assessment, but would rather be a reduction to be made before the rateable value could be ascertained.

Upon these short grounds, I agree that the interlocutors appealed from ought to be reversed.

Interlocutors appealed from reversed; interlocutor of Lord Ordinary reclaimed against affirmed; reclaiming note refused with expenses.

For Appellants, Maitland and Graham, Solicitors, Westminster. — *For Respondents*, Muggeridge and Bell, Solicitors, Westminster.

JULY 28, 1863.

ROBERT JOHN GOLLAN, *Appellant, v.* JOHN GILBERT GOLLAN, *Respondent.*

Entail—Erasure—Materiality of Erased Words—*In the irritant clause of a tailzie applicable to the debts or deeds of the institute,* "or of any of *the said heirs or substitutes of tailzie,*" *the words "or of any of" were written on an erasure.*

HELD (reversing judgment), *That the erasure was not fatal to the validity of the deed, because the words erased were not material to the meaning of the clause.*

OBSERVED, *That the rule is, that words written on an erasure in an entail are to be held* pro non scriptis; *the Court is not entitled to presume, for the purpose of cutting down the entail, that different words destructive of the entail were written originally on the erased space.*[1]

This was a declarator by the heir of entail in possession of the estate of Gollanfield, Inverness-shire, against the heirs substitute to have the entail declared invalid.

The grounds of objection to the entail were as follows :—1. The prohibition against altering the order of succession was as follows :—"With and under this limitation and restriction, that it shall be nowise lawful to, nor in the power of, the said John Gollan, or any of the heirs of entail and substitutes before mentioned, *to inn*ovate, alter, or infringe this present tailzie, or any of the conditions thereof, or the order of succession hereby established, or to do or grant any other act or deed that may infer any alteration, innovation, or change of the same, directly or indirectly."

The word "to" and the letters "inn," printed in italics were written on an erasure.

2. The clause of irritancy of debts and deeds was expressed as follows :—"And it is hereby expressly provided and declared, that all the debts or deeds of the said John Gollan, *or of any of* the said heirs or substitutes of tailzie, contracted, made, or granted, as well before as after their succession to the said lands and estate, in contravention of this present entail, and provisions, conditions, restrictions, and limitations herein contained, and all adjudications or other legal execution and diligence that shall happen to be obtained or used upon the same, (excepting as is above excepted,) shall not only be void and null, with all that shall follow, or may follow thereupon, in so far as they might anywise affect the said lands and estate; but also, the said John Gollan, and the heirs of tailzie respectively, upon whose debts and deeds such adjudications have proceeded, shall *ipso facto* lose and forfeit their right and title to the said lands and estate, and the same shall devolve to the next heir of entail in like manner as if the contravener were naturally dead, and that freed and disburdened of the said debts and deeds and adjudications, or other diligence deduced thereon."

The words "or of any of," printed in italics, were written on an erasure.

It was also objected, that the irritant clause was directed against "debts *or* deeds" instead of being directed against "debts *and* deeds," which created an ambiguity or defect fatal to the deed.

The Court of Session held, that the words "or of any of" being written on an erasure were fatal to the validity of the deed.

The defender appealed, and stated the following reasons :—(1) Because the erasures occurring in the prohibition against altering the order of succession, and in the irritant clause, are not essential, and cannot affect the validity of the entail. (2) Because the appellant's right to insist in the action is barred by the state of the titles under which he possesses the estate, and by his adoption of the entail in the terms in which it has been recorded.

The pursuer in his *printed case* stated the following reasons :—(1) Because the deed of entail is vitiated and erased *in essentialibus;* and must be presumed, *juris et de jure*, to have been

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[1] See previous reports 24 D. 1410 : 34 Sc. Jur. 705. S. C. 4 Macq. Ap. 585 : 1 Macph. H. L. 65 : 35 Sc. Jur. 641.

erased after the deed was executed ; and this presumption cannot be redargued by extraneous evidence. (2) Because the deed is rendered ambiguous, and capable of more than one reading, by the vitiated blank, and the absence of essential words in an essential clause.

