[Heard *7th March* — Judgment *18th August*, 1843.]

ROBERT ANSTRUTHER, Esq. of Caiplie, *Appellant.*

PHILIP ANSTRUTHER, Esq. and Others, *Respondents.*

Tailzie. — Terms of irritant clause *held* to be sufficiently general to comprehend all the acts prohibited, and not to be defective as giving an enumeration of particulars, and that a defective enumeration.

ON the 18th day of January, 1810, Sir Alexander Anstruther executed the deed of entail of his lands of Caiplie and Thirdpart, which was the subject of discussion in the immediately preceding case, (Renton *v.* Anstruther,) and which was made under the circumstances detailed in 1 *Bell*, 129.

This entail was fenced by prohibitory, irritant, and resolutive clauses, which were expressed in these terms: — "It is hereby "expressly provided and declared, that it shall not be lawful to, "nor in the power of, any of the foresaid heirs to alter this pre- "sent deed of entail or settlement, or the order of succession "hereby prescribed, or to do any act, or grant any deed, which "may import or infer any innovation or change thereof, directly, "or indirectly, or to sell, alienate, wadset, dispone, or feu the "foresaid lands and others, or any part thereof, either irre- "deemably or under reversion, or to burden the same, in whole "or in part, with debts or sums of money, infeftments of annual- "rents, or any other burden or servitude whatsoever, or to con- "tract debts, or do any other fact or deed whereby the said "lands and others, or any part thereof, may be adjudged, or "otherwise evicted, in prejudice of the succeeding heirs of "entail, or any of them; excepting always, as is hereinafter "excepted, and it is hereby declared, that all such deeds of con-

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" travention, whether altering the course of succession, selling, " alienating, or burdening the foresaid lands and others, and all " debts contracted, deeds granted, and acts done by any of the " said heirs of entail, as well before as after their succession to " the foresaid lands and others, contrary to the above written " conditions and provisions, shall not only themselves be void " and null, but the persons so contravening in any of the pre- " mises shall, for him or herself alone, irritate his or her right to " the foresaid lands and others, and the same shall fall to, and " devolve upon, the next heir of entail, though descended of the " contravener's body, in the same manner as if the contraveners " were naturally dead," &c.

Immediately following the parts quoted, there was a provision as to the right of the next heir to make up his titles freed from the acts of the contravener, and a prohibition against the contravener in any way interfering in the management of the lands; and then there was the following clause: — " And providing and " declaring, as it is hereby farther provided and declared, that it " shall not be lawful to, nor in the power of, any of the heirs " succeeding to the said lands and estate, to set any tack or " rental of the same, or any part thereof, for any longer space " than for nineteen years, or for such other or farther space as " is or shall be competent for the said heirs to grant by law for " the time, and without diminution of the rental, at least for the " best rent that can be got for the same without collusion: and it " shall not be lawful to, nor in the power of, any of the said " heirs, to set in tack the manor-place or office-houses, yards, or " orchards thereto belonging, or the parks or enclosures adjacent " to the said manor-place, to any person or persons whomsoever, " for any longer space than the liferent of the granter of the said " tack; declaring hereby, that all tacks made and granted by " any of the said heirs of entail, contrary to the above prohibition, " shall in themselves be null and void."

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On the 19th January, 1814, Sir Alexander Anstruther executed a deed of alteration under a power to that effect reserved in the deed of 1810, whereby, after disponing to the appellant, his eldest son, and the heirs of his body, and to his other children *nominatim*, and the heirs of their bodies, and to the other heirs called by the deed of 1810, he introduced two new sets of substitutes before the last called by the deed of 1810.

On the death of his father, the appellant, in the year 1822, made up his title to the lands, by serving heir of line to his father, and heir of tailzie and provision under the two deeds, and expeding a charter of confirmation and resignation, upon which he was infeft in June, 1823.

The appellant possessed the lands upon this title. In 1829, he conveyed his interest in the lands to trustees, for securing payment of his mother's jointure; in 1835, he again, with consent of the trustees in the deed of 1829, conveyed to Renton as trustee, in security of a loan of L.10,000, and also of the jointure.

