convertible preference shares of £1 each, of which 10s. shall be held to be paid up, of the new company in respect of every preference share held by him in the old company; and (*b*) that the ordinary shareholders of the old company shall be entitled to receive an allotment of 10 ordinary shares of £1 each, 10s. per share held to be paid up, of the new company, in respect of every share held by him in the old company. The seventh article of said proposed agreement provides that any shareholder of the old company who, within the period of two weeks after this scheme is sanctioned by the Court, or within such extended period, if any, as the new company may allow, fails to apply for his shares in the new company, shall have no interest in the assets of the old company, or any claim whatever for shares in the new company. The respondent, while he acted as manager, put his whole capital into the said company, and he has now no means to meet the proposed call of 10s. per £1 share. Therefore if the said proposed agreement is sanctioned it will mean a total loss to him of £2010. A favourable report as to the value and capabilities of the colliery belonging to the said Melville Coal Company has been obtained from John Gemmell, a well-known and eminent mining engineer. According to the petitioner's own statement, the company is not, if its assets were realised, in an insolvent state. Even taking it at its worst, the respondent believes that if the liquidation were proceeded with in the ordinary way there would be, after payment of the creditors, a considerable sum available for division among the shareholders. The respondent submitted, as a dissenting shareholder, that the proposed agreement of purchase and sale ought not to be sanctioned, or alternatively that it should not be sanctioned until the liquidator had purchased the interest held by the respondent in terms of section 161 of the Companies Act 1862."

Argued for the petitioner—The hardship complained of by the respondent could be remedied by the allowance of additional time, to which the petitioner was willing to consent. The agreement should be sanctioned in terms of the Act—*English, Scottish, and Australian Chartered Bank* (1893), 3 Ch. 385; *London Chartered Bank of Australia* (1893), 3 Ch. 540; *Nicholl* v. *Eberhardt Company* (1889), 59 L.T. 860, and 61 L.T. 489.

Argued for the respondent—The case was one for the intervention of the Court, in respect of the hardship imposed on the respondent. The agreement should only be sanctioned on the undertaking of the liquidator to take over the respondent's shares, which he was willing to assign at 2s. a share—*Canning Jarrah Timber Company* (1900), 1 Ch. 708; *Burdett Coutts* v. *True Blue* (*Hannan's*) *Gold Mine* (1899), 2 Ch. 616. At least the respondent was entitled to an allowance of additional time.

At advising, the Court (LORD JUSTICE-CLERK, LORD YOUNG, and LORD TRAYNER), without delivering opinions, pronounced an interlocutor in the following terms:—

"Approve of the agreement of sale set forth in the petition, and sanction the same, but subject to this modification, viz., that the period of two weeks stated in the seventh article of said agreement shall not be held as applying to the said respondent James Clark, and that the said respondent shall be entitled to apply for his shares in the new company within the extended period of three months from this date, and decern."

Counsel for the Petitioner—Salvesen, K.C.—Graham Stewart. Agents—T. F. Weir & Robertson, S.S.C.

Counsel for the Respondent—Wilson, K.C.—J. W. Forbes. Agent—Archibald Menzies, S.S.C.

Tuesday, July 5.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

MORE (SOMERVELL'S TRUSTEE) *v.* SOMERVELL.

Entail — Right in Security — Bonds and Dispositions in Security Granted by Heir of Entail in Possession—Substitution of New Entail for Old Entail—Effect of New Entail on Rights of Heritable Creditors under Bonds Granted during Earlier Entail.

The heir of entail in possession under a deed of entail dated in 1823, granted in 1882 bonds and dispositions of the entailed estate in security of certain advances. In each bond there was a proviso that the bond should not affect the lands or rents in any way or to any extent inconsistent with the deed of entail, and that the bond should be null and void so far as inconsistent with the deed of entail, so that no irritancy might be incurred by granting the bond. The power of sale in the bond was "only to the extent of my own right and interest" in the lands, "and of my power to sell the same." In 1899 the heir of entail, with the consent of his pupil son's curator, executed a new deed of entail, which included certain subjects not within the former entail, and conveyed the lands to a different series of heirs to those in the former entail.

