SCOTLAND.

(COURT OF SESSION.)

Dr. JAMES ROBERTSON BARCLAY, of *Keavil* - - - - } *Appellant*;

The Right Honourable WILLIAM ADAM, Lord Chief Commissioner in the Jury Court of *Scotland* - } *Respondent.*

AN entail in the prohibitory clause provided that it should not be lawful to sell, alienate, or put away the lands, &c.; nor to alter the course of succession; nor to contract debt, &c.; nor to do or commit any fact or *deed*, civil or criminal, whereby the lands, &c. might be adjudged, evicted, or forfeited, &c.; nor to permit the estate to be adjudged or affected for any debts or deeds contracted or committed by the grantor or the heirs of entail; It contained an irritant clause in the following words: "All which debts, *deeds* and "contractions are hereby declared null and void, &c." The resolutive clause provided that the heir in possession, if he should not redeem any adjudication which might be led against the estate for and upon the debts and *deeds* of, &c. should forfeit, &c.

Held, that the word "deeds" in the irritant clause does not apply to all the things enumerated in the prohibitory clause, but is restricted by the context to such deeds as are of a nature to create a debt or burden; that it refers especially to the debts and deeds previously prohibited, and cannot be extended to the prohibition against selling.

Upon a sale therefore by the heir in possession, an objection to the title by a purchaser, on the ground that the irritant clause struck at alienation, was held invalid.

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IN the month of November 1820, the Appellant purchased from the Respondent certain lands situated in the county of Fife. By the agreement the Appellant undertook to pay 3,950 *l.* as the price

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of the estate; and the Respondent bound himself to execute and deliver to the Appellant a valid and sufficient disposition of the property.

Of the lands so purchased, certain parts, called Craigincate and Kingseat, are contained in the entail of the Blair Adam estate. These lands consist of about four hundred acres, and the proportion of the price corresponding to them was about 3,000 *l.*

The Appellant having refused to pay this part of the price, on the ground that the entail of the estate of Blair Adam contained a prohibition against *selling*, the Respondent was proceeding to enforce the execution of the contract, when the Appellant presented to the Lords of Council and Session in Scotland, a bill of suspension, in which, after setting forth the terms of the agreement, he professed his readinesss to implement all the obligations incumbent upon him, provided he could be assured that the Respondent was in a situation to give him a sufficient title to the lands which he had purchased.

The bill of suspension having been passed, the cause came to be pleaded before Lord Gillies; who ordained the parties to print and to lodge informations, that it might be judged of by the first division of the Court.

The main objection of the Appellant was grounded on the terms of the Blair Adam entail, as importing a prohibition against selling.

The entail was executed by the Respondent in terms of a former deed of entail, executed in the year 1758, by Alexander Littlejohn of Woodstone, and in terms of an act of parliament, by which the Respondent became bound to settle certain lands on the same series of heirs, and under the same condi-

tions and limitations, as those contained in the deed executed by Mr. Littlejohn.

The entail contains the following prohibitory clause: " That it shall be no ways lawful to the grantor " and heirs of entail, to *sell, alienate, or put away* " the lands, and others foresaid, or any part or por- " tion thereof, *nor to alter the course of succession* " above established, nor to *contract debt* above 500 *l.* " sterling at one time, nor to *do* or *commit any fact* " *or deed, civil or criminal,* whereby the said lands " and estate, or any part thereof, may be anyways " adjudged, evicted, or forfeited from me or them, " or may be anyways affected in prejudice and " defraud of the subsequent heirs of tailzie and " provision successively, according to the order of " substitution above specified; neither shall it be law- " ful for me nor them to *permit the said estate, or any* " *part thereof, to be adjudged,* or affected for any " debts or deeds contracted or committed by me or " them, before our succession, or by any of our pre- " decessors whom I or they may any way represent, " or to which we, as their representatives, may be " liable or subject."

Then follows an irritant clause in the following terms: " *All which debts, deeds, and contractions* " are hereby declared *void and null* by way excep- " tion or reply, and without declarator, in so far as " they may burden the said lands and estate."

After this irritant clause the prohibitory clause is resumed in the following terms: " Neither shall it " be lawful for me, or the said heirs of tailzie, to " permit the said lands and estate, or any part " thereof, to be evicted, adjudged, or affected

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" for any debts or deeds contracted or done by the " said deceased Andrew Littlejohn, or for the said " sum of 500 *l.* sterling, wherewith the heirs of " tailzie are empowered to burden the lands and " estate at one time."

