MARCH 12, 1857.

CONSTANCE M. E. COCHRANE and AMY A. F. A. COCHRANE, &c., *Appellants*, *v.* ALEXANDER DUNDAS ROSS COCHRANE WISHEART BAILLIE, *Respondent.*

Entail—Marriage Contract—Completing Titles—Clause—Construction.—*A father bound himself, in the marriage contract of his daughter, (in* 1715,*) to entail lands in the same way as the rest of his property. In the procuratory of resignation it was provided that the heirs should be subject to the conditions, restrictions, &c., in the charter of tailzie, "which are herein held as repeated* brevitatis causâ." *No title was made up under the procuratory till* 1775, *when a charter was expede in which the fetters of entail were expressed* ad longum. *In a declarator at the instance of the present heir of entail—*

HELD (affirming judgment), *That as the conditions of entail had not been inserted in the original procuratory, the entail was defective, and the lands were, in conformity with the act* 11 *and* 12 *Vict. c.* 26, § 42, *to be viewed as being held in fee simple; that with regard to the obligations, imposed in the marriage contract, the parties to it having executed the procuratory in implement of them, the Court would not interfere to make that instrument more effectual than it had been left by them.*[1]

The appellants appealed against the judgment of the Court of Session, maintaining in their *printed case* that it should be reversed—1. Because, by the marriage contract of 1715, William Baillie of Lamington came under an onerous obligation to execute a strict entail of the lands of Hyndshaw and Watstown, and his whole other lands, in favour of the heirs of the intended marriage between his daughter Margaret Baillie and Sir James Carmichael, which obligation he was bound to carry into effect by the execution of a strict entail of the lands. 2. Because, assuming that the true meaning of the contracting parties was to make a strict entail of the lands, on the model of the Lamington entail, and assuming that the procuratory of resignation, in the marriage contract of 1715, was insufficient for that purpose, the obligation of William Baillie remained unimplemented, and might have been enforced against him at the instance of any heir of the marriage. 3. Because if the obligation to make an effectual entail originally subsisted and might have been enforced against William Baillie *de recenti*, the right to demand implement of the obligation still remained competent to the heirs of the marriage, and had not been lost by prescription.

The respondent supported the judgment on the following grounds:—1. The marriage contract of 1715, which forms the original entail of the lands of Hyndshaw and Watstown, and the disposition of 1722, which is the original entail of the lands of Wiston, were both invalid as tailzies of those lands, because they do not contain any prohibitions or restrictive clauses, but merely make reference to the prohibitions and restrictions in a previous entail of the estate of Lamington. They were therefore defective entails within the meaning of the 43rd section of the Statute 11 and 12 Vict. c. 36, and differed in no legal effect from conveyances in fee simple. *Sir Alexander Don*, Mor. 15,591; *Broomfield* v. *Paterson*, Mor. 15,618; 3 Paton's App. 51; *Lindsay* v. *Aboyne*, 3 Bell's Ap. 254. 2. The original instruments, being thus essentially defective as entails, were not capable of being amended or strengthened in their character by the insertion of the fetters of the entail of Lamington in the feudal titles which followed upon them. 3. There was no foundation in fact or in law for the existence of the supposed obligation in the marriage contract to make a strict and perfect entail; and such obligation as the contract did contain was fully and completely implemented by the execution of the procuratory of resignation within the body of the same deed. 4. The disposition of tailzie executed by Lady Ross Baillie in 1789 could not receive effect as a valid and strict entail, and subsisting title to the lands, in respect that she had no power to execute the disposition containing such clauses of restriction, and that it remained unfeudalised and inoperative as a conveyance.

