are more than imaginary, and whether this clause has not been introduced into the decree, not because there was any real danger of valid complaints by such tenants, but to satisfy importunity of the appellants' solicitors, made before the arbitration was concluded, that the appellants should know in what way the arbiter proposed to secure the company against the tenants' claims, if the money was paid to Sir Norman. At all events, however, it is to be observed, that this provision does not affect the principal sum of £4000 that is certainly due. It is the interest only which is affected, in case any of the tenants' claims should be made good. This is not, properly speaking, an award in which every matter in dispute is to be finally disposed of, but a valuation. And the only effect of the objection ought to be that the valuation should be reduced *pro tanto*, if the respondent should so consent to it. But having heard the opinion already given by my noble and learned friends, I agree with them in thinking that a sufficient case is not made out to reverse the judgment of the Court of Session, either in the whole or in the part.

LORD KINGSDOWN.—My Lords, I entirely concur in the judgment which it is proposed to your Lordships to pronounce, and I think it would be only a waste of time, if I were to go through the reasons which have been already, to my mind, satisfactorily given.

*Interlocutor affirmed, and appeal dismissed with costs.*

*For Appellants*, Grahame, Weems, and Grahame, Solicitors, London; Hope and Mackay, W.S., Edinburgh. — *For Respondents*, Robertson and Simson, Solicitors, London; Bell and M'Lean, W.S., Edinburgh.

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## MARCH 28, 1860.

PERCY ARTHUR CUNNINGHAM, *Appellant*, *v.* SIR THOMAS CUNNINGHAM FAIRLIE, *Respondent.*

Entail—Fetters—Alienating—Disponing—Reduction—*The prohibitory clause of a tailzie declared, "that it shall not be lawful to the heir male of my body, nor to any other of the heirs or members of entail, to sell, dispone, wadsett, or impignorate the lands, nor to contract debts thereupon." The irritant and resolutive clause provided, "that if the heirs or members of entail, shall act and do in the contrary of any of the particulars above specified, with respect to altering the order of succession, selling, or contracting debt, then all and every one of such debts, acts, and deeds, shall be* ipso facto *void and null."*

HELD (affirming judgment), *That the tailzie was invalid, in respect that "disponing" was not struck at by the irritant clause.*[1]

The *defender* having appealed, maintained in his *printed case* that the judgment of the Court of Session should be reversed because—1. The deed of entail was effectual in terms of the Statute 1685. *Russell* v. *Russell*, 15 D. 192. 2. Because the Statute 11th and 12th Vict. c. 36, § 43, upon which the respondent founded as shewing the invalidity of the entail, referred solely to defects in the prohibitory clauses of deeds of entail, and not to any alleged defect in the irritant or resolutive clauses. *Bogle* v. *Cochrane*, 7 Bell's Ap. 75.

The *respondent* in his *printed case* supported the judgment on the following grounds—1. The prohibitions in the deed of entail against alienating were not duly fenced by a valid or sufficient irritant or resolutive clause. And 2. An entail, defective like the present, in regard to any one of the statutory provisions, was, by the Entail Amendment Act, 11 and 12 Victoria, cap. 36, § 43, declared to be invalid and ineffectual as regards all the prohibitions, and the estate declared subject to the debts and deeds of the heir in possession. *Boswell* v. *Boswell*, 14 D. 378; Sandford on Entails, pp. 298, 299; Bell's Principles, § 92; 1 Stair, 14, 1; 1 Bankton, 19, 3; 3 Erskine, 3, 4; 1 Bell's Commentaries, (6th edition,) p. 87; *Ogilvie v. The Earl of Airlie*, 2 Macq. 263; *ante*, p. 470; Bell's Principles, (4th edition,) p. 625; 3 Ersk. 8, 29; Duff, Feudal Conveyancing, pp. 358, 359; Menzies' Lectures, p. 697; *Sinclair* v. *Sinclair*, 1 Paton, Ap. 459; *Nisbet* v. *Young*, 2 Paton, 98; *Little Gilmour* v. *Caddell*, 16 S. 1261; *Lang* v. *Lang*, M'L. & Rob. 871; 11 and 12 Vict. cap. 36.

