HON. W. H. B. OGILVY, ... APPELLANT.
THE EARL OF AIRLIE, ... RESPONDENT.

1855. *March 27th.*

Entail—Prohibition—Irritancy.—The words "Debts and deeds" in the irritant clause held to refer only to the "Debts and deeds" mentioned in the immediately antecedent portion of the prohibitory clause, and not to the "Debts and deeds" mentioned in the prior members of that clause.

Canon of Construction per the Lord Chancellor.—In construing irritant clauses, the presumption is in favour of liberty, and therefore if the words admit of two readings, and the result of one is to give effect to the fetters, and the result of the other is not to give effect to the fetters, that which does not give effect to the fetters is that which ought to be preferred.

Canon of Construction per Lord St. Leonards.—It is not the rule that in a Scotch entail you may not give to the words their natural import, but the rule is, that if words are used in an ambiguous or uncertain sense, you cannot fix upon them a sense which will take from them the freedom which the other parts of the entail may have given.

David, third Earl of Airlie, by deed of entail dated 22d March 1716,

Sold, annailzied, gave, granted, and disponed certain lands therein described to and in favour of Mr. John Ogilvy, his "second lawfull son, and the heirs male to be lawfully procreat of his body; whilks ffailzieing, to Lady Helen Ogilvy, our only lawfull daughter, and the heirs male to be lawfully procreat of heir body; whilks ffailzieing, to the airs-femall to be lawfully procreat of the said Mr. John Ogilvy, his body; whilks ffailzieing, to the airs female to be lawfully procreat of the said Lady Helen Ogilvy, her bodie; whilks ffailzieing, to William Ogilvy, second lawfull son to John Ogilvy of Pitmouis, and the airs male to be lawfully procreat of his body; whilks ffailzieing, to Mr. John Ogilvy of Balbegno, advocat, and the heirs male to be lawfully procreat of his

body; whilks failzieing, to David, Lord Lundores, and the heirs male of his body; whilks failzieing, to Sir James Wood of Bonnyton, and the airs male procreat of his body; whilks failzieing, to the said Mr. John Ogilvy, our son, his nearest airs and assigneyes whatsomever who shall be att the time in capacitie to succeed and inherit by the laws of this realme, The eldest daughter or heir female succeeding alwise without divisione.

The prohibitory, irritant, and resolutive clauses were in the terms following :—

And in Regarde It is our plain Intentione in case of the Restitutione of the said James Lord Ogilvy our eldest son or that he be found innocent of what is laid to his charge That he and his foresaids should enjoy and brooke the saids lands and Estate free of any burden except debts alreadie contracted or to be contracted or other deeds done or to be done by us in our lifetime And that it should not be in the power of the said Mr. John Ogilvy our second son and the airs male of tailzie and provisione mentioned by annailzieing or delapidating the estate or by Contracting debt or doeing any other deed to disappoint the foresaid event In case of the exceptione thereof nor that the s^{d} Mr John Ogilvy or any others of the heirs of tailzie substitute to him should contract debt wadset or dispone or doe any other deed whereby the immediat subsequent heir of tailzie and the other heirs of provisione may be any wayes prejudged in the full and free suecessione to the Lands others hereby dissponed It is hereby specially provided and declared that it shall be nowise leisume nor lawful To the said Mr John Ogilvie nor to any of the saids heirs male of tailzie and provisione to break loose alter or infringe the foresaid tailzie and destinatione nor the order or course of successione written nor Give Grant sell alienat disspone or wadset under reversione or irredeemably any of the lands Earldom Lordships jurisdictiones Barronies or others fors^{ds} or any part or portion thereof nor to burden the same with any infeftments of rents or other yearly duties less or more to b^{e} uplifted furth thereof nor to grant any rights of ffeu tacks or assedationes y^{r} of for small and inconsiderable rents nor for any longer space than during the lifetime of the granter or during the non existence of the foresaid event of the said James Lord Ogilvie his being found innocent or he or the heirs of his body their being Restored nor to Contract debts or soumes of money nor to give or grant bands obliedgments or other rights or securities therefor nor to doe or Commit any other fact or deed Civile or Criminall by which the foresaids lands and Estate or any part or portione thereof may be apprized adjudged evicted or forfaulted from them or any one of them or whereby the order of Successione in the terms of the tailzie above mentioned may be anywise hindred diverted frustrat or interrupted And In case It shall happen the s^{d} Mr John Ogilvy or the hers male of tailzie and provisione fors^{ds} to doe and