Subsequently the trustee on the sequestrated estate of the heir of entail brought an action of declarator that the deed of entail of 1899 evacuated the destination to heirs contained in the deed of entail of 1823, and sopited and extinguished the conditions, provisions, and clauses prohibitory, irritant, and resolutive or other fetters of entail contained in said deed of 1823, and therefore that the bonds and dispositions in security granted in 1882 now

affected the fee of the estate to the same effect as if the granter of the bonds had been a fee-simple proprietor at the date of granting the bond.

Held that the right of the heritable creditors under the bonds was, by the terms of the bonds, a security limited to the extent of the granter's own interest in the estate, and that their real right was from the first merely an infeftment in security subject to the restrictions and conditions of the existing entail; that the heir of entail in possession had no power to give the creditors a greater right over the estate than that originally given, or to enlarge their right by the substitution of one entail for another without the consent of the *curator ad litem* of his pupil son, and that the rights of the heritable creditors were not in any degree enlarged by the execution of the deed of entail of 1899, but remained exactly as they stood during the existence of the entail of 1823.

Francis More, chartered accountant, Edinburgh, trustee on the sequestrated estates of James Somervell of Sorn, in the county of Ayr, and Hamilton Farm in the county of Lanark, brought this action against James Graham, Henry Somervell, and others, children of the said James Somervell, and the tutors *ad litem* of said children, and others. The Scottish Imperial Insurance Company, Glasgow, were called as defenders for any interest they might have.

The pursuers sought to have it declared that the destination to the heirs of entail contained in the disposition and deed of entail, dated 21st July 1823, granted by the deceased Miss Agnes Somervell of Hamilton's Farm, was evacuated, and that the conditions, provisions, restrictions, and clauses, prohibitory, irritant, and resolutive, or other fetters of entail contained in the said disposition and deed of entail, and which were referred to in the bonds and assignations and dispositions in security after mentioned, became sopited and extinguished so as no longer to affect the lands therein contained from and after 30th November 1899 by the recording on said date in the Register of Entails of a disposition and deed of entail executed by the said James Somervell on 23rd October 1899, and recorded in the General Register of Sasines 6th December 1899; and that the said conditions, provisions, restrictions, and clauses, prohibitory, irritant, and resolutive, or other fetters of entail contained in the said disposition and deed of entail, no longer affect, and have not since said 30th November 1899 affected the lands of Hamilton's Farm, in the sheriffdom of Lanark, being the lands described and contained in certain bonds and dispositions in security granted by the said James Somervell on 16th May 1882, 26th May 1884, and 12th May 1894, now held by the Scottish Imperial Insurance Company as the creditors therein, and that the heirs of entail called to the succession of the said lands of Hamilton's Farm under the destination contained in the said disposition and deed of entail dated 21st July 1823, have no right, title, or interest to enforce the said conditions, provisions, restrictions, and clauses, prohibitory, irritant, and resolutive, or other fetters of entail; and that the declarations in the said bonds that they should not affect the said lands of Hamilton Farm in any way inconsistent with the said disposition and deed of entail dated 21st July 1823, and should not operate to infringe the rights of persons succeeding the said James Somervell as heir of entail, except so far as might be consistent with the said disposition and deed of entail, have since 30th November 1899 been of no force and effect; and that the heirs of entail called in the said disposition and deed of entail have no right, title, or interest to enforce the said declarations contained in said bonds and dispositions in security, and that the rights of the defenders the Scottish Imperial Insurance Company, now the creditors under the bonds and dispositions in security, are not limited to any extent or affected in any degree by the conditions, provisions, restrictions, and clauses, prohibitory, irritant, and resolutive, or other fetters of entail contained in the said disposition and deed of entail granted by the said James Somervell, of date 23rd October 1899, and that the said bonds and dispositions in security, and disposition in further security, affect and form permanent burdens on the fee of the said lands of Hamilton's Farm without any limitation whatever.