After this there follows a resolutive clause specially applicable to this last prohibition. It is expressed in the following terms: " And if I, or the heir in " possession, shall not redeem any adjudication that " may be led against the said estate, for and upon " the debts and *deeds* of the said deceased Alexander " Littlejohn, or for the said sum of 500 *l.* sterling, " within three years of the expiry of the legal of " such adjudications; then and in that case, I, or " such heir, shall, for himself only, lose and forfeit " his right to the said lands and estate; and it shall " be lawful to the next immediate heir of tailzie, " and if he shall neglect, to the next succeeding " heir, and so on successively, to redeem the said " estate, and use all the forms necessary in the order " of redemption, and to enjoy and possess the said " estate irredeemably thereafter, free of the debts " and deeds of the preceding heir."

The entail afterwards contains a more comprehensive *resolutive* clause, which was admitted in every respect to be effectual.

The case was decided by the Court of Session on the 8th of February 1821, when the following interlocutor was pronounced: " Upon the " report of the Lord President, in the absence of " Lord Gillies, and having advised the informations " for the parties, the Lords find, that the deed of " tailzie founded on by the suspender does not con-

"tain any irritant clause applicable to the sales or "alienations of the lands in the said tailzie, and "therefore find the letters orderly proceeded, and "decern."

The Appellant, conceiving himself to be aggrieved by this interlocutor, presented his appeal.

For the Appellant—

The irritant clause is introduced at the end of those parts of the prohibitory clause to which it is applicable, and before the last branch of the prohibitions, because it is to that inapplicable. In order to render an irritant or resolutive clause effectual it is not necessary to adopt any precise form of words; either of these clauses may be prefaced by a minute recapitulation of all the different acts which have been previously prohibited, or by a general reference to the previous prohibitory clause in which such enumeration is contained; if a particular recapitulation is attempted, there should be no omission of any one act which is meant to be prohibited, since otherwise the court, consistently with recent authorities, will be disposed to conclude that such omission arises from design, and that the act so omitted is not meant to be comprehended under the irritant and resolutive clauses. But an irritant clause, expressed in terms of general reference to the previous prohibitory clause, is equally effectual as if it contained the most minute recapitulation of particulars.

Thus, in the act of parliament 1685, c. 22, by which entails were first declared to be effectual against the creditors of the heir in possession, it was made lawful "to his majesty's subjects to tailzie their

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" lands and estates, and to substitute heirs in their " tailzies, with such provisions and conditions as " they shall think fit, and to affect the said tailzies " with irritant and resolutive clauses, whereby it " shall not be lawful for the heirs of tailzie to sell, " nailzie or dispone the said lands, or any part " thereof, or contract debt, or do any other deed, " whereby the samen may be apprised, adjudged, or " evicted from the other substitute in the tailzie, or " the succession frustrate or interrupted, *declaring* " *all such* DEEDS *to be in themselves* void and null," &c. Here it will be observed, that after the enumeration of several different prohibitions against selling, contracting debt, &c. the statute proposes the form of a general irritant clause, " declaring all " such *deeds* to be void and null," and by which the general term "*deeds*" is made to comprehend all sales, contractions of debt, alterations of the order of succession, and every other act previously prohibited.

In like manner this mode of expression has been adopted in many of the entails which the Court of Session have had occasion to consider. Thus, in the entail of the estate of Roxburgh, the prohibitory and irritant clauses were in the following terms: " And " sicklike it is expressly provided, that it shall not " be lawful to the persons before designit and the " heirs male of their bodies, nor to the other heirs " of tailzie above written, to make or grant any " alienation disposition, or other right in security " whatsumever, of the lands, lordship, baronies, " estate, and leiving above specified, nor of no part " thereof, nather zit to contract debts, nor do ony

" *deeds* quairby the samen may be apprizit, adjudgit,
" or evicht frae them, nor zit to do ony other thing in
" hurt or prejudice of thir prests and of the foresaid
" tailzie and succession in hail or in part, *all quhilk*
" DEEDS sūa to be done by them, are bv thir prñts de-
" clared to be null and of nane avail, force, or effect."

So in the entail of the estate of Tillycoultry, which was under the consideration of the Court of Session in 1799, there was a prohibition against selling, altering the order of succession, contracting debt, or doing any other fact or deed, " civil or " criminal, by which the lands might be evicted ;" and the irritant clause following these prohibitions was in these general terms : " All which *deeds* are " not only declared void and null *ipso facto* by way " of exception, or reply without declarator, or in so " far as the same may burden and affect the foresaid " estate, but also," &c. An objection was taken to the resolutive clause of that entail, but the parties did not question the irritant clause. On the contrary, it was distinctly admitted, that the irritant clause expressed in these terms of general reference to the prohibitory clause was perfectly sufficient.

For the Respondent :—

An entail with prohibitory and resolutive clauses is not effectual against the onerous deeds of the heir in possession, if it contains no irritant clause declaring such deeds to be null and void.

This was settled by the decisions of *Baillie* against *Carmichael**, and *Gardiner*, &c. against *the Heirs of entail of Dunipace*†. It has ever since been held to be fixed law, and is not disputed by the Appellant.

