[1st *April* 1841.]

JOHN Marquess of BREADALBANE and others, (No. 5.)
Appellants.[1]

[*Lord Advocate (Rutherfurd) — John Stuart.*]

CHARLES CAMPBELL of Combie, Respondent.

[*Pemberton — James Anderson.*]

Entail — Institute — Irritant Clause. — The prohibitory and resolutive clauses of a deed of entail were directed against the institute nominatim and the heirs succeeding to the lands. The resolutive clause was thus introduced: "And "with and under this irritancy," &c.; and the irritant clause which followed, and was alleged by the party supporting the entail to form part of, the resolutive, was thus expressed: "And upon every contravention which may "happen by and through any of the heirs succeeding to "the said lands, their failing to perform all or each of the "conditions," &c., "or acting contrary to all or any of "the limitations," &c., "it is expressly provided not only "that the lands shall not be burdened with or liable to "the debts and deeds, crimes and acts of the heirs con-"travening," &c., "but also all debts contracted, deeds "granted, and acts done contrary to the conditions here-"of," &c. "shall be of no force, strength, or effect, and "uneffectual and unavailable against the other heirs:"— Held (affirming the judgment of the Court of Session), that the irritant clause did not apply to or fetter the institute, and that a sale of the lands by him was effectual.

A provision in an entail, declaring that the estate should not be affected, &c. by the debts or deeds, legal or voluntary, of the institute or heirs of entail, held, with reference to the context, not to import an effectual irritancy of sales.

---

[1] 1 D., B., & M. (N. C.)

1st Division.

Lord Ordinary Fullerton.

Statement.

DAVID Campbell of Combie, by deed of entail under the form of a procuratory of resignation, dated 25th February 1809, resigned his lands of Upper and Lower Glencrutten and others, in favour and for new infeftment of the same, to himself in life-rent, and to Charles Campbell (the respondent), "my only lawful "son, and the heirs male to be lawfully procreated of "his body," whom failing, to the heirs female of Charles Campbell, and a series of other heirs in fee.

The deed contained clauses prohibitory, resolutive, and irritant.

The prohibitory and resolutive clauses were directed expressly against the respondent nominatim, "or any "of the heirs succeeding." The portion of the entail containing the resolutive and irritant clauses was thus expressed:—"And with and under this irritancy as it is "hereby conditioned and provided that in case the said "Charles Campbell or any of the heirs succeeding to "the lands and estate before resigned shall contravene "the other before written conditions herein contained "or any of them that is shall fail or neglect to obey or "perform the said conditions and provisions or any of "them or shall act contrary to the said before written "limitations or restrictions or any of them then and in "these cases the person or persons so contravening shall "for him or herself only ipso facto amitt lose and for-"feit all right title and interest which he or she hath to "the lands and estate before resigned and as such right "shall become void and extinct so the said lands and "estate shall devolve accresce and belong to the next "heir appointed to succeed although descended of the "contravener's own body if capable to possess and "enjoy the said estate in the same manner as if the

" contravener were naturally dead and had died before " the contravention and upon every contravention which " may happen by and through any of the heirs suc- " ceeding to the said lands and estate their failing to " perform all or each of the conditions and provisions " or acting contrary to all or any of the restrictions and " limitations before written it is expressly provided and " declared not only that the lands and estate before " resigned shall not be burdened with or liable to the " debts and deeds crimes and acts of the heirs contra- " vening as is already herein provided but also all debts " contracted deeds granted or acts done contrary to the " conditions and restrictions appointed by me or to the " true intent and meaning hereof shall be of no force " strength or effect and uneffectual and unavailable " against the other heirs called to succeed and who as " well as the said lands and estate shall be noways bur- " dened therewith but free therefrom in the same man- " ner as if such debts or deeds had not been granted " or contracted or such crimes acts or omissions had " never been done or happened."

