

1863.  
April 16th.

EARL OF KINTORE, . . . . . APPELLANT.  
LORD INVERURY, AND ANOTHER, . . . . . RESPONDENTS.

FIRST APPEAL—AS TO THE KINTORE ENTAIL.

SECOND APPEAL—AS TO THE HAULKERTON ENTAIL.

*Kintore Case.*

*Scotch Entail—Prohibitory and Irritant Clauses.*—The prohibitory clause of the Kintore entail contained the usual prohibitions, *inter alia*, a prohibition against the “contracting of debts, and giving bonds and obligations therefor.” The irritant clause declared that if the heirs “should contravene the premises, then and in that case all the said venditions, alienations, dispositions, infestments, alterations, infringements, bonds, tacks, obligations, and all other crimes, treasons, deeds, and acts done in the contrary of this present taillie and provision shall be null and void in themselves.” Held, by the House (affirming the decision below), that the general words contained in this irritant clause, *being words of reference*, rendered it valid and sufficient.

Per the Lord Chancellor : If to a prohibitory clause there be added an irritant or resolute clause, which repeats some of the things prohibited, and concludes with general words, *not being words of reference*, the things so repeated will form the termini within which the adjoined general words will be confined.

But if an irritant or resolute clause be framed on the principle of reference, there can be no objection to its validity ; for *verba relata inesse videntur*. Hence, where the clause of irritancy, after enumerating some of the things prohibited, concludes with general words, *being words of reference*, the effect will be to add to the things enumerated all the other things contained in the prohibitory clause, but not enumerated in the irritant clause.

*Haulkerton Case.*EARL OF KINTORE  
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*Entail—Prohibitory and Irritant Clauses.*—The prohibitory clause in the Haulkerton entail contained prohibitions against altering the order of succession, selling, *disponing*, &c. The irritant clause was in the following terms: “Declaring that if the said Earl of Kintore or  
“ other heirs of entail shall act and do in the contrary  
“ with respect to altering the order of succession, selling,  
“ or contracting debts, granting leases, suffering adjudica-  
“ tions, or in any one of the several particulars above  
“ mentioned, then all and every one of such acts and  
“ deeds shall be *ipso facto* void.” The irritant clause did not repeat the word *disponing*. *Held*, however, by the House, affirming the decision below, that the words “or in any one of the several particulars above  
“ mentioned,” included the prohibition against *disponing*, and gave validity to the irritant clause.

Per the Lord Chancellor: It is impossible, consistently with the rules of grammatical construction, to hold that the cardinal words, “or in any one of the several parti-  
“ culars above mentioned,” can be confined to the things which immediately precede. And if this be so, it follows that the words, which I have called cardinal, must refer to the other particulars mentioned in the prohibitory clause.

THIS case (one of grammatical and technical construction) is fully set out in the Court of Session Reports (a). There were two questions relating to two distinct entails, namely, the entail of Kintore and the entail of Haulkerton. In both the point contested was as to the sufficiency of the irritant clause.

The Court of Session decided in both cases that the irritant clause was sufficient. The Earl of Kintore appealed, and was supported by the *Solicitor-General* (b) and Mr. *Anderson*, Mr. *Rolt* and Mr. *Neish* appearing for the Respondent.

(a) 23 Sec. Ser. 1105.

(b) Sir Roundell Palmer.

EARL OF KINTORE      The reasoning and authorities on which the House  
 LORD INVERURY.      proceeded appear from the following opinions.

Lord Chancellor's  
 opinion.

The LORD CHANCELLOR (*a*):

My Lords, it has been settled by a long series of decisions, that the restrictive clauses in deeds of entail must receive a strict interpretation; so that if the words taken *per se* admit of a grammatical construction which is in favour of liberty, that construction must be preferred. In addition to this general principle, some minor rules of interpretation have been adopted. Thus, if to general words special words are added, the rule "*specialia derogant generalibus*" has been applied, and the general words have been limited to the things denoted by the special words of addition. And if, on the other hand, words of general comprehension are added to special words denoting particular things, the general words are confined in their extent, and reduced to signify things *ejusdem generis* with those that are properly denoted by the special expressions.

The application of these rules has been so frequent in the decided cases that they have given rise to technical denominations of clauses framed on a principle of reference, and clauses framed on a principle of enumeration.