James Graham Henry Somervell and others, the children of James Somervell, and their curator *ad litem*, were the only compearing defenders.

On 11th November 1881 Mr Somervell succeeded to, *inter alia*, the lands of Hamilton's Farm, Lanarkshire, as heir of entail under the disposition and deed of entail dated 21st July 1823. While possessing said lands under said disposition and deed of entail, Mr Somervell, in consideration of certain sums advanced to him, granted the bonds and assignations and dispositions in security mentioned in the summons.

The said bonds and dispositions conveyed the entailed lands in the usual form of bond and disposition in security granted by heirs of entail in possession, and contained, *inter alia*, declarations and provisions by the granter James Somervell, in the following terms—"Whereas I hold the lands before disponed by virtue of a deed of entail containing prohibitions and restrictions against alienating and encumbering the same to the prejudice of the subsequent heirs of tailzie, therefore it is hereby declared by me, and the said creditors named therein by acceptance hereof agree for themselves and their foresaids, that neither these presents, nor any adjudication or other process, diligence, or execution to follow hereon, shall affect the said lands or any part or portion thereof, or the rents, maills, and duties thereof, in any way or to any extent inconsistent with the said deed of entail, nor shall the same operate to infringe the right of any person

or persons who shall succeed or become entitled to succeed to me as heir or heirs of tailzie in the said lands, except in so far as the same may be consistent with the said deed of entail; but the real security hereby constituted, and the assignation underwritten to rents, maills, and duties, and all process, diligence, and execution following upon the same, or upon the personal obligations hereinbefore written, or any of them, shall, in so far as the same may be inconsistent with the said deed of entail, be null and void as against the said lands and the heirs of entail succeeding thereto and the rents thereof, and shall be no further binding against the said lands than is consistent with the said deed of entail of the said lands, so that no irritancy may be incurred by my granting this disposition in security, or by any process, diligence, or execution which may follow hereon; but without prejudice to the effect of these presents in all other respects: . . . And on default in payment I grant power of sale, but only to the extent of my own right and interest in the foresaid lands, and of my own power to sell the same, and nowise to any extent or effect inconsistent with the said deed of entail, and under the conditions and restrictions above written, and not otherwise."

The pursuer averred that the said bonds and dispositions in security affected the fee of the lands of Hamilton Farm from the respective dates when they were recorded, subject only to the declarations above quoted.

On 12th November 1898 Mr Somervell, as heir of entail in possession under the said disposition and deed of entail of 1823, made application to the Court of Session under section 4 of the Rutherfurd Act (11 and 12 Vict. cap. 36), for authority to dispone the said lands of Hamilton's Farm by a new disposition and deed of entail mentioned in the petition, and, the requisite consent having been given by the tutor *ad litem* appointed by the Court to Mr Somervell's pupil son James Graham Henry Somervell, the authority asked for was granted by the Court, and in virtue thereof the new disposition and deed of entail, dated 23rd October 1899, was executed and recorded.

In the deed of entail, dated 23rd October 1899, Mr Somervell disponed the said lands to a different series of heirs to those mentioned in the disposition and deed of entail of 1823, and also included certain subjects of relatively small value which were not included under the entail of 1823. At the date of the action Mr Somervell was institute of entail in possession of the lands of Hamilton's Farm and others under the entail of 1899. Both the deed of entail of 1823 and the deed of entail of 1899 contained the fetters, prohibitions, and declarations usual in strict entails. The pursuer averred that in the proceedings preliminary to the entail of 1899 "no steps were taken for the purpose of preserving the *status quo ante* of the said bonds and dispositions in security, and the consent of the said bondholders to the said proceedings was neither asked nor given. The deed of entail of 1899 is subsequent in date both as to execution and recording to the said bonds and assignations and dispositions in security and disposition in further security, and in no way limits the rights of the heritable creditors under said deeds. It however evacuated the destination to heirs contained in the deed of entail of 1823, and sopited and extinguished the conditions, provisions, and clauses prohibitory, irritant, and resolutive, or other fetters of entail contained in said deed of 1823."

