# United Kingdom House of Lords Decisions





## (1835) 1 S&M 1

CASES DECIDED IN THE HOUSE OF LORDS, ON APPEAL FROM THE COURTS OF SCOTLAND, 1835.

1 ST DIVISION.

No. 1

**Lord ELIBANK and his Commissioners Appellants—Murray.**

***v.***

**PATRICK MURRAY, Esq., Respondent—Sir John Campbell—Smythe.**

[ 19th March 1835.]

**Ld. Corehouse**.

Subject_**Entail —**

> The prohibitory clauses of an entail being directed against the institute and the other heirs of tailzie, but the irritant clause being only directed against the debts and deeds of "the said heirs of tailzie," without specifying the institute. Held (affirming the judgment of the Court of Session) that it was lawful for the institute to sell.

PATRICK Lord Elibank, by bond and deed of tailzie dated 9th of November 1776, granted procuratory for resigning all and whole his lands of Simprim, Maegill, and others therein mentioned, in favour of and for new infeftment of the same, to Patrick Murray the respondent, and the heirs male of his body; whom failing, to

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a series of substitutes, and the heirs male of their bodies; whom all failing, to the entailer's own nearest heirs whomsoever.

This deed contained, among others, the following prohibitions: —

> "That it shall noways be lawful to or in the power of the said Patrick Murray, or of any of the other heirs of taillie and substitutes above named, to innovate, alter, or infringe this present taillie, or the order of succession hereby established, or to be established by any nomination or other writ to be made by us, or to do or grant any other act or deed that may infer any alteration, innovation, or change of the same, directly or indirectly,"

excepting always power to alter the order of succession, so as to exclude heirs forfeited or attainted:

> "And with and under this limitation and restriction also, that it shall not be lawful to or in the power of the said Patrick Murray, and our other heirs of taillie above specified, or any of them, to sell, dispone, alienate, burden, dilapidate, or put away the lands and others above written, or any part thereof, either irredeemably or under reversion, or to contract debts, grant bonds, or any other security, or to do any act, civil or criminal, that shall be the ground of any adjudication, eviction, or forfeiture of the aforesaid lands and estates, or any part thereof."

These prohibitions were fenced with the following irritant and resolutive clauses: —

> "With and under these irritancies following, as it is hereby expressly provided and declared, that if the said Patrick Murray, or any other of the heirs of taillie above specified, shall contravene any of the conditions, provisions, and limitations herein contained, either by failing and neglecting

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> to obey and perform the said conditions and provisions, and every one of them, or by acting contrary to the said restrictions and limitations, or any of them, excepting as is above excepted, that in any of these cases the person so contravening, by failing and omitting to obey the said conditions, or acting contrary to the said limitations, or any of them, shall, for himself only, forfeit, omit, and lose all right, title, and interest to the foresaid lands and estates, in the same manner as if the contravener were naturally dead, and the right thereof shall devolve upon the next heir of taillie,"

&c. — "And it is also hereby expressly provided and declared, that all the debts and deeds of the said heirs of taillie, or either of them, contracted, made, or granted, as well before as after their succession to the aforesaid lands and estates, in contravention of this present taillie, and provisions, conditions, restrictions, and limitations herein contained, and all adjudications or other legal executions or diligences that shall happen to be obtained or used against the fee and property of the said lands and estates, or any part thereof, upon the same, shall not only be void and null, with all that may or shall follow thereon, in so far as they might anyways affect the said lands and estates, but also the heirs of taillie respectively, upon whose debts and deeds such adjudications have proceeded, shall ipso facto forfeit their right and title to the said lands and estates, and the same shall devolve to the next heir of taillie," &c.

On the death of the entailer, in the year 1778, Mr. Murray completed titles, by charter and infeftment, as institute under this deed; and, as he was not an heir

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alioqui successurus, it necessarily continued ever since to be his sole and exclusive title of possession.

Mr. Murray being married, and having no heirs male of his body, but only daughters, and having been advised, that in consequence of a defect in the irritant clause, the entail, in so far as regards him personally, was altogether inoperative to create a limitation in his right; and that whatever might be its effect as against the substitutes, it contained nothing to prevent him from selling or otherwise disposing of the whole or any part of the lands to which it refers, as freely, in all respects, as if he were the fee-simple proprietor, caused the lands to be advertized in the year 1832, to be sold by public auction within the Royal Exchange Coffee House of Edinburgh, and gave intimation thereof to the agent of the Right Honorable Alexander Lord Elibank, the grand nephew of the entailer, and the next heir substitute of entail failing the heirs male of his, Mr. Murray's, own body, of his intention to sell the lands as soon as he could find a purchaser, and that he was actually in treaty for the sale of them. His intentions to do so were no sooner made known, than he was met by a declarator of irritancy, at the instance of Alexander Lord Elibank, concluding to have it found and declared, “that the defender is, by the foresaid deed of entail, specially prohibited from selling the lands and estates before mentioned, or any part thereof, and is legally debarred from selling the same, or granting any obligation, missive disposition, or other deed of sale, or any deed or right, in whatever form the same may be conceived, whereby the said lands and estates



