

Friday, February 6.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

OGILVY v. OGILVY.

Entail-Fetters—Irritant Clause.

A deed of entail, with prohibitions against altering the order of succession, alienation, burdening, &c., contained an irritant clause declaring "that all tacks, alienations, debts or deeds contracted, granted, made or done in the contrary hereof, shall be null and void." Held that the words "all deeds" were used in a generic sense, and included altering the order of succession.

This was an action at the instance of Thomas Wedderburn Ogilvy of Ruthven, in the county of Forfar, heir of entail in possession of the entailed estate of Ruthven, against Major John A. W. Ogilvy and the other heirs of entail of the said estate, to have it "found and declared that the deed of tailzie dated the 11th day of May 1820, recorded in the register of tailzies the 23d day of November and in the books of council and session the 28th day of December, both in the year 1826, made and executed by the now deceased James Ogilvy, Esq. of Ruthven, is and shall be deemed and taken to be invalid and ineffectual as regards all the prohibitions therein contained, in terms of the provisions in the 43d section of the Act 11 and 12 Victoria, cap. 36, and that the pursuer is entitled to hold, and holds, the foresaid lands and others above described, or such part thereof as now belongs to him, free from the conditions and provisions and clauses prohibitory, irritant, and resolute contained in the said deed of tailzie, with full power to sell and alienate the said lands and others, or part thereof, as aforesaid, or to contract debt thereon, or to alter the succession thereto at pleasure, and generally to deal with the same as unlimited *fiar* thereof, and that no action or forfeiture shall be competent at the instance of any heir-substitute under the destination contained in the said deed of tailzie against the pursuer by reason of the contravention of any or of all of the prohibitions or conditions therein contained."

The clauses in question are set forth in the condescendence, and are these:—"As also, that it shall not be lawful to any of the heirs of tailzie to alter the line of succession, to sell, alienate, or dispoise, redeemably or irredeemably, by feu, wadset, or in any other manner of way, the taillied estate, or any part thereof, or to do or grant any deed, or contract debts that may charge, burden, or affect the same, by any kind of right or security whatsoever, made or granted either before or after the succession opens to such heirs, whereby the taillied estate or any part thereof may be adjudged or evicted, or the taillied destination and line of succession hereby established diverted, altered, frustrated, or interrupted: As also, that it shall not be lawful to any of the heirs of tailzie to grant tacks, assedations, or rentals of any part of the taillied estate, excepting only tacks for any space not exceeding twenty-one years, or for the endurance of three lives, all in being at the time of granting the tack." "Declaring, as it is hereby and shall by the infestments to follow hereon be declared and ordained, that all tacks, alienations, debts, or deeds con-

tracted, granted, made or done in the contrary hereof, shall be in themselves null and void so far as concerns the taillied estate, or affecting the same, and that the heirs of tailzie who shall make any such tacks or alienations, or shall contract debts, or do any other act, deed, or thing contrary thereto, or who shall neglect or omit to take and bear the name, designation, and arms, or to fulfil the other provisions herein contained, shall thereby, for themselves only, but not for their descendants, forfeit and lose their right to the taillied estate, and that the same shall, *ipso facto*, fall, accress, and be devolved to the heir of tailzie next in the order of succession and not by the terms of the tailzie excluded from the succession, although descended of the contravener's body, who may in terms of the statute immediately upon the contravention pursue declarators thereof, and serve heir to the person who died last infest in the taillied fee, and did not contravene without necessity any ways to represent the contravener or contraveners, or may make up and establish a right to the taillied estate by adjudication, or by any other way competent by law to divest the contravener thereof, and to vest the estate in the heir who has the title to succeed after the contravener, but always under and subject to and affected with the whole provisions, conditions, and clauses irritant and resolute herein contained."

The pleas in law upon which the pursuer relied were these—" (1) The prohibition against the alteration of the order of succession contained in the deed of entail libelled on is not duly fenced either with an effectual irritant or resolute clause. (2) Or otherwise, the said prohibition is not duly fenced with an effectual irritant clause. (3) The said deed of entail does not contain a valid prohibition against the contraction of debt in terms of the Act 1685, cap. 22, duly fenced with irritant and resolute clauses."

