

[Heard 28th March. Judgment, 4th September, 1844.]

WILLIAM MURRAY, Esq. of Touchadam and Pitlochrie,
Appellant.

MISS ANNE MURRAY and others, Heirs of Entail of the Lands of
Cockspow, *Respondents.*

Tailzie.—Where selling, alienating, and disposing are prohibited, the irritant and resolute clauses, though using the terms “alienating” and “disposing,” but dropping that of *selling*, will be effectual to prevent sales.

Ibid.—The meaning of the word “deeds,” where used referentially, is to be construed by the words to which it refers, and construed in this manner was *held* to mean sales.

Ibid.—A general prohibition to do a certain act is not limited by a subsequent description of one of the consequences of the act, but will include all the consequences.

THE appellant was heir of entail in possession of the lands of Pitlochrie, under an entail bearing date the 29th of May, 1727, and he was also proprietor in fee-simple of the lands of Cockspow.

In 1817 he obtained an Act of Parliament, authorising him to sell the lands of Pitlochrie upon his entailing the lands of Cockspow, by a deed “containing all clauses needful in favour
“ of the heirs called to the succession by the aforesaid entail of
“ the estate of Pitlochrie, and according to the same series and
“ substitution, and under all the provisions and conditions,
“ declarations and clauses prohibitory, irritant, and resolute,
“ that are contained in the said deed of entail; and which entail
“ shall bind the institute as well as the substitutes, so that the

MURRAY v. MURRAY.—4th September, 1844.

“ said lands of Cockspow, and others so to be conveyed, may be
“ enjoyed by the same persons who would, under the said deed
“ of entail of Pitlochie, have enjoyed the said entailed estate, to
“ be sold as aforesaid.”

In compliance with the terms of this Act, the appellant, on the 3rd day of March, 1825, executed an entail of the lands of Cockspow, by a deed which contained the following prohibitory, irritant, and resolute clauses, which, in their expressions, were the same *mutatis mutandis* with the like clauses in the entail of Pitlochie of 1727. “ And sicklike, it is hereby expressly pro-
“ vided and declared, and shall be so declared by the infestments
“ to follow hereupon, and by the services, retours, precepts, and
“ instruments of sasine, of me or the succeeding heirs of tailzie
“ in all time coming, that it shall be noways leisome nor lawful
“ to, nor in the power of me, or the heirs-male or female of my
“ body, nor of the other heirs of tailzie above written, nor the
“ descendants of their bodies, to sell, alienate, or dispone the
“ lands and others before rehearsed, or any part or portion
“ thereof, either irredeemably, or under reversion, or to grant
“ wadsets or infestments of annual rent furth of the same, or to
“ burden the said lands with any servitude or other burdens
“ whatsoever ; nor to set nor grant any tacks of the same above
“ the space of ten years, and not under the ordinary rent ;
“ neither shall it be lawful to them, nor in the power of them,
“ or any of them, to contract any debt whatsoever, nor to commit
“ any crime of whatsoever kind, and particularly the crime of
“ treason, or any species of it, or to do or commit any other fact
“ or deed, civil or criminal, whereby the lands and others
“ before mentioned, or any part thereof, may be apprised or
“ adjudged, or any other manner of way evicted, forfeited, or
“ become caduciary, or the order of succession hereby set down,
“ anywise altered, innovate or infringed, in prejudice of this
“ present tailzie, or of these who shall succeed in virtue thereof ;
“ and if I, or any of the heirs of tailzie, of whatsoever sex, that

MURRAY *v.* MURRAY.—4th September, 1844.

“ shall happen to succeed, by virtue of these presents, in time
 “ coming, or my or their descendants, shall do anything in the
 “ contrary of the said provisions, either by alienating or dis-
 “ posing the lands and others before written, or any part thereof,
 “ or contracting debts either real or personal, or by committing
 “ the crime of treason, or any species thereof, or any other
 “ crime or delict, or doing any other deed civil or criminal, the
 “ said debts, deeds, crimes, and delicts, and all and every one of
 “ them, shall not only, *ipso facto*, become null and void, in so far
 “ as concerns the lands and others before written, so that they
 “ shall be nowise affected or burdened therewith, in prejudice of
 “ the succeeding heirs of tailzie and provision ; but also the con-
 “ traveners shall not only forfeit, amit, and tyne their right to
 “ and interest in the lands and others before specified, but like-
 “ wise to the mails, duties, rents, profits, and casualties thereof,
 “ and the same shall be nowise affectable by the contravener’s
 “ creditors, nor shall they be affectable by them, nor fall under
 “ their single or liferent escheats ; and the said hails lands, and
 “ mails and duties thereof, shall, *ipso facto*, from and after the
 “ respective deeds of contravention, be devolved upon, and per-
 “ tain and belong to the person that shall be next, and have
 “ right to succeed by virtue hereof, free from all debts, deeds,
 “ crimes, and delicts done, contracted, and committed by the
 “ contraveners ; and it shall be lawful to the person having
 “ right to succeed, to use any legal or formal method for esta-
 “ blishing the right of the said lands in their person, in re-
 “ spect the contravener’s right will be resolved and extinct from
 “ the time of the contravention, as if he were naturally
 “ dead.”

A subsequent clause declared that if the granter, or any of the heirs, should omit to obtain themselves entered in the lands within a specified time, “ I and they shall not only forfeit, amit,
 “ and tyne my and their right to, and interest in the lands and
 “ others before written, but also to the mails, duties, rents

MURRAY *v.* MURRAY.—4th September, 1844.

“ profits, and casualties thereof; and they shall be nowise
“ affectable by any of the contravener’s creditors, nor shall the
“ same be assignable by them,” &c.

