JUNE 12, 1866.

JAMES HOWDEN, Accountant, Edinburgh, *Appellant*, *v.* The Hon. CORNWALLIS FLEEMING and Others, *Respondents*.

Entail—Fetters—Acts and Deeds made—Meaning of word "made"—*An irritant clause of an entail stated, that if any heir should contravene the provisions and limitations, then all such acts and deeds of contravention are not only hereby declared to be void and null to all intents and purposes "sicklike as if the same had never been made," but also the heir so contravening, etc.*

HELD (affirming judgment), *Though the word "made" was only used, still it might be either treated as surplusage, or read on the principle* reddendo singula singulis, *as applicable only to deeds of contravention by way of illustration of the meaning; and its effect was not to restrict the previous generality, and hence the clause was effectual.*[1]

The pursuer, Viscountess Hawarden, having made up titles as heiress of entail to the estates of the earldom of Wigtoun, the lands of Waterhead, and the lands of Cumbernauld, brought this action of declarator to have the three several entails of these lands declared effectual, and for reduction of three dispositions in fee simple of these lands executed by John, thirteenth Baron Elphinstone, in favour of himself and his heirs and assignees. The action was defended by James Howden, trustee on the sequestrated estates of Lord Elphinstone, and by George Dunlop, who held an *ex facie* absolute disposition of these lands executed by Lord Elphinstone. The entails of Waterhead and Cumbernauld were expressed in the same terms as the entail of Wigtoun.

The entail of the Wigtoun estates was created by bond of tailzie dated 24th June 1741, executed by the Earl of Wigtoun.

The prohibitory clauses were as follows:—"That it shall not be lawful to the heirs male of my body, or any other the heirs of taillie and provision above written, substitute to them, to do any fact or deed whatsoever, directly or indirectly, whereby to alter, innovate, or infringe this present taillie either in the order of succession thereof nor in any of the clauses, provisions, or irritancies thereto adjected, and if it shall happen any of them to be guilty of treason or lese majesty, misprision of treason, or any other crime whatsoever whereupon forfeiture may ensue, in that case the right of the persons so guilty shall *ipso facto* be void and null as if the same had never been, and my said estate and whole right thereof shall belong to the next heir of taillie substitute to the person guilty, so that any forfeiture by crime shall only affect the person guilty, personally to vacate and make void his right, but shall not affect the succession or prejudge the heirs substitute, to the said guilty person by virtue of this present taillie; and further providing, that it shall noways be lawful to the heirs male of my body or any others, the heirs of taillie above written, to sell, annaille, dispone redeemably or irredeemably, dilapidate or put away my said lands and estate, or any part thereof, to any person or persons, for whatever cause or occasion either onerous or gratuitous, nor to grant tacks thereof, or of any part of the same, in diminution of the rental or for a longer term than 19 years or the granter's own lifetime, nor shall it be lawful to them, or any of them, to contract or ontake debts thereupon, or to grant wadsetts thereof or annualrents or annuities furth of the same, nor to do any other fact or deed whatsomever, directly or indirectly, whereby the said lands, or any part thereof, may be adjudged, apprised, or otherwise affected, burdened, or evicted, except allenarly in so far as is hereby specially reserved, viz."

The irritant and resolutive clauses were—"And further providing, as it is hereby expressly provided and declared, that if it shall happen any of the heirs of tailzie above mentioned to contravene the provisions and limitations above written, or any of them, as the same are above expressed, then and in that case, all such acts and deeds of contravention are not only hereby declared to be void and null to all intents and purposes *sicklike as if the same had never been made*, but also the heir so contravening shall *ipso facto* amit, lose, and tine all right to the said lands and estate above written, and the same, and haill right thereof, shall fall, accresce, pertain, and belong to the next heir of this present taillie substitute to the contravener who shall happen

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[1] See previous report 3 Macph. 748; 37 Sc. Jur. 385. S. C. L. R. 1 Sc. Ap. 40: 4 Macph. H. L. 41; 38 Sc. Jur. 434.

to be in life for the time, to whom it shall be lawful to serve himself heir to the contravener's immediate predecessor who died last vest and seised in the said lands and estate before contravention, sicklike as if the contravener had never existed, or otherwise to prosecute and establish the right of the said lands and estate by reduction and declarator *ex capite contraventionis* or by adjudication, or any other manner of way, as accords of the law, nor shall it be competent to the person so contravening and incurring the irritancies in manner above expressed to purge the same after once duly incurred."

