

[17th April, 1845.]

MRS. JANET DINGWALL and OTHERS, *Appellants*.

ALEXANDER DINGWALL and OTHERS, *Respondents*.

*Tailzie.—Irritant Clause.*—Terms of irritant clause, *held* broad enough to embrace all the prohibitions in the entail.

*Ibid.—Resolutive Clause.*—A clause resolving acts done in contravention of the said “conditions and provisions,” *held* to embrace prohibitions described as “limitations and restrictions.”

ON the 8th of October, 1778, John Dingwall, of Ranniaston, executed an entail of his lands in favour of a series of heirs, “but always with and under the conditions, provisions, limitations, restrictions, clauses irritant and resolutive, declarations, powers, and faculties after-written, viz.”—There then followed a clause requiring the heirs to use a particular surname and arms, which was prefaced by the words, “under this condition and provision;” and two other clauses requiring the heirs to possess under the entail, and to procure themselves early infeft, and obliging them to insert in their infeftments “the several conditions, provisions, limitations, clauses irritant or resolutive, and declarations before and after mentioned;” each of these clauses being prefaced by the words, “with and under this condition.” The entail then contained the following prohibitions:

“And with and under this further limitation and restriction, that it shall not be lawful to nor in the power of the said Arthur Dingwall, or of any of the heirs of taillie and substitutes called to this succession, to alter, innovate, or change, this present taillie, or the order of succession before prescribed, or to do or grant any fact or deed that may import or

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“ infer any alteration, innovation, or change, of the same, directly  
 “ or indirectly: And with this further limitation and restriction,  
 “ that it shall not be in the power of the said Arthur Dingwall  
 “ nor of any of the heirs of taillie or substitutes, to sell, alienate,  
 “ impignorate, or dispone, the said lands and estate, or any part  
 “ thereof, either irredeemably or under reversion, nor to burthen  
 “ the same, in whole or in part, with debts or sums of money,  
 “ infestments of annual rent, or any other servitudes or burthens  
 “ whatsoever, (except as hereinafter excepted,) nor to do any  
 “ other act or deed, civil or criminal, directly or indirectly, in  
 “ any sort, whereby the said lands and estate, or any part thereof,  
 “ may be affected, apprized, or adjudged, forfeited, or become  
 “ escheated or confiscated, or any otherwise evicted from the  
 “ heirs of taillie, or this present entail, or the order of succession  
 “ herein contained, prejudged, hurt, or changed; and with and  
 “ under this condition and provision, that it shall not be in the  
 “ power of the said Arthur Dingwall, or the heirs of taillie and  
 “ substitutes before mentioned, or any of them, to set tacks of  
 “ all or any part or portion of the said lands for a longer space  
 “ than nineteen years, and the lifetime of the granter, or for the  
 “ space of thirty years certain from the commencement.”

There then followed clauses prohibiting the granting of leases, except upon specified terms, and excluding the terce and courtesy of the heirs, each of which clauses was preceded with the words, “ and with and under this condition and provision.”

The prohibitions were fettered by the following clauses:

“ And farther, with and under the conditions, and under  
 “ these irritancies, that in case the said Arthur Dingwall, or any  
 “ of the substitutes or heirs of entail, shall contraveen the before  
 “ written provisions, conditions, restrictions, limitations, and  
 “ others herein contained,—that is, shall fail and neglect to obey,  
 “ fulfil, or perform the said conditions and provisions, or any one  
 “ of them, or shall act contrary thereto, then and in any of these  
 “ cases the person or persons so contraveening, failling to per-

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“ form, or acting contrary as said is, shall, for him or herself  
“ only, *ipso facto* amitt, lose and forfeit all right, title, and  
“ interest he, she, or they have to the said lands and estate, and  
“ the same shall devolve, accresce, and belong to the next heir of  
“ taillie appointed to succeed, albeit descended of the contra-  
“ veener’s own body, in the same manner as if the contraveener  
“ was naturally dead: and with and under this irritancy, as it  
“ is hereby provided and declared, that in case any adjudication,  
“ apprising, or other legall diligence, shall happen to be obtained  
“ or used for or against the fee or property of the said lands and  
“ estate, or any part thereof, upon any debts or deeds of the said  
“ Arthur Dingwall, or for any debts or deeds of any of the other  
“ substitutes, or heirs of entaill, done or contracted before or  
“ after their succession, to the said lands and estate, not only  
“ shall such debts and deeds, with the adjudications, apprisings,  
“ or other legall diligence, be void and null, in so far as they may  
“ affect the said lands and estate, or any part thereof: but also  
“ the said Arthur Dingwall, and the whole substitutes and heirs  
“ of entail respectively, upon whose debts or deeds done or con-  
“ tracted as aforesaid, such diligence has proceeded, shall *ipso*  
“ *facto* forfeit his or her right to the said lands and estate, and  
“ the same shall devolve, fall, and accresce, to the next heir of  
“ taillie, in the same manner as if the contractor of such debts,  
“ or the granter of such deeds, were naturally dead, and that free  
“ and disburthened of such debts and deeds, adjudications,  
“ apprisings, or other diligence led and deduced thereupon: and  
“ with and under this farther irritancy, that in case the said  
“ Arthur Dingwall, or any of the substitutes or heirs of entaill  
“ succeeding to the said lands and estate, shall committ the  
“ crime of treason, or any other crime, and shall be lawfully con-  
“ victed thereof, whereby the said lands and estate may become  
“ forfeited and caduciary, the said heir or heirs so convicted shall,  
“ for him or herself, and for all his or her descendants, *ipso facto*  
“ forfeit, amitt, and lose all right and title they had to the said

