Friday, March 12.

(Before Lord Chancellor Cairns, Lords Hatherley, Selborne, and O'Hagan.)

LIEUT.-COL. ALASTAIR M. M'DONALD OF DALCHOSNIE AND KINLOCH-RANNOCH *v.* JOHN ALAN M'DONALD & OTHERS.

(*Ante*, vol. xi, p. 394; March 20, 1874, 1 R. 858.)

Entail—Construction of Clause—Resolutive Clause.

In a deed of entail there was inserted after the cardinal prohibitions the following resolutive clause:—In case the heirs "shall contravene the before written conditions, provisions, restrictions, and limitations herein contained, or any of them, that is, shall fail or neglect to obey or perform the said other conditions and provisions, and each of them, or shall act contrary to the said other restrictions to be hereinafter added and appointed by me, excepting as is before excepted therein, in any of those cases that person or persons so contravening shall for him or herself only *ipso facto* amit, forfeit, and lose all right, title," &c.

Held (aff. judgment of Court of Session) that the clause must be construed as having reference to restrictions and limitations before written as well as to those after written, and deed of entail sustained as valid and effectual.

This was an appeal from the decision of the Second Division of the Court of Session, on March 20, 1874. The appellant, Colonel M'Donald, was the heir of entail in possession of the lands of Dalchosnie, Lochgarry, and Kinloch-Rannoch, Perthshire, under a deed of entail made in 1837. The respondent, Mr J. A. M'Donald, was the brother of the appellant, and was next in succession on the failure of the appellant and the heirs-male of his body. Colonel M'Donald raised an action against his brother and sisters to have it declared that the deed of entail was not valid and effectual, and that the lands belonged to the appellant in fee-simple. The ground on which he founded his action was the insufficiency of the resolutive clause in the deed. That clause ran as follows:—"In case the said Alastair M. M'Donald, or any of the other heirs succeeding, shall contravene the before written conditions, provisions, restrictions, and limitations herein contained, or any of them, that is, shall fail or neglect to obey or perform the said other conditions and provisions, and each of them, or shall act contrary to the said other restrictions to be hereinafter added and appointed by me, excepting as is before excepted therein, in any of those cases that person or persons so contravening shall for him or herself only *ipso facto* amit, forfeit, and lose all right, title," &c. It was maintained that this clause had reference only to conditions "thereinafter written," and as the deed had not any such conditions that the clause became inoperative, and the entail was not valid and effectual. Both the Lord Ordinary (Mackenzie) and the Second Division were of opinion that the deed of entail was good, and assoilzied the defenders. The pursuer appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—My Lords, there are no cases which have afforded a greater room for the exercise of the astuteness and skill of counsel in matters of construction than those cases which concern the stringency of the clauses in Scotch deeds of entail, and the present is certainly not an exception from that general observation. But I am bound at the same time to say that if the questions which have been raised upon the construction of the deed now before your Lordships had been raised upon the construction of any instrument which was not a deed of entail, they would have appeared to me to have created no serious difficulty.

My Lords, I cannot admit that there is to be applied to deeds of entail a rule of construction altogether differing from the rules of construction applicable to other instruments. I am quite satisfied with the expression of the principle which should guide us in such cases that fell from the late Lord Wensleydale in the case of the Kintore entail when it was before your Lordships' House. Lord Wensleydale there said—"If an expression in an entail fairly 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. But this rule does not authorise you to put on any expression a forced unreasonable or ungrammatical construction in order to defeat the entail. You must first construe the instrument according to its fair meaning, and if that leaves two courses open, freedom of disposition must prevail." I propose to your Lordships in this case first to construe this instrument according to its fair meaning. If upon a construction of it according to its fair meaning two courses are left open to your Lordships, by all means let that be adopted which will favour freedom of disposition.

Now, my Lords, are two courses of construction open in this case? I will read the resolutive clause in the first place, up to a certain point, where I will pause for a few moments.—"In case the said Alastair M'Iain M'Donald, or any of the other heirs succeeding to the lands and estate before disponed, shall contravene the before written conditions, provisions, restrictions, and limitations herein contained, or any of them, that is, shall fail or neglect to obey or perform the said other conditions and provisions, and each of them,"—there I pause. My Lords, I observe in the first place that in order to prevent possible ambiguity your Lordships will, I think, construe the words "that is" as synonymous with these words—"by which I mean," and I will read it to you again thus—"shall contravene the before written conditions, provisions, restrictions, and limitations herein contained, or any of them, by which I mean, shall fail or neglect to obey or perform the said other conditions and provisions and each of them."