The entailer was succeeded in the Wigtoun estates by Mr. Charles Fleeming, who became Earl of Wigtoun, and who died without issue and without having made up titles to the estates. The succession then opened to Lady Clementina Fleeming, daughter of the entailer, who made up her title by general service to the entailer by instrument of resignation and charter of resignation under the Great Seal.

It was objected by the defenders against all the entails, (1.) that the irritant clause was not directed against contraction of debts, inasmuch as it declared null acts and deeds of contravention "sicklike as if the same had never been made," the word "made" being applicable only to a written instrument, and therefore restricting the meaning of the words "acts and deeds of contravention" to written instruments. It was further objected to the Wigtoun entail—(2.) The irritant clause in the Crown charter and instrument of sasine, constituting the investiture under which the Wigtoun estate has been possessed, is ineffectual, and does not strike at the prohibition against the contraction of debt, otherwise than by written instruments. (3.) As the procuratory of resignation of 1779 is essentially different in the destination from the original bond of tailzie 1741, it, with the investiture following thereon, formed a new entail of the lands, and prescription having run on that investitute, the original tailzie was extinguished. (4.) This new tailzie never having been recorded in the Register of Tailzies, the same is inoperative as against the defender.

The Court of Session held, that the entail was effectual.

The defender appealed to the House of Lords, and in his *printed case* prayed for a reversal of the judgment of the Court of Session, on the following grounds :—1. Because the deeds of entail are invalid as deeds of strict entail, in respect that the irritant clause in the said deeds does not apply to or embrace the prohibition in these deeds against contracting debt, nor strike at adjudications led or diligence used against the lands for debt contracted—*Earl of Kintore* v. *Lord Inverury*, 4 Macq. Ap. 527, *ante*, p. 1179 ; *Brown* v. *Macgregor*, 15 S. 842 ; *Lumsden* v. *Lumsden*, 2 Bell, Ap. 125 ; *Sharpe* v. *Sharpe*, 1 Sh. and M'L. 618 ; *Ogilvy* v. *Earl of Airlie*, 2 Macq. Ap. 271, *ante*, p. 470 ; *Buchan* v. *Erskine*, 4 Bell, Ap. 38 ; *Duffus' Trustees* v. *Dunbar*, 4 D. 523 ; *Martin* v. *Dunbar*, 6 D. 1320 ; *Graham* v. *Stewart*, 2 Macq. Ap. 299, *ante*, p. 548 ; *Wharncliffe* v. *Nairne*, 7 Bell, Ap. 134 ; *Murray* v. *Graham*, 6 Bell, Ap. 441. 2. Because the irritant clause in the investiture under which the Wigtoun estate has been possessed is ineffectual, and does not strike at the prohibition against the contraction of debt otherwise than by written instruments. 3. On the assumption, that the word "made" in the entail is applicable to all acts of contravention, and is not confined merely to written deeds, then the lands may be attached by creditors, in respect that the conditions of the entail have not been inserted in the heir's title—*Cathcart* v. *M'Laine*, 8 D. 970 ; *Mordaunt* v. *Innes*, 9th March 1819, F. C. ; *Holmes* v. *Cuningham*, 13 D. 689 ; *Fife* v. *Duff*, 4 Macq. Ap. 484, *ante*, p. 1086, 1174. 4. The tailzie of 1741 is invalid, in respect of the omission in the resolutive clause to provide, in terms of the Act 1685, c. 22, that on a contravention the next heir should have power to make up a title to the lands without representing the contravener—*Hamilton* v. *MacDowal*, 3rd March 1815, F. C. ; Dallas' Styles, 600—642 ; 1 Jur. Styles, 238.

The Attorney General (Sir R. Palmer), and *Rolt* Q.C., for the appellant.

Anderson Q.C., *Sir H. Cairns* Q.C., *Pattison*, and *M. Lloyd*, for the respondents, were not called upon.