may be anywise evicted or carried off, to the prejudice of the pursuer, or any of the other substitutes in the said entail; and it ought and should be found and declared by decree foresaid, that any such missive obligation, disposition, or other deed or right, in whatever form the same may be conceived, conveying or entered into for the purpose of conveying away the said lands, or any part thereof, to the prejudice of the pursuer and the other heirs substitute of entail, whether already contracted, made, or granted, or to be contracted, made, or granted, by the defender, is null and void, and incapable of affecting the said lands and estates; and that by contracting, making, or granting such obligation, missive disposition, or other deed or right for affecting, evicting, or carrying off the same, to the prejudice of the pursuer, or any of the other substitutes in the said entail, the defender has already forfeited, or upon contracting, making, or granting such obligation, missive disposition, or other deed or right for affecting, evicting, or carrying off the said lands and estates, or any part thereof, will forfeit, lose, or amit all right, title, and interest in the said lands and estates.”

Mr. Murray founded his defences to this action on the defective nature of the irritant clause: and pleaded, that the irritant clause applies only to the debts and deeds of the heirs of taillie, and he is not one of the heirs, but the institute in the entail,—the lands being conveyed to him directly, and not as substitute to any other person; and further,

that the irritant clause does not apply to any disposition or deed of alienation of the entailed estate, but only to debts and deeds of that



description upon which adjudications or other legal diligences may be deduced; and, upon these grounds, he claimed to be entitled under the entail to sell or alienate, the whole or any part of the estate, without incurring thereby a forfeiture of any of his rights and interests.

Before this action came to be disposed of, Mr. Murray, having completed a transaction for the sale of the whole of the entailed lands, raised a counter action of declarator against Lord Elibank, and the other substitute heirs of entail; in which, on the ground of the defects in the irritant clause, as set forth in his defences to the previous action at his Lordship's instance against him, he concluded to have it found and declared, not only that he had full and undoubted right and power effectually to sell and alienate the several lands and others contained in the before-mentioned bond of taillie, to any person or persons, in any way he may think proper, for a price, or other onerous consideration, and to grant and execute all deeds and writings whatsoever, which may be requisite and necessary for effectually conveying the lands so sold to such person or persons purchasing the same; but also, “that, upon selling or alienating the whole or any part or parts of the said several lands and others, the pursuer will have the sole and exclusive right to the said price or prices, or other consideration, and will have power to grant a valid and sufficient discharge for the same to the purchaser or purchasers; that the said price or prices, or other consideration, will become the pursuer's absolute property; that he will have full power to use and dispose of the same at pleasure; and that he will not lie under any obligation to invest, employ, or lay out the same, or any part



thereof, in the purchase or on the security of any other lands or estate, or otherwise, for the benefit of the defenders, or any of them; and that they will have no right or title to interfere with or control the pursuer in the use or disposal of the said price or prices, or other consideration, in any manner of way: And also, that the defenders, or any of them, will have no claim or demand of any description against the pursuer, or against his heirs and representatives, in the event of his death, for or in respect of the sales or alienations which may be made, or dispositions or other writings which may be granted or executed by the pursuer; or adjudications or other diligence that may be deduced thereon; or for or in respect of the pursuer using or disposing, at his pleasure, of the said price or prices, or other consideration.”

Upon advising the closed record and mutual case, Lord Corehouse, Ordinary, reported them to the Court, and issued this note: —

"The Lord Ordinary reports this case, not on account of any doubt which he entertains on the point at issue, but because it is of importance to the parties that it should be speedily determined by the Court whether Mr. Murray, the institute in possession, is in a situation to give a valid title to the person who has agreed to purchase the estate."

The Trustees of the late Earl of Strathmore, and the late Sir John Marjoribanks of Lees, Bart., the parties to whom the estates of Simprim and Maegill were sold by the respondent, had in the meantime raised actions of suspension in the Court of Session of threatened charges for payment of the price of their respective purchases;



and a record having been closed in both of these suspensions, the Lord Ordinary of this date made avizandum with them to the First Division of the Court.