* 11 July 1734. † 27 January 1744.

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The irritant clause in the present entail is not a general one, applicable to all the prohibitions, but specially and exclusively directed against the debts and deeds which are specified in the particular branch of the prohibitory clause which immediately precedes it; and therefore it has no relation to sales and alienations.

The prohibitory clause in the present entail consists of three distinct branches or members, each of which is introduced by the words, "It shall no ways be lawful," or "Neither shall it be lawful" to me or the heirs of entail. The first branch prohibits the heirs from selling, from altering the order of succession, and from contracting debt; the three restrictions which are essential to a strict entail. The prohibition to contract debt is not an absolute one, but is qualified in favour of the heirs in possession, and that by words so ambiguous in their meaning as to give room for different interpretations. This branch contains also another clause, prohibiting the heirs "to do or to commit "any fact or *deed*, civil or criminal, whereby the "said lands and estate, or any part thereof, may "be anyways adjudged, evicted, or forfeited:" but the word *deed*, as used in this restriction, which is a common one in entails, has been invariably held to apply solely to feudal delinquencies, and to have no reference to written instruments or conveyances affecting the lands.

The provision as to contracting of debt, inserted in the first member of the clause, seems to have been thought insufficient, as not applicable to those debts which the heirs of entail might have contracted, or become liable for, before their succession to the

estate; and it was further foreseen that the lands might be adjudged for debts left by the entailer himself, or those which the entail permitted the heirs to contract.

But the two classes of debts last mentioned stand in very different situations. Those for which the heirs were liable at the time of their succession it was in the entailer's power, by proper prohibitory, irritant, and resolutive clauses, to prevent from ever affecting the estate at all; whereas, having no such power with regard to debts which he might contract himself and leave unpaid, or to debts which he had allowed the heirs to contract, it was necessary to guard against them in a different way.

Hence a separate prohibition, or member of the prohibitory clause, is applied to each class of debts. By one of these prohibitions it is declared not lawful for the heirs to permit the estate to be adjudged or affected "for any *debts or deeds contracted or* "*committed* by me, or them, before our succession, "or by any of our predecessors, whom I, or they, "may anyways represent, or in which we, as their "representatives, may be liable or subject to." And as it was meant to prevent such debts or deeds from affecting the estate *at all*, there is added the irritant clause in question: "*All which* "*debts, deeds, and contractions*, are hereby declared "void and null, by way of exception or reply, and "without declarator, in so far as they may burden "or affect the said lands and estate."

Then follows the third member of the prohibitory clause, declaring it unlawful for the heirs to permit the lands to be adjudged for the debts or deeds of

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the original entailer, Alexander Littlejohn, or for the sum of 500*l.* with which they are allowed to burden the estate. As no irritant clause similar to that applied to the former class of debts, could have been used here, a special resolutive clause is immediately subjoined, declaring, that if the heir in possession did not within a certain time redeem any adjudication which might have been led against the estate for the entailer's debts, or the above 500*l.*, he should lose and forfeit his right to the lands.

The irritant and resolutive clauses above mentioned, being specially applicable to particular prohibitions, left the entail defective, in so far as regarded the restrictions contained in the first branch of the prohibitory clause. The defect has been partly supplied by the insertion of a general resolutive clause applicable to the whole prohibitions. But there is no additional irritant clause, the defect having so far escaped observation.

It is argued that the words "all which debts, "deeds, and contractions," in the irritant clause, must be held to apply to all the things which had been previously prohibited, the word "*deeds*" in particular being comprehensive enough to embrace every act of the heir in possession, by which the estate may be alienated, or the order of succession altered: That this word *deeds*, when it has been used generally in an irritant clause, with reference to the prohibitions which have gone before, has always been held to comprehend every prohibited act: That the irritant clauses both of the Roxburghe and Tillicoultry entails were of this kind, and their efficacy would most certainly have been disputed

had it been thought possible to raise a question on the point: That in both those cases the word "deed" had been previously used in the prohibitory clause, in a way which showed it to apply merely to feudal delinquencies: That there is no good ground, therefore, for taking it here in a more limited sense, more especially when there can be no doubt of the intention of the entailer that his estate should descend entire in the line of succession pointed out. But the general intention of an entailer to preserve his estate to the series of heirs he has called, as manifested by his making a deed of the present kind, can be no reason for giving to particular words or expressions an interpretation different from their legal sense. Were such a mode of construction admissible, there is not one of the numerous entails which have been found ineffectual by the courts of law which would not have been sustained as effectual. There is not one where the general object of preserving the estate was not obvious, and where there were not words which, if taken in their most comprehensive sense, might not have been held to imply the restriction contended for. But this is not the rule of construction applicable to such cases. On the contrary it is *tritissimi juris* that the words in which restraints and limitations are imposed are to be strictly interpreted, and in no case extended beyond the limited signification, in which, according to the proper style of the deed, they are used.