In the year 1839, the appellant brought an action against the substitute-heirs in the entail, in which he sought to have it declared, — "That the prohibitions against wadsetting and "feuing the foresaid lands and others, contained in the foresaid "deed of entail, are not legally or effectually fenced by irritant "and resolutive clauses; and that the pursuer has full and "undoubted power to wadset or feu the foresaid lands and "others, and to grant all deeds necessary and requisite for that "purpose; and that the said deeds of wadset or feu, when "granted, shall be legally effectual to the receivers, as fully, and "in the same manner, as any deeds of wadset or of feu granted "by an absolute proprietor holding in fee-simple; and that the "defenders, and all others substitute-heirs of entail under the "said deed, shall have no right to make any claim or demand "against the pursuer, in respect of the said wadsetting or feuing, "whether to have the pursuer's right in the said lands forfeited,

" or to have him ordained to make payment of any sum " in name of damages or otherwise, or of any other kind or " description whatever;" and also, to have it declared, " that " the prohibition aforesaid, against letting tacks of the foresaid " lands and others for a longer space than nineteen years, or " such other space as may be competent to heirs of entail for the " time, or with diminution of rental, is not legally and sufficiently " fenced by a resolutive clause; and that the pursuer has full " and undoubted power to grant leases or tacks of the said lands " and others, without restriction or limitation as to the endurance " of the same, or the amount of rent therein stipulated, and to " grant all deeds necessary or requisite for this purpose; and " that all leases or tacks of the foresaid lands, for whatever " number of years, or at whatever rent the same may be granted, " shall be valid and effectual to the receivers, as fully, and in the " same manner, as any lease or tack granted by an absolute " proprietor holding in fee-simple; and that the defenders, and " all others substitute-heirs of entail under the said deed of " entail, shall have no right to make any claim or demand " against the pursuer, in respect of his granting the said leases " or tacks, whether to have his right in the said lands forfeited, " or to have him ordered to make payment of a sum of money, " in name of damages or otherwise, or of any other kind or " description whatever."

The defenders pleaded in defence:—

" I. The irritant and resolutive clauses, as well as the pro- " hibitory clause, strike at all wadsets, and feus, and leases, for a " longer space than what an heir of entail may by law grant.

" II. The defenders should be assoilzied, in respect the " three cardinal prohibitions against alienating, contracting, " debt, and altering the order of succession, are fenced by irri- " tant and resolutive clauses; and in respect, that, although they " had not, the prohibitions themselves are effectual, as in a ques- " tion *inter hæredes*."

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The Lord Ordinary (Jeffrey) ordered cases by the parties, and on advising these papers, made *avizandum* with them to the Court, accompanying his interlocutor with a note, in which he expressed his opinion, that the entail was sufficiently fenced.

The Court, on the 26th November, 1840, pronounced the following interlocutor: — "The Lords having advised the case; "and heard the parties, assoilzie the defenders from the conclu- "sions of the libel, and decern; and find the pursuers liable to "them in expenses.

The appeal was taken against this interlocutor.

Mr Solicitor General, Mr Rutherford, Mr M'Conochie, and Mr Forbes for appellant. — If the irritant clause had been confined to the general terms with which it sets out, there can be no doubt that it would have been effectual, and beyond challenge. But it is not so — it goes on to enumerate the acts to be irritated; the efficacy of the clause, therefore, must be limited to the acts specified in the enumeration. In the prohibitory clause, wadsetting and feuing are specially mentioned; but in the irritant clause, they are altogether omitted in the enumeration which is there made; what might have been the effect of the entail, in voiding an act of feuing or wadsetting, if it had been confined to the general term "alienation," which is to be found both in the prohibitory and in the irritant clause, is beside the question. The entailer has not left the matter in that state. He has prohibited alienation; but *besides* alienation, he has prohibited wadsetting and feuing, as if *he*, at least, viewed these acts as not falling within the term "alienation," or as having some specific difference requiring a separate designation, or as being particular instances of alienation. In the irritant clause, he has irritated alienation generally, but he has omitted to irritate those acts which, in the prohibitory clause, he has designated under the

terms wadsetting and feuing, as not embraced by the term "alienation."

In doing this, the entailer has not done that which is without a legal meaning. A wadset, in strict legal language, is not an alienation, it is a mere pledge of the lands, a disposition under reversion, which may never have the effect of carrying away the lands. Neither is feuing alienating — it is merely the constitution of a sub-vassal under the proprietor; and if the feu-duty be the just avail of the lands, the beneficial interest, if not the property, remains pretty much as it was before. Looking, therefore, at wadsetting and sub-feuing as acts not of alienation, they are prohibited, but not irritated.