Upon that it is argued that in this deed there is a clear distinction drawn between sentences which are to be termed "conditions and provisions" on the one hand, and sentences which are to be termed "restrictions and limitations" on the other, and that in the last clause of what I have read, beginning with the words "by which I mean," the failure which is supposed is a failure or neglect to obey or perform "conditions and provisions," and that no reference is made there to "restrictions and limitations."

Now, let us inquire in the first place whether this is a true description of this deed,—is there a distinction drawn throughout between "conditions and provisions on the one hand, and "restrictions

and limitations" on the other. My Lords, I arrive at a very different conclusion. You will observe that the deed commences at page 59 by stating that the settlement is made "with and under the conditions, provisions, restrictions, limitations, exceptions, clauses irritant and resolutive, declarations and reservations after specified;" and then commences this—"with and under this condition always as it is hereby expressly provided." There we have a "condition" ranged under the head of a "provision." Then, my Lords, at page 61, between letters A and B, you will find these words—"and with and under the restrictions and limitations after written, as it is hereby expressly conditioned and provided." Here we have what we are in search of, namely, "restriction and limitation" treated as exactly synonymous with—at all events ranged under—"condition and provision." "Condition and provision" is perhaps not treated as being synonymous with "restriction and limitation," but as the larger and more comprehensive term of the two. Then lower down in the same page, 61, at the letter G, we find this—"and with and under this restriction and limitation also, as it is hereby expressly conditioned and provided." There we have "condition and provision" again carrying in it "restriction and limitation;" then again at page 63, letter G, we have that which is a restriction expressly called a provision,—"providing always that it shall not be in the power of any of the said heirs to set any tack or rental of the manor place," &c.; and again at the top of page 64, "with and under this condition, as it is hereby specially provided and declared,"—that is another change, putting "condition" under the head of "provision and declaration." And again, lower down, at letter B—"and also with and under the limitation and condition,"—"condition and limitation" being used as synonymous. Then at letter D—"with and under the irritances following, as it is hereby expressly conditioned and provided," you have the word "irritancy" treated as a condition or provision.

My Lords, I have gone through those examples, and I daresay further examples might be given, but these will be sufficient to show your Lordships that it would be altogether a mistake to suppose that there had been any distinction drawn in an earlier part or in any other part of this deed between "restrictions and limitations" on the one hand, and "conditions and provisions" on the other. They are treated as synonymous, and the word "providing" is treated throughout as the most comprehensive introduction that can be given for any and every of the clauses of the deed. If that is so, if there is nothing in any other part of the deed which limits you in the construction which is the natural construction of a term such as "condition and provision," I ask your Lordships what reason is there why in this particular sentence the words should be so limited?

But, my Lords, is there not something more than that? I still continue to omit for the present the words "or shall act contrary to the said other restrictions to be hereinafter added and appointed by me," for the purpose of carrying your Lordships on to a clause consisting of a few words which follows those words, namely,—"excepting as is before excepted." Those words obviously cannot refer to "restrictions to be hereinafter added," because there could be no "excepting as is before excepted" from that which had not been mentioned at all before, but was to be mentioned afterwards. Those words "excepting as is before excepted" must therefore refer to what is called "the said other conditions and provisions." But what was there, my Lords, in the nature of an exception in the earlier parts of the deed, and from what was the exception excepted? From nothing whatever that is mentioned before except from restrictions and limitations. There were exceptions, two in number, from restrictions and limitations, and there were no other exceptions whatever. Therefore you have in those few words that which absolutely constrains your Lordships to give to "conditions and provisions" a meaning which would include within them "restrictions and limitations."

Now, my Lords, again not looking at the later words "or shall act contrary," I ask is there any authority which bears upon the construction of words like these?

I will first ask your Lordships to observe how authority stands as to words, "other," which read just now in the sentence "shall fail or neglect to obey or perform the said other conditions and provisions and each of them." Does that impose any diffiulty in the way of holding that the failing or neglecting to obey or perform applies to all conditions and provisions which went before. My Lords, it was decided in a case which was cited at the Bar with respect to the Abercairnie entail, the case of *Stirling* v. *Moray or Home Drummond*, amongst other things, that in an entail which contained the words —"shall contravene the other before written conditions and provisions, restrictions and limitations," the word "other" was not an inappropriate word, that it merely meant to express a reference to the clauses of the deed which went before other than the resolutive clause itself, of either a restriction or condition. That appears to be a case which has always been approved in the Scotch courts, and the effect of that authority would be to give a natural and proper meaning to the word "other" in this clause.