Rolt Q.C., and *Neish*, for the appellant.—The Lord Ordinary was right, and the Second Division was wrong, in dealing with this deed. Erasures, though not mentioned in the testing clause, do not necessarily vitiate a deed, if they occur in an immaterial part of the deed, or of a sentence, or of a word. Thus the letters "ve" of the word twelve, though written on an erasure, were held immaterial—*Gaywood* v. *M'Eand*, 6 S. 991 ; so as to the letter "x" in the word six—*Cassillis* v. *Kennedy*, 9 S. 663. But where the word "pages" was written upon an erasure in the testing clause, it was held fatal, because it was an essential word—*Morrison* v. *Cauvin's Trustees*, 7 S. 810. When words are written on an erasure, the true rule is to treat such words *pro non scriptis*, and if the rest of the context is capable of expressing the meaning, then the erasure is immaterial. Such at least is the rule where there is no reason to suspect fraud—*per* Lord Cockburn in *Boswell* v. *Boswell*, 14 D. 378 : 24 Sc. Jur. 188 ; *Kemp* v. *Ferguson*, M. 16,949 ; *Adam* v. *Drummond*, 12th June 1810, F. C. ; *Howden* v. *Ferrier*, 13 S. 1097. The name of the grantee of a deed is essential—*Reid* v. *Kedder*, 13 S. 619 ; 1 Rob. Ap. 183 ; so is that of the first substitute in a deed of entail—*Shepherd* v. *Grant*, 6 D. 464 ; 6 Bell's Ap. 153. Mere grammatical niceties, however, are often immaterial—*per* Lord Brougham, *Sharpe* v. *Sharpe*, 1 S. & M'L. 594. Applying the rule of *pro non scriptis* to the words written on the erasure in this deed, it will be found, that the sentence bears precisely the same meaning whether the sentence is read with or without these words, so that their absence can make no difference. The sentence without the words is almost grammatically correct. It is said, that if it be possible that some word may have originally stood in the deed which would have altered the meaning, then the erasure will be fatal, but there is no authority for such a doctrine, and there is no reason why the Court should be astute to imagine some possible ground of vitiation, seeing that it must be mere conjecture, and nothing else.

Anderson Q.C., and *A. Mackintosh*, for the respondent.—The general rule is undoubted, that if the erasure occurs *in essentialibus*, the deed is null—*Grant* v. *Shepherd*, 6 Bell's Ap. Cas. 153. Here the clause in which the erasure occurs is an essential clause, and it is well known, that the intention of an entailer must be expressed, and is not to be extracted by mere inference—*per* Lord Brougham, *Sharpe* v. *Sharpe*, 1 Sh. & M'L. 594 ; *Lumsden* v. *Lumsden*, 2 Bell's Ap. 104 ; *per* Lord Cottenham, *Murray* v. *Graham*, 6 Bell's Ap. 441. In attempting, therefore, to get at the intention, this erasure thwarts the Court. An erasure *primâ facie* imports, that there were words originally there which were wrong. Therefore, it is not enough to say, that the words written on the erasure are to be read *pro non scriptis*, for that gives no account of what the words were originally ; and an extrinsic proof is admissible of what they were. This breeds uncertainty, and uncertainty is nullity. Bell (Prin. § 875) and Erskine (iii. 2, 20) say that the presumption is, that the erasure was made after the deed was signed, and so as to give a different meaning—see also *per* Lord Colonsay, in *Boswell* v. *Boswell*. Therefore it is necessary to imagine something which formerly stood where the words on the erasure now stand ; but as no evidence can shew what those words were, the deed cannot be made certain and valid. In the chief clause of an entail there must be no ambiguity—*Lang* v. *Lang*, M'L. & Rob. 871 ; *Murray* v. *Graham*, *supra* ; *Ogilvy* v. *Earl of Airlie*, *ante*, p. 470 : 2 Macq. Ap. 260 : 27 Sc. Jur. 348. Therefore the Court below rightly held this erasure fatal.

Cur. adv. vult.

LORD CHANCELLOR WESTBURY.—My Lords, this is an action of declarator brought by the respondent for the purpose of having it declared, that a certain deed of entail of the estate of Gollanfield is defective and invalid in the fencing clauses ; and that the respondent was therefore entitled, as unlimited fiar, to the fee simple. The objection is, that the prohibitory and irritant clauses of the deed of entail are erased *in essentialibus;* and that these clauses are therefore void. The Lord Ordinary was of opinion that the erasures were not fatal to the entail. But his interlocutor was reversed by the Lords of the Second Division, who decided, that the erasure in the irritant clause was fatal, and that the entail was therefore defective and void.