It is also a rule invariably applied to the construction of such deeds, that the sense in which a word which admits of different meanings is to be

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taken, must be regulated by the context, and will be affected by the other terms with which it may be coupled in the passage where it is found. Thus a prohibition in which the word "dispone" is coupled with the words "sell and alienate" has been found insufficient to prevent a gratuitous disposition, by which the lands were conveyed away from the heirs of entail; and in the same cases the prohibition to "do" or "to grant any other *deed*, whereby the lands might be evicted," was found ineffectual to prevent an alteration of the succession, because it was held as restricted to things of the same kind with those previously enumerated*.

Now the word deed, as used in this irritant clause, is not a single or insulated one, as in the Roxburghe or Tillicoultry entails. It is coupled with others, and placed betwixt two, which being specially and exclusively applicable to burdens of the nature of debt, leave no doubt as to the proper sense. The things declared null are "debts, deeds, and contractions." The deeds therefore in view must be such as are of a nature to create a debt or burden. The conveyancer, by adding the word *contractions*, which is nearly if not wholly synonymous with *debts*, shows clearly that the whole expression must be held to denote things of the same kind. Had he conceived the word "debts" to be sufficient to express all burdens of this nature, and used the term "deeds" to denote things of a quite different kind, he could never have thought of adding the word "contractions," which can apply only to those

* 8th July 1789, *Stewart* against *Home*; and 25th May 1808, *Brown* against *the Countess of Dalhousie*.

very things which are supposed to have been already dismissed from his mind, as sufficiently designated by the term "debts." As the first and last are clearly of limited signification, the intermediate term, though more flexible in its nature, can only be taken in a sense consistent with that of its adjuncts. The whole form a complex expression, which cannot be understood to comprehend things of a kind altogether different from those denoted by any one of its terms.

The same inference is no less clearly deducible from the context which immediately precedes the irritant words. These do not, as in the Roxburghe and Tillicoultry cases, form a separate clause coming after all the prohibitions, and having no particular relation to any one. They are added to, and make a part of, the second branch of the prohibitory clause, so as to have a special relation to what is contained there. The words, "all which debts, deeds, and contractions," refer to some debts and deeds which had been previously mentioned; and if there are to be found in the same member of the clause, and in the sentence immediately preceding, the words "debts and deeds," these must, according to every known rule of legal or grammatical construction, be held the proper antecedents of the pronoun "which," and it is not allowable to seek for them elsewhere. When the entailer, after prohibiting his heirs to allow the estate to be evicted "for any *debts or* "*deeds contracted or committed* by me or them "before our succession," immediately subjoins "all "which debts, deeds, and contractions are hereby "declared null," we cannot in sound construction

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hold the debts and deeds so annulled to be any other than those so contracted or committed by the heirs before their succession.

There occur, it is true, in the first branch of the prohibitory clause, the words *debts* and *deeds*. The heirs are there prohibited "to contract *debt* above 500*l.* at one time, or to do or commit any fact or *deed*, civil or criminal, whereby the lands may be adjudged or forfeited." But so far is the occurrence of the words there from being a reason for extending the irritant clause to the whole prohibitions, that it affords the clearest evidence against its extending to any of them.

The entailer, while he was expressly leaving the heirs at liberty to contract debts to the extent of 500*l.* at one time, could never have thought of declaring the whole debts contracted by them to be null and void. This would have been quite inconsistent with the prohibition itself; and had an irritant clause been contemplated, as applicable to this species of debt, it must, it is evident, have been qualified in the same manner as the prohibition. It could only have declared the debts contracted by the heir in possession to be null, in so far as they exceeded the sum of 500*l.* at one time.

The same observation applies to the prohibition to commit facts or deeds, civil or criminal, whereby the lands may be evicted or forfeited; for the entailer could not by any declaration take away the rights of the crown or the superior, in cases of treason or feudal delinquency, though he might resolve the right of the heir who was guilty of them.

But if the irritant clause is not applicable to those restrictions in the first branch of the prohibitory clause in which the words debts and deeds actually occur, still less can it have any reference to the prohibition which respects selling.

A question as to the meaning of the word *deed*, when used in the irritant clause of an entail, was determined by the Court of Session in circumstances much more favourable for an extensive interpretation than the present (*Sir John Dick* against *Drysdale*.)* But it was taken there in the restricted sense of feudal delinquencies, because this was the sense in which it had been previously used by the entailer.

For the Appellant, *Mr. J. P. Grant.*

For the Respondent, *Mr. Cranston.*

The *Lord Chancellor*:—I have fully considered this case, and, independently of the authority cited by Mr. Cranston (*Dick* v. *Drysdale*), I think the judgment ought to be affirmed.

Judgment affirmed.

* Fac. Coll. 14 Jan. 1812.