the pursuers have established their case, and are entitled to decree as concluded for by them. I may just in a single sentence add that it is not a little remarkable and significant as regards the defender's case that he has been unable to show, or even to aver, that there has ever been any arrangement or transaction whereby he or any author or predecessor of his acquired the pieces of ground in dispute or any of them. It being my belief that there never was any such arrangement or transaction, and that possession of these pieces of ground has been illegally taken without any right or title whatever, it is only just that they should be restored to the pursuers, their true owners.

Lord Gifford—I do not feel myself warranted in dissenting from the judgment proposed. But the difficulties of the case appear to me greater than they have done to your Lordships.

In regard to the possession of the subjects, I am inclined to agree with the Lord Ordinary. His Lordship saw the witnesses for the defender and believed them, and I am not in a position to say that they ought to have been disregarded.

In regard to the question whether the defender has a sufficient title taken in connection with the possession and proof to establish his right, I appreciate the well-settled character of the rule that in the case of a bounding charter no right of property can be acquired by prescription beyond the specified boundaries. Possession without a title goes for nothing. But when we look at the defender's title, the difficulty arises, whether there is any distinct boundary on the east and west sides. The High Street of Inverkeithing is a well-defined boundary, and so is "the way above the head of the yards," or the old Roman Road, and these are still as they have always been; but when we look at the east and west boundaries there is a great deal more difficulty. When the lands of one party are described as bounded by the property of another, as when it is said that the estate of A is bounded on the east by the lands of B, it arises from the very nature of the title that the boundary must be proved by possession. It requires proof where the land of A begins and that of B ends; and the boundary may advance or recede, and is a flexible boundary by its very nature.

I quite admit that there is a great presumption against the defender in the origin of the line of subjects fronting the High Street of Inverkeithing and in the line of the ground. But I doubt whether the eastern boundary of the defender is so distinctly defined as to prevent him prescribing by possession a right to ground originally without that boundary.

I have felt these and other difficulties in concurring, but still looking to the strong grounds of your Lordships' judgment I do not dissent.

The Court recalled the Lord Ordinary's interlocutor, and decerned in terms of the conclusions of the summons, reserving to the defender any claim he might have to be indemnified for expenses incurred in respect of the subjects in dispute, and to the pursuers their defences thereto, as accorded, and finding the pursuers entitled to expenses, &c.

Counsel for the Pursuers (Reclaimers)—Balfour—Shaw. Agent—A. Gordon, S.S.C.

Counsel for the Defender (Respondent)—Strachan—M'Kechnie. Agent—P. Morrison, L.A.

Tuesday, November 4.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

FRASER *v.* FRASERS (INVERALOCHY ENTAIL).

Entail—Prohibitory and Irritant Clauses—Contraction of Debt—Act 1685, *c.* 22; *Act* 11 *and* 12 *Vict. c.* 36 (*Rutherfurd Act*), *sec.* 43.

The prohibitory clause of an entail provided that it should not "be lawful for the heirs of entail to sell, dispone, wadset, or impignorate the lands and barony . . . . or grant infeftments of annual-rent or liferent forth of the same, or any other right or security, redeemably or irredeemably, of the lands . . . . nor to grant tacks or leases, nor to do any other act or deed, civil or criminal, or even treasonable, for which the said lands and barony may be anyways adjudged, evicted, or confiscated." The irritant clause included a special irritancy against "contracting debt." *Held* (in conformity with *Cathcart* v. *Cathcart* (Carleton Entail), March 31, 1863, 1 Macph. 759) that the entail was invalid, as (1) there was no prohibition against the contraction of personal debt—the prohibitory clause striking merely at the granting of voluntary securities, and the defect not being such as could be supplied by the irritant clause; and as (2) the general words in the prohibitory clause "nor to do any other act or deed," &c., could not be extended beyond the particular acts previously enumerated.

