KERR, ... APPELLANT.

THE MARQUIS OF AILSA, . . RESPONDENT (*a*).

1854.
23rd, 26th May, and 12th June.

Retrospective Legislation.—Although Courts of justice are slow to ascribe a retrospective operation to any statute, yet cases do occasionally arise in which this must be done.

Lord Rutherfurd's Act—Amendment of.—The 16 & 17 Vict. c. 94, retrospectively corrects formal inaccuracies into which parties may have accidentally or incautiously fallen in carrying through disentailing proceedings under Lord Rutherfurd's Act. And for the purpose of correcting such mistakes the Act will affect rights actually in litigation prior to its passing.

Affidavit.—The taking of an affidavit is a ministerial, not a judicial act.

Justice of the Peace.—A Scotch Justice of Peace may take an affidavit out of his jurisdiction, provided the locality be within the authority of the Great Seal of Great Britain. Hence an affidavit before a Justice of Peace of the County of Midlothian was held valid though taken in London.

Purchaser's Objection to Title repelled.—State of circumstances in which a party was congratulated by Lord St. Leonards on having to pay costs.

THE decision appealed from was pronounced on the 12th June 1852, and the main question was whether an Act of Parliament passed on the 20th August 1853 had operated retrospectively, so as to remedy certain informalities, and to affect rights already made the subject of litigation.

Another point contested was whether a Scotch justice of peace could take an affidavit in Middlesex. The

(*a*) Sec. Ser., vol. xiv. pp. 240, 864.

Court of Session had held that he could, and they ruled that the alleged informalities were corrected by the subsequent proceedings in the cause.

The appeal was supported by the *Solicitor-General* (Sir *Richard Bethell*), and Mr. *Anderson*; who on the question of retrospective legislation cited *Urquhart* v. *Urquhart* (*a*), *Moore* v. *Phillips* (*b*), *Towler* v. *Chatterton* (*c*), and *Doolubdass Pettamberdass* v. *Ramloll Thackoorseydass* (*d*).

On the point respecting the Scotch justice of the peace, they maintained that the taking an affidavit was a judicial act, which a magistrate could not perform out of his jurisdiction.

Mr. *Rolt* and Mr. *Roundell Palmer*, for the Respondent, contended that the alleged informalities were immaterial; that the Act of Parliament was clearly retrospective; and that the taking of an affidavit was a ministerial—not a judicial—act, which could be performed anywhere within the limits of the powers vested in the Great Seal of Great Britain, for which last position they cited *Hellier* v. *Benhurst* (*e*).

The LORD CHANCELLOR (*f*):

Lord Chancellor's opinion.

My Lords, unless there be something in the language, context, or objects of an Act of Parliament showing a contrary intention, the duty and the practice of Courts of justice is to presume, in conformity with the adage of Lord *Coke*, that the legislature enacts prospectively and not retrospectively. There may, however, be enactments that are evidently on the face of them by their language and subject-matter intended to be retrospective; and when such is the case, the maxim of Lord *Coke* must give way.

(*a*) *Suprà*, p. 658.
(*b*) 7 Mee. & Wel. 536.
(*c*) 6 Bing. 258.
(*d*) 7 Moore's P. C. Ca. 239.
(*e*) 3 Cro. Car. 212.
(*f*) Lord Cranworth.

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A few years ago, in 1848, the legislature by the 11 & 12 Vict. c. 36 (*a*) gave facilities for disentailing estates in Scotland, and for enabling persons having entailed estates with charges upon them to get rid of those charges by selling a competent portion of such entailed estates. The Act directed a course of procedure to be adopted, of which the substance was, that the petitioner and the three next heirs in tail should be consenting parties to that which was to take place. Such was the substance of the enactment. The rest was machinery. A petition was to be presented, verified by affidavit, and certain persons were to be served with notice so as to bring before the Court all those who might interpose a veto against the intended application.