On the 2d of July 1833, their Lordships of the First Division pronounced this interlocutor:—

> "Having considered the record and revised cases for the parties in the conjoined actions of declarator at the instance of Lord Elibank and Commissioners against Patrick Murray of Simprim, and at the instance of the said Patrick Murray against the said Lord Elibank and others, and having also considered the records in the actions of suspension at the instance of the trustees of the late Earl of Strathmore, and the trustees of the late Sir John Marjoribanks, against the said Patrick Murray, also reported by the Lord Ordinary, of consent conjoin all these processes, and in the conjoined actions of declarator and suspension, find that the entail of the estates of Simprim and Maegill does not contain any irritant clause applicable to the debts and deeds of the said Patrick Murray, as the institute in the said entail; and that the sales made by the said Patrick Murray of the lands contained in the said entail are valid and effectual; and in respect of the said defect in the entail, find in terms of the conclusions of the libel at the instance of the said Patrick Murray, and decern and declare accordingly; assoilzie the said Patrick Murray, defender, from the whole conclusions of the libel at the instance of the said Lord Elibank, and decern; repel the reasons of suspension stated for the said Lord Strathmore's trustees, and for the said Sir John Marjoribanks' trustees; find

> the letters orderly proceeded, and decern; find no expences due to any of the parties." [1]

Against this interlocutor, in which the whole Court were unanimously agreed, Lord Elibank appealed. The trustees of the Earl of Strathmore and the trustees of the late Sir John Marjoribanks, and who were the purchasers, also appealed.

*Appellants*.—According to the terms of the statute and the language generally used in deeds of entail, the term "heirs" is applicable to all members of tailzie, without distinction between the institute and substitute, and there is no reason to hold, from any part of the deed of entail in question, that the tailzier meant to make any distinction between Patrick Murray and the other members of tailzie, by exempting him from the limitations imposed on the others; there are many deeds of entail on record where the expression is "John such a one (the institute), and the other heirs of entail."

A deed of entail need not be drawn up in any particular technical words or form in order to render it effectual; provided the requisite clauses are inserted, and are sufficiently distinct to convey his meaning, the entailer may adopt any order and any form of words he chooses. Whatever may be the sense in which the term "heirs" is in the general case to be construed, it will be sufficient to comprehend the institute, if either by a special clause, de interpretatione verborum, it is declared to be used by the entailer to signify the institute as well as those called after him to the succession, or if this is

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[1] *11 Shaw, Dunlop, and Bell, 858.*



made perfectly clear and certain by the manner in which the word is used in the different parts of the deed. There is nothing to prevent the maker of a deed of entail from using any word either in a more confined or more comprehensive sense than its legal or ordinary one, and all that is necessary to its being received in that sense is, that it should be quite clear that such was the sense in which it was used, and the meaning which was by it intended to be conveyed; and were the maker of an entail by a special clause to declare, that certain words therein were used by him in order to signify a particular thing therein also clearly stated, these words would, whenever they occurred in the deed, be construed in the sense in which they were so declared to

be used: in short, the general conventional or technical legal meaning of words must give way to what is proved to be the meaning of the person using them.

The principles on which the Court of Session has always acted, are stated by the Bench in the case of Douglas v. Glassford, 14th November 1823, and, in conformity with them, subsequent cases have been disposed of. The words used by their Lordships are: “no doubt entails are strictissimi juris; that doctrine is founded on common law and common sense; but it has also its limits in common sense,—you cannot hold words pro non scriptis. The statute lays down no verba solemnia with which to express the entailer's intention; I may use any words that I choose, if they are but intelligible and unequivocal. If the meaning can be understood, it will be given effect to, and the Court will not inquire whether it might or might not have been better expressed.”

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By the manner in which the word “heirs” is used in the entail of the estates of Simprim and Maegill, and the whole frame and structure of the deed, it is rendered clear beyond all doubt, and is substantially declared, that the maker of the entail used it for the purpose of designating, and understood that it would designate, not only the heirs of entail substituted and called to the succession after the respondent, Patrick Murray the institute, but also Patrick Murray himself; and the construing it so as not to include Patrick Murray would be to resort to an interpretation by implication, while the not putting that meaning upon it would frustrate the will of the entailer by allowing what may be the technical meaning of the word to overrule the entailer's meaning of it, which is not warranted by any principle of construction hitherto applied to deeds of entail.