LORD CHANCELLOR CRANWORTH.—My Lords, I believe that your Lordships agree with me in thinking, that we need not call on the respondents in this case. It is perfectly true, that upon very intelligible grounds the Courts of Scotland and this House have always construed deeds of entail very strictly, so as to give no encouragement to that which is to fetter the common and ordinary circulation of property. And if deeds can be so fairly construed as not to create an entail, the courts in Scotland and this House, (which is for these purposes the same as a court in Scotland,) will not only be not astute to further the object of the creation of the estate tail, but will be, so to speak, perhaps rather astute in finding such a construction as shall defeat it. It is, however, true, as was pointed out by LORD BROUGHAM in one of the cases to which we have been referred, that the construction which is here sought to be put is not only contrary to the ordinary rules of construction, but it is contrary to that which we know must have been the intention of the settler ; for when a person creates an entail, of course he means it to have effect. And, therefore, when you find out words to shew, that it is not to have effect, you are defeating his intention. And although the rule of construction in favour of the free circulation of property has been for a long time adopted and acted upon, it must not be a rule that is to lead courts of

justice and this House to pretend to see doubts and difficulties where there are none, and to a construction upon the words which no person, looking at them and unaware of this rule of construction, could possibly for a moment entertain.

Now let us see what the point is here. It lies in the narrowest compass. The entail created has *in gremio* the three ordinary prohibitions—a prohibition against alienation, a prohibition against diverting the ordinary course of descent chalked out in the deed, and a prohibition against incurring debts whereby the lands might in future get into the hands of creditors; and then follows this irritant clause: "And further providing, that if it shall happen any of the heirs of tailzie above mentioned to contravene the provisions and limitations above written, or any of them," that is, if the heirs of entail shall either do the positive act of alienating, or the positive act of diverting the course of succession, or the negative act (as I read it) of incurring debts whereby the lands might (as we should say in this country) be taken in execution, "then, and in that case, all such acts and deeds of contravention"—words that clearly include acts of omission as well as commission (if it be said that omission is not an act, I would appeal to the very language I have used, "acts of omission," which is a very common expression)—then, and in that case, all such acts and deeds of contravention are not only hereby declared to be void and null to all intents and purposes, (then just leave out the few following words and proceed,) "but also the heir so contravening shall *ipso facto* amitt, lose, and tine all right to the said lands and estate," etc. Now what are the words that are said to create the doubt? They are these, "sicklike as if the same had never been made."

Now it is said, that an act of omission cannot be "made," and that, therefore, you must so construe these words as to confine them to acts of commission, which, although not very accurately, we may say are acts "made."

To this there are two answers which are perfectly satisfactory to my mind, namely, first, that inasmuch as the words are "sicklike as if the same had never been made," and inasmuch as the word "same" applies to all the deeds and acts of contravention specified, and those deeds and acts include acts of omission as well as of commission, if the word "made" is not aptly used, it is only that the party who prepared the deed has used a word incautiously that does not include everything that was intended. But I do not think that signifies at all; for if it applies only to acts and deeds properly so called, then I say, upon ordinary principles, it must be read *reddendo singula singulis*, that is, if there is any contravention, then the estate is to go over, the party is to lose the estate, such acts being void to all intents and purposes "sicklike as if the same had never been made"—that is, as if the deed from which the contravention has arisen had never been done. And this latter construction applies exactly, as well to the subsequent Latin instrument, the deed of investiture, as it does to the original deed of entail. Whether the Lord Ordinary arrived at the conclusion to which he came upon right grounds, it is not material to inquire; but I think there is not the least doubt, that the Lord Ordinary and the Court of Session both arrived at the proper conclusion, and, therefore, I have no hesitation in moving your Lordships to affirm the interlocutors appealed from.

LORD CHELMSFORD.—My Lords, the words "sicklike as if the same had never been made," are, in my opinion, not explanatory or interpretative, but merely emphatic; and if you give a qualifying and restrictive sense to these words, then, although it is perfectly clear, that acts as well as deeds of contravention were intended to be rendered null and void, you would have to strike the word "acts" entirely out of the irritant clause. The question is so very clearly put by the Lord Justice Clerk, that I can only adopt his language in expressing the same opinion. His Lordship says, "it rather appears to me that the sentence 'sicklike as if the same had never been made' is not only surplusage quite unnecessary to the completion of the irritant clause, or to working out or explaining its meaning, but that it is neither intended, nor, according to the grammatical structure of the sentence, is it calculated to restrict what goes before it. I am well aware that it may not have been intended to restrict what goes before, and still it may have that effect according to the construction which is given to deeds of entail. But I think it is neither intended, nor, according to the proper grammatical structure of the sentence, is it calculated to have that effect. A declaration of irritancy, which is followed by such words as 'in so far as' would be very different, because a sentence introduced by the words 'in so far as,' clearly imports a limitation of what goes before; and in like manner if you were to say, that all acts and deeds are to be irritated 'to this effect that' you would then limit what goes before by that which follows. But I think the true meaning of the words 'sicklike as if' is not to limit what goes before, but that it is an attempt to expound by an illustration the meaning of that which goes before." That is very clearly expressed. I entirely agree with it; and I think your Lordships ought to affirm the decision of the Court below.