Another clause was in these terms: “ And likewise it is
“ hereby expressly provided and declared, that if I, or any of the
“ heirs of tailzie, or my or their descendants, shall be owing, or
“ shall have contracted any debt, or committed any crime or
“ delict, or shall happen to become liable for any debts for myself
“ or themselves, or as representing any others before my or their
“ succession to the said lands, and others before written, or for
“ any other cause whatsoever. In that case, these debts, deeds,
“ and crimes shall be void and null in so far as concerns the
“ lands and others before rehearsed, nor shall the same, nor the
“ mails and duties thereof, be affectable therewith any manner
“ of way, neither shall it be leisome nor lawful to me or any of
“ the heirs of tailzie in time coming, in the case before mentioned,
“ to assign the mails and duties of the said lands for payment of
“ any such debts that I or they shall happen to be owing or
“ become liable to, before my or their succession, nor shall the
“ said mails and duties, or any part thereof, in that case be
“ affectable by my or their creditors, nor fall under my or their
“ single or liferent escheat, in prejudice of the said heirs, their
“ wives and children, and others that shall succeed to me or
“ them by virtue hereof, and I and the said heirs shall be holden
“ to pay the same, and to free myself and themselves from all
“ debts and deeds whereunto I or they might be made
“ liable.”

The appellant, conceiving that the resolute and irritant clauses were not effectual against sales, executed a missive of sale to John Murray, and then brought an action against the substitute heirs of entail, to have it declared that he had full powers to sell the lands of Cockspow; that the missive of sale constituted a good and valid sale, and binding on the said pursuer, who is bound and entitled to implement the same, and that the said

MURRAY v. MURRAY.—4th September, 1844.

sale is nowise affected by or challengeable under the said disposition and deed of entail, nor by any of the provisions, qualifications, limitations, conditions, restrictions, and clauses irritant, therein contained; and further, that the said pursuer, being bound and obliged to give the said John Murray a valid and sufficient title to the said lands, and others, he is not prevented from so doing by the said disposition and deed of entail, nor by any of the clauses therein contained, and that the pursuer has full and undoubted right and power to grant and execute all dispositions and other deeds that may be requisite or necessary for effectually conveying the said lands and others sold by him to the said John Murray, and that the pursuer is not prevented from selling the said lands in manner before mentioned, nor from granting and executing the dispositions and others before mentioned, by the said disposition and deed of entail, or by any of the titles under which the pursuer possesses the said lands and others. Here, then, followed a conclusion that the pursuer had an absolute right to the price of the lands.

At the same time John Murray, the purchaser, brought an adjudication in implement of the missives of sale. The defenders pleaded in answer to the action by the appellant,—

“ I. The entail of Cockspow contains an effectual prohibition against the heir in possession selling the estate, and consequently the pursuer, in entering into the missive of sale libelled on, acted beyond his powers, and in contravention of the entail.

“ II. At all events, the pursuer is not entitled to have it declared against the defenders, that he has right to grant dispositions of the entailed lands.

“ III. The pursuer is barred, *personali exceptione*, from violating the prohibitions of the deed of entail executed by himself.

MURRAY *v.* MURRAY.—4th September, 1844.

“ IV. Even if the sale of the lands were found good, the pursuer is bound to reinvest the price for the benefit of the substitute heirs.”

The Lord Ordinary (*Cunninghame*), after argument before him, appointed the parties to put in cases, and after considering these papers, his Lordship made avizandum with the cause to the Inner House, accompanying his interlocutor with a full note, expressing doubts upon the question raised. The Inner House ordered the opinions of the other Judges to be taken; that opinion was unanimous, and was delivered by Lord Moncrieff in the following terms:—

The object of this action is to have it found and declared, that the pursuer has power to make an effectual sale of the lands of Cockspow and others, in which he stands invested under a disposition and deed of entail executed by himself, in obedience to the express provisions of an Act of Parliament of the 57th Geo. III. The summons sets forth, by a recital of the terms of that entail, that the pursuer had succeeded to the lands of Pitlochrie and others, as an heir substitute of entail, under a deed executed by Patrick Murray in 1727; and that, having become proprietor of the lands of Cockspow and others in fee-simple, he had obtained an Act of Parliament for enabling him to sell the said lands of Pitlochrie and others, at the sight of this Court, on condition that the price should be applied in the purchase of the lands of Cockspow and others, and that these lands should be entailed on the same series of heirs, he being bound to execute, at the sight of the Court, a deed of entail, ‘ containing
‘ all clauses needful, in favour of the heirs called to the suc-
‘ cession by the aforesaid entail of the estate of Pitlochrie, and
‘ according to the same series and substitution, and under all the
‘ provisions and conditions, declarations, and clauses prohibitory,
‘ irritant, and resolute, that are contained in the said deed of
‘ entail, and which entail shall bind the institute as well as the
‘ substitutes,’ &c. It is further set forth, that the sale took

MURRAY *v.* MURRAY.—4th September, 1844.

place, and that the entail of Cockspow was executed in terms of the statute, on which the pursuer was infeft. Then the summons states, that the pursuer has entered into an onerous contract for the sale of these lands of Cockspow and others, and proceeds to conclude to have it found and declared—1st, ‘That the pursuer has full undoubted right and power to sell the said lands of Cockspow,’ &c. in any way he may think proper, at a fair price, ‘or other onerous consideration;’ and 2d, ‘That the foresaid missives of sale, entered into between him and the said John Murray as aforesaid, constitute a good and valid sale, and binding on the said pursuer,’ &c.

