JULY 14, 1853.

BEAUCHAMP COLCLOUGH URQUHART, of Meldrum and Byth, and his eldest Son, *Appellants*, *v.* BEAUCHAMP COLCLOUGH URQUHART, *Respondent*.

Entail—Fetters—Reduction—Marriage Contract—Statute 11 and 12 Vict. c. 36, § 43—Title to Sue—*An heir of entail in possession under an entail in a marriage contract, which contained prohibitions merely against gratuitous alienation, executed a strict entail. On his death, the succession under both entails having opened to the same person, he made up titles under the second entail, and was infeft, but thereafter raised a reduction of the entail and of his own titles, on the ground that the execution of the second entail was* ultra vires, *and the first could not be gratuitously defeated, and that he was entitled to hold the estate free of all conditions or fetters save those contained in the original marriage contract.*

HELD, 1. (affirming judgment), *that the pursuer was not barred from raising the action by reason of his having made up titles under the entail sought to be reduced, nor by his having succeeded to the maker of it in moveables, as his residuary legatee, under certain conditions in favour of the widow.*

2. *It having been pleaded, that as, under the recent Entail Amendment Act,* § 43, *the first entail was invalid, in respect of defects in the fetters, the pursuer had no title to reduce the second, on the ground that the second entail was to be held as validly executed;*

HELD (*the action having been raised before the passing of the Entail Amendment Act*), *that that act had no retrospective effect, and did not apply: and, on the ground contained in the first finding, the second entail ought to be reduced.*[1]

The defenders appealed, maintaining that the judgment of the Court of Session should be reversed; because—"1. The elder respondent, by his acts at and since his succession, accepted and homologated the entail of 1825. 2. He was also barred from challenging the entail of 1825 by having made up a title under it to superiorities which the entailer was *in titulo* to deal with as he pleased, which were included in the entail of 1825, and which had been possessed by the respondent down to the date of the action. 3. As he had also succeeded, under the entailer's last will and testament, to his moveable estate, he was barred from disturbing in any way the general settlement of his estate, of which the entail formed a portion; and, 4. As he had elected to take the succession of James Urquhart in all respects as he left it, and ratified the entail of 1825, he thereby renounced all right to challenge it."

The respondents supported the judgment on the following grounds:—"1. The late James Urquhart having succeeded to the estate under the destination in the marriage contract of 1753, which contained a prohibition against altering the order of succession, but no restrictions against selling or contracting debt, was not entitled to make a strict entail of the lands, imposing new fetters; and the deed of strict entail executed by him in 1825 was *ultra vires* of the granter, and is reducible at the instance of the respondents. 2. They were not barred from insisting in this action, either in consequence of the respondent, Mr. Urquhart, senior, having made up titles under the entail in 1836, or in respect of his having accepted of the moveable succession bequeathed to him by the testament of James Urquhart. 3. Their right to challenge the entail of 1825, and the titles following on it, was not affected by the 43d section of the Act 11 and 12 Victoria, cap. 36, (1.) because that clause had no retrospective effect, and merely declared the invalidity of an entail defective in one of the prohibitions to commence with the passing of the act; and (2.) because, at all events, this action was instituted, and the question made litigious, in February 1847, while the Entail Amendment Act was not passed till August 1848."

Rolt Q.C., and *Kerr*, for appellant.—We have two preliminary objections to the competency of this action, of which the chief is homologation. The elder respondent has homologated the entail of 1825 in two ways—1. He has made up his title to the estates under it. Further, he has taken under it the superiorities which were included in the deed of 1825, and which James Urquhart had a perfect right to deal with as he pleased, inasmuch as they were validly sold and reacquired. The respondent elected to accept the deed of 1825, and he cannot be allowed now to disturb it; and it is no answer that he has not been *lucratus*, or that he has now consented to restrict the deed merely to these superiorities, however competent it might have been for him to do so in 1836. 2. Besides the entail of 1825, James Urquhart left a *mortis causa* deed, dealing with the moveable estate as that of 1825 dealt with the heritable. That deed refers to the entail of 1825, and the two together form one settlement. The heir, therefore, cannot reprobate