The *Attorney General* (Bethell), and *Kerr*, for the appellant.—The rule established with regard to the construction of deeds of entail is, that they are to be treated as *strictissimi juris*. It is, however, a mistake to suppose, that the Courts are to be ingenious in devising constructions which are favourable to freedom; on the contrary, the plain meaning of the language used must

[1] See previous reports 19 D. 597; 29 Sc. Jur. 276. S. C. 32 Sc. Jur. 473.

always be given effect to, whatever be the consequence, and however strict the provisions of the deed may be supposed to be—*Per* L. Campbell, *Lumsden* v. *Lumsden*, 2 Bell's Ap. 104; *Anstruther* v. *Anstruther*, 2 Bell's Ap. 249. Here the general irritant clause happens to omit one of the things included in the prohibitory clause, but it is not to be inferred that the irritant clause was not intended to be as wide as the prohibitory. On the contrary, it was intended to be equally comprehensive, for it begins with general words, and the mere fact of some only of the particulars being mentioned afterwards ought not to be taken to import, that the general words also used are to be restricted to such particulars. The rule by which, when general words are used, and particulars are then added which might properly be included in those general words, the particulars are held to govern and restrict the general words, has been carried to an extent inconsistent with common sense. Here the general words in the irritant clause ought to be given effect to, and the particulars following may be disregarded. But even if the particulars are only to be regarded, the words "altering the order of succession" are sufficient to include every "disponing" of the lands. Even though the irritant clause is defective as not striking against the disponing of the estate, the entail is not bad *in toto* under the Rutherfurd Act, 11 and 12 Vict. cap. 36, § 42, which applies only to deeds which are defective in the prohibitions. Here the prohibitions are all right, and it is only the irritant clauses which are defective, if any. The interlocutor of the Court below ought therefore to be reversed.

*Rolt*, Q.C., and *Anderson*, Q.C., for the respondent, were not called upon.

LORD CRANWORTH.—My Lords, I think that, as a general rule, it is not desirable to stop the argument without hearing what is to be said in favour of the decree which is objected to; but there really are some cases so clear, that after hearing the counsel for the appellant your Lordships would feel it a waste of time to let the argument proceed further; and I must confess that this appears to me, and I believe to all of your Lordships, to be one of those cases.

Two questions have been raised — one as to the construction of the deed of entail, the other as to the construction of the act of parliament. With respect to the construction of the deed, that again is divided into two heads—*First*, It is said, (I alter the order in which these questions were raised,) that everything which is prohibited is substantially irritated, because the irritant clause here extends to "altering the order of succession, selling or contracting debt," and it is said, that that embraces everything which is prohibited, for altering the order of succession extends, in truth, to every alienation or disposition, whether by sale or otherwise. Now, that certainly is not the case, at least it is not the light in which the legislature has viewed such a thing, and I think very properly viewed it; because, suppose there be in the deed of entail an order of succession according to which that property is to go first to A and the heirs male of his body, afterwards to B and the heirs male of his body, and then to C and the heirs male of his body; and suppose the tenant in tail in possession should take upon himself to say that C and the heirs male of his body shall precede B and the heirs male of his body, that would be altering the order of succession. That is the thing against which that branch of the Statute and that part of the clauses of prohibition in deeds of this sort is always directed, and that is clearly treated in the act as distinct from the other prohibitions.

Then it is said, that if that argument is unavailing, still, in truth, everything that is prohibited is here in terms irritated; for this reason, because the irritant clause is in these words—That if any of the heirs male shall "act or do in the contrary of any of the particulars above specified, with respect to altering the order of succession, selling or contracting debt," and so on. It is said, that these latter words, "with respect to altering the order of succession, selling or contracting debt," are not to be taken as qualifying what went before, but as being an enumeration of certain instances, as it were, of that which is prohibited in general. My answer to that is, that I do not know how language could be framed to make more clear the intention of the framer of this deed to qualify the irritant clause and to restrict it to these particular acts. At the time when this deed was framed, the principle of Lord Rutherfurd's Act certainly did not apply. It was not introduced for a century afterwards, and I suppose the framers of this deed did intend, that there should be a power of disponing this property, not by sale, and not by altering the order of succession, and not by contracting debt. I want to know how they could have framed and expressed that intention more clearly than these words have expressed it?