Colonel F. M. Fraser was heir of entail in possession of the lands and barony of Inveralochy and others, under, *inter alia*, a disposition of tailzie dated 27th August 1793. The prohibitory clause of this disposition, after prohibiting alteration of the order of succession, proceeded—"It shall not be leisome nor lawful to the said Major Alexander Mackenzie, or the heirs-substitutes or successors before named, to sell, dispone, wadset, or impignorate the lands and barony before disponed, or any part thereof, or grant infeftments of annual-rent or liferent forth of the same, or any other right or security, redeemably or irredeemably, of the lands and barony before disponed, or of any part thereof, nor to grant tacks or leases, nor to do any other act or deed, civil or criminal, or even treasonable, for which the said lands and barony may be anyways adjudged, evicted, or confiscated." The irritant clause of the same deed ran thus—"If the said Major Alexander Mackenzie and the heirs-substitutes and successors before named, or any of them, shall act or do in the contrary of the particulars before specified, or any of them, or shall neglect to fulfil the conditions and provisions before written, or any of them, then and in that case all and every such acts and deeds, whether by altering the order of succession, selling, disponing, contracting debt, or otherways, with all that shall happen to follow or may follow thereupon, shall be *ipso facto* void and null."

Colonel Fraser raised an action of declarator to have it declared that the entail was invalid and

ineffectual, in terms of the Acts 1685, cap. 22, and 11 and 12 Vict. cap. 36 (Rutherfurd Act), sec. 43, seeing that there was no valid prohibition against the contraction of debt. Frederick G. M. Fraser and others, the next heirs of entail, were called as defenders.

The Lord Ordinary (CURRIEHILL) pronounced an interlocutor finding, decerning, and declaring in terms of the conclusions of the summons, to which his Lordship added the following note:—

"*Note.*—The pursuer is heir of entail in possession of the lands and barony of Inveralochy and others, under and in virtue of (1) disposition and assignation by Mrs Martha Mackenzie or Fraser in favour of Colonel Alexander Mackenzie, dated 20th September 1800; (2) disposition of tailzie by the said Martha Mackenzie or Fraser, dated 27th August 1793, and recorded in the Register of Tailzies 1st June 1803; and (3) procuratory of resignation by Colonel Charles Fraser, dated 17th December 1814. In this action he seeks to have it declared that these deeds do not constitute a valid and effectual entail of the said lands and others, in respect that they do not contain an effectual prohibition against the contraction of debt. The prohibitory clause which is contained in the tailzie of 1793, and is repeated in the procuratory of resignation of 1814, after prohibiting alteration of the order of succession, is thus expressed:—'It shall not be leisome nor lawfull to the said Major Alexander Mackenzie, or the heirs-substitutes or successors before named, to sell, dispone, wadset, or impignorate the lands and barony before disponed, or any part thereof, or grant infeftments of annual-rent or liferent furth of the same, or any other right or security, redeemably or irredeemably, of the lands and barony before disponed, or of any part thereof, nor to grant tacks or leases . . . . nor to do any act or deed, civil or criminal, or even treasonable, for which the said lands and barony may be anyways adjudged, evicted, or confiscated.' If the contraction of debt is prohibited at all, it is the contraction of debt which by the act of the heir of entail is created a real security over the estate by way of wadset or impignoration, or infeftment of annual-rent or liferent, or by way of security, redeemable or irredeemable, or by some similar act or deed. There is no prohibition against the contraction of personal debt which may be made the foundation of legal diligence against the estate. The prohibitory clause in the present case cannot, in my opinion, be substantially distinguished from the corresponding clause in the *Carleton* entail, which was held by the Court not to contain an effectual prohibition against contraction of debt. See the case of *Cathcart*, 31st May 1863, 1 Macph. 759.

"The defender, however, who is supporting the entail, maintains that if the irritant clause is read along with the prohibitory clause, it is made clear that the entailer meant to prohibit, and has effectually prohibited, the contraction of all debt which, whether by legal or by voluntary securities, can be made to affect the estate. The irritant clause is thus expressed:—'If the said Major Alexander Mackenzie and the heirs-substitutes and successors before named, or any of them, shall act or do in the contrary of the particulars before specified, or any of them, or shall neglect to fulfil the conditions and provisions before written, or any of them, then and in that case all and every such acts and deeds, whether by altering the order of succession, selling, disponing, contracting debt, or otherways, with all that shall happen to follow or may follow thereupon, shall be *ipso facto* null and void,' &c.