Anderson Q.C., and *Kinnear*, for the appellants.—As to Hyndshaw and Watstown, the marriage contract of 1715 is not to be viewed as the original entail of these lands, but the charter of resignation following on the procuratory contained in the contract is the original entail. The case of *Irvine* v. *The Earl of Aberdeen*, M. App. 'Taillie No. 1,' 2 Paton's App. 419, does not

[1] See previous report 17 D. 659; 27 Sc. Jur. 279. S. C. 2 Macq. Ap. 529: 29 Sc. Jur. 336.

establish the position, that an entail cannot be made by such a charter. The charter, therefore, being treated as the entail, it contains all the necessary conditions, provisions, and irritancies required by the Statute 1685, set forth at full length. The only defect is, that it is not recorded, but that is an objection that cannot be taken between heirs, being competent only to creditors. The entail is therefore complete, and cannot be impeached by the respondent. But even if the charter of resignation cannot be taken to be the original entail, but the procuratory in the marriage contract must be treated as such, then the entail, being an entail by reference, is invalid, and the onerous contract of marriage has never been implemented. It is accordingly still binding on the heirs of that marriage, who may obtain another and a better procuratory—*Renton* v. *Anstruther*, 6 D. 230;—and the respondent is one of those heirs. The obligation in the marriage contract, was to execute not an imperfect but a perfect entail, and the other heirs can still demand that this shall be done. No prescription has run against this right, for there has been no adverse possession, and therefore no basis for prescription to work upon. When Lady Baillie, in 1775, made up her title, she did not do so in a way adverse to the marriage contract of 1715. On the contrary, she expressly recognized and adopted it, her own titles shewing the subsistence of the obligation to make the entail valid.—*Cunningham's Trustees* v. *Cunningham*, 14 D. 1065; *Murray* v. *Ramsay*, 17th January 1811, F.C. The same reasoning applies to Wiston, which was an estate acquired in 1722, for the marriage contract applied to *acquirenda* as well as *acquisita*. If, therefore, the obligation to make a valid entail still subsists, Lord Rutherfurd's Act does not apply, for it contemplates only the case of an entail already executed. The statute, moreover, applies only where there is a defect in any one prohibition; but it does not apply to an entail good in all respects except that it is not recorded. The statute does not apply to an unrecorded entail, any more than it applies to an unfeudalised entail.

Lastly, the deed of entail executed by Lady Baillie in 1789 was complete and regularly recorded, and it was within the scope of her powers to make such an entail. In doing so she only carried out the intention of the original entailer, and implemented the obligation incumbent on the heirs of the marriage of 1715. Hers was not a case like that of *Urquhart* v. *Urquhart*, ante, p. 264: 1 Macq. Ap. 658; 25 Sc. Jur. 537, where the heir added to the prohibitions, or altered the line of succession; nor was it a mere voluntary deed like that in *Cathcart* v. *Gammell*, ante, p. 192: 1 Macq. Ap. 362; 25 Sc. Jur. 146. The interlocutor of the Court below, therefore, on one or other of the above grounds, ought to be reversed.

Attorney-General (Bethell), and *Rolt* Q.C., for the respondent.—The marriage contract of 1715 was not an effectual entail, for it was only so by reference.—*Broomfield* v. *Paterson*, M. 15,618; *Lindsay* v. *Aboyne*, 3 Bell, Ap. 254; *Paterson* v. *Leslie*, 7 D. 950; *Gammell* v. *Cathcart*, 12 D. 19: 1 Macq. Ap. 362. The contract executes itself—that is, it first states what is agreed to be done, and then it proceeds to carry out that agreement. The procuratory is full performance of the contract. If both parties blundered in executing their intention, the deed must nevertheless stand as it is, and there is no power now to amend or reform it. The defect, therefore, existing, the entail is struck at by Lord Rutherfurd's Act, § 43. That section does not specify any particular ground for the defect; but any defect is sufficient. There is no obligation on the parties to the marriage contract of 1715 to execute any more perfect entail than what they already executed; for where the parties make an imperfect entail, there is no implied obligation to re-execute a perfect entail.—*Cathcart* v. *Gammell*, explaining *Fraser* v. *Lovat*, 1 Bell, Ap. 105. The estate of Wiston was clearly not included in the marriage contract of 1715. There is no foundation for saying that the charter of resignation, following on the procuratory, and not the procuratory itself, must be looked at as the original entail: that point was settled by *Irvine* v. *Earl of Aberdeen*, *supra*. The deed of entail executed by Lady Baillie in 1789 was clearly *ultra vires*, for it was merely an attempt by an heir of entail in possession to impose further fetters on the succeeding heirs, which is incompetent.—*Urquhart* v. *Urquhart*, *supra*.