The case was before the Lord Ordinary in November 1873, when his Lordship pronounced the following interlocutor:—

"*Edinburgh, 12th November 1873.*—The Lord Ordinary having heard the counsel for the parties, and considered the closed record and deed of entail libelled on—sustains the defences, assoilzies the defender from the conclusions of the summons, and decerns: Finds the pursuer liable in expenses, of which allows an account to be given in, and remits the same when lodged to the Auditor to tax and to report.

"*Note.*—The pursuer in the present action challenges the deed of entail of the estate of Ruthven on the ground that the prohibitory clause is not, in so far as regards the prohibition against alteration of the order of succession, duly fenced with effectual, irritant, and resolute clauses. The Lord Ordinary is of opinion that the pursuer's objections to the deed are not well founded.

"The prohibitory clause provides 'that it shall not be lawful to any of the heirs of tailzie to alter the line of succession, to sell, alienate, or dispoise, redeemably or irredeemably, by feu, wadset, or any other manner of way, the taillied estate or any part thereof, or to do or grant any deed, or contract debts that may charge, burden, or affect the same by any kind of right or security whatsoever, made or granted either before or after the succession opens to such heir, whereby the taillied estate or any part thereof may be adjudged or evicted, or the taillied destination and line of succession hereby

established diverted, altered, frustrated, or interrupted; as also that it shall not be lawful to any of the heirs of taillie to grant tacks 'except for any space not exceeding twenty-one years, or for the endurance of three lives, all in being at the time of granting the tack. The deed then proceeds to prohibit at considerable length other acts on the part of the heirs of entail, and to bind them to insure the mansion-house, offices, and furniture against loss by fire; and there is inserted between the prohibitions and the irritant and resolute clauses a clause by which, 'for giving more effect to these prohibitions, it is hereby declared that transgressions of these prohibitions and restraints, and how far any actings or doings are contrary thereto, within the meaning and intention thereof as above declared, shall be determined' by the judgment of any five gentlemen of landed estates. Immediately after this peculiar and inept clause, the irritant and relative clauses are inserted in the following terms, 'Declaring, as it is hereby and shall by the infettments to follow hereon be declared and ordained, that all tacks, alienations, debts or deeds contracted, granted, made, or done in the contrary hereof, shall be in themselves null and void, so far as concerns the taillied estate, or affecting the same, and that the heirs of taillie who shall make any such tacks or alienations, or shall contract debts, or do any other act, deed, or thing contrary hereto, or who shall neglect or omit to take and bear the name, designation, and arms, or to fulfil the other provisions herein contained, shall thereby, for themselves only, but not for their descendants, forfeit and loose their right to the taillied estate, and that the same shall, *ipso facto*, fall, accress, and be devolved to the heir of taillie next in the order of succession.'

"The pursuer admits that the prohibitory clause contains valid prohibitions against alterations of the order of succession, against alienation, and against the contraction of debt. But he maintains that the word 'deeds' in the irritant clause must be held to have the same meaning with the word 'deeds' in the latter part of the prohibitory clause, where it is confined to deeds charging, burdening, or affecting the estate by any kind of right or security whereby the estate may be adjudged or evicted. And on this reading he maintains that there is no irritancy fencing the prohibition to alter the order of succession. As regards the resolute clause, the pursuer's argument is that the word 'hereto,'—'any other act, deed, or thing, contrary hereto,'—must be read as referring back only to the irritant clause, and as therefore liable to the same objection as the irritant clause.