If to a prohibitory clause, stating distinctly various things that are prohibited, there be added an irritant or resolute clause, which, beginning with general words of reference, proceeds to particularize or enumerate some only of the things prohibited, then the concluding words of the clause, declaring the irritancy or forfeiture are in construction confined to the things specified or enumerated. Of the application of this rule the leading examples are the Tillycoultry

(*a*) Lord Westbury.

case, *Bruce v. Bruce* (a) ; and the cases of the Ballileisk entail (b), and of the Gala (c) and Banchory entails (d).

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And, secondly, if to a prohibitory clause, having numerous prohibitions, there he added an irritant or resolute clause, which makes a repetition of some of the things prohibited, and concludes with general words, *not being words of reference*, then, in conformity with the rule I have stated, the special words form the termini within which the adjected general

(a) 4 Paton's App. Cas. 231.

(b) *Rennie v. Horne*, 3 Sh. & McL. 142., where the House of Lords held that upon a prohibition against sales, the irritant and resolute clauses having a general declaration, followed by a particular enumeration of things prohibited, without mentioning sales, the entail, by reason of this omission, was ineffectual.

(c) *Scott v. Scott*, 18 Sec. Ser. 168. In this case the irritant clause was framed upon the principle of enumeration, and failing to enumerate completely, was held defective.

(d) *Thomson v. Milne*, 27 Feb. 1839, 1 Sec. Ser., and see Duncan's Entail Precedents. The irritant clause in the Banchory case was as follows:—"And in case any of the heirs of tailie and provision before mentioned shall contravene or fail in performing any part of the premises, *particularly* by possessing the foresaid estates in virtue of any other title than this present deed of tailie, or by omitting to insert in the whole writs, charters, retours, precepts of clare constat, and infestments the order of succession, and whole conditions, provisions, prohibitions, restrictions, limitations, reservations, clauses irritant and resolute and prohibitory, herein contained, *or by altering the order and course of succession* hereby set down, *or if they or any of them shall contract debt or do any deed or deeds whereby the foresaid estates or any part thereof may be* burdened, evicted, confiscated, forfeited, appraised, adjudged, escheated, or become caduciary, or set tacks other ways than as before directed, *or shall contravene* or fail in any part of the premises; then all *such* deeds of contravention, and all debts so to be contracted, shall and are hereby declared not only to be null and void to all intents and purposes, in so far as the same may or can *affect*, burden, evict, or forfeit the lands and estates, but also the contravener for himself only shall *ipso facto* tyne amit lose and forfeit all right, title, and interest to the said lands and estates." In this case the Court of Session held that the irritant clause was not effectual, and therefore that the heir of entail in possession had power to sell.

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words will be confined, and the clause fails equally upon the principle of defective enumeration.

On the other hand, if an irritant or resolute clause be framed simply on the principle of reference, there can be no objection to its validity, for "*verba relata inesse videntur*," and the whole of the prohibitions are by the reference repeated.

The peculiarity of the present case of the Kintore entail is, that the operative part of the clause of irritancy, after enumerating some of the things prohibited, concludes with general words *being words of reference*, which therefore have the effect of adding to the things enumerated all the other matters contained in the prohibitory clause but not enumerated, as effectually as if they had been particularly mentioned, instead of being included by being referred to.

Concluding general words, being words of reference to things previously mentioned, are equivalent to a repetition of the things so referred to, and the effect is the same as if everything prohibited, which is not enumerated in the first part of the clause, had been expressly mentioned in the concluding portion.

In my judgment, therefore, the objection to the validity of this entail, which rests entirely on the supposed defect in the clause of irritancy, is not well founded, and the judgment in the Court below ought to be affirmed.

With respect to the Haulkerton entail, the same *ratio decidendi* applies to it as I have already expressed with reference to the Kintore entail. It is impossible, consistently with the rules of grammatical construction, to hold that the cardinal words which occur in the clause of irritancy in this entail, namely, "Or in any one of the several particulars above mentioned," can be confined to the things which

immediately precede, and which are stated in the disjunctive, and governed by the words "with respect to," namely, with respect to altering the order of succession, selling or contracting debts, granting leases, suffering adjudications to be deduced. And if this be so, it follows that the words I have called cardinal words must refer to the other particulars mentioned in the prohibitory clause, and that the case also is one of a clause of irritancy containing a partial enumeration followed by words of general reference, which, for the reasons given in the judgments in the Courts below, appears to me to be good. In my judgment, therefore, the Interlocutor in this case also ought to be affirmed.