LORD WESTBURY.—My Lords, I have nothing to add to the judgments of the Court of Session. I think those judgments are extremely satisfactory, and that both the Lord Ordinary and the Judges of the Second Division have arrived at the right interpretation of the language of this entail.

Interlocutor affirmed, and appeal dismissed with costs.

Appellant's Agents, Scott, Moncrieff, and Dalgety, W.S.; Connell and Hope, Westminster.—*Respondents' Agents*, T. Ranken, S.S.C.; Tatham and Proctor, Lincoln's Inn Fields, London.

JULY 13, 1866.

JAMES WHITE, Shoemaker, Aberdour, and Another, *Appellants*, *v.* The DUKE OF BUCCLEUCH and Others, *Respondents*.

Process—Issues—Consent to a Verdict—Applying Verdict—Highway—Res judicata—*In an action of declarator of right of way, this issue was adjusted: "Whether there existed a public right of way by or near the red line on the plan lodged in process," etc. The defender, before trial, gave in this minute: "The defender consents to a verdict for the pursuer on the issue."*

HELD, *The Court had no power thereafter to remit to a surveyor to lay out the road so consented to "in a route least burdensome to the defender;" therefore interlocutors pronounced on that basis were* ultra vires, *or if made with consent, were incapable of being appealed to the House of Lords, as being beyond the* cursus curiæ.

QUESTION, *Whether such an issue was not vitiated with an incurable uncertainty?*

Process—Abandonment of part of Action—Absolvitor—*W. in an action of declarator claimed five public roads, A B C D E. Before the record was closed, he gave in a minute abandoning C D E, but no expenses were paid, nor any interlocutor of the Lord Ordinary allowing the abandonment, nor were any issues adjusted as to these roads, though the roads A and B were ultimately established.*

HELD, *The Court was entitled to assoilzie the defender as to C D E, inasmuch as the abandonment had never been completed.*

HELD FURTHER, *That such absolvitor would not be* res judicata *as regards the roads C D E, for* ex facie *there was no adjudication of the subject matter of those roads.*[1]

The summons was raised in 1846. It was an action of declarator by Robert Hay and others, which was brought against the late Earl of Morton, to establish certain rights of way between Aberdour and Burntisland. The conclusions were applicable to five different paths—one from Aberdour harbour to Burntisland; another from Old Aberdour, joining the former road about half way between Aberdour and Burntisland; and the other three were paths in the neighbourhood of Aberdour joining one or other of the other two roads. The two roads first mentioned were described in the 1st and 4th articles of the condescendence, and the other three in the 2d, 3d, and 5th articles.

The summons, besides conclusions for declarator of right of way, contained the ordinary conclusions for removal of obstructions, and for interdict against the defender obstructing the pursuers in their right of way.

While the record was being made up, the pursuers (March 1851) abandoned the claims of rights of way in three of the articles of condescendence, but no interlocutor ever finally disposed of the minute of abandonment.

On 31st May 1851 the record was closed.

A great deal of procedure took place in regard to the adjustment of issues, which were frequently amended, and on other points; but in 1854 the issues were adjusted. The issues related to the two roads first mentioned, those described in the 1st and 4th articles of the revised condescendence; and no issues were asked in reference to the three other roads.

But before the case went to trial, the defender (8th December 1854) consented to judgment in the same way as if a verdict had been found for the pursuers on the issues; and the Court, on the defender's application, by interlocutor of 22d December 1854, remitted to Mr. Wylie, C.E., to prepare a plan, and lay off on the ground, and mark on the plan paths in accordance with the claim for rights of way in the issues.

Mr. Wylie returned a report, and made a plan; and the Court pronounced this interlocutor:—

"*22d November* 1856.—The Lords having considered the report by Mr. Wylie, No. 744 of process—In respect, that no objections have been stated thereto, approve of the said report and

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[1] See previous report 21 D. 1055; 24 D. 116; 1054. *Hay* v. *E. Morton*, 34 Sc. Jur. 61; 538; S. C. L. R. 1 Sc. Ap. 70: 4 Macph. H. L. 53; 38 Sc. Jur. 543.