"The argument for the defender is that the entailer by using the words 'contracting debt' in the irritant clause has interpreted the prohibitory clause as containing a prohibition against the contraction of all debt affecting or which may be made to affect the estate. I have no doubt that the entailer meant to prohibit the contraction of all debt, and the use of the words 'contracting debt' in the irritant clause very clearly shows that such was her intention. But these words, which are relative, cannot be extended beyond their antecedents in the prohibitory clause, which, if it prohibits the contraction of debt at all, does not prohibit the contraction of personal debt, which may be the foundation of real diligence against the estate, but is restricted to debt which by the act of the heir is made a direct burden upon the estate. Whatever, therefore, the intention of the entailer may have been, that intention has not been so expressed as to impose upon the heirs of entail an effectual prohibition against the contraction of debt within the sense and meaning of the Act 1685, c. 22.

"I ought to observe that the defender, in support of this branch of his argument, endeavoured to distinguish the present case from that of *Cathcart*, on the ground that the irritant clause in the *Carleton* entail was materially different from the present. That entail declared the nullity of all contraventions 'by altering or changing the order of succession, or disposing, selling, wadsetting, or burdening with infeftments of annual-rent or other servitudes or burdens, ... or by contracting debt, in so far as they are empowered in manner abovementioned, or by doing any other act or deed, civil or criminal, whereby the said lands may be burdened, evicted, forefaulted, or adjudged.' The defender maintains that the judgment in the *Carleton* case may be explained in this way, viz., that the use of the words 'or by contracting debt' showed that the maker of that entail regarded the contraction of debt as something different from wadsetting or burdening the estate—that, as he had omitted to prohibit expressly contraction of debt, the irritant clause was directed against something which had not been prohibited, and that if (as in the present case) the enumeration of burdens, &c., had not been repeated in the irritant clause the judgment would have been the other way. But in my opinion this argument proceeds upon a misapprehension of the *Carleton* case. The Court there held that the prohibitory clause (which, as I have said, is substantially identical with that now in question) did not contain an effectual prohibition against the contraction of debt of one particular kind—viz., personal debt—and that the defect could not be supplied by the use of words of wider scope in the irritant clause.

"On the whole matter, therefore, I am of opinion that the Inveralochy entail being defective as regards the prohibition against contraction of debt, it must, in virtue of the Act 11 and 12 Vict. c. 36, sec. 43, be deemed to be ineffectual as regards all the prohibitions, and that

the pursuer is entitled to decree of declarator to that effect with expenses."

The defenders reclaimed, and argued—(1) The prohibitory clause on a fair construction struck at the contraction of debt. Personal debts, on which the estate might be evicted, were fairly included in "any other right or security," especially as further explained by the general words at the end of the clause. To say that "grant" struck only at voluntary securities, and did not include personal debts, was a technical and almost "malignant" construction. The words "any right or security" might by a supposed ellipsis be read to include "legal or voluntary," just as in *Arbuthnott's* case "any security whatever" was allowed to be read as "judicial or voluntary." And the word "contract" in that case made quite as crabbed grammer as "grant" would here. (2) The irritant clause specified "contracting debt," and served to explain and illustrate the terms of the prohibitory clause. The two clauses should be read together.

The pursuer (respondent) replied—(1) A valid entail must have a substantive prohibition, express and not inferential, against each of the three cardinal irritancies. The contraction of personal debt was not struck at in the prohibitory clause of this deed, and by 11 and 12 Vict. cap. 36, sec. 43, the entail was therefore invalid *in toto*. The word "grant" pointed to voluntary securities alone; and deeds of entail must be read strictly. The case was undistinguishable from *Cathcart's* case. (2) The irritant clause could not be used to explain and enlarge the prohibitory; it was purely referential to it. The general words at the close of the prohibitory clause could not supply the defect of the previous words.

Authorities cited—*Cathcart* v. *Cathcart* (Carleton Entail), March 31, 1863, 1 Macph. 759; *Arbuthnott* v. *Arbuthnott*, May 27, 1865, 3 Macph. 835; *Lindsay* v. *Earl of Aboyne*, Sept. 5, 1844, 3 Bell's App. 254; *Cathcart* v. *Cathcart*, Feb. 12, 1838, 8 S. 497.