My Lords, even if there were not this authority for such an explanation of the word "other," I am not myself clear that that word might not be held here to have naturally a reference prospectively to further provisions of the settler as to restrictions afterwards to be imposed, just as we often in language which is perhaps not altogether inaccurate speak in anticipation in the first part of a sentence, using the word "other" in contradistinction to some exception which is made in the latter part of the sentence.

Before I refer to another authority which appears to me to have a strong bearing upon the present case, I will turn to those words which I omitted in the first instance, viz.—"or shall act contrary to the said other restrictions to be hereinafter added and appointed by me," My Lords, other restrictions or restriction upon some minor points were or was added afterwards (at page 68 of the deed), to which no doubt the words "hereinafter added" would be applicable. Much argument took place upon these words, but I am not sure that I myself have been able to appreciate the force of that argument. It appears to me that the observations are quite just; that there is a use of the word "said" in this clause of the sentence which makes that word inappropriate, having regard to what is spoken of afterwards. But, my Lords, it appears to me in the first place that any inaccuracy in the use of the word "said" is corrected, and must of necessity

be corrected by the words "to be hereinafter added and appointed by me." Those words are so clear, and so unambiguous, that there can be no doubt as to what they point to, and if before the use of those words you have the word "said" applied to "restriction," I apprehend that the latter words being so clear and free from ambiguity, they must correct the earlier words. But further, even if it could be found out, as I do not think it is made out, that there was ambiguity in this particular clause, it does not appear to me that it would in any way operate to make invalid or imperfect or inefficacious the earlier words of the sentence "other conditions and provisions," which in my opinion must be applied to the whole of the conditions, provisions, restrictions, and limitations contained in the earlier part of the deed.

My Lords, those are the observations which would have occurred to me if this case had come before us in the first instance, not governed by any particular authority. But I am bound to say that I am entirely unable to distinguish in the way in which one case should be distinguished from another the present case from the case of *Adam* v. *Farquharson*, which came before your Lordships' House in 1844. In that case the resolutive clause was this—"It is hereby expressly provided and declared that in case the said William Farquharson, or any other of the heirs of taillie substitute to him as above, shall contravene any of the before written conditions, provisions, limitations, and restrictions; that is, shall fail and neglect to obey and perform the haill conditions and provisions above sett down, or any of them, or any other after conditions and restrictions that may be added by me, that then and in that case the person or persons so contravening by failing to obey the said conditions, or by acting contrary to the above limitations and restrictions, or any of them, shall for himself or herself only lose and forfeit the estate."

Upon those words, which for all substantial purposes appear to me to have extremely little, if any, difference from the words now before your Lordships, the argument which has been raised upon that occasion also, and Lord Cottenham speaking of that argument says—"The next objection raised was as to the sufficiency of the resolutive clause, that it does not apply to the restrictions and limitations contained in the prohibitory clause. This objection is founded upon a supposed distinction made by the entailer between the conditions and provisions stated in the deed and the limitations and restrictions which it also mentions. The resolutive clause, it is contended, is confined to the former, and does not therefore prevent the altering the order of succession, or the sale of the estate or the burthening it with debts. It does not appear to me that there is any real difficulty in the interpretation of this clause. It begins by declaring that in case any of the heirs of tailzie shall contravene any of the before written conditions, provisions, limitations, or restrictions, and then prodeeds thus—That is, shall fail or neglect to obey and perform the haill conditions and provisions above set down, or any of them. It is clear that the word 'provisions,' which is general enough to include 'limitations and restrictions,' was here intended to include them." I pray your Lordships to observe the reasoning which satisfied Lord Cottenham—"For otherwise this part of the clause would be inconsistent with the former, which could not have been the intention of the framer of the deed." And Lord Brougham in the same case said —"Next the resolutive clause is itself called a provision. It begins with these words—'It is expressly provided and declared.' In trust 'provide' and 'provision' are words both in legislative enactments and in the framing of deeds of the largest extent and import. They cover everything that can be enacted in a statute or enumerated in a deed."