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“ lands, and the same shall accresce and pertain to the next heir  
 “ or member of taillie not descending of the contraveener’s body,  
 “ in the same manner as if the contraveener and the whole  
 “ descendants of the contraveener’s body were naturally dead;  
 “ and it shall be free and lawful to the said next heir and member  
 “ of taillie to establish his or her right to the said lands; in the  
 “ same manner as hereinafter directed with respect to other irri-  
 “ tancies.”

After a clause, giving the heirs power to make liferent provisions to their wives and husbands, but excluding any to younger children. There then followed this clause:

“ And also with and under this provision and condition, as it  
 “ is hereby expressly provided and declared, that upon every con-  
 “ travention that may happen by and through the said Arthur  
 “ Dingwall, or any of the substitutes and heirs of entail their  
 “ failing to perform all and each of the conditions, or acting  
 “ contrary to all or any of the restrictions, it is hereby expressly  
 “ provided and declared, that not only the said lands and estate  
 “ shall not be *burthened and liable* to any of the debts and deeds,  
 “ acts and crimes of the said heirs of taillie, but also all such  
 “ debts, deeds, and acts, contracted, granted, done, or committed  
 “ contrary to these conditions and restrictions, or to the true  
 “ intent and meaning of these presents, shall be of no force,  
 “ strength, or effect, and shall be unavailable against the other  
 “ substitutes and heirs of taillie, and who, as well as the said  
 “ estate, shall be nowise burdened therewith, but free therefrom,  
 “ in the same manner as if such debts or deeds had not been  
 “ contracted, made, granted, or committed.”

Alexander Dingwall, the heir in possession under the entail, sold the lands, but the purchaser raising a question as to his right to do so, he brought an action, (which on his death was insisted in by the appellant,) against the heirs of entail, to have it declared that the entail was not fenced against sales and alienations.

The respondent, the next heir of entail, appeared and put in

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defences to the action. The Lord Ordinary ordered cases by the parties, which he reported to the Court by whom they were ordered to be laid before the Judges of the other Division of the Court and the Lords Ordinary for their opinion. Upon receiving these opinions, the Court on the 26th of February, 1842, pronounced the following interlocutor:—

“ The Lords having advised this action of declarator and  
“ revised cases for the parties, and heard counsel,—find the  
“ objections stated to the validity and effect of the entail in  
“ question unfounded and groundless, therefore dismiss the action  
“ of declarator; assoilzie the defenders from the conclusions  
“ thereof, and decern; find the pursuer liable in expenses to the  
“ defender, and remit the account thereof to the auditor to tax  
“ the same, and report.”

The appeal was against this interlocutor.

*Mr. Kelly* and *Mr. Anderson* for the appellant.—Although the irritant clause sets out with words of general signification, the declaration immediately following is limited to debts and deeds of a nature to burden the lands, and the declaration of irritancy is of “*such* debts, deeds, and acts,” which, by the recognised rules of construction, must limit the irritancy to the deeds, debts, and acts mentioned immediately before, viz., those burdening the land. Not only so, but after declaring that the debts, deeds, and acts, shall not be effectual against the heirs, the clause goes on to say, that the lands shall not be “burdened” therewith. The clause must in strictness, therefore, be confined in its application to deeds and acts of that nature, and cannot be extended to embrace sales. That it ought to be so limited is confirmed by reference to the other clauses of the deed, where “burdening or “affecting” the lands is the matter specially provided against, *Lang v. Lang*, *McL. & Rob.* 871. *Sharpe v. Sharpe*, 1 *Sh. & McL.* 623. The terms, “burdening or affecting” the lands, have in more instances than one, been held not to apply to sales. *Breadalbane v. Campbell*, 2 *Rob.* 109. *Sinclair v. Sinclair*,

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3 *D. B. & M.* 636. But, further, the irritant clause is also defective in not declaring the matters done in contravention to be absolutely null, but merely that they shall not be available against the heirs, or burden the lands. *Sharpe v. Sharpe*, 1 *Sh. & McL.* 622.