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Committ any such deeds or Contract such debts The same are hereby declared to be void and null by way of exceptione or reply without Declarator and of no force Strength nor effect to burden or affect the lands and others hereby dissponed In prejudice of the said James Lord Ogilvy and heirs of his body In case he be found innocent or that he or they be Rehabilitat or restored as said is or In prejudice of the subsequent heirs of tailzie herein specified In case thir presents shall still subsist and Continow And the person so Contraveening shall amitt ferfeitt tyne and lose all right and title to the said lands and Estate and the right thereof free of all such debts and deeds shall fall accresse to and be devolved in the next heir who should succeed as if the Contraveener were naturally dead And the Contraveener shall be obleidged to denude in his or her favours *omni habili modo* and to make and grant all writes and rights necessar for that effect or otherways the haill rights and infeftments in their names and persons shall from thence furth *Ipso facto* become void extinct and null be way of exceptione or reply without necessity of any declarator to follow thereupon And the said next heir may serve heir to the last infeft preceding the Contraveener or may pursue such declarators as may be found necessary or use any other way or method that is formall and legall for establishing the right in his or her person the one but prejudice of the other.

The question was whether the irritant and resolutive clauses applied to the prohibition against altering the order of succession, or the prohibition against alienations and sales. The Court of Session had on the 16th December 1852 decided in that question in the negative. Hence this Appeal.

The *Lord Advocate* and Mr. *Blackburn*, for the Appellant, cited *Lumsden* v. *Lumsden* (*a*), *Lang* v. *Lang* (*b*), *Murray* v. *Murray* (*c*), *Barclay* v. *Adam* (*d*), *Dick* v. *Drysdale* (*e*).

The *Solicitor General* (*f*) and Mr. *Anderson* for the Appellant.

The LORD CHANCELLOR (*g*):

Lord Chancellor's opinion.

My Lords, this question is one of a class of which several have been before your Lordships' House of late

(*a*) 2 Bell, App. Ca. 104.
(*b*) McL. & Rob. 871.
(*c*) 3 Bell, App. Ca. 100.
(*d*) 1 Sh. App. Ca. 24.
(*e*) Fac. Coll. 1812.
(*f*) Sir R. Bethell.
(*g*) Lord Cranworth.

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years; namely, concerning the construction to be put, or which the Courts ought to put, upon these irritant and prohibitory clauses; and sometimes the question has arisen upon the other, the resolutive clause, but here the question is with respect to the irritant clauses in a deed of Scotch entail.

My Lords, in all these questions it is truly said that the point we are to search for is the principle of construction, and when that is ascertained, then precedents can be of little use, except in showing in what way that rule of construction has been acted upon from time to time by the Courts. Now I take the rule to be clear. If it was supposed that Lord *Campbell*, by his opinion in this House, or that the House itself in adopting that opinion, laid down a rule in the case of *Lumsden* v. *Lumsden*, which had not been previously the rule, that is a mistake. No doubt, in construing irritant clauses in these entail deeds, you must, as you do in construing all deeds, look to the whole instrument; and you must not pretend that there are doubts if there are no doubts. But, on the other hand, I take this to be the canon of construction in these cases; namely, that just as in construing Acts of Parliament imposing penalties, enacting certain acts to be crimes, you construe them strictly, so in construing these irritant clauses you construe them strictly also; and if there be two modes of reading them, in one of which the result is to give effect to the fetters, and in the other not to give effect to the fetters, that which does not give effect to the fetters is the one that is *primâ facie* to be presumed to be right, because freedom of alienation and freedom of dealing with property is that which is to be presumed in every case.

That, then, being the canon which has guided the Courts in the construction of clauses of this sort in deeds of entail, the question is, how is this rule to be applied to the present case?