It certainly presents a remarkable peculiarity in this case, that the pursuer, after having found it necessary, with the consent, it may be presumed, of the substitute heirs of entail, to obtain an Act of Parliament for enabling him to sell the lands of Pitlochrie, which he held under an entail said to have contained precisely the same clauses, which, in terms of that Act, were made to constitute the conditions of the entail of Cockspow, should now bring an action to have it found by this Court, that notwithstanding those clauses, he has power to sell the lands of Cockspow absolutely and unconditionally. The meaning of this, however, is plain enough. It must be supposed, either that the pursuer has now discovered some essential defect in the entail, which was not observed while he held the lands of Pitlochrie, or otherwise that the law and the principle of judgment in such cases have been changed, since the time when the Act of Parliament was obtained, and the new entail was executed under the authority of this Court. Whatever may have been the decisions pronounced in particular cases, and however it may be thought that there is difficulty in this as in other branches of law, in reconciling all the decisions, I cannot assent to the proposition, that the law, or the principle of judgment in the application of it, has undergone any change. But it is a possible thing, that the discussion of other cases may have disclosed a

MURRAY *v.* MURRAY.—4th September, 1844.

legal defect in this entail, which had not before occurred to the party or his advisers: and, if it be so, it is perfectly fair for the pursuer to try the question, concerning the extent of his power with reference to onerous deeds of sale.

It seems to be very clear, on the one hand, that the pursuer can be in no better situation, as the *fiar* in possession under the entail of Cockspow, than he was as the entailed proprietor of Pitlochie. All the restraining clauses being, as the Act of Parliament required, expressly applied to him as *institute*, he can have no power which he would not have had as the *substitute* heir under the entail of Pitlochie; and it is impossible that, by the change of the lands, effected only at his own desire, with the consent of the heirs of entail, and by the force of a statute, all being completed in due form and in compliance with the Act 1685, he can have obtained any advantage against the heirs of entail, which he did not possess before, in regard to the lands of Pitlochie. But, on the other hand, it does not appear to me, that he can be in a worse situation with regard to any question of power, according to the legal import of the entail. For although the Act of Parliament was no doubt applied for and obtained, in the belief that the entail of Pitlochie contained effectual restraining clauses against all sales and alienations, yet, if it should appear that it was not *de facto* and *de jure* effectual for that purpose, it must then be held that the pursuer might have sold Pitlochie without asking for any Act of Parliament, and might still have possessed Cockspow in fee-simple. And it does not appear to me, that the mere circumstance of the entail of Cockspow having been necessarily executed by the pursuer himself under the Act of Parliament, can have any effect in the question concerning the legal construction of the entailing clauses as they stand. I do not think, therefore, that the plea last insisted on in the case for the defenders (the 3rd plea in law in the record), could be available against the declaratory conclusion of the summons, if that conclusion should be found to be in itself

MURRAY v. MURRAY.—4th September, 1844.

well-founded. Every thing must depend on what the legal effect of the entail really is.

The question then is, whether this entail is effectual to prevent a sale of the estate. The pursuer takes two points,—1st, That there is a defect in the *resolutive* clause; and 2nd, That the *irritant* clause is also insufficient.

1. The objection to the resolutive clause is no new discovery. It is, that whereas the prohibitory clause prohibits the heirs to *sell, alienate, or dispo*ne the lands; the resolutive clause, which is combined with the irritant, only declares that the heirs shall forfeit if they ‘shall do any thing contrary to the said provisions, ‘either by *alienating* or *dispo*ning the lands, &c.,’ the word *selling* not being repeated. If this objection were well-founded, it probably would apply to both the clauses. But as the very point has occurred, and has been decided both by this Court and in the House of Lords, even with reference to a more doubtful case, and as there is yet no decision whatever to the contrary, I am of opinion that the plea cannot be sustained.

It appears to me, that the present case must be ruled by the two judgments in the case of Elliot of Stobbs, the one in 1803, and the other by the House of Lords in 1821; and that it is too late to argue this question as a matter of abstract law. The question in the case of Elliot, May 19, 1803, was identical with the point raised in the present case, with only the important difference, that in the resolutive clause of the Stobbs entail, the word *alienate* did not occur. The prohibitory clause prohibited the heirs ‘to *sell, annailzie, wadset, dispo*ne, dilapidate, and put away.’ The resolutive bore only the words ‘or who, whether male or female, ‘and I, shall *dispo*ne the said lands and estate,’ &c. Sir William Elliot had entered into a minute of sale, as the pursuer has done. The purchaser suspended on the ground that Sir William had no power to sell; and Sir William brought a declarator to have it found that the entail was not effectual to prevent a sale. The Court sustained the defences, holding the entail to be good. I

MURRAY *v.* MURRAY.—4th September, 1844.

can see no difference between that case and the present, except a difference which is very strong against the pursuer, that here the word '*alienating*' is in the resolute clause. I am not aware that it has ever been doubted, that *sales* are comprehended under the word *alienating*. But in Elliot's case the term *dispone* alone was held sufficient.

The discussion on that entail was renewed in 1813, in relation to the validity of a long lease. This proceeded on the notion that, however the word *dispone* might be sufficient to cover *sales*, it was not equivalent to the term *alienate*, under which the Court had found in the Queensberry cause that long leases were effectually prohibited. This argument prevailed in this Court at the time. But the case having been appealed, the Lord Chancellor Eldon, on very deliberate consideration, reversed the judgment, and found *in terminis*, 'that, according to the true construction of the deed of entail of the estate, the prohibition to *dispone* extends to the lease in question, and that the irritant and resolute clauses do so refer to the specific prohibition to *dispone*, as to render the same effectual against third parties.' It is impossible not to see, that this judgment was a great deal stronger than the decision in 1803. It had long before been decided in the case of Humbie, that a clause prohibiting to *dispone* was sufficient as a *prohibition* against *sales*; and the judgment in 1803 simply held the same term to be sufficient in the *resolute* clause to cover *sales*. Lord Eldon's judgment, again, in express words declares the irritant and resolute clauses expressed by the term *dispone* to be sufficient, by relation to the same term in the prohibitory clause, to secure the entail against third parties. But it was evidently going a step farther, to hold that, under an entail which prohibited to *sell*, *annailzie*, *wadset*, *dispone*, &c., the term *dispone* alone in the resolute clause was sufficient to cover the case of a *long lease*. Yet there would have been no question there, if the term *alienate*, as well as *dispone*, had been in the resolute clause, as it is in the entail of

MURRAY *v.* MURRAY.—4th September, 1844.