With respect to all prohibitions that relate to altering the order of succcession, selling, or contracting debt, it is provided, that the thing prohibited shall be irritated. But when there is a prohibition in respect to which the irritancy is not applied, really it seems to me that there is no reasoning necessary upon the subject. It is expressly in terms excluded from the irritant clause. Then, that being so, the only other question is upon the construction of the late act, called Lord Rutherfurd's Act. The language of that act is, that where any tailzie shall not be valid and effectual in terms of the Statute passed in 1685, in regard to the prohibitions against alienation and contraction of debt, and alteration of the order of succession, it shall be invalid as regards any one of such prohibitions, and shall be invalid as to all. The argument of the appellant is, that all that is there referred to is the prohibitory clause, and it is said, that the prohibitory clause is not invalid. Of course the prohibitory clause by itself is not invalid; but

if the prohibition is invalid upon the whole face of the deed, as to any of the particulars, it is invalid as to all. Now here it is invalid, because the pr hibition is not struck at by the irritant clause—not that there is anything in the prohibitory clause itself which makes it invalid; but it is invalid, because that which is necessary to give validity to the prohibition in the subsequent part of the deed is wanting.

The very few observations which I have thought it necessary to make upon the subject are probably so many too many, because one here may run and read. It is perfectly obvious that here is a deed of entail in which there is wanting an irritant clause upon one of the particulars prohibited, and Lord Rutherfurd's Act says, that in such a case the deed shall be void altogether. I have preferred to go thus far into the case rather than to rely upon the numerous previous decisions upon this subject, because I am glad to be able to say, that if these decisions had not taken place, and we had now to decide (what we have not now to do) this question for the first time, I think we ought to have decided it exactly in the same manner. It would, in truth, be sufficient upon this part of the case to say, that it is *res judicata* in at least half a dozen instances since the Act passed. I therefore move your Lordships, that this decree of the Court of Session be affirmed, and this appeal be dismissed with costs.

LORD WENSLEYDALE.—I am of the same opinion. I think it is a point perfectly clear in this case, that the prohibitory clause goes farther than the irritant clause. The prohibitory clause is a prohibition against disponing in any way; the irritant clause clearly applies only to one mode of disposition, that of selling. Therefore, as there may be many other modes of disposition short of altering the course of inheritance, it is clear, that the irritant clause is defective. Therefore I concur entirely in the motion of my noble and learned friend, that the judgment of the Court below be affirmed.

LORD CHELMSFORD.—I agree in every respect in the opinion of my noble and learned friends.

LORD KINGSDOWN.—I also entirely agree.

*Interlocutors affirmed, and appeal dismissed with costs.*

*For Appellant*, Hooke, Street, and Gutteres, Solicitors, London; John A. Campbell, C.S., Edinburgh.—*For Respondent*, Robertson and Simson, Solicitors, Westminster; Dundas and Wilson, C.S., Edinburgh.

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APRIL 20, 1860.

## PETER DREW and MATTHEW DICK, *Appellants*, *v.* NATIONAL EXCHANGE CO., *Respondents.*

Appeal to the House of Lords—Company—Descriptive Name—Competency—Process.

HELD, *That an appeal to the House of Lords was incompetent, in respect the judgments submitted to review were interlocutory and unanimous, and leave to appeal had not been obtained from the Court of Session.*

*Interlocutors as to the title to sue, as to the form of issues, and as to havers, and production of documents, are all interlocutory matters.*[1]

*A company by its descriptive name may sue and be sued in Scotland, it being a* persona standi.

The defenders now appealed, maintaining in their case that—1. The pursuers had no title to insist. 2. The Court of Session ought to have granted one or other of the appellants' motions—either, *first*, to ordain the company to produce the detailed balance sheets and relative statements of the affairs of the company for the years 1846 and 1847; or, *secondly*, to grant warrant of imprisonment, otherwise called second diligence, against James Gourlay, one of the respondents, for not producing, when examined as a haver for the appellants, the detailed balance sheets and relative statements of the company's affairs for the years 1846 and 1847, which were traced into his possession, and have been fraudulently concealed or destroyed by him; or, *thirdly*, to absolve, *de plano*, the appellants from the action. 3. The issues settled by the Court were not the correct issues for the trial of the cause. 4. The interlocutor of 19th March 1858, which approved of the auditor's report, and decerned for a certain amount of expenses, was *ultra vires* of the Court below, in respect that, at the time when said interlocutors were pronounced, the whole cause was taken away from the Court of Session by appeal, and was then depending in this House.

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[1] See previous reports 20 D. 837: 30 Sc. Jur. 272, 484. S. C. 32 Sc. Jur. 482.