The averments were denied by the compearing defenders.

The pursuer further stated that on 8th May 1901 a petition was presented to the Court by the trustee on Mr Somervell's sequestrated estates for authority to disentail the estate of Hamilton's Farm, and that in the proceedings following thereon the defenders maintained that the lands and dispositions in security only affected the estate during the period of Mr Somervell's possession and did not form a permanent burden on the fee of the estate without any restriction or limitation which was effectual against the landholders, and that it was not competent to dispone in the disentail proceedings of the question as to the said deeds. As the value of Mr Somervell's interest in the estate could not be determined or the measure of the bondholders' rights fixed till this question was settled the present action had been rendered necessary.

The defenders averred, *inter alia*, that the effect of the bonds and dispositions in security granted by Mr Somervell was to convey Mr Somervell's life-interest only in the said entailed estate in security of the advances made to him, and that the rights of the said creditors were in no way enlarged by the granting of the deed of entail of 1899.

The pursuer pleaded, *inter alia*—"(1) The bonds and assignations and dispositions in security mentioned in the summons having affected the fee of Hamilton's Farm subject only to the fetters of the entail of 1823, and those fetters having been sopited and extinguished by the entail of 1899, decree that said bond and others affect said fee without any limitation or restriction should be pronounced as concluded for. (2) The entail of 1899 having evacuated the destination in the entail of 1823, the heirs called to the succession under the 1823 entail have no right, title, or interest under said 1823 entail in any question relating to Hamilton's Farm. (3) The said bonds and assignations and dispositions in security being antecedent in date both of execution and recording to the entail of 1899, are not limited or restricted in any way by that entail."

The defenders pleaded, *inter alia*—"(5) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons. (6) In respect that the said bonds conveyed only Mr Somervell's life interest in the estate, the decree of declarator last craved should be refused. (7) In respect that the power of sale in said

bonds was expressly limited to the extent of Mr Somervell's own right as heir of entail, the decree of declarator last craved should be refused."

On 21st May 1904 the Lord Ordinary (KYLLACHY) assoilzied the defenders from the conclusions of the summons, and decerned.

Opinion.—"This is an action which has been brought to determine a question which was lately raised, but not, I understand, decided, in an entail petition at the pursuer's instance now depending before Lord Pearson. Lord Pearson expressed an opinion upon it—as upon certain other points in the case. But in the Inner House it was observed that the question could not properly be determined in the absence of certain persons, and in particular the Imperial Insurance Company, who are now the holders of certain bonds and dispositions in security to which the dispute relates.

"The present action has been brought so as to have all the parties interested in the field. It is an action of declarator, and although the bondholders referred to have not appeared, they have been duly called. The other parties interested, viz., the minor heirs of entail and their curator, have appeared and lodged defences; and they have really the main interest to try the question. They have stated in their defences certain prejudicial pleas, some of them perhaps not wholly without substance. But I may say at once that I do not think it necessary to dispose of those pleas. I see no reason why I should not decide the case upon its merits, especially as the view I take, if it should be upheld, will obviate further procedure and further expense.

"The pursuer's author—Mr Somervell of Sorn—is heir of entail in possession of the lands of Hamilton's Farm. He is in course of disentailing these lands, and for that purpose he has to compensate the interests, *inter alia*, of his eldest son and other children. For this purpose he (or rather the trustee in his sequestration who is the ostensible pursuer) desires (for reasons into which I need not enter, and which may be entirely legitimate) to reduce as far as possible the value of his children's interests. And, as one mode of doing so, he seeks in this action to have it found that (as he maintains in his entail petition) certain bonds for borrowed money (being the bonds now in question held by the Insurance Company) granted by him (Mr Somervell), and secured in the usual form over his life interest in the entailed estate, have now by reason of certain proceedings in the year 1898, which he contends involved a disentail—come to affect the fee of the estate, doing so to the same effect as if when he granted the bonds he had been a fee-simple proprietor.