Cockspow. It is, however, also of the greatest importance, that the Lord Chancellor, in pronouncing that judgment, referred expressly to the numerous previous decisions on the effect of the word *dispone*; and though, among those quoted to him, the case on the same entail in 1803 was very prominently presented, there is no trace of his having expressed the least doubt concerning the soundness of the judgment pronounced in it. There is, besides, another case, in which all the same doctrine concerning the import of the term *dispone* was in express terms confirmed. *Stirling v. Dun*, House of Lords, June 22, 1829, *W. and S.* 3, p. 462.

Holding, therefore, that the answer to the pursuer's objection in the present case follows *à fortiori* from these decisions; and being farther of opinion, that, even independent of them, the terms of the resolute clause in the entail of Cockspow are sufficient, I think that this plea on the part of the pursuer must be rejected.

2. The special objection taken to the validity of the *irritant* clause is of a different nature, and may admit of more doubt. It seems to have been suggested by the late decision in the House of Lords, in the case of Lang against Lang. But, as it appears to me, that the terms employed in the present case, are of a very precise and determinate nature, and that there is an important difference between it and the case of Lang, I am not able to come to the opinion, that the irritant clause is not sufficient to protect the estate and the heirs against a sale or alienation.

After the prohibitory clause, the entail proceeds to provide, that 'if I, or any of the heirs of tailzie,' &c. 'shall *do any thing* ' *in the contrary of the said provisions*, either by *alienating or* ' *disponing* the lands and others before written, or any part thereof, or *contracting debts*, either real or personal, or *by committing* ' the crime of treason, or any species thereof, or any other crime ' or delict, or doing any other deed, civil or criminal, *the said* ' debts, *deeds*, crimes, and delicts, shall not only *ipso facto* be-

MURRAY v. MURRAY.—4th September, 1844.

‘ come null and void in so far as concerns the lands and others
‘ before written,’ &c. ; but also the contravener shall forfeit the
whole lands, which shall *ipso facto*, ‘ from and after the *respec-*
‘ *tive deeds* of contravention,’ devolve upon the next heir, who
shall have right to succeed ‘ free from all debts, *deeds*, crimes, and
‘ delicts, *done*, contracted, and committed by the contraveners,’
&c.

There can be no doubt concerning the obvious meaning of these clauses. But I fully agree in the statement, that, in such a question of construction, the mere intention to be discovered from a comparison of the different clauses of the deed is not sufficient. It is quite unnecessary to go into any detail of the authorities in this matter. I only think it necessary again to observe, that I cannot entertain the idea, that any of the later decisions which have been pronounced in this Court, or in the House of Lords, have made any change on the rule or principle of the law for the construction of such deeds, as being *strictissimi juris*. The application of the principle to particular cases, is often a matter of great difficulty ; and, in reviewing such cases, it may be thought by individual lawyers, that in some of them it has not received full effect, and in others has been carried too far. But the principle itself is fully recognised throughout them all, and in truth has never been disputed in any one of them, though parties may have contended, and Judges may have thought, that it was sometimes strained to excess, and sometimes did not receive the effect due to it. And it appears to me, that any of the late decisions, which are supposed to have altered the principle of judgment, are no more than exemplifications of the application of the principle of strict construction, always acknowledged, according to the view taken of the special case before the Court.

Waving any farther discussion on this subject, let it be observed, that the passage of the entail from which the above excerpts have been made, constitutes one unbroken sentence,

MURRAY *v.* MURRAY.—4th September, 1844.

embracing both the irritant and the resolute clauses, and that the full legal import of it cannot be seen without taking into view the whole parts of it. It is all governed by the hypothesis with which the clause begins—‘*If, I, or any of the heirs,*’ &c. ‘*shall do any thing in the contrary of the said provisions,*’ &c. This is no doubt followed by an enumeration of particulars, which, according to the rule established, at least since the case of *Tillicoultry*, does and must qualify the general term. But, unlike the clause in *Tillicoultry*, the special acts here enumerated *do* comprehend the case of sales. Not to go back on the point already considered, the words are express, that if the pursuer or any of the heirs shall do any thing in the contrary of the provisions, ‘*either by alienating or disposing the lands,*’ &c., which words, even in an irritant and resolute clause of an entail, which in the prohibitory clause has the word ‘*sell,*’ must be held to be sufficient to comprehend sales. The second case in the hypothesis is ‘*or contracting debts.*’ There is a third case, that of committing treason or any other crime: And then there is a *fourth* more general and comprehensive supposition, viz., by ‘*doing any other deed, civil or criminal*’—that is, any *other* deed contrary to the provisions. It is of very great importance, that *all* these cases or supposed acts of contravention are *alike* under the form of the first words—‘*If I, or any of the heirs*’ ‘*shall do anything contrary to the provisions,*’ ‘*either by selling,*’ &c. The clause, being so far made special by the enumeration, must be so regarded and dealt with; and all the cases are covered alike by the words ‘*If,*’ &c. Now it must certainly be supposed, in giving effect to such an express provision as this, that *something* is to follow in *all* and *each* of the cases stated, and more especially in those which are specific and definite—‘*alienating or disposing*’—‘*or contracting debts.*’ The sentence is not completed till that consequence is laid down. It is possible, no doubt, that by confusion or inadvertency, the words employed may be insufficient. But the question is, whether they are so or not. If they are in

MURRAY *v.* MURRAY—4th September, 1844.