It appears unequivocally and emphatically proved that by the word “heirs” the entailer meant to designate and did designate Patrick Murray the institute, as well as the substitutes in the entail; and that, in particular, he used it in that sense in declaring an irritancy of all the debts and deeds of the said heirs of tailzie or either of them, contracted, made, or granted in contravention of or against the prohibitions or conditions of the entail; as if it had been specially set forth in a substantive clause or provision, that the entailer had, under the word “heirs,” included or was to include the institute as well as the substitute heirs, and that it was to be received in that sense.

The peculiar frame of the deed, and the manner in which the different classes of its provisions are introduced

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by the words “with and under,” and the form in which the clauses so introduced are drawn, as respects the introduction of the word “heirs,” and the way in which that bears upon the particular clause providing the irritancies, forfeiting the rights of the contravener of the prohibitions, and voiding the deeds of contravention themselves, which is drawn as one clause, all show, that under the term “heirs” the entailer meant to include and to designate the respondent, Patrick Murray the institute, as well as the substitutes. Nor will it be overlooked that, in several of the enabling provisions of the deed which are introduced as exceptions from the prohibitory provisions, (which are indisputably directed against Patrick Murray the institute,) the word “heirs” alone is used, proving very distinctly that “heirs” was used to designate the institute as well as the substitute heirs; for it is impossible to suppose that the same privileges were not to be conferred on the institute as the substitutes: and not only so, but there is a whole series of other clauses, such as the assignation to writs, and the clause providing for the recording the entail, and others, where the word “heirs” alone is used, and which are demonstrative that it was used as including the institute as well as the substitute heirs.

The entailer's meaning of the word “heirs” is therefore rendered quite clear and unequivocal. He has, by the terms of the deed, supplied as clear and express a translation of it as if there had been a substantive clause declaring the sense in which he used it, and required that it should be understood; and consequently, in construing the entail in question, the word “heirs” in the irritant clause must be taken as including the institute,



Patrick Murray, and affecting him as well as the substitute heirs. [1]

*Respondent.* [2]—The respondent being the institute in possession under an entail containing no irritant clause applicable to his debts and deeds, has, notwithstanding the prohibitions, full right to sell the entailed lands, and power to confer a valid title on an onerous purchaser.

The provisions of the irritant clause in this entail are directed exclusively against the debts and deeds “of the said heirs of tailzie, or either of them,” and contain no declaration whatever applicable to the respondent, who is the institute and nominatim disponee, and who therefore, as far as that deed is concerned, must be held to stand precisely in the same situation as a party in possession under an entail, which from a total want of an irritant clause has not the protection of the statute of 1685; for it may now be assumed, as a point of settled law, that the restraints imposed upon heirs of entail cannot be extended by implication so as to affect the institute, if he be not

expressly fettered. This rule is founded on a very obvious principle, derived from a consideration of the difference between the character of an institute and of an heir. The institute is not in a

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*[1] Appellant's Authorities.—4 Stair, 183, (Leslie, Elch. Taillie, No. 49.); Edmonstone of Duntreath, 24 Nov. 1769, (Mor. 4409); Wellwood, 23 Feb. 1791, (Mor. 15,463); Baillie, 11 July 1734, (Mor. 15,500); Kemp, 28 Jan. 1779, (Mor. 15,528); Elch. Notes on Stair, p. 114; 3 Ersk. 8, 26; Dick v. Drysdale, 14 Jan. 1812, (F. C.); Barclay v. Adam, 18 May 1821, (1 Shaw's App. Cases, p. 24; 2 Mackenzie on the Statutes, p. 484, Fol. Ed. 1722); Morehead v. Morehead, 2 July 1833, reversed in the House of Lords, 31 March 1835; vide next case.*

*[2] The House did not call on the respondent's counsel. The following argument is taken from his appeal case.*



legal and technical sense an heir at all; his right is not completed, like that of the heir, by the intervention of a service, but being a simple disponee he takes directly as singular successor of the grantee. It is absolutely requisite, in order to bind the institute effectually, that he should be either expressly named, or legally described as one of the persons to whom the restrictive clauses are meant to apply, otherwise no restraint will be created, however clear the intention of the entailer may appear to be. This intention has always been justly considered an important element in the construction of an entail, in cases where a question has arisen between two parties, as to which of them is entitled to take up the succession; but in cases like the present, where there is an individual unquestionably preferred in the first instance, and legally and completely vested in the fee, a very different rule prevails in the construction of the subsequent clauses which go to limit that fee in his person. Where a question arises as to the existence of a valid and effectual prohibition of any kind, it must be shown, not only that the particular act is forbidden, but also that the prohibition is sufficiently guarded by corresponding irritant and resolutive clauses, the absence of either of which will be fatal to the entail. Are or are not the fetters of this entail so imposed as effectually to include the respondent, who is not an heir, but the institute or disponee? The irritant clause in this entail does not extend to the institute, but is directed exclusively against the heirs of taillie; and its terms cannot be stretched beyond their literal meaning by any implication of the entailer's intention. The prohibitory clause applies generally, and in all its material provisions, “to the said Patrick Murray