My Lords, fortified by that authority, and supported by the considerations which I have endeavoured to express to your Lordships, I certainly arrive at the conclusion that we have here under the words "that is," and under the words that follow it, nothing whatever which falls short of a repetition of that which occurred in the first member of the sentence, "shall fail or neglect to obey or perform the said other conditions and provisions." It appears to me to point to a failure or neglect to obey or perform any of the conditions, provisions, restrictions, or limitations of the deed. My Lords, I understand that this was the view of the Lord Ordinary. The Second Division of the Court of Session arrived at the same conclusion, but by a different process. I myself am unable to adopt the construction which the Second Division of the Court of Session appear to me to have been inclined to adopt. I not only prefer the construction of the Lord Ordinary, but in my opinion that construction was the right construction, and the interlocutor which he pronounced was entirely right. I therefore submit to your Lordships that this appeal ought to be dismissed with costs.

Lord Hatherley—My Lords, I have come to the same conclusion as my noble and learned friend upon the consideration of the whole of this instrument which is before us.

The argument for the appellant has very properly been rested by Mr Cotton almost entirely upon the question whether or not those words which profess, as it appears to me, to be words in explanation of the preceding passage—the words "shall fail or neglect to obey or perform the said other conditions and provisions,"—are large enough to include within themselves the same extent of meaning as the original sentence which immediately precedes them. That the original sentence is quite sufficient I believe has not been doubted in the course of the argument, but the point in question is whether or not the resolutive clause sufficiently embraces those special and cardinal points with which the limitations of Scotch entails require to be fenced by a resolutive clause. That is the point before us, and as to the original words, as I say it is not disputed that they are sufficient. Those words are, if the heir "shall contravene the before written provisions, restrictions, and limitations herein contained," then the resolutive clause is to take effect. Now stopping there for a moment, I beg your Lordships to observe that these words are large enough and ample enough to cover both the restrictive clauses, properly so called, as Mr Cotton would say, and the clauses by way of condition. They embrace in their terms the whole of the cardinal points insisted upon in a Scotch deed of entail.

The argument for the appellant is that this clause is restricted in its generality by the explanation which follows the original sentence. After saying that the heir shall not "contravene the before written conditions, provisions, restrictions, and

limitations herein contained, or any of them, the explanation proceeds to say—"that is," (which is equivalent to "my meaning is") shall fail or neglect to obey or perform the said other conditions and provisions, and each of them." I will stop there for a moment. The words which might at first create, and which appear to have created, some degree of hesitation in the construction are the words "said other," preceding the words "conditions and provisions." However, the meaning of these words "said other" is determined by authority, and from the very construction of this deed one sees that that authority was not unreasonable in holding the words "said other conditions" in a resolutive clause to mean other than this resolutive clause itself. In this instrument it seems to me to be very clearly brought out that that is the meaning, because the immediately preceding passage is that those persons who were to come in were to take under the "same conditions, restrictions, and irritancies to which the heirs contravening or failing were liable, and with and under this irritancy as it is hereby conditioned and provided," Then it goes on to give the provision which I have read, and it says "that it shall fail or neglect to obey or perform the said other conditions and provisions;" that is, those other conditions and provisions to which all other heirs of tailzie are subject, besides this very provision contained in the resolutive clause.

My Lords, that being so, the only question we have to consider is whether those words which are contained in the explanatory clause, namely, "fail or neglect to obey or perform the said other conditions and provisions," are sufficient to embrace all the limitations and restrictions which are mentioned in the deed, as well as what Mr Cotton calls specially the "conditions and provisions" of the deed.

Now, first as regards the word "provision," it has been said by Lord Brougham, in your Lordships' House, that "provisions" is one of the most general words which can be used in a deed, and will, unless it is limited by some special rule of construction which you must deduce from the frame and character of the deed itself, include every stipulation and condition that is made throughout the whole instrument. That was illustrated by a case which turned upon a singularly narrow point in one sense, namely, the case of *Speed* v. *Speed*, where the word "provision" was inserted in the sentence "shall contravene the provision" instead of the "condition." In that case the learned Judges appear not to have doubted that if the word "condition" had been inserted it would have been adequate to cover every provision in that deed, whether called a condition, a limitation, a restriction or a provision, but the word "provision" being used in the singular they considered it ambiguous, and they seem to have doubted whether it applied to one provision more than another, and in consequence of that ambiguity the entail was broken.