Anderson replied.[1]

LORD ST. LEONARDS.—My Lords, with the permission of my noble and learned friend, I will state very shortly the grounds upon which I arrive at an opinion in this case. I must say that I think Mr. Anderson has argued the case remarkably well in his reply, and has certainly met every point fairly with the means which he had before him. But I am clearly of opinion that the decision of the Court below was right. I think there is not a point in the case which is not concluded by the decisions of this House, unless it be the question last argued, arising upon the obligation. The settlement of 1715 is admitted to be defective as regards the statute of 1685. That point was clearly settled by the case of *Irvine* v. *Lord Aberdeen*, and is not now open for discussion. It was a very good settlement in itself, and we have seen that the estate has been enjoyed under it ever since 1715. There is nothing, therefore, the matter with the

[1] *Note.*—In the course of the argument, Lord St. Leonards complained that there were 163 defenders cited by the heir in possession, and remarked (the other Law Lords concurring) against the propriety of continuing the practice of citing in such cases all the succeeding heirs of entail, however remote.

settlement, *qua* settlement; but as far as fetters were attempted to be placed upon the estate under the Statute of 1685, there was a defect in the registration which rendered those fetters inoperative, in so far as they sought the aid of the statute; and without the aid of the statute they were null and void.

That applies to the two estates, Hyndshaw and Watstown. Then, as regards Wiston, assuming that it is within that contract, that is equally void as regards the fetters. That is admitted; and therefore the three estates, or we may call them two, are neither of them bound by the fetters.

As regards authority, the case of *Cathcart* v. *Gammell*, decided by this House, (and, I am glad to see, approved by the Judges in Scotland,) established, that you cannot, by reference, give effect to prohibitory, irritant, and resolute clauses. And that is not now in discussion. That simple naked point was decided by this House in that case, and is now the law of the land.

Then, as regards the other point, the case of *Urquhart* v. *Urquhart* is equally conclusive; and, therefore, those points, upon which the legal validity of the prohibitory, irritant, and resolutive clauses depend, are, in point of fact, all concluded by that decision.

The settlement of 1774 never can be considered, and it is impossible it should be considered, as clearing up the difficulty.

Then, as regards the settlement of 1789, that is clearly within the case of *Urquhart* v. *Urquhart*. No question can arise upon the settlement of 1789, because, not only Lady Ross Baillie does, herself, by that deed, reserve power to except herself from the fetters, but she reserves the actual power to dispose of the estate. To say, therefore, that that was a continuance of the entail is quite impossible. According to the case of *Urquhart* v. *Urquhart*, and other authorities which have settled that point, it is a new settlement, and an attempt to impose additional fetters upon the heirs substitute, which she had not the power to impose; and, therefore, that deed, in my opinion, is perfectly inoperative as regards the fetters. No title, therefore, can be founded upon that settlement in the way which is attempted.