and the other heirs of taillie," and the resolutive clause is in the same terms. But the irritant clause is directed only against the debts and deeds "of the said heirs of taillie, or either of them," there being in it no declaration to render null and void any act done by the institute contrary to the prohibitions of the entail; and a special resolutive clause immediately following the irritant is in like manner limited in its application to "the said heirs of taillie." If the irritant clause of the present entail be neither directly applicable, nor capable by any sound legal construction of being applied, to the acts of the institute, it must be held that, in so far as he is concerned, the entail is not complete in terms of the statute; and that he stands in precisely the same situation as if there had been no irritant clause of any description; consequently the prohibitions which the deed contains cannot affect him, nor deprive him of the power, flowing naturally from his right of property, to sell or otherwise dispose of the entailed estate.

Upon the authority of the late decisions in the cases of Tillicoultry [1] and Ascog [2], where it was laid down, in the broadest and most unqualified manner, that, if an entail does not contain proper irritant and resolutive clauses in terms of the act 1685, the substitutes have no redress against the onerous deeds of the party in possession, the respondent having sold the entailed estate, has now the exclusive and uncontrolled right to the purchase

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[1] *Bruce v. Bruce, 15 Jan. 1799, (Mor. 15,539).*

[2] *Stewart v. Fullarton, 23 Feb. 1827, 3 Shaw & Dunlop, p. 418, and p. 396, new edit.; reversed in House of Lords, 16th July 1830, 4 Wilson & Shaw, p. 196.*



money or price received by him as the consideration of the sale, and power to dispose of it as his own property; and he is under no obligation to re-invest or lay it out in the purchase or on the security of any other lands for the benefit of the substitute heirs: nor is he liable to any claim or demand whatever at their instance for damages or reparation on account of the sale.

A general principle of law is established by the above decisions, depending upon no specialty in the circumstances of each individual case, but universally applicable in

every instance where the prohibitions cannot be enforced from a want of any of the statutory requisites. [1]

**Lord Brougham**: — My Lords, I think this case is so plain that there is no necessity for calling upon the learned counsel for the respondent. It differs from a number of other cases decided in Scotland in one respect, and one only. I am not aware that in any former case there has arisen a controversy respecting the omission of words sufficient to fetter the institute in one of the restrictive clauses, namely, the irritant clause, — his name, or a direct reference to

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*[1] Respondent's Authorities.— 3 Ersk. 8, 31; Edmonstone of Duntreath, 24 Nov. 1769, (Mor. 4409); Leslie v. Leslie, 1752, (Elch. Taillie, No. 49); Erskines v. Hay Balfour, 14 Feb. 1758, (Mor. 4406); Gordon v. Lindsay Hay, &c., 8 July 1776, (Mor. App. Taillie, No. 2.); Menzies v. Menzies, 25 June 1785, (Mor. 15,436); Millwood v. Millwood, &c., 23 Feb. 1791, (Bell's Cases, p. 191, Mor. 15,463); Marchioness of Titchfield v. Cuming, 22 May 1798, (Mor. 15,467); Miller v. Cathcart, 12 Feb. 1799, (Mor. 15,471); Steel v. Steel, 12 May 1814, (F. C. and Dow's Reports, vol. v. p. 62); Douglas and Co. v. Glassford; 14 May 1823, (House of Lords, 10 June 1825, 1 W. & S.); Syme v. Dickson, 27 Feb. 1799, (Mor. 15,473); Bruce v. Bruce, 15 Jan. 1799, (Mor. 15,539); Earl of Breadalbane v. Campbell, 1812.*



him by implication, (by which I mean direct and necessary implication,) having occurred in the others of those restrictive clauses. In the Duntreath case [1] he was not named in any one, either the prohibitory, the irritant, or the resolutive clause. In the Dougalston case [2] he was named in a way to which I will presently advert further. In the Findrassie case [3] he was not named; and I am not aware of any case in which the question has precisely arisen which we have here. But in principle there cannot be the slightest difficulty in the application of the authority of those cases to the present. The institute being named in the introductory part of the deed, and in the dispositive clause,—being named in the prohibitory clause,—being named in the resolutive clause,—but not being named in the irritant clause, the question is, whether that irritant clause is sufficient, the institute being named before? or whether it is insufficient, because he is not named in that clause? I am not aware of any former case in which the omission of the institute has not been in all the clauses; here it is in the irritant clause alone. There may be cases of that description of which I am not

aware; but in this case there can be no doubt, unless we are to introduce a totally new law of entail from that which has been the law of real property in Scotland (not referring merely to the Duntreath case but to the cases previously decided), without one single exception in any finally adjudged case. I might almost say, without any difference