"This somewhat curious contention is based, as I understand, upon two considerations. The first is that, according to the usual style, the bonds in question, although in effect merely conveying the grantor's life interest, yet express, according to the usual styles a conveyance of the entailed lands, with a declaration adjected that the conveyance shall merely operate in so far as the grantor, as heir of entail, had power to convey without contravention of the entail. The second consideration is this—that, by a not unusual proceeding, Mr Somervell in 1898, with the consent of his eldest son, and under the powers of the 4th section of the Rutherfurd Act, made some not very important alterations in the destination in the entail, and at the same time added to the estate certain small parcels of land not previously entailed, these objects being effected by what I should call a supplementary disposition and deed of entail—a deed which was just a repetition of the existing entail with the necessary modifications.

"I must say at the outset that, so far as I can see, there is not much substance in this controversy. For supposing the pursuer to succeed upon what is really a conveyancing puzzle, the only result I apprehend would be that there would at once be an action of reduction at the instance of the next heir, under which the proceedings of 1898, including the deed of that year, would, I should expect, be set aside. For there was plainly no intention on the part of anybody to enlarge Mr Somervell's title or the bondholders' security. And neither he, nor they (the bondholders), nor his general creditors, could, I apprehend, be allowed to retain a gratuitous benefit which was the result of a mutual mistake.

"But, taking the case as presented as a case raising simply a point of conveyancing, I have come to the conclusion that Lord Pearson's view, as expressed in his judgment in the petition, is, if I may say so, clearly right.

"It may be true that if there had been here a disentail—a disentail following upon unconditional consents—and Mr Somervell thus came to possess the estate in fee-simple as a fee-simple proprietor, there might thence have resulted an enlargement of his title, and by consequence an enlargement of the bondholders' title. That would have happened on the principle of accretion, which of course is the only principle applicable. For it is not, I suppose, suggested that a disentail, say after Mr Somervell's death, could have had any effect of the kind suggested. But there was here no disentail,—no accretion or room for accretion. There never was a moment of time at which Mr Somervell was an unfettered and fee-simple proprietor. What happened simply was that he and his son exercised a power which they had,—not indeed conferred by the entail but conferred by Act of Parliament,—a power to make, as they did, by an appropriate deed, certain alterations on the existing entail; alterations not affecting the incidence of the fetters or the rights of Mr Somervell, or the rights of the bondholders to whom he had pledged his life interest, but leaving all these matters exactly as they previously stood.

"It was said that the same section of the Rutherfurd Act authorised, subject to the same conditions, a sale of the estate; and it

was asked what (the entail being thus brought to an end) would have been the position of the bondholders in the event of a sale. As to that, I should think it enough to answer that it may be safely assumed that in the necessary proceedings the position of the bondholders would have been expressly defined and so far as necessary safeguarded. But it might also, I think, be added that the bondholders' rights could not possibly be enlarged by the extinction of the title of their author. As against that extinction, they (the bondholders) might be protected by their recorded infeftment. They probably would. But on the other hand, as against any claim by them to enlarged rights, the purchaser would, I should think, be equally protected by the transfer, implied in the sale, of all rights competent to the consenting heirs of entail.

"Altogether, I am quite unable to see that, even from the most critical standpoint, the pursuer is entitled to the declarator which he asks."