Then comes the question upon the supposed obligation in the settlement, which is called (and properly enough) the contract of 1715, and Lord Rutherfurd's Act; and, again, in the way in which Mr. Anderson has put it—whether, supposing an obligation to be found to exist, there is, independently of Lord Rutherford's Act, now to be had the benefit of that existing obligation. I see nothing myself in the settlement of 1715 which bound future estates. When a man talks of all his estate—his property at that period—he cannot mean future property; although, on the contrary, where there is a settlement which includes all a man's property at the time, if he never acquires anything afterwards, but he attempts to deal with the property in such a way as to avoid his obligations—if, for example, he lays out personal estate, bound by the settlement, in the purchase of real estate—the Court will hold that that real estate is subject to the settlement, because it was bought with money which was bound by the settlement. But, here, speaking now of the Wiston estate, there is nothing to shew that the Wiston estate was an after acquired estate in the sense in which we view the contract. But even if it were, for the reasons I have stated, a title could not be made out by the appellant.

Now as I understood Mr. Anderson, it is said that there were two contracts in the settlement of 1715. He says, that there is a contract to provide the lands to the series of heirs called, and afterwards there is a contract to resign the lands in favour of these heirs, and he says that there is no performance of that contract, because it does not go far enough. Independently of the argument upon the general question, the point arises, whether, upon the settlement of 1715, this case does or does not come within Lord Rutherfurd's Act. I do not myself see where a doubt can arise. I am not now speaking of the obligation, the last point argued, but I am speaking of the general tailzie. I do not see where a question can arise. I have read the act very often, and I have been reading it over and over again now, and I cannot raise any question upon it. The whole of it amounts to this—that if there is a defect in any of the prohibitions of the settlement, then the settlement shall be wholly ineffectual and void; because the heir of entail or the substitute is at liberty to deal with the estate as if it were his own. Here is a case in which the settlement is good. There is nothing the matter with the settlement—the settlement is a good settlement, according to the law of Scotland, but it is not a good settlement as regards those perpetuity clauses, which alone are authorized by the Statute of 1685. And then Lord Rutherfurd's Act amounts to this—that instead of being compelled to take the circuitous course of selling, for example, in order to get rid of the settlement, if there be in those prohibitory clauses an omission which renders any one of them inoperative, the whole settlement shall be at the mercy of the heir of entail. Here is a case which, in my opinion, taking the whole together, falls directly within the act of parliament, and therefore the act of parliament ought to have full operation.

But then it is said, and I think with very great reason, that Lord Rutherfurd's Act could not affect a positive contract. I am not prepared to say that it could. If there was an actual and independent contract, it would require further consideration before I would venture to say that that was my opinion. But I cannot find a contract in the sense in which it has been here put

forward in argument—that is to say, a contract going beyond that which was actually executed between the parties. And it would be rather a strong thing to say, after 140 years possession under a settlement, and a very good one, and all the heirs in succession enjoying the estate according to the settlement, that it is now found out that that settlement was not effectually made, and that you want something further. In point of fact, I have no doubt that the settlement did everything which the parties at that time meant to do. They meant to do exactly what they have performed, for this reason. At the time that settlement was executed, it was not doubted that by the law of Scotland you might, by references to proper clauses in another deed, create an effectual entail. It was not till long afterwards that it was settled that you could not by reference create proper prohibitory clauses with irritancies, and so on. And therefore, in point of fact, the parties made the exact settlement which they meant to make. Subsequent decisions have given to that, which they did perform, a meaning, which may or may not have been in their minds, but they meant to do exactly what they did do. And if parties in settling an estate had used apt words as the law then stood, it is not because a subsequent train of decisions has given to those words a different interpretation, and the estate, therefore, would be of a different quality, or of different extent, that you can therefore call upon the heir substitute in possession to give to those words the operation of creating an estate tail, which the law has subsequently said is not the true operation of these words. You cannot do that; but you must take the settlement as you find it, subject to all the accidents which may arise from the decisions in the Courts of law as to that estate, as well as to many others.