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[1] *Edmonstone, 24 Nov. 1769, (Mor. 4409.)*

[2] *Douglas and Co., 10 June 1825, 1 Wilson & Shaw, 323.*

[3] *Leslie, (No. 49, Elch. Taillie.)*



of any kind, the authority is uniform, (unless we regard the decision in the Court below, in the Duntreath case, which was reversed here,) that in order to make an effectual tailzie you must have all the three clauses; that you must have not only a valid prohibitory and a valid resolutive clause, but a valid irritant clause also, and that it is in vain to attempt to fetter an heir of entail, or to fetter an institute, unless the entailer has completed the formal clauses, prohibiting him from alienating or contracting debt, or altering the order of succession, invalidating the prohibited act if done, and creating a forfeiture in the event of his contravening the prohibitions. He will in vain attempt to make his prohibition effectual if there be not a complete irritant clause, rendering null and void the contravening acts of either the substitute or institute. Possibly, my Lords, that law may be gathered from the entail act; it may also be contended that you may gather from the entail act the nicety of the Findrassie case, which requires that there should be a complete prohibition, and every act specified and fenced with irritation, in order to make it impossible for one of the persons in possession to contravene any one of the provisions: this inference from the statute is barely possible. Then we come to the Duntreath and other cases, which, perhaps, may not be said so entirely to flow from the act, and cannot be so logically gathered as the legitimate result of it,—cases laying down for fettering the institute rules which have now for above a century become the governing authorities in this branch of the law, having been uniformly upheld since this House, in the only instance



of a departure, recalled the Court below to the right path, and enforced the adoption of this proposition as the result of the law of Scotch entail,—that the institute or disponee is unlimited in his enjoyment of the title to the property, excepting he shall

be validly fettered; that he is not of that class whom we technically know under the designation of heirs of tailzie, and cannot be struck at so as to be validly fettered by that which shall strike at and validly fetter heirs of tailzie eo nomine; that in order to fetter the institute, and prevent him from being an absolute fiar, it is necessary that you should do a great deal more than fetter heirs of entail as a class, for he and the heir of entail stand in contradistinction one to another. That is the principle laid down in the Duntreath case, as it had been in former cases, and it has been ever since followed in Scotland. It becomes then necessary to fetter him, either by his name, or by words distinctly and inevitably applying to him; as, for instance, “the said institute;” or by reference back to him, he having been previously named; or, if he has not been previously named, by such reference as shall leave no doubt that he is prohibited, that his estate is forfeited,— if he contravenes, his act of contravention void. That is the law of Scotland, as laid down in the course of decisions both below and here; below almost uniformly, here with perfect uniformity. There are no technical rules to show how you are to name him; nor are there any technical rules to show how you are to refer to him; nor any technical rules to designate in what way you are to class him and the others within the four corners of each given clause, if he is struck at and fettered in



each clause; but there must be either such a nomination of him, or such a designation of him, or such a reference to him, as to make it perfectly clear that he is struck at in the prohibitory clause, forfeited in the resolutive clause, and his act contravening avoided in the irritant clause. The rule is laid down in these cases that it is not a sufficient mode of designating him; it is not a valid mode of referring to him in anyone of those three clauses, that you should refer to heirs of entail, because he is not an heir of entail. If the preceding part has spoken of the institute and the heirs of entail, it is not a valid mode that you should refer to him by saying “said heirs of entail.” The Court must in such case refer the words “said heirs of entail” to the class ejusdem generis, namely, heirs of entail, and not the institute, though he may have been coupled with the heirs of entail; just as if it mentions “a man and three women,” and then in the reference made it says, “the said three women;” that will not refer to the man, although he was involved together with the third woman by the conjunctive proposition. The institute and heirs of entail being introduced, the reference afterwards by the words “the said heirs of entail” does not make that word “said” refer to the institute, but to the heirs of entail, because they were “said” as well as the institute. Then the word “other,” which has been very ably reasoned on by the appellants' counsel, must be thrown out as useless; for the word “other” has occurred in other cases; and it has not been held a clear designation on the part of the entailer meaning to make a reference to the institute.