Now since it might in some cases turn out that a person who had complied with the substance of these requirements might nevertheless have incautiously or carelessly omitted to follow certain forms and matters of mere detail, it was the object of the 16 & 17 Vict. c. 94 (for the security of those who had sold an estate tail, but much more of those who had purchased it) to put an end to all possible objection arising from such formal non-compliance. Wherever the requisite consents had been given, the object of the legislature was to extinguish all doubt, and to make good the title. That object could not have been effected without making the operation of the Act retrospective. Keeping in view this probable intention of the legislature, I will proceed to read shortly to your Lordships the words of the enactment (*b*) :

"No interlocutor judgment or decree following or that has followed upon any petition presented, or which shall be presented,

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(*a*) Lord Rutherfurd's Act.
(*b*) 16 & 17 Vict. c. 94, sect. 1.

Lord Chancellor's opinion.

under the said recited Act (*a*), or this Act, shall be questionable upon the ground of any want of compliance with the provisions of the said recited Act or of any relative act of sederunt in so far as such provisions regard applications to the Court under the authority of the said recited Act, or this Act, and the matter set forth in such applications, the intimation and service and advertisement thereof, the persons to be called as parties thereto, the mode of calling them, the making and producing of affidavits therein, the matters to be set forth in such affidavits, and generally the procedure under such applications.

The words are, "no interlocutor or decree that has followed." If we are to construe them according to their natural meaning, and with reference to the probable intention of the legislature, supposing any error to have been committed in the presenting of the petition, or in the serving of notices, or in the making of affidavits, it is clear that no decree or interlocutor shall be questioned in respect of any error of that sort. In other words, my Lords, the legislature enacts that all those enactments in the prior Act (*b*) shall be deemed to have been in the nature of directory regulations, and not essential to the validity of the proceeding; a course of legislation far from unusual in regard to matters which are not of substance but of mere form.

In my opinion, this goes to the very root of the present case; and even assuming that there was some ground for the appeal at the time it was presented, that ground is now removed, and it will become your Lordships' duty to affirm what has been done in the Court below. But independently of this remedial statute, there is, I apprehend, quite enough in the case to show that the Court of Session were right in the conclusion at which they arrived.

Three objections have been made to the decision. The first is, that the decree, which is a decree in the

(*a*) Lord Rutherfurd's Act. (*b*) Id.

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nature of a disentailing order (as we should call it in this country) was made in the absence of the *tutor ad litem* of the first tenant in tail, an infant. I cannot see in any sense that that is strictly true. The infant was regularly served: that is not disputed. It was necessary, in order to fix the infant, that his tutor should be served. But, in this case, his tutor, or the person who was in the position of tutor, namely, his father, was himself the petitioner. What was to be done in such a case? The statute is silent upon that point, but it says that the Court of Session may, by an act of sederunt, direct the course of proceeding to be pursued in carrying the statute into execution; and the Act of Sederunt (*a*) accordingly provides that when the petitioner is the father, it shall not be necessary to serve the petition on him, but it shall be lawful for the Court at any time in the course of the proceedings to appoint a *tutor ad litem*.

If therefore at any time in the course of the proceedings the Court appoints a *tutor ad litem* it will have complied with the literal requisitions of the Act of Parliament.

In this case after the amount of the debts had been ascertained, and pending the inquiry as to what property should be sold, or in English phraseology after the reference and before the final adjudication, it was discovered that there had been no *tutor ad litem* appointed to the first tenant in tail; but a *tutor ad litem* was appointed in course of the proceedings. That was exactly what the Act of Sederunt said should be done.

But then it is said that the tutor ought to have been present at all the previous inquiries. I do not think it is competent to your Lordships to inquire into those

(*a*) 23 Dec. 1848, sect. 4.

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facts, of which you have no means of forming a judgment. The tutor might well have inquired into all those matters in six days, the time limited for the purpose. They were matters patent upon the surface. The first point was as to the debts, of which there were but four or five. One had been constituted by Act of Parliament, and there were some three or four others amounting to between 38,000*l.* and 40,000*l.* That these debts existed, no one ever pretended to raise a doubt.