But I do not find in the settlement of 1715 anything approaching to what I may call an independent contract. In the first part of the deed they speak of what they intend to do, and when they come to the operative part—to implement that—observe the words, "and for that effect" they do so and so. "That effect." What do these words mean? These words clearly mean to carry into operation that which is to have "that effect." And they proceed to do—what? They proceed to do all that they could do at that time. Mr. Anderson says that there are no words of disposition. He does not mean to deny that that contract of 1715, which is the procuratory, and what followed, operated as a positive transfer of the estate. That is perfectly clear law. Therefore, what they do is as valid a conveyance of the estate by the law of Scotland, as any form or forms could possibly accomplish. Then they have executed their own purpose. Remember, that if this contract was an independent contract in point of fact, then supposing, for example, by accident, or by force of the estate, the land had been sold, and the money spent, you might, in the way in which it has been argued, have a right of action against the original settler, and say—"You did not settle the estate as you ought to have done under your contract. Here am I, B; I come in succession after A. In consequence of your making an informal deed, A has sold the estate, and has spent the money, and I am disappointed in that which I was entitled to receive. Therefore, I bring an action against you." That, if it was an independent contract, would be right enough. It is not merely that you can come upon the estate, and say that those who took the estate were bound to take it *cum onere*, and therefore they must make a settlement of it, but you would have a right to bring an action, which would not be barred by time, if it was a continuing contract—a contract of assurance, for example. You would have a right to bring an action against the party for not having done that which he undertook and covenanted to do.

My opinion, therefore, entirely coincides with that of the learned Judges of the Court below. I am bound to say, that they have taken great pains in this case. The case has received equal attention, I am sure, in this House. It is impossible not to see, that in the Court below every point received very great attention; and everything which could be urged on the part of the appellants has been presented both in the Court below and in this House.

There being no independent contract, it is the common case of a marriage settlement. I have never seen a marriage settlement (and I have seen as many as most people in the course of my life) which did not begin with a recital, that the parties had agreed to make a settlement of the property herein after mentioned. And they then proceed to do it. This is no more than that, and they have done it ineffectually—that is, they have done it ineffectually for the purposes, which the act of 1685 did not give power to effect unless in a particular form. They thought they had accomplished it, but they have not done it, and therefore the settlement is gone.

In the view which I take of this case, it is not necessary to rely upon the question of prescription. I do not know that I should have had any considerable difficulty if it depended upon that. The inclination of my opinion is, that the negative prescription has barred, if there was, an independent obligation. But I do not at all rely upon that, because in the view which I take of it, the case is one which does not require the aid of prescription.

Upon these grounds, which I have stated very shortly, I beg to move your Lordships, that this appeal be dismissed. The respondent does not ask for costs, as it is a family cause, otherwise we must have given them strictly, though it is a point open to great difficulty.

LORD CHANCELLOR CRANWORTH.—My Lords, I am extremely glad to have heard the opinion of my noble and learned friend. He has really, together with the judgments which

have been delivered in the Court below, so entirely exhausted the subject, that I do not feel at all called upon to go at any great length into the case. The few observations, which I shall have to make in concurring in the motion which has been made by my noble and learned friend, will be rather by way of very shortly and summarily stating the view which I take of this case, than attempting to follow out all the arguments in detail.