The resolute clause also is ineffectual to prevent sales, because it is limited to acts in contravention of “the conditions and provisions” only, omitting “limitations and restrictions,” which in this deed are used in a sense contradistinguished from “conditions and provisions,” and selling is classed by it under limitations and restrictions. No doubt the clause sets out with embracing the whole clauses, but it afterwards, by the words “that is,” assumes the form of enumeration, and in that enumeration, embraces only “conditions and provisions.”

*The Lord Advocate* and *Mr. Turner* for the respondents, (were informed by the House that they need not trouble themselves as to the resolute clause).—It must be admitted that, but for the use of the word “such,” sales would have been struck at by the irritant clause; and why so, but that the words used are sufficiently broad to include them. In those cases where words of similar import to those used here have been held not to include sales, it was, because the previous part of the clause recited prohibitions which did not relate to sales; but here, the clause sets out with words of the broadest and most general import,—“failing to perform all and each of the conditions.” Assuming the appellant to be correct in the meaning he imputes to “burdened and liable,” the clause does not stop there, but goes on to declare, that all “*such* debts, deeds, and acts,” &c., that is, all debts, acts, and deeds in contravention. But “burdened and liable” have not the limited meaning which is sought to be attached to them; they apply to all acts by which the lands may in any way be affected.

LORD COTTENHAM.—My Lords, if I felt that in this case

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there was any danger of running counter to any decision of this House in former cases, I should have thought it necessary that we should take time for consideration, in order to be quite sure of the grounds upon which we proceeded, but it appears to me that this case depends on its own circumstances, and is not in the least affected by any of those rules and principles laid down in former cases, which have been referred to.

It appears to me that the whole turns upon the construction of the clause in question, for if that clause does embrace all matters before prohibited, then there is an end of the argument on the part of the appellants. Upon looking at the clause I think it does. There is no doubt that a sale is prohibited. That is one of the restrictions, or one of the provisions, (by whatever term it is described,) to be found in the earlier part of the settlement. Then how does the settlement proceed? “And also with and under this provision and condition, as it is hereby expressly provided and declared that upon every contravention that may happen by and through the said Arthur Dingwall, or any of the substitutes and heirs of entail, their failing to perform all and each of the conditions, or acting contrary to all or any of the restrictions, it is hereby expressly provided and declared, that not only the said lands and estate shall not be burthened and liable to any of the debts and deeds, acts and crimes, of the said heirs of taillie, but also all such debts, deeds, and acts, contracted, granted, done or committed, contrary to these conditions and restrictions, or to the true intent and meaning of these presents, shall be of no force, strength, or effect, and shall be unavailable against the other substitutes and heirs of taillie, and who, as well as the said estate, shall be nowise burthened therewith, but free therefrom.”

Now it has occurred, (and that is the only ground upon which any argument can be built,) that in certain cases the terms “debts and deeds,” to be found in a clause referring clearly to

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incumbrances or burthens thrown upon the land, have been construed not to extend the meaning beyond that which was clearly confined to burthens upon the land. So that where we refer to burthens upon the land, and then find the words “debts and deeds” following, the debts and deeds so to be understood by those expressions are to be confined to that which the sentence before contains. But there is another rule which is equally clear, arising from decided cases, that the words “debts and deeds,” where they are not so confined by referring to instruments which are limited to burthens on the estate, will embrace all acts, all debts, and all deeds before prohibited.

Then do these words “debts and deeds” fall within the one or other of those classes of cases? We decide this case without touching upon nice distinctions. We find, after the prohibition of sales, a clause commencing with a clear and distinct reference to all matters before prohibited, and then it says that “the estate shall not be burthened or liable to the said debts and deeds, acts and crimes.” Is the term “deeds” to be confined to debts, when the very sentence enumerates all matters prohibited.

So that taking the first part by itself, if it had not been aided by what is found in the subsequent part of the clause, I should have said that within the principle of decided cases, and according to the common sense and obvious meaning of the terms, the “deeds” here referred to are deeds prohibited in the early part of the instrument.

We come, then, to the further clause, and I give the appellants the benefit of the argument that the word “such” must be explained by the antecedent. What is the antecedent? The antecedent is “deeds.” If, therefore, we get a construction from the word “deeds” extending it beyond burthens upon the land, although the appellant has the benefit of the reference, he gets ultimately nothing by it, because the matter referred to extends beyond that to which he wishes to confine it. “But all such



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“ debts, deeds, and acts, contracted, granted, done, or committed  
“ contrary to these conditions and restrictions, or to the true  
“ intent and meaning of these presents, shall be of no force.”  
It is argued that that cannot extend the meaning of the prior  
part of the clause. But it is extremely useful in construing that  
sentence of which it forms a part, showing that the intention  
was not to limit it to debts and deeds, the words being clearly  
large enough to go beyond burthens upon the land, and showing  
that the object of this clause was to deal with all matters pro-  
hibited, “ all debts, deeds, acts, and crimes before prohibited;”  
and not to confine it to what may be strictly burthens upon the  
land.