their nature and import sufficient for the natural purpose of covering the supposed acts of contravention, and so completing the sentence with reference to all of them, there is here no confusion or cause of ambiguity, to make it the duty of the Court to refuse effect to them in any particular case. The consequence, then, is thus laid down,—‘the said debts, *deeds*, crimes, and delicts, and *all and every one of them*, shall not only *ipso facto* become null and void,’ &c. That the word *deeds* is in itself technically sufficient to comprehend all deeds of *alienation* or *disposition*, and so to cover the special case in the first part of the hypothesis put, which again is equivalent to sales, will not admit of any serious doubt. For many entails, which have been sifted to the uttermost, had no other word to protect them against sales; as in the Roxburgh entail, in which the irritant clause was simply ‘all *whilk deeds* so ‘to be done,’ &c. Neither in the present case is there any room for the construction, which has been applied in some other cases, that the words have reference only to the last member of the enumeration—‘or doing any other deed, civil or criminal.’ The whole structure of the sentence forbids this: But it is also excluded by the circumstance, that *debts* and *crimes*, which stand *before* that clause, are clearly and expressly included in the declaration of nullity. The word ‘debts’ is not in the general clause; and the specification of them may have seemed to be necessary with reference to the contracting of *personal* debts, as to which no deed or writing of any kind may be executed.

But it is to be observed, that this declaration of nullity does not terminate the sentence. Other consequences are to follow, which all hang upon the same hypothesis, and are also evidently dependent on the nullity of the deeds. The clause goes on—‘*but also* the contraveners, shall not only forfeit’ all right to the estate, but likewise to the rents, &c.; and the lands and mails, &c., ‘shall *ipso facto*, from and after the respective *deeds* of contravention, be devolved on and pertain, &c. to the next heir, ‘free from *all* debts. *deeds*, crimes, and delicts, *done, contracted,*

MURRAY *v.* MURRAY.—4th September, 1844.

‘ and *committed* by the contraveners,’—that is, *applicando singula singulis*, ‘ deeds *done*, debts *contracted*, or crimes *committed*; and ‘ it shall be lawful for the next heir to establish his right as if ‘ the contravener were naturally dead.’ This completes the sentence; and it will be observed, that all the last words are perfectly general, and cannot by possibility be confined in their application to any particular part of the hypothetical cases of contravention stated in the first part of it. They evidently do, and must apply equally to them all. Yet they only follow and are dependent on the irritancy or nullity first declared, proceeding on the entire hypothesis in the first part of the sentence.

From the peculiar structure, therefore, of the whole clause in this entail, it seems to me to be impossible, on any construction however strict, to hold, that there is not a complete and express irritant clause applying to all deeds of alienation or disposition, wherein sales are necessarily comprehended.

The case which apparently gives the most probable support to the pursuer’s argument, is that of *Lang v. Lang*, as decided in the House of Lords. I am bound to hold that case to have been rightly decided, though the judgment of the Court here was different; and I do so hold it. But there is the most marked difference between it and the present case. The clause is constructed in an entirely different manner from that followed in the entail of Overtown. In general, the safest form for making an effectual irritant or resolute clause is to rest on a general assumption of any contravention of the conditions or prohibitions before laid down; because, in any special enumeration, there is always a danger of some important article in the prohibitory clause being omitted, which no general words prefixed or added to the enumeration will in that case legally supply. But there is a different danger in the other form. If care be not taken, in the position and terms of the general clause of irritancy, to make it expressly and necessarily apply to all the parts of the prohibitory clause, and to exclude any more limited application, the

MURRAY v MURRAY.—4th September, 1844.

principle of strict construction may make it necessary to understand it in a more limited sense in favour of freedom, because the words admit of such an interpretation. This seems to be the principle of the case of Lang, as it was of that of Adam v. Robertson Barclay. The entailer had confined himself to general words immediately following the last part of the prohibitory clause—‘and if they *do in the contrary*, it is declared,’ &c. The question was, whether these general words, in connection with the *special* consequence laid down, necessarily applied to everything within the prohibitory clause, or might be construed as being confined to the last member of that clause, with which they stood in immediate juxtaposition. It was held, as I understand the case in this point of it, that they did admit of this last construction, and that the words, ‘if they *do in the contrary*,’ ‘all *such debts and deeds* shall be intrinsically void and null,’ were to be taken as limited in their application to the immediately preceding substantive prohibition—‘nor to contract *debts*, nor do *any other deed*, whereby’ the lands might be evicted, &c.

Whatever opinion shall be formed of the present case, it cannot, in my apprehension, stand on the same ground with that of Lang. Even if the entailer had here rested on the general words in the beginning of the irritant clause, they are such that it would have been difficult or impossible to confine their application in the same way as the simple words ‘do in the contrary’ were confined in Lang’s case. For they are, if I or any heir ‘shall do anything in the contrary of *the said provisions*’—words which plainly relate to the whole limitations laid down. But the *irritant clause itself* here contains an enumeration of the cases to which these general terms were expressly meant to apply; and the very first is that of ‘alienating or disposing.’ The declaration of irritancy is express, that if the party shall act ‘*contrary to the provisions, by alienating or disposing*,’—in *that precise case* the consequence declared shall take effect. It is very true, that if the words in which that consequence is

MURRAY v. MURRAY.—4th September, 1844.

expressed were not *in themselves* sufficient to comprehend deeds of alienation or disposition, there might be a failure from the want of apt and proper terms. But this would be quite different from the result obtained in the case of Lang, and must be rested on a different principle. And if, on the other hand, the words, or any of them, are in themselves sufficient for the case of alienation or disposition, which I apprehend they clearly are, it cannot in this case require or warrant a more limited construction of them, that the term *deeds* is necessarily connected with *debts* and *crimes*, in whatever order, with reference to the *other* cases of contravention in the enumeration; or that there is in that enumeration a general clause added to the contraction of debts, of doing any other deed, civil or criminal. The entailor has *expressly* said, that the consequence shall follow in all or any of the cases hypothetically assumed; and therefore, holding it to be clear law, that acts of alienation or disposition are comprehended under the term *deeds*, I cannot, without rejecting what appears to me to be the plain declaration of the entailor, come to the conclusion that this irritant clause does not effectually reach any act of alienation or sale.