What we have therefore to look for in the deed is to see whether we find any such distinct appropriation of the word "provision" as would induce your Lordships to say that it is not used in its full generality, but in a restrictive sense, and that it would be applicable only to those parts of the deeds which are in the nature of conditions, as distinguished from those parts of the deed which are in the nature of restrictions. Our attention has been called with great minuteness to the deed for this purpose, and I think the Lord Chancellor has pointed out how entirely that fails to prove what Mr Cotton was bound to prove in order to succeed in his argument, namely, that a peculiar vocabulary has been adopted by the framers of this deed, by which they have restricted the word "provision" with regard to its use here—have deprived it of its generality, and appropriated it exclusively to those parts of the deed which operate by way of condition, as distinguished from those which operate by way of restriction.

The first mentioned of these restrictions which are about to be inserted in the deed occurs at page 58, at letter G, where, after describing what we should call the limitations in the English law; that is to say, after describing the heirs and substitute heirs, it says—"But always with and under the conditions, provisions, restrictions, limitations, exceptions, clauses irritant and resolutive, declarations and reservations after mentioned." There the vocabulary of the deed, and the provisions which are contained in it, seems to be brought before the conveyancer's mind, and then afterwards we have to see whether or not he has fixed and stamped upon the word "provision" that definite and limited meaning which has been contended for by the learned counsel for the appellant. The next mention of these restrictions occurs after that on page 59, at letter F,—"But with and under the conditions, provisions, restrictions, limitations, exceptions," then it goes on with the same list of words as I have just read from the preceding page.

But without fatiguing your Lordships by going through this, which has been already gone through in some detail by my noble and learned friend the Lord Chancellor (as it is desirable that it should be done, if I may say so,) I have only now to point out one or two instances in which it seems to me to be quite plain that no such alteration in the force of the word "provision" had taken place in the mind of the draughtsman who drew this deed as is contended for on the present occasion. We find on page 61, near the bottom—"And with and under this restriction and limitation also, and it is hereby expressly conditioned and provided." There the draughtsman thinks it right to express a restriction and limitation by saying that it is "conditioned and provided." It appears to me, my Lords, to be as plain as possible that he there brings all the four words—"restriction," "limitation," "condition," and "provision" into operation in one clause, which is a restrictive clause.

Another passage struck me very much in the same way, and that is at the bottom of page 63. After having between letters E and F said in the first place, "and with and under this restriction and limitation, that it shall not be within the power of any of the heirs succeeding," and so on "to set tacks or rentals with diminution of rental and payment of a grassum," he goes on, a little below letter G, thus:—"And providing always that it shall not be in the power of any of the said heirs to set any tack or rental," and so on. There the word "providing" is used, and I cannot think that any distinction can be drawn between the use of the word "providing" and the use of the word "provision." That which is "provided" is of course a "provision," and in that case it is a provision which is restrictive, and therefore it is a provision which is a restriction. Consequently, instead of the word "provision" having lost its generality of application, it is here

applied to restrictions just in the same manner as in the preceeding passage you find "restriction" and "limitation" used in connection with "conditioned" and "provided."

Then at the top of the following page your Lordships will find this: "And with and under this condition as it is hereby specially provided and declared." There you have the word "condition" used in connection with the words "provided and declared," not expressly with "restriction." But you find afterwards, "and also with and under the limitations and conditions that the land and estate before disponed shall not be affected or burdened," and so on. There you find "condition" tacked with "limitation," as you have before found "provision" tacked with "restriction."

Now my Lords, the argument has been that in the clause before us on page 15, "conditions and provisions" go together as applicable only to conditions, and also that "restrictions and limitations" go together as applicable only to restrictions. But we find in this instrument the word "provision" applied to a restriction, and we find the word "limitation" coupled with "condition." The passage I have read last from page 64 says, "under the limitation and condition." Is it possible therefore to say that the conveyancer has taken upon himself, as he is supposed to have done in the case of *Cunninghame* v. *Cunninghame*, the duty of taking a word of the largest signification in its general sense (the word "provision") out of the general vocabulary, and of appropriating it to one particular portion only of the provisions instead of to all the provisions contained in the deed, namely, to the conditions as distinguished from the restrictions. It would require a very strong case, as it appears to me, to induce your Lordships to think that you ought so to restrict the word (which in itself is a *nomen generalissimum*), and to say that it is so clearly and manifestly made out that it is restricted in that way that when used in the sentence "to obey and perform" the other conditions and provisions, the word "provisions" is applicable only to those provisions which are strictly synonymous with conditions.