"The Lord Ordinary considers that the objections of the pursuer are opposed to the fair and true meaning of the words employed in the irritant and resolute clauses. There is not, as was maintained by the pursuer, any positive rule in the construction of entails that a general word used in a limited sense in one part of a deed of entail must have the same limited meaning attached to it throughout the deed. Every word must receive its true meaning according to a fair and grammatical reading of the deed. If there is ambiguity, then the word is to receive the meaning which confers freedom from the fetters of the entail. But if there is no ambiguity—if there is nothing in the clause in which the general word is used which refers back to and connects it with the same word when used in a previous part of the deed in a limited sense, and if

the context shows that the word was employed by the granter of the deed in its general signification, and can only be so construed according to the fair and grammatical meaning of the clause in which it stands,—then the general, and not the limited, meaning must prevail. In the present case there is nothing in the irritant clause to connect the word 'deeds' with the same word in the prohibitory clause. The irritant clause does not refer back to the prohibitory clause, and there is no relative connecting the two clauses. These clauses do not run into one another, but are separate and distinct. The kind of deeds intended to be covered by the use of that word in the latter part of the prohibitory clause is specified and defined, while in the irritant clause, so far from there being any specification or limitation, the most general and comprehensive terms are coupled with that word which the entailor could employ. He declares to be null 'all' 'deeds made or done in the contrary hereof'—that is, every deed contrary to the entail, and to the prohibitions therein contained. The word 'deed' is in itself a general word sufficient to include all acts of contravention. To this word is prefixed the adjective 'all,' which shows that it was used in its most comprehensive sense in the irritant clause by the entailor. The quality of the deeds declared to be null is also clearly defined as being those 'in the contrary hereof.' So that, in point of extent, and in point of quality, every deed contrary to the prohibitions is declared null.

"The irritant clause does not proceed on the principle of enumeration which, from omission in the enumeration, has proved fatal to so many entails. It is, on the contrary, a substantive and independent irritant clause, by which all deeds made or done in the contrary of the prohibitions of the entail are declared void and null. No doubt the clause, before mentioning 'deeds,' specifies 'all tacks, alienations, debts;' but it does not conclude with the general word 'deeds,' and it is not otherwise in such terms as to give rise to the objection that general words at the end of the enumeration are not presumed to extend beyond the enumeration. Such a presumption must yield to clear and distinct expressions to the contrary, such as are contained in this entail. The irritant clause concludes with the important words, 'made or done in the contrary hereof,'—words which, when adjoined to 'all deeds,' exclude, it is thought, any such presumption, as well as the view contended for by the pursuer, and leave no room for doubt that the fair and true construction is that all deeds are irritated which are contrary to the deed of entail and the prohibitions therein contained. The subject matter of the clause includes all deeds contrary to the prohibitions of the entail, and it is these which, in addition to tacks, alienations, and debts, are declared null. If this view be correct, then the prohibition against alteration of the order of succession is fenced with a valid and effectual irritant clause, because the words are so comprehensive as to reach every contravention.

"The words 'contrary hereto' in the resolute clause do not, the Lord Ordinary considers, refer to the irritant clause, but to the deed of entail and its prohibitions.

"The similarity of the words employed in these two clauses, and the fact that they truly form one sentence, strengthen, if that were necessary, the construction which the Lord Ordinary is of opinion must be put, not only upon this clause, but also upon

the irritant clause. See *Mackintosh*, 18 D. 249; *Kintore*, 23 D. 1105, 4 M.Q., H. of L. 520; *Gilmour*, 15 D. 587."

The pursuer reclaimed.

Authorities—*Lang v. Lang*, M-Lean & Robertson, 871; *Scott v. Scott*, 18 D. 168; *Rollo v. Rollo*, 3 Macph. 78; *Preston v. Heirs of Valleyfield*, 1 D. 332.

At advising—LORDS BENHOLME and NEAVES having delivered opinions for the defender in favour of the validity of the entail,—the LORD JUSTICE-CLERK said—I concur. The principle deducible from the case of *Overton* is often imperfectly or inaccurately stated. It is just this, that if a word of flexible meaning is used in a restrictive sense in one part of a deed of entail it must be read in the same sense in subsequent parts of the deed. But the case of *Overton* established no such principle. It only decided that the same construction must be applied to the term when used along with connecting words relative to the collocation in which it was formerly used. The case of *Overton* was a strict but quite logical or rather grammatical application of this rule. But where generic words are used without any qualification they must receive their generic effect; nor does it signify that in a previous part of the deed the same words have been used along with qualifying and restricting expressions. The cases of *Gilmour* and *Drummond* are clear authorities for this proposition. This case, therefore, having no such relative words, must be construed on its own terms; and the question is whether the words "all deeds done in the contrary hereof" are used in a generic or restrictive sense. The argument has been ingeniously stated, but I fail to see any reasonable meaning but one of which the words are susceptible. The clause irritates all deeds which may be done in the contrary hereof, that is of the entail of the prohibitions of the entail. I cannot doubt that an alteration of the order of succession is a deed done in the contrary of the prohibitions of the entail. The universality of the expression all deeds entirely dissociates the term from the sense in which it was previously used, and leaves the general terms to have their legitimate effect.