The pursuer reclaimed, and argued—The bonds and dispositions, which were in the usual terms of bonds granted by heirs of entail in possession, were habile to carry the fee of the estate. They could not override an existing deed of entail, but the continued existence of such deed of entail was the only thing which prevented the bonds affecting the full fee of the estate. The bonds created a security over the property, subject only to the condition that they were null in so far as in contravention of the existing entail. An heir of entail in possession was not a liferenter but a fiar subject to the restrictions and limitations of the entail—*Montgomerie* v. *Earl of Eglinton*, August 18, 1843, 2 Bell's App. 149, at pp. 185 and 193; *Earl of Breadalbane* v. *Jamieson*, March 16, 1877, 4 R. 667, at. p. 670, 14 S.L.R. 420. Accordingly, the moment the entail was out of the way the bonds affected the full fee. The deed of entail of 1899 disponed the lands to a different series of heirs to those in the entail of 1823. It also included certain subjects not included in the earlier entail. It was really a substantive disposition of the whole estate, and not a mere variation of the earlier entail. The old entail came to an end, and a new and different entail containing no references to the former came into existence. Under section 4 of the Entail Amendment (Scotland) Act 1848, an heir of entail in possession held his lands freed and the new entail sopited and extinguished the conditions and clauses, prohibitory, irritant, and resolutive of the earlier entail. The fee of the estate was thereby opened to Mr Somervell's creditors in the bonds as soon as the new entail was executed and recorded. The condition to which the bonds were formerly subject, viz., that they should not operate to contravene the existing entail, flew off, and the security became absolute, as the entail which was not to be contravened had ceased—*Paterson* v. *Brounfield*, 1786, M. 15,618, May 19, 1786, 3 Pat. App. 50; *Paterson* v. *Cuthbert*, February 23, 1789, Hume's Dec. 869; *Paterson* v. *Leslie*, July 1, 1845, 7 D. 950; *Gammell* v. *Cathcart and Others*, November 13, 1849, 12 D. 19, *affd.* 1 Macq. 362; *Christie*, June 29, 1888, 15 R. 793, 25 S.L.R. 609. In carrying through the new entail no steps were taken to preserve the *status quo ante* of the bonds, and the new entail being subsequent in date of execution and recording to the bonds could not limit the right of the heritable creditors under the bonds.

Counsel for the defenders and respondents were not called on.

LORD M'LAREN—We have had an elaborate argument in support of this reclaiming-note, but the reclaimer has failed to satisfy me that the Lord Ordinary's view as expressed in his note is unsound. The point first developed by the Lord Ordinary is that even if this pursuer were well founded in his argument on the question of conveyancing "there was plainly no intention in executing the re-settlement of Mr Somervell's estate to enlarge Mr Somervell's title or the bondholders security," and therefore neither he nor the bondholders could "be allowed to retain a gratuitous benefit which was the result of a mutual mistake." That is the first and substantial ground of judgment. Then the Lord Ordinary points out that according to the theory of the action there was a point of time when the bonds were not affected by any entail, and that the rights of the bondholders were enlarged to a right over the fee of the estate, although under the new deed the lands were again tied up under a new entail. The Lord Ordinary disposes of this argument when he points out that it has no basis in fact, because there never was any moment of time at which the lands were freed from the fetters of an entail. The same deed which resolved the fetters of the old entail at the same time put the lands under new fetters, and that not at the will and pleasure of Mr Somervell, because this was not a case in which the heir in possession had an unqualified right to disentail the estate but only with consent of his son. This is not a new thing. I suppose there may have been hundreds of such re-settlements under the powers of the Rutherfurd Act since 1848. Instead of the estate being absolutely disentailed it is often found that all the purposes can be effected by revoking the old entail and substituting a new entail with new burdens and new provisions. If new burdens are imposed no doubt the entailed estate will be less valuable to the next heir, and that will have to be taken into account in assessing the compensation to which he will be entitled, but until this case it had not occurred to any conveyancer that the effect of such a substitution of a new for an old entail was to enlarge the rights of existing creditors. It is exceedingly difficult to figure a case in which such a transaction could affect the rights of creditors. In this case the proprietor and the heritable creditors entered into a

contract of loan in which the creditors stipulated for a security. They knew the extent of the security which they could get from an heir of entail. What they stipulate for is such a security as an heir of entail in possession can give. By the forms of the deed they have got that security and nothing more. If by any inadvertence they got anything more, the heir of entail would have a right of action to have the blunder corrected and the right of the creditors restricted to what he bargained for. So much for the right of the creditor. The second answer to the action is, if possible, more conclusive, because it relates to the powers of the heir in possession. He could not disentail without consent. Mr Somervell's re-settlement bears to be executed with the consent of his son's curator, and that consent would not be binding if there were any concealment or latent benefit to a third party which would prejudice the next heir. The heir in possession could only substitute a new entail for the deed of 1823 in virtue of the consent of his son's curator, and could give no greater rights over the estate than was consented to by him. But there is no reason to suppose any latent benefit to the heritable creditors was contemplated.