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Lord  
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Lord WENSLEYDALE :

My Lords, these two cases' come before your Lordships upon Appeals from two Judgments of the First Division of the Court of Session ; one in an action to declare void the fetters of a tailzie of the estate of Kintore, the other of a different tailzie, that of the estate of Haulkertoun ; each on account of a defect in the irritant clause ; and the question in each case is, whether that clause is void.

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The Lords of the First Division, with the exception of Lord *Deas*, who was of a different opinion, held that both the tailzies were valid, though they all considered the questions of some nicety and doubt. Sitting in a Court of Appeal, we ought not to reverse a judgment unless we are quite satisfied that the decision was wrong ; and I must say, after much consideration of the questions, that I am far from coming to that conclusion ; on the contrary, my impression is that the decision was right.

The objection in the case of the Kintore entail is, that the prohibition contained in the prohibitory clause of

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the deed of tailzie against the contraction of debts is not fenced by a proper irritant clause.

That in the entail of Haulkerton is, that the prohibition contained in the prohibitory clause against disposing is not fenced by a proper irritant clause.

The objection to each tailzie, if well founded, undoubtedly avoids it altogether. The question then is, whether both or either objections are well founded? It seems to me neither is. If in deciding these questions we had only to consider, first, what the meaning of the maker of the tailzie was to prohibit, as expressed in the terms of the deed, according to the ordinary rules of construction of written instruments, and then whether he had properly fenced that prohibition by irritant and resolute clauses, without being bound in that construction by any technical rule peculiar to entails, I do not feel that there would be any difficulty in deciding these cases in favour of the Respondents. What the language, according to its natural and ordinary construction, means, seems to me to be matter of no doubt. It is clear that the maker of the entail meant to prohibit everything done in contravention of each tailzie, though he uses different language in each instrument.

If the case, then, were governed by the ordinary rules of construction, there would not, I think, be any question as to what the decision ought to be. But there are authorities which lay down that there is a different rule which is to govern the construction of deeds of entail, and by those authorities we are bound.

One is that entails are *strictissimi juris*, and the prohibitory, irritant, and resolute clauses must be clearly and distinctly expressed; and if a deed of entail is reasonably capable of two constructions, one of which prohibits the free disposition of the estate, and the other does not, the presumption is in favour

of freedom. This is the law frequently laid down, and particularly by Lord *Campbell*, very clearly and distinctly in the case of *Lumsden v. Lumsden* (a). If an expression in an entail fairly admits of two meanings, both equally technical, grammatical, and intelligible, that construction must be adopted which destroys the entail, rather than that which supports it. But this rule does not authorize you to put on any expression a forced or unreasonable and ungrammatical construction in order to defeat the entail ; you must first construe the instrument according to its fair meaning, and if that leaves two courses open, freedom of disposition must prevail.

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Another rule, which has been derived from cases, and which is by no means unreasonable, is, that if the maker of the tailzie undertakes to enumerate and specify with particularity, in the irritant or resolute clause, those acts which he means to create forfeiture, and uses general words in connexion with them, those general words ought not to be extended in their meaning beyond the enumerated acts. This appears to me to be a rule of good sense, and very intelligible.

None of the cases cited in the Court of Session and at your Lordships' bar, in which the application of that rule is exemplified, are in the form of words used precisely in point, though they give examples of the application of a principle of construction by which we are bound.

We have, then, to apply these rules to the cases which we have to dispose of. To begin with the Kintore entail, to which the last-mentioned rule is said to apply, and upon the supposed application of which the objection seems to me to rest, I must own that I think it has really no application. The prohibition in that tailzie is not, as it seems to me,

(a) 2 Bell, 104.



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founded on the principle of enumeration. That principle applies to a case when the maker provides that if any heir shall contravene by doing certain specified acts, particularly described, then superadded general words are limited by the context. But here he begins, in the first part of the clause, by expressly providing for the case of *every* contravention of the previous provisions ; and he points out the consequences, by the avoidance of acts done, in particulars and also in general terms. In this case it seems to be clear that the maker meant to prohibit every contravention of the entail, and no established rule of construction, properly understood, seems to me to stand in the way of our giving what we think to be the true construction of the words used.