If that be the correct construction of the clause the only  
ground upon which the argument for the appeal can be supported  
fails, being founded as it is upon the supposition that by the  
true construction of that clause the term “ debts and deeds ”  
ought to be confined to that which constitutes strictly debts or  
burthens upon the land. Being of that opinion, I cannot doubt  
that the judgment of the Court below was correct.

LORD BROUGHAM.—My Lords, I entirely agree with my noble  
and learned friend. I have looked into the Hoddam case, as I  
have done over and over again, and I have looked into the other  
cases, and those cases do not furnish any ground for the argu-  
ment in support of the appeal. I do not see the slightest incon-  
sistency between the decision in the Hoddam case, or what was  
said in that case, and the present case, because the case there  
was an admission of the very thing upon which this case rests.  
Here it is not merely that the lands are declared to be not  
liable and not burthened, but there is also added, that all those  
things of whatever kind, not merely debts, and incumbrances,  
and burthens, but “ deeds, acts, and crimes,” all those things  
shall be null and void, and of no effect. The large enumeration  
of the prohibitory clause has been referred to by my noble and

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learned friend. I am clearly of opinion that the judgment should be affirmed.

LORD CAMPBELL.—My Lords, I agree that we may safely dispose of this case immediately, and that it is proper that we should take that course; for I have no doubt at all, that giving to this clause its natural and grammatical meaning, it is free from all doubt.

My Lords, I perfectly concur in the doctrine that has been laid down upon the part of the appellant, that where there is any doubt that doubt is to be construed in his favour, but where there is no doubt we are bound to give effect to the law as it stands, and to allow the entail to be preserved.

My Lords, for the reasons that have been stated by my noble and learned friend, who first addressed your Lordships, it is quite clear to me, that this irritant clause comprehends in the most express terms, every prohibition that is to be found before-mentioned, and without detaining your Lordships by again going over the grounds, it is quite clear to me that the meaning of the entail is expressed in language which, in giving to that language its natural and grammatical import, carries into effect the intention he entertained.

My Lords, since I have had the honour of being a member of your Lordship's House, and have taken a part in these discussions, I have had occasion to review almost all the cases upon these subjects, and to lay down the principles which I think ought to govern your Lordship's decisions upon Scotch entails. I abstain from repeating what I have before said, and from referring to any case except the Hoddman case. I will only make an observation to explain that case, and to save your Lordships from the infliction of that case being again brought forward as an authority for what it does not in the slightest degree prove.

Nothing can be more fair than the course upon which the

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learned gentleman who drew the appellant's case has proceeded; for he has set out in parallel columns, the irritant clause in the Hoddam case, and in the case now before your Lordships. They are very fairly set out. In the case at bar there is a perfect sentence, with the nominative, verb, and accusative, everything round and complete, admitting of no sort of doubt. We know what is irritated in this case. We know that everything is irritated that is prohibited. Now, when we come to the Hoddam case, we do not know what is irritated at all, because when we come to the word "acts," it is quite clear, looking at the deed merely *ex facie*, without enquiring as to the history of the case, that something was omitted. Therefore you do not know what is the nominative. The words are, "contrary to these conditions and provisions, or restrictions and limitations, or to the true intent and meaning of these presents shall be of no force, strength, or effect." You cannot, in the slightest degree tell what is to be of no strength or effect, because the nominative is omitted. I had the honour to argue that case I think three times at the bar of your Lordship's House. It was not contended that without some interpolation, that could be a perfect irritant clause, but it was said that the necessary mode of supplying it was by introducing words, that all is to be included which is contained in the prohibitory clause. That was one mode of filling up the blank. Another mode of filling up the blank was to shew, that merely the acts of the substitute were to be irritated. Upon that ground, and that ground alone in the Hoddam case the entail was held to be defective, and I shall lament, if after this attempt once more to explain the grounds upon which the House proceeded, the Hoddam case should be again cited as an authority to prove that which it has no tendency at all to establish.

My Lords, not to detain your Lordships with any further observations, I think the irritant clause is abundantly sufficient; upon the resolute clause we stopped the respondent's counsel,

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thinking that it did not admit of any argument, and I think upon due consideration, that the irritant clause is equally sufficient, and therefore I entirely concur with the motion that has been made in this case, that the judgment of the Court below be affirmed.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutor therein complained of be affirmed with costs.

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