On the whole matter I agree with the Lord Ordinary that the creditors had no right to additional security, that the heir in possession had no power to give them additional security, and that in fact no such additional security was given. The right of the creditors was defined by their sasine as at the date when it was taken, and no subsequent transaction to which they were not parties could enlarge it. I am therefore of opinion that the Lord Ordinary's interlocutor should be adhered to.

LORD KINNEAR — I agree with Lord M'Laren. I think this is really a very simple question, although it has been somewhat perplexed by the ingenuity of counsel in the contrivance of what the Lord Ordinary has called conveyancing puzzles, which, however, fall to pieces when one considers for a moment the true legal character of the rights involved. Mr Somervell was the heir in possession of an entailed estate, and he found it convenient to borrow considerable sums of money, in security for which he assigned to the creditors certain policies of insurance over his life, and gave them also, so far as he could, a real security over the entailed estate. But as he held the estate under the fetters of a strict entail he could not in any way burden the fee. All that he could do was to give a security affecting his own life interest. Mr Chree objected to this phrase, because, as he said quite correctly, an heir of entail in possession is not a liferenter but a fiar subject to the restrictions and limitations of the entail. That is a perfectly accurate statement of the law. But the expression used by the Lord Ordinary, and which I also have used, is nevertheless perfectly apt to describe the only right in security over the estate which an heir of entail can give to a lender, and I think it will be found to have been used in judicial decisions, and also by learned writers, such as Professor Bell and Mr Duff, who had occasion to discuss the question at a time when this branch of the law was perhaps more familiar than it is now. The effect of the entail is not to confine the heir's interest to a liferent. But while he is in law a fiar he has no power to affect the fee. Not only has he no power to dispose of the estate, but even his administration must be commensurate with his own period of possession, except in so far as the restriction upon his powers has been relaxed by statute or the common law for the benefit of the estate itself and the heirs who are to succeed him. He may therefore grant an effectual security over his own interest, which may properly be called his liferent interest, because his possession in general, although not invariably, endures for his lifetime, and never extends beyond it, but he cannot do so otherwise than on condition that his conveyance is so expressed as not to affect the property or to prejudice the heirs substituted to him.

Now, what he did in the present case was quite in accordance with the nature of his own right. In the bond and disposition in security he specially provided that it shall not "affect the said lands in any part or portion thereof, or the rents, mails, and duties thereof, in any way, or to any extent inconsistent with the said deed of entail;" and he goes on to say that, so far as inconsistent with it, it shall be null and void, so that no irritancy may be incurred by my granting this disposition in security," and when he comes to the power of sale, he provides that it is only to be "to the extent of my own right and interest in the foresaid lands and of my own power to sell the same." To represent that this is a security over the fee of the estate is in my opinion extravagant. It is by the terms of the deed itself a limited security—a security to the extent only of the granter's own interest in the estate. I think the effect of this deed must be regarded, as Lord M'Laren pointed out, from two points of view—first, that it is a contract, and second, that it creates a real right. As to the contract, it is as clear as words can make it that the borrower did not grant and the lender did not bargain for a security over the fee but only for a security which should affect the borrower's own interest in the estate; and as to the real right created, which is the more important aspect when the question is how far the land has been effectually burdened, the material point is that the infeftment was not an absolute but a qualified infeftment from the first. It was an infeftment in security subject to the restrictions and conditions of the entail. The notion that an infeftment so limited can carry within it some capacity for enlargement on the execution of an extrinsic deed which does not mention it, and has nothing to do with it, is altogether foreign to our system of conveyancing. A security over land, in

order to be effectual, must be definite and specific both as to the amount of the encumbrance and as to the extent of the estate conveyed in security. These are fixed by the deed and the infeftment following thereon, and a real right created by infeftment, whether redeemable or irredeemable, cannot afterwards be enlarged except by a new conveyance of the subjects, followed by a new infeftment.