The next inquiry was, what were the proper portions of the estate to be sold. It is said, perhaps truly, that the tutor was not appointed until after the selection had been settled. Perhaps that statement is not in strictness quite correct. But even supposing it to have been correct, what could the tutor have done even if he had been appointed earlier? He could only have referred the matter to competent surveyors; and it had already been referred to persons whose integrity and skill could not be questioned. There is no suggestion made that any one else would have said or done any thing different on the subject. Therefore, that the statute was complied with in substance is clear beyond controversy, so that I apprehend there is really nothing on the part of the purchaser to complain of.

Then, my Lords, we come to the question as to the affidavit. That is the only point upon which I confess at one time I had some little hesitation; but not upon the matter of the interest, for it seems to me that that is quite out of the question. A justice of the peace, or a magistrate, in taking an affidavit is not exercising a judicial function. In the present case the affidavit is that of a person who says that the only charges against the estate are A, B, C, D. But it is urged that one of these sums is a sum which belongs to a person with

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whom the magistrate is intimately connected (*a*). But if it is true that the party has the charge, the affidavit does not give it or take it away. It leaves it just where it was before.

I had a doubt at first whether an affidavit appointed to be taken by a Scotch justice of the peace could be validly taken out of Scotland. But upon consideration, I think that it is not a matter that ought to be disputed. It seems clear that in Scotland a justice of the peace is the proper person before whom to make an affidavit to be used in the Court of Session. I assume also from what is stated by one or two of the authorities that have been referred to, that it is a matter of undoubted law in Scotland, that, in order to make such an affidavit valid, it is not necessary that it should be taken by the justice within the county for which he is justice of the peace. Such being the law of Scotland, I can see no limit to the place within which the magistrate is to exercise this function. The conclusion which I come to is, that the authority to take an affidavit is a mere ministerial act according to the law of Scotland, at all events, vested in the person by reason of his character of justice of the peace. He is a justice of the peace for the county of Mid-Lothian. If his power to take an affidavit were confined within the county of Mid-Lothian, then I could understand that view of the law. But if you once get beyond Mid-Lothian, to which alone his magisterial functions are confined, you can only go beyond it because it is a power which he can exercise as one personally inherent in him as a justice of the peace. That being so, it seems to me to make no difference whether it is done in Scotland or in any other portion of Her Majesty's dominions, over which

(*a*) The connexion was that the justice of peace who took the affidavit in London was the husband of a lady entitled to a provision out of the estate.

the Great Seal exercises jurisdiction in appointing justices of the peace.

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It appears to me, therefore, upon all these grounds, that the Court of Session came to a right conclusion in this case; and I shall have no hesitation in moving your Lordships to affirm their decision and to dismiss this appeal with costs.

The Lord BROUGHAM:

Lord Brougham's opinion.

I had originally some hesitation with respect to the affidavit, not as regards the interest of the magistrate taking it, which I hold to be clearly out of consideration in this case, but as to the question of jurisdiction. I however now think it is clear from the cases that a justice of the peace in Scotland can take an affidavit out of the county within which his authority is in other respects confined. Nay in the case of Cochrane (*a*) a stronger thing was done, namely the ratification of a deed by a married woman, taken by a sheriff out of his jurisdiction; and this was held to be good, as being a matter not of contentious but voluntary jurisdiction. I therefore deem it clear that the affidavit in this case might duly be taken by a Scotch justice of the peace acting out of Scotland under the commission from the Great Seal of Great Britain, seeing that it could have been so taken (which seems undeniable) out of the county for which he was such justice.

With respect to the 16 & 17 Vict. c. 94, I hold with my noble and learned friend that the first section has a retrospective operation; and if anything were wanting to convince me of this, I should find it in the very different language used in the subsequent sections compared with those appearing in the first—it being clear that those subsequent sections are not intended to have a retrospective operation.

(*a*) 3 Feb. 1688, Morr. 7294.

