

1808. *May 25.*

ROBERT BROWN and Others, *against* The COUNTESS of DALHOUSIE.

On the 12th September 1701, Thomas Brown, Esq. executed an entail of the lands of Eastfield on a certain series of heirs. The prohibitory clause was expressed in the following terms: ‘ And likewise it is hereby expressly provided and declared, that it shall be nowise leisome, and left unto any of my ‘ said heirs of tailzie and provision above specified, to sell, alienate, and dispo- ‘ the lands and others above written, or any part thereof, either irredeemably, ‘ redeemably, or under reversion, or to grant wadset infeftments to burden the ‘ said lands with any servitudes or other burdens, or to set tacks or rentals for ‘ any longer space than the setter’s lifetime or interest, or for any other duty ‘ than the ordinary duty payable for the same; neither shall it be lawful for ‘ them, nor in their power, to contract debt, nor do any other deed whereby ‘ the said lands and others foresaid, or any part thereof, may be appraised, ad- ‘ judged, or any manner of way evicted, in prejudice of this present tailzie, or ‘ of those who, by virtue thereof, shall be then to succeed.’

No. 19.  
Clause inef-  
fectual to  
prevent an  
alteration in  
the course of  
succession.

The irritant and resolute clauses were of the following tenor:

‘ And if the said heirs of tailzie and provision shall do any thing in the con- ‘ trar of the aforesaid provision, by disposing or contracting debts, or doing ‘ any other deed, the said debts and all others, and every one of them, shall ‘ not only be void and null, in so far as concerns the lands and others hereby ‘ disposed, so they shall not be affected herewith in prejudice of the said heirs ‘ of tailzie and provision who are to succeed, seeing thir presents are granted ‘ *sub modo*, and with the provisions above specified; but also the contraveners ‘ for themselves, and the descendants of their body, shall amit and forfault ‘ their right and interest in the lands and others above disposed, and the same ‘ shall be devolved upon and pertain to the person who shall be next, and ‘ have right to succeed thereto by virtue of this disposition, free from all debts ‘ and deeds done, contracted, and committed by the contraveners.’

The deed of entail was regularly recorded and completed. It was the in- vestiture under which the successive heirs made up their titles, and possessed the estate.

On the 4th June 1794, Charles Brown of Coalston, having completed his titles as heir of entail of this estate, executed a disposition in favour of himself, and the heirs male of his body, whom failing, to the heirs *whomsoever* of his body, whom failing, to certain other substitutes, thus altering the order of suc- cession under which the estate had been taken up.

In the year 1800, Mr. Brown died without heirs male of his body; and his only daughter, now the Countess of Dalhousie, was served heir of provision under the disposition granted by him in 1794 above mentioned, and obtained a charter of resignation on the procuratory in that disposition.

No. 19. George Brown, Esq. Commissioner of Excise, the nearest heir male of Thomas Brown the entailor, obtained himself served heir male and of tailzie to the former heir ; and raised an action of reduction for setting aside, *1st*, The retour of the service of the late Mr. Brown of Coalston, with the precept and instrument of sasine following thereon ; *secondly*, The disposition granted by him in 1794, and infestment proceeding upon it ; and, *lastly*, The retour of the Countess of Dalhousie's service as heir of provision to her father, with the charter of resignation following on the procuratory in the before mentioned disposition ; on the ground that the titles made up by Charles Brown, and the disposition executed by him, were in contravention of the deed of entail under which the estate was held, and by which it was entailed on the heirs-male of the granter.

The cause was discussed before the Lord Armadale, Ordinary, who repelled the reasons of reduction, sustained the defences, and decerned ; (8th Feb. 1805.)

The case then came before the Court by petition and answers.

Argument of the pursuer.

In questions on the interpretation of entails, a distinction is recognised between questions *inter heredes*, and those to which purchasers or creditors are parties.

The jealousy of the law, in admitting restraints on property, with the consequent strictness of interpretation in contests between freedom and restraint, in which the former is always presumed, does not arise from speculations on the impolicy of entails, speculations on which the views of mankind daily change, but has for its object the safety of commerce, and the protection of third parties from being injured by restraints in their debtors right, which they have not means to suspect or discover. Hence this reluctance of the law to presume restraint does not respect personal obligations, but only real burdens on the property.