In truth, the point as to the effect of the irritant clause in Lang's case could only have become of any importance, if the other point which occurred in that case, as to the want of a substantive clause against altering the order of succession, had been determined differently from the judgment regarding it. When it was decided, that there was no such effectual clause, and consequently that the heir in possession could at once extinguish the interest of all the substitutes, by a gratuitous act of alteration, the effect of the irritant clause ceased to be of any practical consequence. Still the point was solemnly determined; and I have so considered it.

The case of Adam was of the same nature with that of Lang. But it appears to me to have been a stronger case in favour of the judgment; the general words—'all which debts, deeds, and

MURRAY *v.* MURRAY.—4th September, 1844.

‘contractions’—plainly admitting of a fair application to the special class of debts or deeds immediately before mentioned, viz. debts or deeds *before the heir’s succession*. There was, altogether, in that entail, an inaccurate disorder in the clauses, which fairly unhinged the entail on sound principles.

JAMES W. MONCRIEFF.

We concur in this opinion.

J. H. FORBES.

A. MACONCHIE.

J. A. MURRAY.

H. COCKBURN.

F. JEFFREY.

In this opinion Lord Cunninghame ultimately concurred; and thereafter, in conformity with it, the Court pronounced the following interlocutor:—“26th February, 1842.—The Lords
“having advised these actions, and revised cases for the parties,
“with the opinions of the consulted Judges, sustain the defences,
“dismiss the action and supplementary action of declarator, and
“also the action of adjudication in implement: assoilzie the
“defenders from the conclusions of the said actions, and decern.”

The appeal was against this interlocutor.

Mr. Burge, Mr. Moir, and Mr. Anderson for the Appellant.
—I. The resolute clause does not apply to sales; the prohibition in the prohibitory clause is against selling, alienating, or disposing; each of these terms must receive a meaning and effect—selling speaks for itself—alienating, if used alone, might perhaps have been sufficient to include selling, but when used along with the word “selling,” it has evidently a sense different from selling, and intended to embrace those methods by which alienation may be accomplished, other than by selling.

[*Lord Brougham*.—All are agreed that *alienate* will include selling, but the question is, if it will when selling is used along with it, and is subsequently dropped.]

MURRAY *v.* MURRAY.—4th September, 1844.

Precisely. In using the three expressions “selling,” “alienating,” and “disponing,” the entail follows the exact terms of the statute, which uses all three as expressive of distinct substantive acts, and not as synonymous designations of the same act. Alienation and disposition relate to deeds of conveyance, by which a right to the lands is given; but an heir selling, though he incur a personal obligation which may be the ground of adjudication, gives neither an alienation nor a disposition; the purchaser gains his entry not by any deed from the seller, but by entry with the superior. If, then, selling, in the language of this entail, as it is obtained from the prohibitory clause, be something different from alienating or disponing, to make the prohibition effectual, selling must be found also in the irritant and resolute clauses, for in these clauses alienating and disponing are to receive the same limited construction given to them in the prohibitory clause, according to those principles which have been laid down in *Speid v. Speid*, 5 *Sh.* 619; *Horne v. Rennie*, 3 *Sh. & Mc. L.*, 143; *Dick v. Drysdale*, 16 *F. C.*, 460; *Barclay v. Adam*, *Hume*, 877; *Lang v. Lang*, 1 *Mc. L. & Rob.*, 871. In *Hopetown v. Humbie*, *Mor.* 15,505, no doubt it was held that a prohibition against disponing included one against selling, but that judgment never received the sanction of this House, and at all events the case was different from the present in this respect, that there *selling* did not occur at all, while here it does occur in the prohibitory clause, along with alienating and disponing. In the case of *Elliott*, 1 *Sh. App.* 17, it certainly was held that a prohibition to sell occurring along with disponing was fenced by an irritancy of *disponing* alone; but that decision would not now be consistent with those strict rules of construction which have since been laid down in *Speid v. Speid*, and *Lang v. Lang*.

II. The irritant clause is also defective, inasmuch as it does not apply to sales. It does not in terms apply to them, and the only word which constructively can by possibility have such an

MURRAY *v.* MURRAY.—4th September, 1844.

application is the word “deeds.” In the prohibitory clause, however, “deeds” is classed with crimes and acts of feudal delinquency, and is in a branch of the clause separate from that applicable to sales; and so in the irritant clause it appears in the same company. After speaking of crimes or delinquencies, it says, “the said deeds,” which is plainly referable to the deeds immediately before spoken of, and this is confirmed by that part of the clause which declares that the lands shall devolve upon the next heir; it is here the nominative to the verb “done,” the proper verb to be used in speaking of crimes and acts of feudal delinquency, and not to the verb “granted,” which would have been the appropriate expression, if the making of legal instruments had been meant to be provided against.

The Lord Advocate and Mr. Moncrieff, for the Respondents, cited *Hopetown v. Humbie*, *Mor.* 15,505; *Elliott, Sh. App.* 97; *Brown v. Dalhousie*, *F. C.*; *Queensberry v. Wemyss*, 1 *Bligh*, 406; *Adam v. Farquharson*, 2 *D. B. & M.*; *Lumsden v. Lumsden*, 2 *Bell*, 104; *Anstruther v. Anstruther*, 2 *Bell*, 242.

LORD CAMPBELL.—My Lords, the question here is, whether the appellant is entitled to sell the lands of Cockspow, in which he stands invested under an entail which he has executed in pursuance of a private Act of Parliament, authorizing him to entail these lands as a substitute for the lands of Pitlochrie, to which he had succeeded as heir of tailzie and provision. He has executed this entail in the terms of the Act of Parliament, and he is justified in asking a declaration of his power to sell, although he obtained the Act upon the supposition that, under such an entail, the power of sale did not exist.