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I am willing to take the view which was suggested by the *Solicitor General* as the more scientific way of dealing with this question, that here there are four distinct prohibitions:—The first prohibition is against altering the course of succession; the second is against alienating or incumbering; the third, against contracting debts or granting bonds; and the fourth, in general terms, against "doing or committing any other fact or deed, civil or criminal, by which the aforesaid land and estate, or any part or portion thereof, may be apprised adjudged, evicted, or forfeited, or whereby the order of succession, in the terms of the tailzie, may be in anywise hindered, diverted, frustrated, or interrupted.' Those are the four prohibitions, and then follows that which gives rise to the present question,viz., the irri tant clause, which is in these words: "and in case it shall happen the said Mr. John Ogilvy or the heirs male of tailzie and provision foresaids to do and commit any such deeds or contract such debts, the same are hereby declared to be void? Now what is it that is there declared to be void." Does that make void the deed of alienation, or does it not? That is the simple question.

It is said, that consistently with the case of *Lumsden* v. *Lumsden*, you must read the whole together, and then reading the whole together, you must take the word "deeds" to apply to any deed of alienation, or any other deed whatsoever. But, my Lords, I think that that is not only unnecessary, but I agree with the learned Judges in the Court of Session, in thinking that it is not the most natural mode of dealing with the terms of the clause. What is prohibited on the subject of deeds is doing and committing any such deeds, or contracting such debts. Now, that is a very strange expression: you have no mention of deeds throughout the whole of the prohibitory clauses, till you come to the final clause, which excludes alien-

ation; because it is "do or commit any other fact or deed." When, however, I see that the expression, doing or committing any other fact or deed, is immediately followed by an irritant clause, to the effect that if it shall happen that the heirs shall do and commit any such deeds, the same are hereby declared to be void, I think I must understand it to have specific reference to the doing or committing of such deeds as are mentioned in the prohibitory clause which is found immediately preceding.

That was the view which was taken by the Judges of the Court of Session, and that view appears to me to be in conformity with all the authorities which bear upon the point. Without going through the whole of them, as they have been gone through so often of late years, I will just refer to two or three which seem to me to show clearly that the view taken by the learned Judges in the Court of Session was the correct view.

In the case of *Barclay* v. *Adam*, just as in this case, the prohibition was against selling, alienating, and so on, in the first place; and in the next place against contracting debts or doing any deed whereby forfeiture might arise. Then the irritant clause was, "all which deeds, debts, and contractions are declared null and void." Now, there as here, it might be said that, reading the whole together, we cannot but suppose that in all probability the maker of this deed intended in the irritant clause that the prohibitions in the former part of the deed should be completely fenced. Probably he did not know the effect of the words which he was using; but the question is, what is the meaning of these words, "all which deeds, debts, and contractions are declared null and void"? Did they extend to deeds, whereby the estate was alienated? The Court held that they did not, but that they only

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referred to the immediate antecedent: it appears to me that it is extremely difficult indeed to distinguish that case from the present case.

Then there was the case of *Lang* v. *Lang*, which came before this House about fifteen years ago; in that case the prohibition was in the same way against selling and contracting debts; and, as here, against doing or committing any act or deed whereby forfeiture should be incurred; then the irritant clause was, "if they do in the contrary" (that would cover anything) "it is declared that all such debts and deeds shall be void," and the House held, reversing the judgment of the Court of Session, that although the irritant clause began "if they do in the contrary," that is, if they do any of those things in the contrary; yet, inasmuch as it went on to say, "it is declared that all such deeds and debts shall be void," the meaning was, if they do in the contrary in respect of any such deeds or debts, and that consequently the irritant clause only applied to the latter member of the sentence, namely, the doing or committing any act or deed whereby forfeiture should be incurred.

Then, my Lords, the latter case of *Lumsden* v. *Lumsden* was supposed in some respect to have shaken the authority of those prior cases; though, as I have already stated, I think it did no such thing. In that case there was a prohibition against selling, contracting debts, or doing any other act, civil or criminal, whereby forfeiture should be incurred; then, contrary to what I believe is the usual form in these deeds, the resolutive clause preceded the irritant clause; but I suppose that makes no difference in the effect of the clause. After having stated that if any of those acts were done the title of the parties should come to an end, the irritant clause proceeded, "and if any of these acts are done,

all the debts and deeds of the said heirs made or granted before or after their succession shall be null and void." But the language of the prohibitory clauses in that case was not at all the same as it is here. There was nothing to which you could impute debts and deeds; if you applied it at all to what preceded, that did not govern the whole, and therefore you have not that to guide you in respect of the construction of the word "deeds" in that case which you have in the other cases, namely, that is coupled only with the expressions found in the last member of the prohibitory part of the deed, which prohibits the committing or doing any other fact or deed whereby forfeiture should be incurred.