Viewing wadsetting and sub-feuing, on the other hand, as sufficiently comprehended under the term alienation, in a generic sense, and as being merely *instances* of alienation — still the entail will be ineffectual, as, on the authority of many cases, where a generic term is used in the prohibitory clause, and an enumeration of different species of acts or instances coming within the generic sense follows, it will not do to make use, in the irritant clause, of the generic term alone; but the terms expressive of the particular instances must be repeated.

These grounds of objection apply with still stronger force to the prohibition against granting leases beyond nineteen years. This prohibition is separate and distinct from all the others; it follows the irritant clause, and is, as it were, singled out as a particular object of the entailer's attention. Yet not only is there no irritant clause following, and peculiarly applicable to it, but the act is not enumerated in the general irritant clause, and cannot, in fairness of construction, be held to come within any of the general terms there used. Leases of a great length of duration, and granted under certain circumstances, have, no doubt, been declared to be alienations; but no case has gone the length of fixing, that a lease for any period, however small, beyond nineteen

years, and at a fair and adequate rent, is an alienation. If so, it is only leases exceeding the exact period of nineteen years which are prohibited, and these cannot be embraced by the term alienation, in the general irritant clause, even if that could be made applicable to what does not come before, but is found after it.

Neither will the different acts of wadsetting, sub-feuing, or letting leases beyond nineteen years, be affected by the irritancy of "all acts and deeds" done or granted contrary to the prohibitions; for these terms "acts and deeds" cannot, according to the authorities, embrace all that has gone before; but comprehend only those acts and deeds mentioned separately from the other acts prohibited, or the enumeration which precedes it.

The authorities relied on, in support of these arguments, were the cases which have so often been referred to of late with similar views. Bruce *v.* Bruce, *Mor.* 15539; Dick *v.* Drysdale, 16 *F. C.* 460; Barclay *v.* Adam, 1 *Sh.* App. 24; Horne *v.* Rennie, 3 *Sh. and M'L.* 142; Lang *v.* Lang, 1 *M'L. and Rob.* 871; and also Thomson *v.* Miln, 1 *D. B. and M.* 592; and Duffus *v.* Dunbar's Trustees, 4 *M. and D.* 523.

Lord Advocate, Mr Pemberton Leigh, and Mr Anderson, for the respondents, referred to act 1685, cap. 22; Roxburgh, *Mor.* App. *voce* tailzie, as to the efficacy of the words, "all such deeds" in the irritant clause, — To Queensberry *v.* Wemyss, *Mor.* App. *vo.* tailzie, p. 53; Cod. lib. 4, tit. 51; *Stair.* II. 11. 13; *Ersk.* II. 8. 4; Elliot, *Mor.* 15542, as to the extent and application of the term "alienating,"—To Queensberry *v.* Wemyss, *Mor.* App. *vo.* tailzie, p. 44; Malcolm *v.* Brown, 2 Dow. p. 90, and *Mor.* App. *vo.* tailzie p. 57; Elliot *v.* Pott, 20 F. C. 611; Hamilton *v.* M'Donald, 18 *F. C.* 302; Queensberry, 1 *Sh.* App. 16, and *Wil. and Sh.* 462; Mordaunt *v.* Innes, 19, F. C. 619; Stirling *v.* Walker, 20 F. C. 279, in regard to the length of leases grantable by heirs of entail, and struck at by the terms "alienate or dispone.'

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LORD CAMPBELL. — I am of opinion that in this case, likewise, the interlocutor appealed from should be affirmed. The appellant first contends, that upon the construction of the deed of entail, he has full power to *wadset* or *feu* the entailed lands, on the ground that the irritant clause is not directed against *wadsetting* or *feuing*. But although *wadsetting* and *feuing* are not specifically enumerated among the acts or deeds which are declared null and void, I think they are included, if the clause be construed according to its grammatical, and natural, and usual meaning. Implication, or probable conjecture, cannot be resorted to for the purpose of supporting an entail; but if the language employed in an irritant clause, according to its grammatical, and natural, and usual meaning, applies to particular acts and deeds, it must by law be applied to those deeds, although they are not specifically enumerated. Here the prohibitory clause, after forbidding any alteration of the succession, forbids the heirs "to sell, alienate, wadset, dispone, or feu "the lands; or to burden them with debts, or any other burden "or servitude; or to contract debts; or to do any other fact or "deed whereby the lands might be adjudged or evicted, in "prejudice of the succeeding heirs of entail." Then comes the irritant clause, declaring, "that all such deeds of contravention, "whether altering the course of succession, selling, alienating, "or burdening the lands; and all acts done by the heirs of "entail, contrary to the above-written conditions and pro-"visions, shall not only themselves be void and null, but the "persons so contravening, in any of the premises, shall irritate "his or her right to the lands, &c."