Their Lordships adhered to the Lord Ordinary's interlocutor.

Counsel for Pursuer—Marshall and Duncan.
Agents—Mackenzie & Black, W.S.

Counsel for Defenders—Solicitor-General (Clark).
Agents—Gibson-Craig, Dalziel, & Brodies. W.S.

Friday, February 6.

SECOND DIVISION.

[Sheriff of Lanarkshire.

WATERSTON V. CITY OF GLASGOW BANK.

Cheque to Bearer—Recall—Presentation—Non-Payment.

In an action against a bank for payment, by holder of cheque payable to bearer, but which had been recalled by the granter, the bank having refused to pay—Held that the bank was entitled to refuse payment, a cheque being an order by a customer which may be countermanded before payment.

This was an appeal from the Sheriff of Lanarkshire. From the summons in the Sheriff-court it appeared that the pursuer, Waterston, horse dealer in Beith, had sold a horse to William Anderson, farmer, Gillespie, Glenluce, who gave in payment a cheque for £34, dated 28th June 1872, drawn upon the branch of the City of Glasgow Bank at Stranraer, and payable to bearer.

This cheque the pursuer endorsed and delivered for value to the Union Bank of Scotland, who presented it for payment to the branch of the City of Glasgow Bank at Stranraer on 1st July. The agent of the said bank at Stranraer, however, refused payment of the cheque, although there was in the bank at the time funds belonging to the drawer sufficient for that purpose.

In consequence of this refusal of payment by the defenders' bank at Stranraer, the pursuer was compelled to retire the cheque in the hands of the Union Bank, and he now brought this action against the City of Glasgow Bank for the value of the cheque, and the commission charged by the Union Bank for presenting the said cheque for payment.

The City of Glasgow Bank defended the action, and stated their defence "to be a denial of resting-owing or liability for the sums sued for, or any part thereof. The said William Anderson, the granter of the draft or cheque libelled, having stopped payment thereof before it was presented to the defenders for payment as libelled, and instructed them not to pay the same. The defenders are entitled to absolvitor, with costs."

Anderson, the drawer of the cheque, not having been called as a party, the Sheriff-Substitute (Dickson) ordered the process to be intimated to him, and pronounced the following interlocutor:—

"Glasgow, 24th May 1873.—Having resumed consideration of the case, parties' procurators dispensing with further debate, and no appearance being made for William Anderson referred to in the last preceding interlocutor, notwithstanding intimation of the process to him—Finds that on 28th June 1872 the said William Anderson granted and delivered to the pursuer, for value received, a bank-cheque in the following terms:—'Stranraer, 28th June 1872. To the Agent of the City of Glasgow Bank. Pay Mr John Waterston, or bearer, thirty-four pounds stg. Signed Wm. ANDERSON—£34 stg.' Finds that the pursuer received the said cheque from Anderson for value received, but that the cheque did not set that forth, and it is not proved that the defenders were aware of the fact till this action was raised: Finds that the pursuers having endorsed and delivered the cheque to the Union Bank at its branch at Beith, the same was presented at the defenders' branch at Stranraer for payment on or about 1st and 4th July 1872, but payment thereof was refused on both occasions, and in consequence the pursuer had to retire the cheque from the Union Bank by repaying it the amount thereof, with 1s. 8d. of bank charges: Finds that at the time of the said refusal the said William Anderson had in the defenders' branch at Stranraer funds sufficient for payment of the cheque, and that the non-payment was occasioned by his having countermanded payment before it was presented: Finds, in point of law, that the said countermand was a sufficient reason for the said refusal: Therefore, and for the reasons stated in the note, sustains the defences, and assolizies the defenders: Finds