The rules of the law of Scotland on the subject of erasures in the deeds appear to be well settled. Any erasure which is not noticed in the testing clause is presumed to have been made after the execution of the deed. But such an erasure is not necessarily fatal to a deed. The words written on the erasure are taken *pro non scriptis*. If such words are essential to the clause in which they are found, and the clause without them is insensible, the clause is void ; and if the clause so avoided be essential to the deed, it follows that the deed also becomes void. But if, after rejecting the words written on the erasure, the words which remain are sufficient to enable the Court to ascertain the meaning of the clause, and to give its proper effect to it, then the words rejected are not indispensable, and the clause does not become void. If the erasure occurs in one of the fencing clauses of a deed of entail, and the words written on the erasure are taken *pro non scriptis*, it is necessary, that the remaining words should be a sufficient expression of the

proper effect of the clause according to a strict and necessary construction of such remaining words. It is not sufficient, that you are able to infer the intention from the words which remain; it is necessary that they should express that intention, and no other.

It does not follow, that a clause becomes unintelligible by the omission of a word that may be proper for its grammatical construction. The words which remain may still be clearly intelligible, and denote a certain and definite meaning, and that without the implication of any additional word or words.

And such I conceive to be the case with the clause of irritancy in the present deed of entail, after the words written on the erasure on that clause are rejected. For, if the words "or of any of" (which are the words written on the erasure) be struck out, and a comma, that is, a pause in the delivery, after the words "the said heirs," be substituted, the clause is intelligible and distinct, if not also strictly grammatical.

It was objected in the Court below, that the words "the said heirs" might mean the heirs collectively. But this seems to be negatived by the words "the said," which must mean "the heirs hereinbefore mentioned in the dispositive clause." And "the said heirs" must therefore mean "the respective and successive heirs as they take under the substitution contained in the dispositive clause."

But if this construction be not adopted, the words of the clause, as they remain after the rejection of the words on the erasure, necessarily involve, and therefore warrant, the implication of the word "or," after the words "the said John Gollan," which word "or" may be implied upon the authority of *Sharpe* v. *Sharpe*, decided by this House in 1835, and mentioned by the Lord Ordinary in the note to his interlocutor.

With respect to the contention of the respondent, that he has a right to read into the blank left by the rejection of the words on the erasure any words whatever, however inconsistent with the rest of the clause, for the purpose of destroying it, such a proposition is, in my judgment, unsupported either by principle or authority.

I am therefore of opinion, that the erasure in the clause of irritancy is not *in essentialibus*, and that the rejected words, though possibly required by the strict rules of grammar, are not absolutely necessary for ascertaining the meaning of the clause, even according to that strict construction which is applicable to the fencing clauses of a deed of entail. I must therefore advise your Lordships to reverse the interlocutor of the Inner House, and to adhere to and affirm the interlocutor of the Lord Ordinary. On the reclaiming note I think that the parties agreed, that the reclaiming note should be refused without expenses: and, therefore, I advise your Lordships not to give to the appellant the expenses of the reclaiming note in the Court of Session.

LORD CHELMSFORD.—My Lords, the law of Scotland with respect to the alteration of deeds after execution appears to be less strict than the law of England. In this country, if a deed after execution is erased or altered in a material part, it is avoided, and this is the case even if the erasure or alteration is made in an immaterial part by the party who is entitled to the benefit of it, though it is otherwise, if made by the party who is bound by the deed or by a stranger. By the Scotch law a mere erasure is not sufficient to vitiate a deed. Where words in a deed are upon an erasure, the presumption is, that they were written after the parties and witnesses had signed the deed. But the deed does not on that account become void. The only consequence is, that the words must be taken *pro non scriptis*. If the words are essential to the clause, the clause is considered to form no part of the deed. When an erasure is said to be *in essentialibus*, this must refer to the words that are written in and not to those which have been obliterated; for as to what particular words were previously in the deed, no presumption is admissible. The supplying conjectural words is called by one of the learned Judges of the Court of Session a "malignant construction," and is supposed by him to have been supplied in the decision in *Boswell's case*. It ought, however, rather to be called a malignant conjecture, for the purpose of destroying the deed. Now, although clauses in a deed of entail are to receive a strict construction in favour of freedom, no presumption ought to be made against them.

The question then is, whether the words written on erasures are essential to the clauses in which they are found? I pass by the alteration in the words "to innovate," because the clause may stand very well without them, and I confine myself to the erasure in the irritant clause. Are the words "or of any of" necessary to the clause? Do they so far alter its meaning as that the irritancy would have a different effect if they were omitted? Suppose the clause to be read without these words, it will run thus: "All the debts or deeds of the said John Gollan the said heirs or substitutes of tailzie contracted," etc.