In this case there might perhaps have been something said if the words had been "obey the conditions and provisions." But the words are "shall fail or neglect to obey or perform" the "conditions and provisions." "Obey" might be thought perhaps to be applicable more to a restriction than to a condition, and "perform" to be applicable rather to a condition than to a restriction. But here you have both the words "obey" and "perform," and the very use of those two words, instead of assisting the argument of the appellants in any way, rather tends to show that the conveyancer had before his mind in explaining the word "contravene" to us, two points to which he wished to draw attention, the first being that the is to obey that which he is subject to, namely, the restrictions, and the second being that he is to perform what it would be his duty to perform before taking possession of the estate or enjoying its privileges, namely, the conditions attached to the possession of the estate and the acquisition of the privileges. Accordingly, you find that the word "contravene" as applied to the whole of the conditions, provisions, restrictions, and limitations, is, as it appears to my mind, very well paraphrased in the sentence introduced by the words "that is" (which shows what the conveyancer was doing), "fail or neglect to obey or perform the other conditions and provisions." Construing it in that way, you give to each of the words its proper meaning; you strike nothing out of the deed, and you make the latter sentence a clear and satisfactory explanation of what it was that the settler, the author of the deed, intended.

Then, my Lords, come these words, which are supposed to create some ambiguity. If the heir "shall fail or neglect to obey or perform the said other conditions and provisions and each of them, or shall act contrary to the said other restrictions to be hereinafter added and appointed by me." Now, the whole of that comes under the head of explanation, as has been shown by the Lord Chancellor, because the next words are "excepting as is before excepted." Therefore the words "that is," must include the whole of the sentence which follows, or else you must refer back the expression "excepting as is before excepted," to the contravening of "the before written conditions, provisions, restrictions, and limitations," in as much as those words are not applicable to any restriction by way of limitation contained in the deed afterwards.

Therefore all we now have to do is to interpret what is meant by "acting contrary to the said other restrictions to be hereinafter added." There is no difficulty whatever in that, as has been already observed, except as regards the use of the word "said," and the introduction of that word would not in my opinion produce any ambiguity in the sense of there being two meanings, either of which might be adopted. If there were such ambiguity the entail would fail, because ambiguity is not allowed in Scotch deeds of entail; and if words were to be found in this instrument which could not be interpreted on account of their doubtful meaning, the result would be the total destruction of the deed. But nothing of that kind occurs here. There is no doubt that "other restrictions to be hereinafter added," are intended, and therefore if other restrictions afterwards added happened to be called "said," I do not apprehend that the introduction of a word which creates no ambiguity in construction, and can only be said at the most to be inappropriate and unnecessary, can have the effect of destroying the validity of the instrument.

But, my Lords, I think it would be possible to give an interpretation to the word "said," if it were necessary to find one—which I do not think it is. It would not be straining the English language too severely to read it thus—the settler has carefully from the beginning to the end said—Mind every provision limitation (I am using that word in the English sense again), which I introduce into my deed, every estate which I grant every possible benefit which I confer by my deed, is to be subject to the "conditions, provisions, restrictions, limitations, exceptions," and so on that follow afterwards; that is twice repeated in the earlier part of the deed; and therefore, having had that very strongly impressed upon his mind when he is saying I condemn by this resolutive clause every contravener, he goes on to say I explain what I mean by every contravener, I mean every contravener of all the limitations before contained in the deed. Aye, and I mean something more too. I extend it to a person not performing those "said other conditions and provisions" which I have spoken of, for all my provisions are

not yet exhausted—those "said other provisions" mean the provisions which I have spoken of in the beginning of the deed, and which I intend to insert at the end of it. It is not an elegant, indeed it is a clumsy mode of expression; at the same time it does not appear to me to be deficient in sense, and what is more important a great deal, there is no other sense that can be given to the expression which can create ambiguity and thereby destroy the instrument.

Therefore my Lords, upon the whole case I agree in the conclusion at which my noble and learned friend the Lord Chancellor has arrived.