Thus a person purchases an estate, of which the price is to be paid by an annuity for a certain period to the seller, or a person named by him. To render this a real burden on the estate, it is necessary that it be engrossed in the titles, and make a part of the investiture. If this be not done it is ineffectual ; and if it be doubtfully expressed, the law presumes against it. But the personal obligation, which the purchaser has incurred to pay the price of the estate in the shape of the annuity is subject to no such rigid interpretation, nor does any presumption in favour of liberty interfere in this case to enable him, by availing himself of inaccuracies, to escape from it. In like manner, if a person receives an estate gratuitously under a condition, that on a certain event it shall return to the donor, the personal obligation incurred by the acceptance of the estate, will be interpreted with as much liberality as in the case of the purchaser.

An heir of entail, especially if not *alioqui successurus*, is exactly in the same situation in relation to the other substitutes. The institute is the donee in the strictest sense of the word; and the obligation to fulfil the entailer's injunction, is not weakened, as it reaches the substitutes. Each substitute, by taking up the estate, undergoes a personal obligation in favour of the next substitute, in terms of the entail. In actions on this personal obligation between prior and posterior substitutes, in which a real burden on the estate is not contended, and the interest of third parties not involved, the principles of strict interpretation do not operate. Nor is there room for any mode of interpretation different from what governs that of every onerous contract.

From these principles it follows, that the rule of strict interpretation, which obtains with regard to irritant and resolute clauses, of which the object is to secure against third parties contracting, does not apply to those simply prohibitory, which are effectual only in virtue of the personal obligation they create, and which bind only the heirs in possession, or their representatives.

Accordingly, our law writers recognise three species of entails. 1st, Simple and defeasible destinations. 2d, Destinations with prohibitory clauses, which create a *jus crediti* in the substitutes sufficient to prevent gratuitous alienations; but impose no real burden or limitation on the fee. 3d, Destinations with prohibitory, irritant, and resolute clauses, of which the effect was to *prejudge creditors and commerce*, and which were therefore subject to a strict interpretation. Mackenzie, B. 3. Tit. 8. § 16 and 17; Erskine, B. 3. Tit. 8. § 22 and 24. On the principles stated by these writers, a prohibition to sell and contract debt must be equally effectual to bar gratuitous alienations; because, to lay down that a *jus crediti* is created in the substitutes by the destination, and at the same time to admit that this *jus crediti* may be precariously and gratuitously disappointed, is a legal inconsistency.

There is nothing in the terms or object of the act 1685, which dictates the application of the principle of strict interpretation to clauses merely prohibitory. By common law, a person might destine his estate with the protection of prohibitory clauses; and effectually adject to his gift, any reasonable and not immoral condition, which, by acceptance, the heir incurred a personal obligation to fulfil; nay, before the statute, it appears that by the addition of irritant and resolute clauses, a real *nexus* on the estate, effectual against creditors and purchasers, might be created in favour of the heirs, 26th February 1662, Stormont, No. 76. p. 15475. But as doubt was entertained on this point, the act 1685 was passed.

From the preamble, and the various regulations, it is clear that the statute had in view only those entails which were to be effectual against third parties; and that while an observance of the rules therein dictated was necessary to render an entail effectual against onerous parties, those personal obligations on the heirs, arising from the prohibitory clauses, were left to be governed by the principles of the common law. Accordingly, an observance of the forms of

**No. 19.** the statute is not necessary to give effect to an entail containing only prohibitory clauses, Erskine, B. 8. Tit. 8. § 27. But, by unsuccessfully attempting to render this entail effectual against third parties, by the addition of irritant and resolute clauses, the entailer is not put in a more unfavourable situation than if these had been wanting, and this entail had been of the second species.

By neglecting the requisites of the statute, and failing to create a real right in favour of the heirs, which must have precluded onerous deeds, the entail is not deprived of the support of common law, which renders it effectual against gratuitous deeds; nor can the substitutes be deprived of the benefit of the personal obligation incurred by the heir, by the acceptance of the succession so qualified.

Abandoning all benefit from the statute, and all assistance from the irritant and resolute clauses, it is sufficient for the pursuer that this entail have the qualities of the second species, in which nothing more is required for its constitution than a distinct expression of the entailer's will. Indeed, to the effect of imposing a personal restraint on the heir, an entail may be constituted, not only without a prohibition to alter the order of succession, but without prohibitory clauses at all. Thus, where a gratuitous settlement is made on a person not *alioqui successurus*, wherein, on a certain event, there is a clause of return to the grantor, this condition cannot gratuitously be defeated by the heir taking under the settlement.