In the first place, with regard to the Hyndshaw estate, the title of that arises out of a contract under the deed of 1715. Now, as to that, the title of the present respondent is a title as heir substitute in possession, under an entail validly created by that deed. Infeftment or feudalization not having followed for 60 years afterwards, namely, in 1774, but the title being now completed, he is the heir substitute in possession. And this being so, then the question is—what are his rights as heir substitute in possession? Has he a right to sell the estate? Has he a right to burden it with debts? Why not? The heir substitute in possession can burden the estate with debts, or can sell it, unless he is prohibited by fetters properly introduced to restrain him from doing so. Now that he is not restrained by fetters properly introduced for restraining him, is quite obvious from looking at the terms of the act of 1685, which expressly provides that these fetters must be in terms stated in the procuratory. Here they are not stated in the procuratory, and therefore there are no fetters restraining him from selling the estate or burdening it with debts. If there are no fetters restraining him from selling the estate or burdening it with debts, he is free from all fetters and all restraint by the express terms of the statute called Lord Rutherfurd's Act, passed in 1848, to the very terms of which I have again referred, in consequence of Mr. Anderson's very able argument in reply. But I confess that that argument has failed to raise in my mind any doubt whatever upon the subject. The words of the statute are, (reading them shortly,) that where any entail shall not be valid and effectual in the terms of the act of 1685, in reference to prohibitions against alienation and contraction of debts, in consequence of defects either in the original deed of entail, or of the investiture following thereon, if it shall be invalid and ineffectual with reference to any one of such prohibitions, it shall be invalid and ineffectual with reference to all the prohibitions. The argument of the appellant is, that there is no invalidity in the original deed, but I think there is, because in the original deed there was not contained in the procuratory of resignation that which it was necessary it should contain, in order to create an effectual entail. Therefore I think this case comes within the terms of that act, and certainly within the manifest intention of it.

Then, that being so, the question as to the original deed, except so far as relates to the supposed contract implied in it, is disposed of. The heir substitute in possession takes the benefit. I do not know whether it was necessary that he should have a declarator. I rather think not; but, however, we need not go into that—he has a declarator in order to make his title more perfect, and the effect of that section of the act is to make him absolute owner of the fee simple.

Then, with regard to the Wiston estate, the case is exactly the same. The fetters there were created by the deed of 1722, (subject to what I will presently state about the contract,) which did exactly the same as the other deed. That deed was not feudalized till some years after the other, I think in 1792. But the present respondent is in just the same position with regard to the Wiston estate as with regard to the other estates. He is heir substitute in possession, under a deed which makes him heir substitute, but which creates no valid fetters, and therefore he is entitled to dispose of the estate as he thinks fit.

That brings us to consider the two questions raised upon the cross action. The first point arises from the circumstance, that Lady Ross Baillie, who was the heir substitute in possession, in 1789 created, or attempted to create, a new entail—that is to say, she made an entail, in which she imposed fetters which would be valid if she had the power of creating that entail. I do not go into the question of whether they were well created or not. I assume that they would have been perfectly valid, if she had been the proprietrix of the fee simple. But she was not. She was the heir substitute in possession; and, according to the authority of many cases, especially one decided in your Lordships' House, *Urquhart* v. *Urquhart*, it is quite clear, that the heir substitute in possession cannot add to fetters or alter the destination of the property in any respect whatever. He must enjoy it according to the terms of his entail; that is the law, and by that he is bound. His powers do not extend beyond those which are conferred by the entail. Therefore that entail is out of the question upon that ground.

Then the other point raised is this:—Conceding, as things now stand, according to the deeds that have been made, and the infeftments which have followed thereupon, that the title of the respondent would be good, yet it is said that there was an onerous contract by the deed of 1715, which in equity, as we should say in this country, binds the successive owners to make a good entail, even if the entail is bad. Now, my Lords, upon this point I adopt entirely the observations of my noble and learned friend, that, first, with regard to the estates of Hyndshaw and Watstown—the two estates included in the deed made in 1715—it is quite clear, that there was no contract to do anything more than was actually done. The parties recite that they have agreed to do so and so; and, in order to effect that, they appoint certain procurators, who are to

carry into effect their intention in the mode that prevailed in Scotland. But the contract has ceased to be a contract, because it was *ipso facto* by the very deed itself performed. They contract to do that which, as my noble and learned friend has observed, they did perfectly, except that probably the intention of the maker was to do something more than he there did. A valid deed was created, and by that deed the parties must be bound. I therefore think that it is quite clear that there was no contract at all, except that which was actually performed.