Now, this being the law to be gathered from the



decisions, we are to apply that law to the present case; and as I am moving your Lordships to affirm this judgment, I should not have troubled you at so much length, had I heard the respondent's counsel. It is not denied that in all the dispositive parts of the deed Patrick Murray is referred to as the institute, nor is it denied that he is well prohibited by the prohibitory clause, nor that he is well forfeited by the resolutive clause; but it is denied that he is struck at by the irritant clause; and the question is, whether, consistently with the principles I have just referred to, he is struck at by that clause? It is said that, within the four corners of that clause, he is fettered by reference. The words of the resolutive clause are these:

> "With and under these irritances following, as it is hereby expressly provided and declared, that if the said Patrick Murray, or any other of the heirs of taillie above specified, shall contravene any of the conditions, and so on, he shall forfeit, and so on."

That it is admitted is sufficient to forfeit heirs; but then there follow these words in that which may be called the irritant clause, "and it is also." Now that is beyond something done before ex vi termini, that is, going forward and adding another clause to the clause already expressed,— "and it is also hereby expressly provided and declared."

Then comes a complete clause, not a member or part of a clause, but a complete irritant clause, which proceeds, after having put what acts being done shall be in contravention,— "that all the debts and deeds of the said heirs of taillie, or either of them, contracted, made, or granted, as well before as after their succession to the



aforesaid lands and estates, in contravention of the said taillie, and provisions, conditions, restrictions, and limitations therein contained, and all adjudications, or other legal executions or diligences, that shall happen to be obtained or used against the fee and property of the said lands and estates, or any part thereof upon the same, shall be void and null, with all that may or shall follow thereon."

And then comes a special clause, which contains both forfeiture and irritancy:

> "But also the heirs of taillie respectively, upon whose debts and deeds such adjudications shall have proceeded, shall, ipso facto, forfeit their

> right and title to the said lands and estates, and the same shall devolve to the next heir of taillie in like manner as if the contravener were naturally dead, and that freed and disburdened of the said debts and deeds, and adjudications, and other diligences deduced thereon."

Now, my Lords, I am clearly of opinion, that we should shake the cases which have been decided on the principle to which I have adverted in all their fair reasonable meaning, and depart from the rule supported by those cases, if we found this was any thing like a specific fettering of the institute or fiar, for the words are "the said heirs of taillie." "Said" refers to the heirs of taillie who have been before mentioned; and as the first part of this clause only says, "that all the debts and deeds of the said heirs of taillie, or either of them, contracted,"— "in contravention of this present taillie, and all adjudications upon the same shall be null and void, with all that may follow thereon,"

that is not sufficient, as is



decided by cases, to comprehend or to irritate any thing done by the institute. Then it is said, "But, also the heirs of taillie respectively, upon whose debts or deeds such adjudications shall have proceeded, shall ipso facto forfeit their right and title to the said lands and estates, and the same shall devolve to the next heirs of taillie." There is not a word here about the institute; it is an absolute statement of what is not to be done by the heirs of taillie; and to hold that as sufficient to comprehend the institute would be contrary to all the cases. I must observe on these cases, that the case of Duntreath is attempted to be differed from the present by a statement not to be gathered from the reports in the books, but which is found by resorting to the papers themselves. It is said that the Duntreath case contained a reference to the institute, and that he was stated to be the institute. I do not see, even if we admit that to be a correct statement of the case, how the decision can have gone upon it; I do not see how it is possible that any reference which could have been made in any part of the deed to Archibald Campbell, as the institute, could in the slightest degree have affected the decision of that case, which was this,—that though a man is stated to be institute, and though dealt with as such, though there is a disposition made to him in that capacity, yet if in the forfeiting and irritating clauses he is not plainly and distinctly referred to, the entail is good for nothing, for he is not touched; but the Duntreath case laid down the broad principle which I read from the very order of the House itself, that no implication can take place at all,—that it is not to be by implication,

but by nomination and direct reference to the individual. The only difference between that case and the present is this, that whereas there the institute was not named or referred to in any one of the three clauses, here he is named in two out of three, but not in the third. But the irritant clause is as necessary as the resolutive or the prohibitory, and if it is necessary that you should have irritancy as well as forfeiture and prohibition, it will at once abolish that fundamental rule of the Scotch law of entail,—if you decide that there was any difference in principle between a case where he was named in not one, and a case where he is named in two and not in the third, it will be said that the House of Lords has decided that the irritant clause may be full of holes, and yet that will not signify; and that not only in the case of the institute and heir of entail, (the one now before your Lordships,) but in all cases where the question was as to the acts of the substitute, if you have a perfect prohibitory clause, and a perfect resolutive clause, it does not signify whether the irritant is good or not. I now come to the case immediately before the Duntreath case, that is, the Findrassie case. The entailer expressed his intention "to provide for the upholding of his family, with and under the provisions, faculties, limitations, restrictions, and irritancies after specified, in favour of the heirs male of his own body, and heirs taillie, and provisions under written." There he refers distinctly to the heirs of taillie who are mentioned; and he says, these clauses shall bind "the heirs of taillie above mentioned," and in another place, "the haill persons and several branches