I must confess that I agree with the *Lord President* and *Lord Ivory*, that this clause does not fall within the description or principle of an enumeration clause as properly understood, which is, that the enumerated defaults are to be considered as the only faults provided for, the added general words being only applicable to things of the like character. Here the general prohibition cannot, I think, be doubted.

I am of opinion, therefore, that the irritant clause in the Kintore case is good and valid, and the tailzie good.

The objection of the Haulkertoun entail does not seem to me to fall within the objection of the clause being enumerative.

In the view I take of this case no great difficulty appears to me to arise. The material clause is as follows :—“ If the said Anthony Adrian, Earl of Kintore, or any of the other heirs or members of entail above mentioned substituted to them, shall act or do in the contrary with respect to altering the order of succession, selling or contracting debts, granting

leases, suffering adjudications to be deduced, or in any one of the several particulars above mentioned, then and in that case all and every one of such acts and deeds, with all that shall happen to follow or might be otherwise competent to follow thereupon, shall be *ipso facto* void and null and of no force, strength, or effect, in the same manner as if the said acts and deeds had not been done; acted, or committed."

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Now, if after the acts enumerated, altering the order of succession, selling, or contracting debts, &c., there had been added only the words "*or the like,*" or "*otherwise,*" it might have been successfully contended that the irritancy could not be further extended; that it must be confined to things *ejusdem generis*, and consequently that the irritant clause did not include a disponing. But, according to the natural, ordinary, and grammatical construction, the clause applies to render void the violations of the entail, not merely in the named particulars, but the several particulars *before* mentioned. The particulars before mentioned, in the ordinary and usual mode of construction, mean those *before* the enumeration from which it is distinguished, those in the earlier part of the entail; and the prohibitory clause, immediately before, includes "disponing." This word is clearly, as it seems to me, introduced by reference. You cannot, without doing violence to the ordinary rules of grammatical construction, insert instead of those words, the words "*or the like,*" with the last enumerated acts. It seems to me that those words must be read as purposely extending the irritancy to all the prior prohibited violations of the tailzie, including the "disponing."

I concur, therefore, with the great majority of the Lords of Session, and recommend that this judgment should be affirmed.

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 opinion.*

Lord CHELMSFORD :

My Lords, if there were no decided cases in the way of the construction of the fettering clauses of these entails, there would be no great difficulty in construing them according to the apparent intention of the grantor. But the hesitation which I have felt in agreeing with the opinions of the majority of the Judges of the Court of Session has arisen from an apprehension that they were not to be reconciled with some previous decisions which were referred to in the course of the argument.

It seems to be agreed that if the words of a deed are capable of a construction which will have the effect of freeing an estate from the fetters of an entail, this construction, strict in itself, but liberal in its effect, ought to be adopted ; and all the cases establish that if the fettering clauses are framed upon the principle of enumeration, the clearest general words must be used to manifest the intention to extend the clauses beyond the particulars enumerated. It was contended, indeed, by Mr. *Anderson* in his argument for the Appellants that if the entailer has once resorted to enumeration, no general words afterwards used, though obviously comprehending more than the enumerated particulars, can extend the force of the irritant and resolute clauses beyond the acts particularized. But no authority was adduced for such a narrow principle of construction, which would have the effect of tying an entailer down to one particular mode of expressing his intention, and of rejecting words from the deed which are capable of, and therefore entitled to, their appropriate application.

In the Kintore entail the question arises upon the irritant clause. In the prohibitory clause, amongst a minute and specific detail of prohibited acts, is expressly included "the contracting of debts, and giving bonds and obligations therefor." It is con-

tended on behalf of the Appellants that there is nothing in the irritant clause which is applicable to this prohibition.

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The irritant clause is in these words:—"And if the said William Lord Inverury shall contravene the premises, then and in that case, all the said *ventiones, alienationes dispositiones*," and so on, "and all other deeds and acts done in the contrair of this present taillie and provision shall be null and voide in themselves *ipso facto*, without the necessity of any action or sentance of declarator thereupon."

In this clause, connecting itself closely with the preceding prohibitory clause by the words "and if," the word "premises" must mean all those things just before mentioned, and intended to be prohibited. And then follows, not an enumeration of the particular things contained in the prohibitory clause, but general words descriptive of the deeds or other instruments by which the prohibited things may be accomplished, or of the acts which would be contrary to the prohibitions, concluding with the words "all other deeds and acts done in the contrair of this present taillie and provision."