At advising—

Lord President—The only question is, whether there is an effectual prohibition against the contraction of debt in this deed of entail? and that depends on the construction which we are to put upon certain words in it. There is a good prohibition against selling—of that there is no doubt; and these words are added—"wadset or impignorate the lands and barony before disponed, or any part thereof;" and I do not think it is contended that these words in themselves amount to a valid prohibition against contracting debt. But there follow other words which, it is contended, do constitute a good prohibition against contracting debt, viz., "grant infeftments of annual-rent or liferent forth of the same, or any other right or security, redeemably or irredeemably, of the lands and barony before disponed, or of any part thereof." Now, certainly at first sight it seems very clear that when heirs of entail are prohibited from granting rights and securities, they are prohibited from doing certain kinds of acts which are direct and voluntary proceedings on their part affecting the estate; and this is so far different from the contraction of debt in the ordinary sense that such securities must be given from another person than the heir himself.

It is said that these words can be supplemented by reference to the general words with which the prohibitory clause is wound up—"nor to do any other act or deed, civil or criminal, or even treasonable, for which the said lands and barony may be anyways adjudged, evicted, or confiscated;" and if I understand the argument addressed to us in support of this view, it amounts to this—that there is a prohibition in the body of the clause against contracting a certain class of debts, and these words may be read to comprehend other debts, because those others are *ejusdem generis* with those so prohibited. The contention is ingenious, but it is inconsistent with a long series of decisions which deny any effect to general words at the close of the clause of prohibition to supply a defect in any one of the three cardinal prohibitions. An imperfect prohibition cannot be supplemented by general words of that description.

Lastly, aid was sought from the words of the irritant clause—[*reads irritant clause as above*]. Now, the suggestion here is that this shows what he intended to do; and that the prohibitory clause was meant to prohibit all contracting of debt. It is a new proposition to supply defects in the prohibitory clause from the irritant clause or from any other, and I am not aware that there can be any enlargement of the prohibitions by these means. But even supposing that this could be so, I should doubt the proper construction of the irritant clause to be that all deeds in the way of contraction of debt are to be null and void. On the contrary, reading the clauses together, I should conceive the proper meaning to be, that if the heirs of entail, either by disponing, selling, contracting debt, or otherways act in the manner prohibited, all shall be null and void. Even giving effect therefore—which I should be slow to do—to this interpretation, and comparing the one clause with the other, the defender can still derive no benefit from the irritant clause. It is perhaps almost unnecessary to have gone into the examination of the clauses so minutely after the case of *Cathcart*, which I think is indistinguishable from the present one. I shall only say as to the other cases—those of *Arbuthnott*, *Aboyne*, and the rest—that the words used there are certainly quite sufficient, on a fair and even obvious construction, to prohibit anything being done which should affect or burden the estate with security of any kind, voluntary or judicial, and they are therefore of no value here as authorities.

I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord Deas—This is a nice and troublesome case, as all these cases are. I think I shall make the opinion which I have formed of it clearer by observing first on the irritant clause, next on the general words at the conclusion of the prohibitory clause, and third on the prohibitory clause itself. That may seem rather going backwards, but this particular case seems to be made clearer by this order. First, then, as to the irritant clause, I do not think it necessary to say, nor am I satisfied, that an irritant clause can never be referred to in illustration of a prohibitory one; but assuming that it may, which is the favourable way of taking it in support of the entail, there are two reasons why the reclaimers can have no aid from it in this case—(1) Certain classes of debt are prohibited by the prohibitory clause. So that when the irritant clause speaks of contracting debts, the observation has much point that they must be

entirely the kind specified in the prohibitory clause—a very strong answer indeed. (2) The other observation is the same which I made in the *Carleton* case, viz., that the way in which the entailer speaks about contracting debt in the irritant clause is rather a kind of confession that he forgot to say anything about it in the prohibitory clause. I am therefore clearly of opinion that the defenders can have no aid from the irritant clause.

Next, as to the general words, "nor to do any other act or deed, civil or criminal, or even treasonable, for which the said lands and barony may be anyways adjudged, evicted, or confiscated." It is very clear that no aid can be got here either. The words are not used in connection with the latter part of the prohibitory clause, which deals with the granting of rights or securities, but with reference to the whole of it—the heirs are not to sell, nor to contract debts in the ways specified, nor "to do" so and so. If the words had been used as to contracting debt by securities alone, there might be room for argument, but it is too clear for argument that the general words here do not affect the special ones.