He objects to the resolution and irritant clauses of the entail on three grounds,—1st, that they do not specifically apply to *selling*, although *selling* is specifically forbidden in the prohibitory clause; 2nd, that *sale* is not comprehended under the word

MURRAY *v.* MURRAY.—4th September, 1844.

“*deeds*” in the irritant clause; and 3rd, that the operation of this word in the irritant clause is at all events destroyed with respect to *sale* by a subjoined qualification, “so that the lands shall be no wise affected or burdened therewith in prejudice of the succeeding heirs of tailzie and provision.”

In considering the validity of these objections, I deem it quite unnecessary to discuss the general principles of the law of Scotland respecting entails, which are familiar to your Lordships, and which you very recently had occasion to expound in the cases of *Lumsden v. Lumsden*, and *Anstruther v. Anstruther*. I shall therefore at once proceed to deal with the objections, taking them in their order.

First. The first applies both to the resolute and irritant clauses which are introduced by the words “and if I or any of the heirs of tailzie shall do anything in the contrary of the said provisions, either by alienating or disposing the lands, or contracting debts, or by committing the crime of treason, or doing any other deed civil or criminal,” there having been a prohibition to “to *sell*, alienate, or dispoⁿe the lands.” It is not disputed that if there had been merely a prohibition “to alienate or dispoⁿe,” *selling* would have been included, and the fetters would have been complete; but it is contended that, as there is a specific prohibition against *selling*, it is not enough that the resolute and irritant clauses should be directed merely against *alienating* and *dispoⁿing*.

If *selling* is to be considered as contemplated by the entailer as a different act from *alienating* or *dispoⁿing*, I think the objection would be well founded, for where the resolute and irritant clauses, instead of generally referring to the acts prohibited, enumerate some of them specifically, they must comprehend all; but if, in the prohibitory clause, there is first a *specific* act expressed, and then a *generic* word is used so as to be clearly intended to comprehend the specific act, and not merely to express another specific act in addition to the former, I conceive

MURRAY *v.* MURRAY.—4th September, 1844.

that it is sufficient if the *generic* word is introduced into the resolute and irritant clauses, for thereby the entailer has expressed his intention by language which, in its grammatical and natural sense, without conjecture or doubtful inference, unequivocally shows that the specific act expressed in the prohibitory clause is included in the resolute and irritant clauses.

Here, when the words “alienate and dispone” follow the word *sell* in the prohibitory clause, I think it clear that the entailer intended to use *generic* words, including an alienation or disposition by *selling*, and therefore that the resolute and irritant clauses are directed against selling, being directed against “alienating or disponing.”

So I should have thought, my Lords, had the question been new; but the appellant’s counsel admit that the very same objection was urged against the entail of Stobbs, in 1803, and was overruled. As that case was not brought by appeal before this House, we are not absolutely bound by it, but it has stood for law during forty years. As a decision of the Supreme Courts in Scotland, it received great countenance from this House in the Queensberry case, in the year 1821, and, in my humble opinion, it rests on sound principle.

Secondly. The next objection is, that the word “deeds” in the irritant clause does not apply to *selling*. This word is most flexible, for it may be confined to written instruments, or to feudal delinquencies, or it may extend to all acts enumerated in the prohibitory clause. Here it is a word of reference, and we must ascertain in what sense, according to the grammatical and natural construction of the language employed, it is used. The prohibitory clause forbids the heirs of tailzie “to sell, alienate, or “dispone,” or “to do or commit any *other* fact or deed in pre-“judice of the present tailzie, or those who shall succeed in “virtue thereof,” thereby showing that to sell, alienate, or dispone, was a *deed* in the contemplation of the entailer. Then he goes on to say, that if the heirs of tailzie should do anything

MURRAY *v.* MURRAY.—4th September, 1844.

against the said provisions by alienating or disposing the lands, (words which we must now assume include *selling*), or do any other deed civil or criminal, “the said deeds” shall be void, &c. Now, I cannot doubt that the word “deeds” here includes selling and every species of alienation and disposition contrary to the provisions of the entail; and this construction is strengthened by looking to the language of the statute, 1685, and to the manner in which deeds of entail that have been established as valid, are constructed.

The Tillicoultry case and the others relied upon, proceed upon the principle, that general words of reference which would of themselves be sufficient, may be cut down by subsequent words of imperfect enumeration, showing that, according to the grammatical and natural construction, they were used in a qualified and restrictive sense. In this entail there is nothing to show that the general words relied upon should not have full effect given to them, unless the third objection should prevail, which I now proceed to consider.

Thirdly. It is said that deeds here cannot include *sale* or *alienation*, the entailer having declared his object merely to be that the lands should not be burdened in the hands of the heirs of tailzie. We cannot refuse to listen to this objection, although it was not taken in the Court below; but after mature consideration, I come to the conclusion that it was not urged sooner, because it was felt to be untenable. I know not that the entailer must be taken to express the whole of his object by the clause which he introduces with “so that,” or that he intended to do more than state one consequence of the irritancy. But, at any rate, can it be doubted that by a *sale* the lands would be affected in prejudice of the succeeding heirs of tailzie and provision? After a written agreement to sell, the purchaser would have a specific remedy to take up his title to the land; and if there were at once a regular disposition to the purchaser, it is difficult to say that the land would not be *affected* by the deed which

MURRAY v. MURRAY.—4th September, 1844.

defeats the destination in the tailzie, and carries it away from the heirs, who would otherwise have succeeded.

I am not surprised therefore to find the same words in other entails, which have been upheld after strenuous objections on other grounds, although this objection, which might have been taken, was not urged.

Upon the whole, my Lords, I am of opinion, that in this case the appellant has not power to sell the lands of Cockspow; and I humbly move your Lordships, that the interlocutors complained of be affirmed with costs.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend in the view which he takes of this case. I had myself prepared a judgment upon this case, in which I took precisely the same view of those three several objections to which he has adverted.