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Another case cited—that of *Anstruther* v. *Anstruther* (*a*)—which occurred in the same Session of Parliament, is open to a similar observation, namely, that there was no mention of deeds at all, except as might be implied in the terms of the prohibition against alienation. Consequently, when it says that all deeds shall be void, it must refer to those deeds whereby any of those objects were effected.

My Lords, under these circumstances I have no hesitation in at once moving your Lordships to affirm the judgment of the Court of Session.

Lord ST. LEONARDS:

Lord St. Leonards' opinion.

My Lords, I entirely concur in the opinion which has just been expressed by my noble and learned friend. I consider this case altogether concluded by the authorities; and I confess that I never have been able to entertain the slightest doubt upon it from the first moment that it was opened. It is not the rule that in a Scotch entail you may not give to the words their natural import; but the rule is, that if words are

(*a*) 2 Bell, App. Ca. 242.

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used in an ambiguous or uncertain sense, you cannot fix upon them a sense which will take from them the freedom which the other parts of the entail may have given. It stands as a rule by itself. It is not a general rule of construction applicable to all cases; and, therefore, to argue a case of this sort upon the mere general rules which are applied to general cases, is really profitless, because we are bound now by the rule established in Scotland and by this House as the law of Scotland, and I must say that nothing could be more unjust, as regards the Courts of Scotland, than first of all to coerce them, as this House has done, to establish a certain rule, and then when they act upon that rule to turn round and find fault with the construction which this House itself, by its decisions, has forced upon the Courts of Scotland.

Now, my Lords, let us look at the cases of *Lang* v. *Lang* and *Murray* v. *Murray*, which have been so often referred to, and which have been most relied upon. It is mere pedantry to go through all the cases now; it was very important some short time ago, but it is no longer important. Let us take the last two cases; and let us begin with the case of *Murray* v. *Murray*. That case, it is supposed, authorizes this Appeal, but it really does not touch it. The first prohibition in that case was against selling, alienating, or disponing; and afterwards, in the irritant clauses, the word "selling" was dropped; and it is perfectly clear, that unless that was used as a particular term standing by itself, and admitting of a particular construction, the word "alienating" of itself would include the word "selling;" and, therefore, when the party had said, I will prohibit you from selling or alienating, and if you do alienate, such and such will be the consequence, surely it comprehended that which was an alienation, although it could not be particularly named as an act of sale; and this

House, most wisely in my judgment, relied upon that circumstance as giving a construction to the whole instrument; and, therefore, I do not consider that case as at all touching the point which is now before your Lordships.

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Now, my Lords, if we look at the case of *Lang* v. *Lang*, I think it will show us as nearly as anything can do, what the construction is in these singular cases. In that case the decision of the Court of Session was reversed upon both points, both upon the prohibitory clause and also upon the irritant and resolutive clauses; and though the words, no doubt, begin in a way which would rather lead you to suppose that it would hit the case, "that it shall at no rate be allowable to the said Gabriel Lang, my son, nor any of the substitutes above named called to the succession of the lands, and others before conveyed, to sell off or dispose upon any part of the lands and subjects before transmitted, nor to contract debt or do any other deed whereby the said lands and subjects may be adjudged or evicted from the succeeding members of entail, or their hopes of succession thereto in any measure evaded, and if they do in the contrary" (certainly those are strong words, which would seem to embody the whole of the preceding prohibitions), "it is declared, in the first place, that all such debts and deeds shall be intrinsically void and null," and so on. But those words, which would seem to embrace all the prohibitions in the deed, were held to be contracted, and cut down, and explained by the subsequent words, that "all such debts and deeds shall be intrinsically void and null." That case, therefore, decided this, that if the prohibition extends to the three points—alienation, altering the succession, and so on, and debts and then you confine your irritant clause to the same words as are in the prohibition—it shall not extend

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beyond the precise words which are used in the prohibition, and even those words which preceded the word "debts," and so on, were held not to admit of their general sense so as to include all the prohibitions.