LORD O'HAGAN—My Lords, I am quite of the same opinion, both upon authority and upon a careful consideration of the details of this deed. After the very exhaustive criticism which the deed has undergone by my noble and learned friends, I shall only say a single word upon, and even that would not be necessary if it were not in my opinion important that it should be known that the views which I at all events take are not the views of the Second Division of the Court of Session. I think the view which was presented in a very simple, lucid, and satisfactory way by the Lord Ordinary, is the view which may fairly be sustained by your Lordships. The view upon the other side, or rather the view of the Inner House, was one which I for one cannot adopt, and if the case had been as presented by one of the learned judges there, a case in which this clause was wholly incapable *per se* of construction, I should have said that the decision of your Lordships ought to be the other way, and that the decree of the Court below ought to be reversed. I shall only just point to the real ground of decision of the Lord Ordinary, which I venture to adopt.

My Lords, the question in the case is substantially to what extent, value and effect should be given to the word "provisions" in this deed, and all the argument which has been offered on either side, and all the observations which fell from my noble and learned friends who have preceded me, bear ultimately upon that. Of course, with a view to ascertain that it is necessary to examine this deed through all its parts, to look at its various clauses and carefully to dissect them. That having been done, it appears to me very clear that the word "provisions" in the resolutive clause with which we have to deal bears the ordinary general comprehensive meaning which is attributed to it in common parlance; and if so there is an end of this case.

The word "provision" is, as has been said by Lord Brougham and other judges, a word of the most comprehensive character. It reaches every clause whether it be restrictive, whether it be conditional, or whatever it may be that the deed may contain. And unless there are other words to limit the operation of the word "provisions" in that respect, we should take it in its ordinary sense. My Lords, we have heard a good deal here about the special view of the Scotch Courts as to the interpretation of deeds of entail. No doubt there is a certain amount of strictness applied in such cases, but unless there be, as has been said, some difficulty or doubt in construction, some balance upon the one side and the other, we ought to take the words of a deed of entail just as we would take the words of any other deed, and interpret them according to the natural and ordinary course of things, and the common understanding of mankind.

Now, the word "provisions" in this particular instrument does not appear to me, I confess, by anything that is attached to it or that surrounds it, to be limited to something within the sphere of its common operation. The word occurs twice in this resolutive clause, and I endeavoured repeatedly, two or three times at all events, to ascertain from the learned counsel who so very ably argued the case for the appellant what meaning he would put upon that word if it were not to have its ordinary and universal value, but I certainly was not able to learn from him, if the word was to be restricted at all, within what precise sphere it ought to be restricted, or what it would be taken to regard, unless it regarded all the clauses whether restrictive or conditional in this deed.

My Lords, so far as the use of the word "provisions" in the first place in this resolutive clause goes, it is used in this way; it is said that if M'Donald "shall contravene the before written conditions, provisions, restrictions, and limitations herein contained or any of them." I see nothing, and the Lord Ordinary saw nothing, to limit the effect of the word "provisions" in that portion of the clause. It was said by Mr Cotton that the words "conditions, restrictions, and limitations," being used along with the word "provisions" must necessarily be taken to have a different meaning from those other words, and to represent a particular class of things which was not described by these other words. But at the same time he said that if that word "provisions" were put at the end instead of in the middle of those four words, it might be taken to have a universal operation. I confess my Lords I cannot see the force of the distinction. It is a mistake no doubt—it is a technical error—perhaps it may be an error of the transcriber of this deed. But the word "provisions" there seems to me to have precisely the same operation as it would have had if it had been placed in another portion of the sentence, and I was not able to get from the learned counsel any definition of the word on account of its particular collocation in that place.

Well, if that be so, and if the word be, as it was taken by the Lord Ordinary, used in its common and ordinary sense, we come next to the words "that is." I take the view of the Lord Chancellor to be irrefragable with respect to these words. They are equivalent to, "I mean to say," "shall fail or neglect to obey or perform the said other conditions and provisions." Now, undoubtedly the word "other" there did appear to me originally to present a considerable difficulty in the case, and but for the authority of the case to which we have been referred, namely, *Stirling* v. *Moray*, or *Home Drummond*, the word "other" would still appear to me to create very considerable doubt as to the construction of this clause. But that case is decisive upon it, and shows that the resolutive clause itself and its conditions, must be taken as the antagonist to the other clauses referred to by the word "other." That being so, my Lords, that difficulty is entirely removed.

Then for the purpose of construction you may read that portion of the sentence as if the word "other" were altogether omitted. Reading it in that way how will it run? It will run thus:—"The before written conditions, provisions, restrictions, and limitations herein contained, or

any of them." If so far there be nothing to limit the operation of the word "provisions," and if, as the Lord Ordinary held, it reached to all the antecedent provisions of this deed, then the sentence will proceed thus:—"that it shall fail or neglect to obey or perform the said conditions and provisions," and whatever was the meaning of the word "provisions" antecedently in this clause, ought to be the meaning of the word "provisions," with the word "said" before it in the subsequent part of the clause. If that be so, the universality of the operation of the word "provisions" is preserved. It will affect restrictive clauses, and conditional clauses, and all clauses; and if that be so there is an end of the controversy, and this deed is perfectly good.