Now, with regard to the other property, the Wiston property, I speak with more hesitation, because I think the opinion of the majority of the learned Judges below seems to have been that there was a contract to settle lands *acquirenda*, as well as *acquisita*. If that had been a necessary point to decide, I confess I should have required a little more time to consider it, because (speaking certainly with diffidence, according to my present impression,) I do not think that was the intention of the parties at all; and I am confirmed in that by observing, that in the settlement actually made in 1722 of the Wiston estate, there is not an allusion to any such contract as binding this gentleman. It is merely that there is a disposition *mortis causâ* of Wiston, not because he was under an obligation to make such a settlement, but because he was minded to do so. I do not feel at all satisfied that there was any contract whatsoever to settle it; but if there was, I think the same observations apply to that as apply to the other estates, namely, that all that was meant to be done was, that a similar settlement should be made as to lands *acquirenda*, as was there made as to lands *acquisita*. If that was the meaning, that was effectually done.

That really disposes of the whole question. But I must say, that there is a view of this case taken by Lord Cowan, to which I think no valid answer has ever been suggested, and it is this. Supposing there had been in the most distinct terms an onerous contract upon the part of Sir W. Carmichael, that he would settle this property with proper fetters, and suppose even that the case of *Cathcart* v. *Gammell* did not apply to such a case, what has the heir substitute in possession to do with that? He is not bound by that onerous contract. All that he is bound to do is to succeed to, and enjoy the property in the mode in which it descends to him. I think it would be a very dangerous position indeed to hold, that onerous contracts, entered into by the parties to the original creation of these Scotch entails, many of which, I might say most of which, are 150 or 200 years old, are to be personally binding upon each succeeding heir substitute, so that he is not only to hold the estate subject to the fetters originally imposed upon it, but to be liable to new fetters imposed in fulfilment of a contract entered into by some person in some prior time. How is he to do that? The case of *Urquhart* v. *Urquhart* decided that he has no power to create any fetters except those under which he has received the estate. Independently, therefore, of the view taken by my noble and learned friend—and I do not suppose he takes a different view of this point—he adverted to that which was quite sufficient to justify him in the conclusion at which he arrived, but, independently of those considerations—I think, that that view of the case taken by Lord Cowan is of itself quite sufficient to dispose of this case. I have therefore no hesitation whatever in concurring in the motion made by my noble and learned friend.

LORD WENSLEYDALE.—My Lords, I do not feel any difficulty in concurring with the recommendation of my noble and learned friends. After considering the very able arguments at the bar on both sides, and the extremely able exposition of the subject in the opinions of the learned Judges of the Court below, I must own that I cannot feel any reasonable doubt about the propriety of dismissing this appeal.

In the first place, I think it seems to be admitted by all the learned Judges in the Court below, that the attempts, that have been made in this case to create an entail, are void. The marriage contract of 1715 is void as against creditors and singular successors, because it does not comply with the terms of the Entail Act of 1685. That is a matter perfectly clear. It is not made better by the deed of 1774, because the true entailing deed was the marriage contract of 1715. And if it be void as against creditors and singular successors, it is, I think, plainly by Lord Rutherfurd's Act, void also as against heirs. Though Mr. Anderson has argued very strongly that that is not the meaning of the act of parliament, I take the meaning of the act of parliament to be perfectly clear. The 43d section of Lord Rutherfurd's Act says—"And no action of forfeiture shall be competent at the instance of any heir substitute in such tailzie against the heir in possession under the same, by reason of any contravention of all or any of the prohibitions." Therefore, if this entail be void in consequence of not complying with the act of 1685, with respect to creditors and singular successors, it is equally void with respect to heirs. That is the opinion which has been pronounced by the learned Judges in the Court below. That applies to the case of the lands of Hyndshaw and Watstown.

Then, with respect to the lands of Wiston, the deed of 1722, which is the original deed, is entirely void for the same reasons. Therefore, I quite agree upon the actual state of the title, that the entail is void.

