its nature an enumerating clause—which enumerates the several acts prohibited in the prohibitory clause, but does not include among these selling, which therefore invalidates the entail.

After hearing counsel, it was

Ordered and adjudged that the interlocutor be, and the same is hereby affirmed.

For Appellant, *Wm. Alexander*, *Arch. Cullen.*
For Respondent, *John Clerk*, *David Cathcart.*

NOTE.—Unreported in the Court of Session.

WILLIAM GLOVER, Merchant, Leith, . *Appellant;*

JOHN GLOVER, Wright in Leith, and WM. KEIR, Merchant there, Oversman. } *Respondents.*

House of Lords, 11th February 1805.

SUBMISSION—ARBITERS—POWERS TO PROROGATE—OVERSMAN.—Disputes as to an accounting in a copartnership concern, were, after action was raised, submitted to arbitration. The sumbission conferred a power on the arbiters to prorogate the submission from time to time, and provision was made for an oversman in case of difference of opinion. They differed in opinion; and the matters coming before the oversman, he prorogated the submission. There was no power conferred on him to do so by the submission. In a reduction of his decree, Held, that though the submission conferred no express power on the oversman to prorogate, yet that the powers of doing so, conferred on the arbiters, must be held as having devolved on him, when they differed in opinion.

The appellant, and the respondent, John Glover, were partners in business together, which was carried on in Leith as merchants and herring-curers there. On the dissolution of the concern in October 1799, the respondent, John Glover, brought an action of count and reckoning before the sheriff, to ascertain and recover a balance alleged to be due to him upon the books of the company.

The matters in dispute were, of this date, submitted to Nov. 14, 1799.
the arbitration of two arbiters, with power, in case of difference, to appoint an oversman. The arbiters proceeded, by the aid of an accountant, to investigate the books and the affairs of the company, when, having differed in opinion, the other respondent was chosen oversman in terms of the submission. The oversman's first order was, of this date, to Oct. 27, 1800.
prorogate the submission, in order to keep it from expiring, which it did in the lapse of the year. And, of the same date, he ordered the appellant to deliver up all books and