Now, there can be no doubt that the description "heirs of tailzie" would extend to all or any of the heirs, and would, therefore, *ex vi termini*, be equivalent to the expression "or of any of" such heirs. By the omission of those words the grammatical construction would be a little impaired, but the meaning being obvious, there is nothing in any of the authorities to prevent the Court adding words which, without altering the sense, would express it more accurately. It may as properly be said, in Scotch as in English law, that "*falsa grammatica non vitiat chartam.*"

In the case of *Sharpe* v. *Sharpe*, my noble and learned friend, LORD BROUGHAM, put various

instances of omissions being supplied for the purpose of completing the obvious meaning of a sentence. A very small addition only would be requisite in this case, supposing the word "substitutes" is taken to be synonymous with "heirs." If it is not, nothing would be required to be added to give the sentence an intelligible meaning and a grammatical construction.

I agree with my noble and learned friend on the woolsack that the Lord Ordinary was correct in his opinion, that the alterations were not fatal to the deed, and that the interlocutor of the Court of Session, finding that the irritant clause of the deed of tailzie is vitiated and erased *in essentialibus*, is wrong, and ought to be reversed. I ought to mention, that my noble and learned friend LORD BROUGHAM, at the close of the argument, did not appear to concur in the opinions which have been expressed by my noble and learned friend and myself. I have not had an opportunity of ascertaining what his final opinion is, and therefore am unable to state it.

With respect to the expenses of the reclaiming note, I entirely agree with the view of my noble and learned friend.

Interlocutor of Inner House reversed, and that of Lord Ordinary affirmed.

For Appellant, Holmes, Anton, Turnbull, and Sharkey, Solicitors, Westminster. — *For Respondent*, Deans and Stein, Solicitors, Westminster.

FEBRUARY 15, 1864.

THOMSON PAUL, W.S., *Appellant, v.* MAJOR GENERAL PHILIP ANSTRUTHER, *Respondent.*

Apportionment Act, 4 and 5 Will. IV. c. 23—Heir of Entail—Widow's Jointure—Time of Payment—*A., the widow of a preceding heir of entail, had a jointure secured on the entailed estate, payable in January and July. R., the next heir, also gave a jointure to his widow, payable at Whitsunday and Martinmas after his decease. R. died on 26th February.*

HELD (affirming judgment), 1. *That R.'s representative was not entitled to demand a proportional part from the next heir of the payment made by R. to A. on the January preceding R.'s death.* 2. *That the half year's jointure payable to R.'s widow at Martinmas following R.'s death was a burden on, and liable to be deducted from, the proportion of the rents due to R.'s representative for the period preceding 26th February.*[1]

The late Robert Anstruther, heir of entail of the estate of Caiplie and Thirdpart, in the county of Fife, who died on 26th February 1856, was succeeded in the entailed estate by the defender. In 1844 the life interest of Robert Anstruther in the estate had been sold, in a ranking and sale, to James Stevenson, commission agent in Edinburgh, who thereafter conveyed it to Mr. Thomson Paul, W.S., who again, in 1858, after Mr. Robert Anstruther's death, conveyed to the pursuer all his claims, which remained undischarged out of the rents of the estate.

The rents were, under the leases, postponed; and the rents for crop 1856 (from Martinmas 1855 to Martinmas 1856) were not paid till 1857, when they were drawn by the defender.

This action was raised by the pursuer (the appellant) for payment of that proportion of the crop 1856, which corresponded to the period between Martinmas 1855 and 26th February 1856, when Robert Anstruther died; and to which, under the Apportionment Act, 4 and 5 Will. IV. c. 23, the pursuer was entitled as in right of Robert Anstruther.

Under the settlements of the estate, Sir Alexander Anstruther, the father of Robert Anstruther, who died on 31st July of a year not stated on the record, had provided his widow, Lady Anstruther, with a jointure of £1000 per annum. This annuity had been paid thereafter half yearly in advance, on or about 31st January and 31st July of each year; and on the 2d February 1856, Mr. Paul had paid Lady Anstruther £500 (less income tax) for the half year from 31st January 1856 to 31st July 1856.

The pursuer now insisted, that the defender should pay him the sum of £420 15*s.* 4*d.*, as the proportion of the £500 corresponding to the period from 26th February 1856 to 31st July 1856, during which time the defender had been in possession of the estate, the interest of Mr. Paul in the estate having ceased on the death of Robert Anstruther.

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[1] See previous reports 1 Macph. 14: 35 Sc. Jur. 19. S. C. 2 Macph. H. L. 1: 36 Sc. Jur. 323.