hereby called to the succession," a word which does not occur here; yet this was held, as far as regarded the institute, to be an absolutely void prohibition, for that he was not referred to under any of those designations. There is a remarkable circumstance about this, to which I pointed the attention of the learned counsel at the bar; it illustrates the argument, and throws light upon the technical foundation of the words "heir of taillie," in a certain use of them. "Heirs of taillie," it appears, had been allowed by all parties, without any challenge whatever, to be a sufficient designation of the institute for certain purposes, and under those words he had taken the personal property of the author of the entail. I believe no one ever supposed that that was not quite sufficient to clothe him as heir of entail, with a view to giving him the rest of the property; but where the property under the entail was in question, it was found perfectly ineffectual. I do not say that has the force of a decision of the Court; it has only the force of the consent of the parties, to the fact of there being no difficulty in letting him in to take the personal estate under that expression, which they did not consider sufficient to fetter him. My Lords, I shall, last of all, make an observation on the case much argued by the appellants' counsel, namely, the Dougalston case. There is not a pretence, there is not what Lord Thurlow used to call even a probable argument, for their calling in aid that case; it is remarkable for its unlikeness. There is

no getting over this, that Mr. Henry Glassford, the fiar, was named in the irritant clause. They had chosen to make one joint



clause of the irritant and resolutive clause; and as I stated in the course of the argument, the second branch of that clause, beginning with the words “but also,” appears nonsense, unless you take it in connection with the other. The clause in the Dougalston case says, in case the said Henry Glassford does so and so, or in case any of the heirs of entail do so and so, then such acts and deeds shall be void, and he himself shall be forfeited. I do not say that the words are “he himself,” but they are quite tantamount to it. The words are, “each and every heir or person so contravening”—(including Henry Glassford, by plain reference,)— “shall forfeit and lose all right therein.”

That is nonsense, unless you take in those words to which the words “so contravening” apply. The appellants' counsel ingeniously attempted to show, that in this case there is, first, a complete resolutive clause, and next, a complete irritant clause; but then, it does not affect this institute, for it does not say the heir of entail or person so contravening. The present case would have been like the Dougalston case, had it been thus: If the said Patrick Murray, or any of the said heirs of taillie, shall contravene so and so, not only such person or heir so contravening shall forfeit, but also the deeds of such and every such person or heir shall be void. If that had been so, it would have been like the Dougalston case; and if you refer to the Dougalston case to show that such would have been a sufficient designation of the institute, the short answer is, that he is referred to by the words which are employed. I by no means intend to say, that the word “person,” if it had occurred in the separate clause, might not have referred



to him, had it been said, “if the said heirs or other persons do so and so, their acts shall be void.” I am not prepared to say that would not have been sufficient; for it is needless to repeat, that the word “person” is totally different in its signification from the words “heir of entail,” which have a technical meaning; whereas the word “person” *may* comprehend institute as well as substitute or heir. In the Findrassie case the words,“the haill persons and several branches called to the succession,” were not held to comprehend the institute; but I state this to show that the Dougalston case does not go so much upon that as upon the other foundation, that including the name of Henry Glassford, the institute, was part and parcel of the clause. Upon these grounds, I have no doubt that the Court below have rightly decided, and that your Lordships ought to affirm their decision. I can by no means approve of bringing cases

here with any trifling novelty that may occur; we might then be deciding the Duntreath case once a week. I shall move your Lordships that this interlocutor be affirmed, with costs not exceeding 100 *l.*

The following judgment was pronounced in the appeal for Lord Elibank and his commissioners:

It is ordered and adjudged, by the Lords Spiritual and Temporal, in Parliament assembled, "That the said petition and appeal be, and is hereby dismissed this House, and that the interlocutor therein complained of, be, and the same is hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondent the sum of 100 *l.* for his costs in respect of the said appeal."



And in the appeal for the purchasers (to which no answers were lodged for the respondent):

It is ordered and adjudged, by the Lords Spiritual and Temporal, in Parliament assembled, "That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutor therein complained of, be, and the same is hereby affirmed."

**Solicitors: Alexander Mundell, Spotteswoode and Robertson—Richardson and Connell,—Solicitors.**

1835

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