Now, my Lords, let us just see how this very singular rule of construction applies to the case now before your Lordships. The prohibition is here in the usual form against any act which would break the succession or burden the estate; and then comes a particular prohibition against incurring debts. Then come these words after the prohibition against incurring debts, "nor to do or commit any other fact or deed, civil or criminal, by which the foresaids lands and estate, or any part or portion thereof, may be apprised, adjudged, evicted, or forefaulted from them or any of them, or whereby the order of succession in the terms of the tailzie above mentioned may be anywise hindered, diverted, frustrate, or interrupted."

Now, let us stop there for a moment, and ask what this last clause means? It is not "to do or commit any other fact or deed, civil or criminal, by which the foresaids lands shall be forefaulted." These words are in contradistinction to the first words of the prohibition against acts which shall alter the succession, and so on,—for these are deeds in the technical sense of the word. You will find that explained very satisfactorily by Lord *Cuninghame* in the judgment which is printed in the Appendix, in these words; he says, "I conceive the present to be a clear case upon the authorities, which must be respected in the decision. The legal construction of the term 'facts and deeds' in irritant clauses, when in immediate connexion and juxtaposition with the same words in the close of the prohibitory clauses referring to 'facts and deeds, civil or criminal, by which the lands may be apprised or

evicted,' &c., has been so often construed to apply only to political and criminal forfeitures, that a different interpretation, comprehending all the antecedent branches of the prohibitory clauses, is now out of the question." Those words, therefore, evidently mean something totally distinct from the execution of a deed in the sense of an instrument. This clause is "to do or commit a fact or deed," that is, to do a thing or an act which shall lead to forfeiture, and it really does not embrace in that sense anything in the shape of a deed, when we are using the term in the sense of a legal instrument. Then that is followed by the irritant clause,—"and in case it shall happen the said Mr. John Ogilvy," who is the institute, "or the heirs male of tailzie and provisions foresaids, to do and commit any such deeds." To what deeds does that refer? Why, the last prohibition is, if they shall "do or commit any other fact or deed, civil or criminal;" and, further, the words here used, "in case it shall happen" that he shall "do and commit any such deeds, or contract such debts," seem to sustain this view. Now, there you have, at once, a clear distinction drawn by the framer of this instrument between doing a deed, civil or criminal, which should amount to the destruction of the entail, and the question of a debt caused by contract, or by the dealings of the person taking under the entail, and so created as to be a burden upon the estate. They are put, therefore, in clear contradistinction the one to the other.

Then, my Lords, what is this clause? Why, it is impossible, in my apprehension, that there can be any doubt about the construction of it; because the irritant and resolutive clauses, instead of beginning in the order in which you find the acts in the prohibition, which begins with altering the succession, and so on, are so framed as to take up the last act, namely,

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"the doing or committing any fact or deed," (which would be those deeds to which I have referred, which would lead to a forfeiture,) "civil or criminal, or contract such debts." Where do you find that in the prohibition? Why, immediately before the last clause, prohibiting the doing or committing any other fact or deed, civil or criminal; so that instead of beginning with the things prohibited in the order in which you find them in the prohibitory clause, this clause takes up the last act prohibited, goes back to the one immediately preceding it, and there stops; and, therefore, the prohibitions being numbered one, two, three, four, they prohibit number four; they go back to number three, and they prohibit that, and they forget or do not mean to prohibit number two and number one.

The result, therefore, is that, not only according to its true construction, but clearly and unquestionably, according to the construction established by this House in regard to Scotch instruments of this nature, this is a case which admits, in my apprehension, of not a particle of doubt. This is an Appeal which I think ought not to have been brought after the decision which had been come to; and, therefore, I entirely concur with my noble and learned friend in advising your Lordships to dismiss this Appeal with costs.

Interlocutors affirmed with costs.

GRAHAME, WEEMS, AND GRAHAME.