Further, in the portion of the entail immediately following the prohibitions there was a clause to the following effect:—" And with and under this restriction and " limitation also as it is hereby expressly provided and " declared that the lands and estate before resigned shall " not be affected or burdened with or be subjected or " liable to be adjudged apprised or any other way " evicted either in whole or in part for or by the debts " or deeds legal or voluntary contracted or granted by " the said Charles Campbell or any of the heirs suc- " ceeding thereto whether before or after their succeed- " ing to or attaining possession of the said lands and

MARQUESS OF BREADALBANE and others v. CAMPBELL.

1st April 1841.

Statement.

"estate nor with for or by the crimes of omission or "commission or acts civil or criminal committed or "done or to be committed or done by them prior or "posterior to their succession."

The respondent, as institute under the entail, having succeeded to the estate, brought a declarator of his right to sell the lands, which the substitute heirs of entail resisted on the ground that the fetters applied to the respondent; and the Marquess of Breadalbane, as purchaser of a part of the lands, brought a suspension of a threatened charge of payment. The processes were conjoined, and the Lord Ordinary (29th May 1838) pronounced the following interlocutor:—"The Lord Ordinary having heard the "counsel for the parties on the closed record in the "conjoined processes, in respect that the irritant clause "in the deed of entail libelled on is not directed "against the institute, repels the reasons of suspension, "and finds the letters and charges orderly proceeded "in the processes of suspension, and decerns; and in "the action of declarator finds, declares, and decerns "conform to the conclusions of the declarator."

Judgment of Court, 23d Nov. 1838.

The appellants reclaimed, but the Court, 23d November 1838, adhered.

The defenders and suspender appealed.

Appellants Argument.

Appellants.—The irritant clause is placed in juxtaposition to, and in truth forms continuously a part of the resolutive clause. Although they are in legal effect separate clauses, yet grammatically, and in order to ascertain the true legal construction of part of the sen-

tence, the whole is to be read as one continued sentence. The declaration that the deeds done shall be void, and that the right of the contravener shall be forfeited, is contained within one clause, in which Charles Campbell, the institute, is named in the outset as the party against whom, along with the other heirs of entail, the irritancy is directed. The rule in the Duntreath[1] class of cases does not preclude a careful examination of the instrument, or a reference from one part of it to another, so as to ascertain whether the words used are plainly meant to include the institute, it being admitted that intention is not enough, unless there are words from which such intention is plainly to be gathered.[2] Upon sound construction it must be held, that the mention of the institute in the leading member of the clause must be held to run through the entire clause above quoted.

[*Lord Chancellor.*—It has been decided that you cannot go to other parts of the deed to gather whether under the word "heirs," used in a certain clause of the instrument, the institute is included.]

But another part of the deed is important, namely, the provision that the "lands shall not be affected with "the debts and deeds of Charles Campbell, or the "heirs succeeding." This has been held in other cases as equivalent to a declaration that the debts and deeds shall be null and void. It is not necessary to say they shall not contract debt if it be said that the land shall

---

[1] Edmonstone, 24th Nov. 1769, Mor. 4409. See these cases collected in a note in M'Lean & Robinson, App. (1839), p. 798.

[2] Elibank v. Murray (Simprim), 1 Sh. & M'L. 1; Glassford (Dugaldstone), 1 W. S. 323; Syme v. Dickson (Blairhall), 6th July 1816, Fac. Coll.; Steele v. Steele, 5 Dow, 72.

MARQUESS OF BREADALBANE and others v. CAMPBELL.

1st April 1841.

Appellants Argument.

not be affected by debt[1]; and it has been held that a declaration that debts and deeds shall be null and void so far as they affect the estate, is sufficient without declaring that they shall be null and void as against the contravener.[2] Now the clause in question has been incorporated into the irritant clause, so as to be held as part of it, and if read along with it, it will thus constitute an effectual irritancy of all sales.

[*Lord Chancellor.*—The words are debts and deeds for or by which the lands may be affected, adjudged, apprised, or evicted, which do not apply to sale, which is personal.]

Respondent's Argument.