The question comes therefore to turn wholly on the special words of the clause itself, and if these had been to prohibit burdening the lands with infeftments of annual-rent or "with any other right or security," I should have said that the case would raise a very important and probably novel question. But unfortunately for the reclaimer these are not the words, and the prohibition is not against burdening the lands themselves but against granting any deed by which this result is to be effected. Voluntary deeds are alone, in my opinion, referred to. I do not overlook the force of Mr Kinnear's argument that this might as plausibly have been argued in *Arbuthnott's* case as here, but the clause there was directed against contracting "debts or sums of money thereupon by any security whatsoever"—words which might refer to voluntary acts. There is great force in the argument, but at the same time I think the words of the present clause are not against burdening the estate, but against the granting of deeds which shall do this; and so I cannot hold this to be a case where the prohibition is against burdening the lands. This is no doubt very technical, but something depends on the rule as to strict and not liberal interpretation in questions of this sort. On the whole, the only conclusion I can come to upon the authorities is that the acts and deeds prohibited here are voluntary alone.

Lord Shand—I am also of opinion that the Lord Ordinary's interlocutor is right. The prohibition against contracting debt—one of the cardinal prohibitions—is only valid and effectual if it prohibits two classes of security—first, those voluntarily constituted by deed or other writing of the heir of entail in possession for the purpose of burdening the estate; and secondly, personal debts to which the execution of a deed is not necessary, and which may be made the subject of legal diligence against the estate. It appears to me that this entail is defective in regard to one of these. There is a prohibition of voluntary securities, but none against the contraction of personal debts, which may be made the foundation of legal diligence against the estate. It was contended that the clause of prohibition will cover the contraction of debt, but giving it a fair construction, I do not think it can be construed to that effect. It opens by prohibiting wadsets made by granting deeds directly intended to affect the estate, and it goes on to prohibit the granting of "infeftments of annual-rent or liferent . . . or any other right or security, redeemably or irredeemably, of the lands and barony"—words all of which, in the collocation in which we have them, seem to me to refer to voluntary securities. The entail is therefore, I think, a bad one. It was attempted to build it up by reference to two subsequent clauses—first, to the general words of prohibition at the conclusion of the prohibitory clause, but it has long been settled that such words are restricted, and held to apply only to the class of acts and deeds formerly mentioned, and can not be strained to include others outside that limit. Again, as to the irritant clause, its terms are quite consistent with the liberty of contracting such debts as I have just mentioned, and may be taken to refer only to the opening part of the prohibitory clause—that is, on a sound construction, to the contraction of debt which is to affect the estate by voluntary security. If there be a wider signification of the irritant clause, and it is to be read as intended to cover personal debts, then that clause goes beyond the prohibitory clause, but cannot make the prohibitory clause effectual to a wider extent than its own terms bear.

I agree with your Lordships that this case is not distinguishable from *Cathcart's* case. It is plainly distinguishable from *Arbuthnott* and the other cases in which more comprehensive words were used in the prohibitory clause, which was held therefore to strike at both voluntary and judicial securities, whereas in the present case voluntary securities alone are struck at.

Lord Mure was absent.

The Court adhered.

Counsel for Pursuers (Respondents)—Balfour—J. P. B. Robertson. Agents—Mackenzie & Black, W.S.

Counsel for Defender (Appellant)—Kinnear—Jameson. Agents—Scott-Moncreiff & Wood, W.S.

Tuesday, November 4.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

GARDNER OR BOUSTEAD *v.* GARDNER AND PARNIE (GARDNER'S JUDICIAL FACTOR).

Fee and Liferent—Rights of Liferenters—Where Powers of Borrowing and of Sale Reserved.

The purchaser of certain heritable subjects took the titles in favour of himself and his wife and the survivor, whom failing to such trustees as they or he or she should appoint, in trust for behoof of himself and his wife and the survivor for their liferent use only, and for behoof of their children—a son and a daughter—*nominatim* and the survivor in fee, but "declaring that the shares and interests of the said children should be subject always to such further limitations and restrictions and to such appointment as the said spouses or the survivor of them might