This distinction between the two cases, wherein clauses prohibitory are effectual among heirs, that would not be so with third parties, has been recognised by the Court in the case of *Donn against Donn*, No. 126. p. 15591. wherein the clause was *verbatim* similar to the present, and wherein the entail was created by a mere reference to the investitures of another estate; the Court qualified their interlocutor, by finding it sufficient to bar a *gratuitous* alienation.

The same was the decision on the 2d February 1728, *Lord Strathnaver against Duke of Douglas*, No. 17. p. 15373. where the clause was less comprehensive than the present.

It has been said that an opposite judgment was pronounced, 8th July 1789, *Stewart against Home*, No. 98. p. 15535. But in truth the case was full of specialties. The intention of the prohibition therein was to prevent the heir from selling or contracting debt, for a certain period, but not to debar him from making a rational settlement of it on his own children in his contract of marriage.

On these principles, the pursuers are entitled to a fair liberal construction of the entail; and, if such be granted, the clause in question would, beyond controversy, import a prohibition to alter the order of succession.

2d, Considering this entail, with reference to the principle of strict interpretation, admitting that to the constitution of an entail, even *inter heredes*, the three distinct modes of alienation must be prohibited; 1st, By selling; 2d, By

contracting debt; *3d*, By altering the order of succession, and that the prohibition of the one mode does not infer the prohibition of the rest; yet the words of the clause are sufficient to include the disposition under reduction. The prohibition to sell, alienate, or ~~dispose~~, reaches the deed complained of. The legal term *disponere* is used without qualification, and applies to all conveyances, gratuitous or onerous. To restrict it to the latter, is to violate the rule of law respecting entails, which requires that the plain meaning of the words shall be regarded without inference either from restriction or extension. If the disposition had borne, *in grevio*, to be for a price, *ex concessis*, it would have been void. But the nature or amount of the consideration cannot alter the legal description or character of the deed under which alone the estate could be conveyed.

In the sense of law, *alienate* applies to any deed, gratuitous or onerous, *inter vivos*, or *mortis causa*, which conveys the property to a stranger. The word is derived from the civil law, where its meaning is defined, *L. 1. C. De Fund. Dot*; see likewise Craig, *De Feud. B. 3. D. 3. § 11*. Such was the meaning of the term *alienate* at the date of the statute 1685; and the entailor himself uses it in this sense, when he says, that, by payment by himself of five marks Scots, 'Thir present letters, alienation, disposition, and infestment, shall become null;' and that in using the terms sell, alienate, and ~~dispone~~, the conveyances meant merely sell, or that in any case where many terms are used, they are to be presumed to be synonymous, is an inference most forced and improbable. On the contrary, where many terms are used in conjunction, the whole must be understood to convey a meaning which each would separately have been inadequate to express. Having prohibited under the word sell, onerous transference, the additional words alienate and ~~dispone~~ apply in their usual acceptation to those, whether onerous or gratuitous.

Accordingly the word alienate, coupled as in the present case with sell and ~~dispone~~, imported a different meaning, and was effectual to prevent long leases. Duke of Queensberry against Earl of Wemyss, No. 15. *supra*.

The heirs are prohibited from doing any 'other deed whereby the lands may be appraised,' &c. or any manner of way evicted, &c. in prejudice of this present tailzie, &c.

Technical words are not required in the constitution of an entail; and almost every stile book has a different formula; neither is it necessary to adhere to the words of the statute. It is enough that the deeds prohibited be explicitly laid down. The words in this clause are equally explicit with those of the statute, and almost identical. The only difference is, that instead of being coupled by the disjunctive particle *or*, the disjunctive particle *nor* is used.

It is impossible to maintain that the general terms, in which the latter part of the clause is expressed, must be explained by and restricted to the previous enumeration of particulars; nor can the terms *any other deed* be held, without a great violation of construction, to refer to those only of the nature of a sale,

No. 19. or contraction of debt, previously prohibited. But if this be the legal interpretation in such cases, it must apply with equal force, and with the same effect, to the statute 1685.

That statute did not mean in technical detail to enumerate the various devices against which it should be lawful effectually to provide, leaving the entail obnoxious to those other modes of defeat which are not there detailed. It dictated certain forms and precautions indispensable to legalize those conditions which the entailer should prescribe; and concludes, as in the present case, with a general clause including all deeds tending to the defeat of the entail.