This clause is therefore not framed upon the principle of enumeration as in *Bruce v. Bruce* (a), where the words of the resolute clause were "it is provided and declared that the said James Bruce, and the other heirs of tailzie, who shall contravene and incur the said clauses irritant or any of them, either by," &c. (then enumerating not all the prohibited acts), "that then and in any of *the said cases*" the right of succession should be forfeited; or as in *Rennie v. Horne* (b), where the words were, "In case the said Archibald Hill, or any of the heirs of tailzie before mentioned, shall contravene or fail in performing any part of the premises,

(a) 4 Patin's App. Ca. 231.

(b) 3 Sh. & McL. 142.

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particularly by," &c. ; then followed an enumeration of particulars, ending with the words "or shall contravene or fail in any part of the premises." As the same general words in the beginning of the clause had been qualified by the word "particularly," which introduced the enumeration, the repetition of them in the latter part of the clause was hardly susceptible of a more extensive meaning.

The case which at first sight appears to be the most difficult to distinguish from the present is that of *Scott v. Scott* (a). But there also the irritant clause was framed upon the principle of enumeration of the prohibited acts, and one of the prohibitions, as to altering the order of succession, was not irritated. If the irritant clause in the present case had been enumerative, the case of *Scott v. Scott* would have been a decisive authority.

But although the distinction between the clause in question and that in each of the other cases to which I have referred may seem to be narrow, yet it is capable of being accurately defined. The introductory words of the irritant clause in this case can be interpreted in no other manner than as applying to all the previously expressed prohibitions in the clause immediately preceding. The subsequent words are not intended to draw out in detail and particularize what had been thus generally expressed, but in the most general and comprehensive terms to describe every deed or instrument which might be executed, and every act and thing which might be done in contravention of the prohibitions, or to affect the acts prohibited. And the general words "all other acts and deeds," at the end of the clause, embrace everything in violation of the prohibitions which had not been specifically included in the previous description.

(a) 18 Sec. Ser. 168.

I agree that the Interlocutor as to this entail should be affirmed.

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The Haulkerton entail appears to me to run even closer to the previous decisions than that of Kintore. The majority of the Judges of the Court of Session proceed upon the ground that the words of the irritant clause in this entail, "or in any of the several particulars above mentioned," cannot be applied to the irritant clause itself, on account of their grammatical construction, and also because they would then have no practical effect. For when it says, "If the Earl of Kintore shall do in the contrary," with respect to certain enumerated things, and then adds, "or in any one of the several particulars above mentioned," if the words "above mentioned" refer to the particulars just before enumerated, they are wholly superfluous and unnecessary.

Lord *Deas*, who differed from the other Judges, said, "If there be two ways of fairly and reasonably reading the clause, the one of which limits these words, 'or in any one of the several particulars above mentioned,' to the particulars in the irritant clause itself, and another which would extend them to all the particulars in the previous parts of the deed, the rule of strict construction would oblige us to take that reading which is not favourable to the entail." It may be doubted, however, whether there can properly be said to be two ways of construing words in a deed, if in one way they would have a practical effect, and in the other way would be wholly inefficacious.

But then again, if the rigid construction in favour of unfettering entails is the rule to be followed, it may be asked why the words in question may not be regarded as an instance of repetition not uncommon in deeds, by way of enforcing the previous enumeration of prohibited acts. We have seen that, in the case of

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*Rennie v. Horne* (a), the words, "or shall contravene or fail in any part of the premises," following an enumeration, were not allowed to extend the clause beyond the particulars previously enumerated, and were thus disabled of all effect.

It seems to me hard to reconcile the present case with the previous decisions, but I do not feel my doubts sufficiently strong to induce me to differ with the opinions of my noble and learned friends, who think that the Interlocutor as to this entail ought to be affirmed.

Mr. *Neish* : Before your Lordship puts the question will you pardon me if I ask for costs on behalf of the Respondents.

Lord CHELMSFORD : That is of course.

*Interlocutors in both Appeals affirmed, and Appeals dismissed with costs.*

LOCH & MACLAURIN—DODDS & GREIG.

(a) 3 Sh. & McL. 142.