Respondent.—There must be separate and independent clauses, prohibitory, irritant, and resolutive; and however accurately two of them may be expressed, so as to include the institute, you cannot borrow expressions from them to supply a palpable defect or omission in the third. No reference can be made to other parts of the instrument to aid the construction of a clause, unless indeed when a word, used in a general sense in one clause, has been in the previous clauses used in a particular or modified sense, when the meaning of such word, though used generally but plainly in the same sense as in the previous clauses, may be controlled and explained by reference to those previous clauses where the generic term has been used in a certain limited or particular acceptation. Now the portion of the instrument introduced by the words "and with and under

---

[1] Mackenzie v. M'Kenzie, 23d May 1823, 2 S. & D. 293. (2d ed.); Nesbet, 10th June 1823, Ibid. 339.

[2] Munro v. Munro, 15th Feb. 1826, 4 S. & D. 467.

"this irritancy," &c. embraces two distinct and independent clauses,—the resolutive and the irritant,—and the latter is directed only against the heirs of entail, which term clearly does not embrace the institute.

Then again as to the provision about affecting the lands with debts and deeds, now for the first time referred to, it must be read with reference to its leading object, which plainly is the contracting of debt. In this view the provision applies only to debts or deeds,—acts—the consequence of which is apprising or adjudication,—and not to sales, which affect the person, and are completed by disposition, and not by adjudication. General words in deeds of entail are controlled by reference to the particular acts specified in the clause in which they occur. Besides, the clause is not truly an irritant clause at all. It occurs immediately after the prohibitory; and the general irritant clause in the after part of the deed embraces all acts of contravention by heirs of entail.[1]

LORD CHANCELLOR.—My Lords: Nothing but the extreme caution which I think it is the duty of this House to exercise in coming to any decision, or acting upon a first impression, however strong, would have made me think it necessary to take a further opportunity of looking into this deed of entail. I have, however, since the hearing took place on the day before yesterday, looked into this deed, and I cannot suggest to myself even a doubt as to the propriety of the interlocutors appealed from. Nothing can be more simple with

[1] Henderson v. Henderson, 21st Nov. 1815, Fac. Coll., confirmed by Lang v. Lang, M'L. & Rob. App. (1839), p. 871.

MARQUESS OF BREADALBANE and others v. CAMPBELL.

1st April 1841.

Ld. Chancellor's Speech.

regard to a Scotch entail than that the institute is not fettered unless the irritant clauses either name him or describe him. This must be considered as perfectly settled law. Now in the irritant clause in the present deed he is not named, nor is he described. The persons whom the irritant clause describes are "heirs," and therefore, according to the decisions, the institute is not included within the irritant clause.

But then it is said, that though the word "heirs" only is used, the whole passage, including the resolutive and irritant clauses, is one sentence, and that in the commencement of the sentence there are words expressly naming the institute, which would supply the defect. Even that would be contrary to the rules which have been adopted. You cannot refer to other parts of the deed for the purpose of giving more effect to the irritant clause than is to be derived from the expressions used in the particular clause itself; but, in point of fact, though it may be grammatically one sentence, yet, in substance, the two parts are totally distinct, and form two independent clauses of the deed. The part which proceeds to impose the irritancies is quite distinct from the part of the clause which resolves the right of the contravener.

But even if it were not so, it is said that that part of the deed which was referred to at the bar contains words which would apply to the case of selling. Now I am very clearly of opinion that, according to the rule of construction adopted in several other cases, although there may be found in the sentence words which, taken from the rest of that sentence, and used by themselves, might be applied to selling, namely, by the words which speak of deeds affecting land; yet that where they are mixed up in clauses, and coupled with expressions or

words of context clearly directed to another purpose, you cannot, in the strictness required in deeds of entail, select particular words, and give a sense to them inconsistent with the general sense of the sentence itself. That the words here referred to are intended to apply to debts and deeds which might be the ground of eviction, and not to sales, is quite clear from the construction of the sentence.

Ld. Chancellor's Speech.

In considering these interlocutors it is sufficient that the irritant clause, which professes to name the heirs of entail, does not name or describe the institute.

For these reasons your Lordships will probably concur in the opinion I have formed, that there is no doubt of the propriety of the interlocutors appealed from.

Judgment.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors, therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

SPOTTISWOODE & ROBERTSON — D. CALDWELL & Son, Solicitors.