Then we come to the strength of the argument urged by Mr. Anderson, that, supposing that is so, still there is a contract contained in the marriage settlement of 1715 which binds all the future heirs of entail. I have very great difficulty in supposing that it could be an existing

contract, for the reasons assigned by my noble and learned friend on the woolsack at the conclusion of his speech. But it appears to me to be perfectly clear, that in this case you cannot discover in the deed of 1715 any other contract than that which the parties have fulfilled. If there had been an independent contract, and a covenant to settle the estate with a proper deed of entail, then there would have been a considerable question, in the first place, whether that bound the successive substitutes; and secondly, whether it could be enforced after this lapse of time. I pronounce no opinion upon the last question, because I have very considerable doubt about it. If there is an actual covenant to settle an estate in a different mode from that in which it has been settled, whether that would be good as against the positive or the negative prescription, is a matter upon which considerable doubt arises. I think it, however, wholly unnecessary to give any opinion upon that part of the case. The ground upon which I proceed is, that there is not to be found within the four corners of the deed of 1715 any covenant whatsoever, except that which the parties have performed. There is no other covenant in it, unless you say that in every deed constituting an entail which is void, there is an implied covenant to make it an entail binding upon substitutes. That proposition cannot for a moment be maintained. I cannot see, after fully considering this case, that there was any other covenant whatsoever, except that which the parties have performed. Therefore, even supposing that the heir of entail could be bound at all, I think it is quite clear that there is nothing which binds him in this case.

Interlocutor affirmed.

Appellants' Agents, Maitland and Graham; T. G. Murray, W.S.—*Respondent's Agents*, Connell and Hope; Menzies and Maconochie, W.S.

MARCH 20, 1857.

WILLIAM KELSO MARTIN, &c., *Appellants*, *v.* ELEANORA KELSO and Others, *Respondents*.

Entail—Construction—Destination—Power to Alter—Heirs Female—Younger Daughter—*By deed of entail, an estate was settled upon A, and the heirs whatsoever of his body. The prohibition against altering the order of succession contained the following exception:—"That it shall be lawful to the said A, and the descendants of his body, so often as their apparent or presumptive heirs are females, so far to alter the destination of succession above written, as to settle the estate upon a younger daughter in preference to an elder daughter, or to pass by such daughter altogether." B, a descendant of A's body, being unmarried, executed an alteration of the succession in favour of his youngest sister, to the exclusion of his eldest. The youngest succeeded B, and entered into possession of the estate, and, while unmarried, she executed a deed altering the succession in favour of an immediate elder sister to the exclusion of her eldest. She then applied for, and obtained disentail of the estate, upon intimations to, and consents by, her immediate elder sister and her children alone, as next heirs of entail. In a reduction of all these deeds, and procedure at the instance of a son of the eldest sister, who would have been entitled to take under the original entail had the destination been left undisturbed:*

HELD (affirming judgment), *That construing the clause of exception in the entail, the deeds and procedure under challenge were valid and effectual.*

HELD FURTHER (affirming judgment), *That the word daughter did not solely mean the daughter of the person exercising the power of alteration, but that that power was applicable to the case where, the heir in possession being childless, the next heirs were females.*[1]

In regard to the judgments of the Court of Session in the original action of reduction, the pursuer appealed, maintaining that they should be reversed, for the following reasons:—"1. Because the disposition by Miss Eleanora Kelso to herself and the heirs of her body, whom failing, to Mrs. Utterson and the heirs of her body, with the instrument of sasine, were inept and reducible; in respect that the destination was at variance with the destination prescribed by the deed of entail, and in contravention of the prohibition against altering the order of succession, and did not come within the scope of the exception to that prohibition: And further, in respect, that in so far as she could be held to have any power of alteration, that power could only be exercised by a *mortis causâ* deed, and not by such a deed as she had granted, and could

[1] See previous report 15 D. 950; 25 Sc. Jur. 543, 552. S. C. 2 Macq. Ap. 556: 29 Sc. Jur. 340.