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The Lord ST. LEONARDS:

My Lords, I am of opinion that a *tutor ad litem* was duly appointed and duly served; and I think this House must consider that the tutor performed his function not simply on account of the memorandum or minute which he put in at the requisition of the Court, for even without that memorandum or minute I should have been of the same opinion, unless grounds had been stated to the House, supported by evidence, to show that he had failed in his duty. The tutor states that he had a knowledge of, and had examined the proceedings and found them to be correct, and that he approved of what had been subsequently done. In point of fact he was appointed before any material steps were taken, and he might have properly examined them and given his assent after such examination. He could not have been better qualified to decide what should be sold, or to estimate the value of the property, or to determine the manner of sale, if he had been appointed before the referees undertook the duty referred to them, than he was by being appointed afterwards. He could judge just as well from the report made on the reference, as if he had been appointed before the reference took place. Indeed he then would have what he could not have had originally, namely, the only matters before him upon which he could form a judgment. It appears to me therefore that that objection entirely falls to the ground.

The objections to the affidavit appear to be untenable. In this country the merely ministerial act of taking an affidavit is performed by justices of the peace out of their counties every day and every hour. For example, you are bound by some Act of Parliament to make an affidavit entitling you to such and such payments; no one ever supposed that that constituted

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a particular jurisdiction in any particular magistrate, although each magistrate is appointed for a particular locality. Those are acts common to all magistrates, and you may make the affidavit before any magistrate anywhere. Considering that the Great Seal has jurisdiction over the whole of the United Kingdom it does appear to me that this is an objection which ought not to prevail.

But it was said that in *Urquhart* v. *Urquhart* (*a*) this House had established a rule which prohibited the House itself from ascribing a retrospective operation to the Act of the 16 & 17 Vict. by the establishment of a rule of law, upon the previous statute of the 11 & 12 Vict. c. 36.

Now, when the very different objects of these two statutes are adverted to, your Lordships will see that the House may, with perfect consistency, now decide that the 16 & 17 Vict. c. 94 is retrospective, although it decided upon a former occasion, as regarded the case then before it, that the Act of the 11 & 12 Vict. c. 36 had not that operation.

The 11 & 12 Vict. c. 36 enacts (*b*), "That where any tailzie shall not be valid and effectual as regards any one of such prohibitions, then and in that case such tailzie shall be deemed and taken, from and after the passing of this Act, to be invalid and ineffectual as regards all the prohibitions." Now I recollect that in the argument the learned counsel stopped there and contended that those words were retrospective. But then follow these words, "And the estate shall be subject to the deeds and debts of the heir then in possession, and of his successors as they shall thereafter in order take under such tailzie."

The estate is to be subject to the deeds and debts of

(*a*) *Suprà*, p. 658. (*b*) Sect. 43.

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the heir then in possession and his successors, but not of the previous owners.

But when you come to the Act of the 16 & 17 Vict. c. 94 you find the provision is a totally different one. It is that no interlocutor, judgment, or decree shall be invalidated. The one operating upon the title or upon the actual conveyances creating the title and rendering them invalid, and the other operating upon judicial proceedings in regard to the estate. So that no two things can be more distinct. Then this Act of the 16 & 17 Vict. c. 94 in the clearest terms declares, "That no interlocutor, judgment, or decree following or that has followed on any petition presented under the said recited Act shall be questionable" upon such and such grounds. The words provide expressly for what is past as well as for what is to come. You must give to words their ordinary import. It is not contended that any other meaning can be assigned to them. But it is said you must strike them out of the Act. But why? Is there more reason for providing that matters of form in time to come shall be taken to have been rightly carried through, than for enacting that matters of form in time past shall be so considered? Why should Parliament have attempted to make all matters right prospectively, and yet not retrospectively? There is much more reason for giving validity to what is past than to that which is to come, wherein parties can by proper caution guard against error. Care and circumspection can operate prospectively, but not retrospectively.

Great anxiety is evinced to provide that the Act shall not apply to cases where any injury has been inflicted. Next, that there shall be the proper consents. These are the substantial things. No one contends here that any injury has been sustained. There is no allegation of the sort, there is no pretence for it. And the proper consents have been given.

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I have therefore great pleasure in congratulating the Appellant upon what Lord *Eldon* said gave more security to a purchaser than anything else, namely the having to pay the costs of an appeal brought by him to test the validity of the title.

Interlocutors in each Appeal affirmed, with Costs.

GRAHAME, WEEMS, & GRAHAME — RICHARDSON, LOCH, & MCLAURIN.