It is really in vain to contend that the words used here do not comprehend a sale in the one clause, after the authorities which are set forth in the Stobbs case, which has been acted upon in one or two instances, and which has been highly approved of for the last forty years and upwards. The objection is one upon which at first one might have been disposed to feel a little more doubt; but when one takes the whole structure of the sentence together, I do not think that any doubt whatever remains. “Deed” is a word of flexible import; it is not a word that has always the same meaning. Sometimes it may mean a fact or act—sometimes it may mean a feudal delinquency—sometimes it may mean an instrument—sometimes it may mean an act of service. In this case, according to the judgment which I had certainly formed, and in which I entirely concur with my noble and learned friend upon the authorities relied upon in this case, there is no doubt whatever that it is sufficient to support the view which has been contended for.

Now, my Lords, the last observation which I have to make,

MURRAY *v.* MURRAY.—4th September, 1844.

refers to the argument which was urged very ably at the bar, and which had a great effect upon me at the time it was urged by Mr. Anderson, to show that there was a limitation by reason of the words “in so far,” as imported into that sentence, and that those words affected what preceded it with a qualification. Now, that certainly at first did appear to some of us to require a little consideration. I had a communication afterwards with a learned conveyancer upon the subject; and the first thing which I found, certainly led me to hope that we should not find it necessary to adopt that argument, and to hold this clause to be affected by those apparently qualifying terms, namely, that it was the case in ninety-nine out of a hundred instruments of this description, in use, and held to be valid, and it would therefore have been a most frightful thing if we had been called upon at this time of day to hold a doctrine which would have shaken the titles under those instruments; but when we come to have the case thoroughly investigated, it seems quite clear that the true, the logical, and rational construction of these words do not at all import or affect the qualification in question of the preceding limb of the sentence. I am sure I need do no more than refer to the very able argument on this question by Mr. Moncrieff, one of the very ablest arguments, so able as to draw commendation and most just eulogy from every one who heard it. He appeared to me not only to deal with it in a very masterly manner in point of succinctness and acuteness, but also in a triumphant manner.

Upon these grounds I retain the opinion which I formed upon this case when I first considered it, and I join with my noble and learned friend in holding that the judgment ought to be affirmed.

LORD COTTENHAM.—My Lords, this is an appeal against a unanimous opinion of eight of the Judges of the Court of Session, Lord Cunninghame, who at first expressed a doubt, having

MURRAY *v.* MURRAY.—4th September, 1844.

ultimately concurred with the other judges upon the first point, whether the resolute and irritant clauses, which are combined, include the act of selling, under the terms “alienate and dispone,” (the prohibitory clauses prohibiting the heir to sell, alienate, or dispone, and the resolute clauses only declaring that the heirs shall forfeit, if they shall do anything contrary to the said provisions, either by alienating or disposing). I concur in the opinion of the Court below that the case is concluded by decisions of the Court of Session and of this House. In the case of *Humbie*, 1758, *Mor.* 15,505, the Court of Session held that a prohibition to dispone an estate implied a prohibition to sell. In the case of *Elliot of Stobbs*, May 19, 1803, the prohibitory clause prohibited selling or disposing, and the resolute clauses contained only the word *dispone*. The declarator prayed a declaration that the entail was not good to prevent a sale, but the Court sustained the defences, holding the entail to be good. That was a much stronger case than the present, the word *alienate* being found in the resolute clause in this entail, though not in that of *Stobbs*, but it was not the subject of appeal. In 1813 another question arose upon the same entail, and the question was whether the clauses applied to long leases. The Court of Session held that they did not, but the judgment was reversed in this House, Lord Eldon holding that the word *dispone* included a grant of a long lease. That long leases were included in the word *alienate* had been before decided in the *Queensberry* case. Granting a lease is a partial alienation or disposing of the interest in the land; selling is an alienation or disposing of the whole. To hold, therefore, that these words do not include a sale, though they have been decided by the House to include leasing, would be to hold that the leasing was more an alienation or disposing of the land than the actual sale, or, in other words, that the part was greater than the whole.

MURRAY *v.* MURRAY.—4th September, 1844.

I think, therefore, that the resolute clause includes the act of selling, although alienating and dispoing are the only words used.

Upon the irritant clause, the question is, whether sales are included in the declaration of nullity; and keeping in mind that the words “alienate and dispoine” include sales, I cannot think that any doubt can exist upon that subject. The “said debt, “deeds, crimes, and delicts, and all and every of them,” are declared to be *ipso facto* null and void, and the question is whether selling, or alienating or dispoing, constitute one of these deeds. To ascertain this, the sentence must be traced from its commencement, “and if I or any heir of tailzie, &c., “shall do anything contrary to the said provisions.” Then comes the enumeration: “by alienating or dispoing,” which includes selling, “or contracting debts, or committing the crime of treason, “or doing any other deed, civil or criminal, the said debts, deeds, “crimes, and delicts shall not only *ipso facto* become null and “and void, so far as concerns the said lands.” Debts and delicts are specified in terms; the only other matter before enumerated is alienating and dispoing, which includes selling. To this, therefore, the word *deeds* must, in the strict construction of the sentence, be held to refer; there is no ground for holding that these words refer only to what immediately precedes them.

If this be the right construction of this sentence, that is, if the words “debts, deeds, crimes, and delicts” refer to and include all the matters before enumerated, the case of *Lang v. Lang* has no application to the present, that decision having turned upon the construction put upon the particular frame of the sentence in that case, namely, that the words “and if they “do to the contrary” referred to the words which immediately preceded it, and did not include all matters before enumerated, which the words used in this case I think clearly do. The case of *Adam* was decided upon a similar ground. I therefore concur

MURRAY *v.* MURRAY.—4th September, 1844.

in the opinion that the interlocutor appealed from ought to be affirmed.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the Interlocutor, so far as therein complained of, be affirmed with costs.

G. and T. W. WEBSTER—GRAHAM, MONCRIEFF, and WEIMS,
Agents.