Now, my Lords, the Lord Chancellor and my noble and learned friend opposite (Lord Hatherley) have gone minutely through the clauses of the deed, through which I have looked myself, and there is scarcely a portion of it in which there are not words corroborating the view of the Lord Ordinary in this respect. There is scarcely a clause in the deed, whether restrictive, conditional, or of any other kind, which does not contain the words "provision" and "provided." Those words pervade the whole instrument, shewing manifestly that there was not in the mind of the person who prepared or dictated that deed any distinction between the "provisions" of it and the restrictive clauses or the other clauses, but that the word "provision" was intended to operate throughout the whole, affecting all the clauses equally from beginning to end.

Upon that short ground, and not going into detail, I am clearly of opinion that the judgment of the Court below was right. I do not think that it would have been right upon the grounds and for reasons stated in the Second Division of the Court of Session—but I need not go into detail upon that. I do not think there was any right or reason to assume that there was a mistake in this deed. It is possible that there may have been; it is possible that there may have been the omission to which the learned Judges point; it is perfectly possible that that omission might be supplied in accordance with the fact upon the ingenious view which they present. But a Court of construction is bound to construe, it is not to invent, and it is not to imagine, and I am very happy in this particular case to say that in my opinion there is no necessity for invention, there is no necessity for imagination, but that taking the plain words of the instrument within the resolutive clause, and throwing the light of the other clauses from beginning to end upon that clause, there is no reasonable doubt in my mind that that clause means to extend the effect of the word "provision" through the whole of the instrument. And that being so, the resolutive clause is good, and the deed ought to be maintained.

Lord Selborne—My Lords, I entirely agree with the very able judgment of the Lord Ordinary in this case, and with the opinion that has been delivered to your Lordships by my noble and learned friend on the woolsack; and I am so entirely satisfied with the grounds stated in that opinion, and with the general reasons on which it is founded, that I propose to add nothing.

The whole argument for the appeal appears to me to have rested upon the theory of a blank or omission of words having occurred in the latter number of the explanatory part of the resolutive clause in the deed, and I am bound to say that that view seems to me to have been adopted in the judgment of the Inner House. With all respect for their Lordships, I cannot at all agree in that view. If indeed I have seen any ground on which we could judicially assume the existence of a blank or omission of words in that portion of the deed, I certainly should not have seen how consistently with principle or with authority, we could have taken upon ourselves to fill up any such blank or omissions.

The blank or omission if well established upon judicial grounds might, I imagine, have been fatal to the deed. But the only ground upon which this theory of a blank or omission of words in the deed appears to be founded is that in that portion of the clause the word "said" is either insensibly or inaccurately used. My Lords, if the word "said" there be entirely insensible, it is wholly innocuous, because the rest of the clause is sufficiently sensible and distinct to leave no doubt whatever that what is there spoken is something afterwards to be done. And if it were necessary I should have no difficulty in saying that the explanation offered by my learned friend opposite (Lord Hatherley) is as reasonably probable as any which occurs to me of the circumstances which may have led to the use of that word "said;" that is to say, in the general introductory portion of the deed there is by anticipation a collecting together of all the clauses, conditions, provisions, limitations, and restrictions which are to occur afterwards throughout the deed, and it may well be that if we were bound to put a meaning upon that word "said" we might properly apply it to the antecedent mention of restrictions and conditions, which would include everything that follows.

My Lords, if we were to go outside the deed and to speculate upon what may have led to this or any other inaccuracy or obscurity of language in the deed, we should be departing wholly from the settled principles of construction. I cannot for a moment admit that there is any impropriety in this deed with reference to the forms used by conveyancers or books of style. But to compare the language of a particular deed, said to be imperfectly expressed, with those forms and styles in order to arrive at the conclusion that something was meant to have been introduced into the deed which would have occurred there had the common form or style been accurately followed, and then to deal with it as if in that manner it had been ascertained that the deed contained an omission or a blank, is a mode of dealing with the construction of instruments from which, my Lords, I am bound to say I entirely dissent.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

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