The appellant admits that the irritant clause may generally refer to the acts and deeds specifically enumerated in the prohibitory clause; but contends that the words in this irritant clause which apply to acts and deeds of contravention, are used specifically, and not generally, and therefore do not comprehend

wadsetting or *feuing*. Now, if the irritant clause be so constructed, that the acts and deeds which it irritates are only particular acts and deeds, and a portion only of those which are described in the prohibitory clause, it cannot be extended to all the acts and deeds described in the prohibitory clause; and the exclusion of any act or deed whereby the succession may be altered, the land may be alienated, or the estate may be burdened by debt, will vitiate the entail. But in this case I am clearly of opinion that the irritant clause does not proceed on the principle of specifically enumerating the prohibited acts to be irritated; that it is as extensive as the prohibitory clause; and that there is nothing to shew that the acts and deeds in contravention of the prohibitions, which are declared null and void, do not comprehend wadsetting and feuing. All acts and deeds alienating or burdening the lands, contrary to the prohibitions, are struck at. By wadsetting, or feuing, the heir would unquestionably grant a deed alienating or burdening the land, and would do an act contrary to the prohibition against wadsetting and feuing. There is nothing to shew that the deeds or acts irritated are to be taken in any restrictive sense, from which wadsetting or feuing should be excluded; and it is quite clear that the clause is framed on the principle of general reference, not of specific enumeration.

Therefore, according to the authorities which I have examined in Lumsden *v.* Lumsden, the last case just disposed of, it appears to me that there was no foundation for this conclusion of the summons.

I think there is equally little for that conclusion, seeking that it may be declared that the pursuer has full power to grant leases, without restriction or limitation as to the endurance of the same, or the amount of rent stipulated.

The foundation for this claim is, that after the general prohibitory, irritant, and resolutive clauses, (which must now be

taken to make a perfect entail, and which would clearly by themselves prevent him from exercising such a power of leasing,) there is afterwards introduced a special prohibition against granting leases for more than nineteen years, and except at the best rent that could be got for the same; with a corresponding irritant, but without a resolutive clause; and it is said that thereby the fetters are struck off as far as leasing for an indefinite term at a nominal rent is concerned.

But I agree that no such effect can be given to the special prohibition against leasing. Even if it merely prohibited specifically what had been before prohibited by the general words against alienating and disponing, fenced with proper irritant and resolutive clauses, I am not prepared to say that it would impair the effect of the general prohibition; but this special clause goes beyond the general prohibition, and the entailer appears to have had a farther object in introducing it, which he has not effectually attained. Although leases for a long term, contrary to the custom of the country, and the beneficial management of the estate, and in fraud of the provisions of the entail, have been held within the purview of a prohibition against alienating and disponing; yet no case has yet decided that a lease for any term above nineteen years, granted by an heir of entail holding under the usual fetters, is necessarily void; and I believe that leases for twenty-one years are by no means uncommon, where the letting is merely with a view to the beneficial management of the estate.

Therefore this prohibition against leases for more than nineteen years, must be considered as of the same nature with that with which it is coupled against letting the manor-place, or any of the inclosures adjacent thereto, for a longer term than the life of the granter, and can in no degree affect the general prohibition against alienating and disponing, which is supported by proper irritant and resolutive clauses, and which is admitted to strike at the unlimited power of leasing now claimed.

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For these reasons, I think the interlocutor should be affirmed, and with costs.

In this case, my Lords, the Lord Chancellor, who heard the case, has authorized me to say that he entirely agrees in the affirmance of the judgment.

Lord Brougham. — My Lords, There are some very important points raised in this case, and therefore we did not immediately dispose of it, but I believe none of us entertained any doubt upon it at the time of the argument. I entirely agree in affirming the interlocutors.

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

JOHN BICKERTON — SPOTTISWOODE and ROBERTSON, Agents.