Now, what was the transaction that is said to have had the effect of increasing the bondholders' rights over this estate. Mr Somervell entered into a contract with his sons' curator by which he substituted a new entail for the old one. When this transaction was carried out I do not doubt that the effect was to create a new title and a new entail. The new entail is different from the old. It embraces land not formerly included, and it conveys the lands by a different destination to a different series of heirs. That it creates a new title I think there can be no question, but I see nothing in the transaction to open the fee of the estate to Mr Somervell's creditors, nor to extend any rights that they may already have acquired over it. The old entail was dissolved and the new entail created in one breath, and under both the estate was subjected to the fetters of a strict entail. There is a new destination, but the cardinal prohibitions are unaltered. It was accordingly conceded that there was no moment of time at which the estate was freed from the fetters so as to make it accessible to creditors of the heir in possession. But even if it had been laid open to the diligence of personal creditors, that would not alter the scope of a real security in the slightest degree. It might possibly have been argued, although it is by no means clear, that a temporary displacement of the fetters could open the estate to the diligence of the creditors in question by virtue of the personal obligation of the borrower since *ex hypothesi* the estate had become his property. But even if that were so, the real right would remain exactly as it was before. It is unalterably fixed by the terms of the infeftment. Mr Chree argued that the legal effect of the bond and disposition was to create a security over the property itself, subject only to the condition that it should be null if it were made to operate so as to contravene the conditions of the entail then existing, and therefore that as soon as the existing entail was displaced by another, to which the deed contains no reference, the condition flew off and the security became absolute, because the entail had ceased to exist, which alone was not to be contravened. When the new entail was executed Mr Somervell was placed under precisely the same restrictions as while the old entail was in force, and it is admitted that he had no power under either, or during any interval between them, to contract debt upon the security of the estate. How a deed can affect what the granter of the deed had no power to effect I am unable to comprehend. But the whole argument, in my opinion, rests upon a misconception of the deed. A security which affects the fee of an entailed estate, and yet does not contravene the entail, is a contradiction in terms. The form adopted by Mr Somervell was devised by conveyancers for the purpose of enabling heirs of entail in possession to grant securities over their own interest without violating the prohibition against contracting debt, and it cannot have a more extensive operation. I am, of course, aware of the feudal difficulty of conveying an interest in land without conveying the land itself. But it has been assumed as common ground that the difficulty has been successfully overcome. If it has not been overcome, the pursuers have no case; for on that supposition the security is either ineffectual because it does not affect the land at all, or else it is null and void because it purports to affect it, and is therefore a contravention of the entail.

The Lord Ordinary suggests that the only ground in law on which such an extension of creditors' right could be supported is the doctrine of accretion. But this was hardly pressed in the argument before us, and I think, as the Lord Ordinary also does, that it is altogether inapplicable. Accretion operates to cure a defect in title where the granter of a precept having the substantial right, but whose title is incomplete, has acquired a complete title after the grant. I doubt if it could ever operate to cure a defect in right. But how a bondholder holding a qualified infeftment following on the precept of an heir of entail can by accretion acquire an infeftment in the fee because the granter has subsequently altered his title without in any way enlarging his power I cannot understand. The principle of accretion is that the law does what the granter ought to have done. But Mr Somervell had neither right nor power to give any higher security over the entailed estate than he actually gave. I therefore think that the Lord Ordinary's judgment is right and should be adhered to.

The LORD PRESIDENT concurred.

LORD ADAM was absent.

The Court adhered.

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