If this be the just interpretation of the statute, one of two consequences must follow. Either *1st*, That the statute regulates such entails only as were to become effectual against third parties onerously contracting, and leaves those in their former situation which were sufficiently secure from the personal obligation they created at common law; or, *2d*, That the statute was intended to comprehend under two heads all the prohibitions which were necessary to give complete security to entails.

The only other supposition is absurd, viz. that while the statute meant to secure entails from defeat arising from onerous causes, it left them obnoxious to the caprice of gratuitous alteration.

The clause is equally comprehensive with those in the cases *M'Laine against M'Laine*, No. 14. *supra.* or *General Ker against Duke of Roxburgh*, 23d June 1807. No. 13. *supra.*

If, as in terms of these decisions, the prohibition of *any other deed* mean something more than is contained in the previous prohibitions, and includes eviction from a gratuitous cause, it does not admit of a doubt, that eviction has taken place in this case; because in legal language a party suffers eviction equally where possession is prevented or withheld, as when it is taken from him.

Argument of the defender.

The origin of the principle of applying strict interpretation to entails is neither to be attributed to any ideas of the general impolicy of entails, nor to a regard to the safety of the public. It is a principle which must operate in every case of a contest between a general rule and an exception, wherein the presumption inclines to the general rule in cases of doubt. Freedom is the general rule, because it is the natural and ordinary condition of property. Restraint is an exception from that rule; and the presumption must always incline to the former from the common principles of legal interpretation—principles applying to all questions, whatever be the nature of the general rule, or of the exception.

This being the origin of the principles, it must apply without distinction to all questions, whether *inter heredes*, or to those in which onerous parties are concerned. Accordingly it is now established beyond controversy, in questions among heirs, that although the intention of the entailer be clear from the object and tenor of the deed, yet if it has not been set down in explicit terms, it will

not be enforced by implication, and the *jus crediti* of the heirs may be defeated in all those events against which the entail has not distinctly provided. No. 19.

Thus a distinction is recognised in law between the institute and the heirs of entail; and where the prohibitions are not expressly directed against the former, he is considered to be free. Judgment of the House of Lords, 24th November 1769, Edmonstone of Duntreath, No. 68. p. 15461.

The same principles dictated the decisions, 25th June 1785, Menzies of Culdares, No. 53. p. 15436;—23d February 1791, Wellwood, No. 70. p. 15463.

To constitute a tailzie effectual, even among heirs, three modes of disappointing the *jus crediti* of heirs must be prohibited; 1st, By selling; 2dly, By contracting debt; 3dly, By altering the order of succession; and from the prohibition of any one, the prohibition of the rest cannot be inferred. In this case, the two first are effectually prohibited, but the last has been omitted, or at least not expressed with that explicitness which the law requires.

The words to *sell, alienate, dispone*, denominate one act, and characterise nothing but a sale.

The general clause, “*nor do any other deed,*” &c. has an obvious reference to, and must be explained and restricted by the previous enumeration of particulars; because it is an invariable rule of law, that general words, following a specification of particulars, are confined in their interpretations to other things of the same kind with those previously enumerated, Ersk. B. 3. Tit. 4. § 9. If these general expressions had stood alone, they would not have constituted an effectual entail, and the previous detail of particulars cannot extend their effect. In these cases the Court observed this rule, 9th November 1749, Sinclair against Sinclair, No. 22. p. 15382;—15th January 1799, Bruce of Tillicultry, No. 100. p. 15539.

This general clause, although to a certain degree co-extensive with that in the statute, has omitted certain very explicit terms therein contained. After enumerating the ways by which the entail might be defeated, 1st, By sale; 2d, By contracting debts, or doing other deed by which the lands may be appraised or evicted, it proceeds, “*or the succession frustrated or interrupted.*” In the deed these words are totally omitted, and no others equivalent are substituted in their place.

In the case of Ker and of M'Laine, after the clause in the entail prohibiting sales and contraction of debt, any deed *in hurt and prejudice or in evasion* of the succession, are the subject of a distinct and separate prohibition.

The Court adhered to the interlocutor of the Lord Ordinary (25th May 1808.)

Lord Ordinary, *Armadales*. Act. *John Clerk*. Alt. *A. Campbell et Henry  
Cockburn*. Agents, *Dundas & Irving*, W. S. and *John Smith, jun.* W. S.  
*Buchanan*, Clerk.

J. W.

*Fac. Coll. No. 43. p. 153.*

\* \* See 23d November 1798, M'Kay against Dalrymple, No. 361. p. 11171.