[1] See previous reports, 13 D. 742; 23 Sc. Jur. 325. S. C. 1 Macq. Ap. 658: 25 Sc. Jur. 537.

the one and approbate the other.—*Breadalbane Trustees* v. *D. of Buckingham*, 2 D. 749; Ersk. 3, 3, 47-8-9; *Mackenzie* v. *Hayes*, Kaimes Dec. 252; *Bertram*, M. 3258; *Steill*, M. 5669.—As to the merits. The deed of 1753 was not an entail at all. The contract was onerous only as regarded Jean Duff and the issue of the marriage, but in no other sense. Beyond them there was no *jus crediti* in any person, but a mere *spes successionis*. This is clear from the provision, that in the event of Keith Urquhart predeceasing the father without issue, the estate should return simply and absolutely to the father, under burden only of the provisions and conditions in favour of Jean, the wife of Keith Urquhart. It also confirms this view, that the word "taillie" is not used anywhere, nor is there any obligation on the heirs to possess the estate under no other title, which are the usual accompaniments of a strict entail. In accordance with this view we hold, that if Jean had predeceased Keith Urquhart without issue, he could have disponed the estate *mortis causa* as he pleased, for he being without issue, the purpose of the marriage contract would have been in his person exhausted. But even assuming this view of the deed of 1753 to be wrong, we contend that the entail of 1825 was a legitimate act carrying out the intention of the contract of 1753, and the doing of such act was quite consistent with the powers vested in a fiar of the estate of Meldrum. It is a well-established rule in Scotland that an heir of entail is an absolute proprietor, except in so far as he is fettered, and fetters cannot be extended by implication—Ersk. 3, 8, 9; Stair, 4, 18, 6; 1 Bankt. 58, 7-8; *Duke of Roxburghe* v. *Ker*, 2 Dow, 210. As, therefore, the estate was not entailed under Stat. 1685, the heir in possession was absolute proprietor in all respects not within the prohibitions of the contract of 1753, and these prohibitions were only three, viz., not to alter the order of succession—not to admit heirs portioners—and not to alter the family name and arms. Now, the deed of 1825 did not contravene one of these prohibitions, but merely superadded others which the maker as a fiar *quoad* them could effectually do. He thereby converted the mere *spes successionis* of the posterior substitutes into a *jus crediti*, and thus bettered their position. The cases quoted against us were cases in which an attempt had been made to vary some of the express conditions, as in *Menzies* v. *Menzies*, M. 15,436; *Meldrum* v. *Maitland*, 5 S. 837; *Earl of Fife* v. *Duff*, 6 S. 698; *M'Leod* v. *M'Leod*, 6 S. 1043; but here all the prohibitions of the original deed were studiously respected. Indeed, to say that one holding an estate, simply on the condition of not altering the succession, cannot add fetters as to sales and contracting debts, is to say that the greater does not contain the less. *Majori inest minus.* He can sell, and thereby altogether disappoint the other heirs; what, then, is to prevent him doing something less than selling? Lords Braxfield and Eskgrove, in *Menzies* v. *Menzies*, Hailes, 969, said, if an heir of entail has a power to sell, he can prohibit the after heirs from selling. So Lords Balgray and Craigie, in *Earl of Fife* v. *Duff*, *supra*. *Lastly*, But even admitting that the after heirs had a *jus crediti*, Rutherfurd's Act, 11 and 12 Vict. c. 36, § 43, strikes at such a contract as a taillie within that clause, and by a retrospective operation annuls all the prohibitions whatever. No doubt it requires clear words to give a retrospective operation to an act, but such clear words are here. It will be said that because the summons was signeted before the act passed, the act cannot affect the question; but it is the time of the trial, and not of the issuing of the summons, which determines that point—*per* Cresswell J. in *Marsh* v. *Higgins*, 1 L. M. & P. 263. The contract here was not a contract, so far as the respondents were concerned, who were merely substitutes called after the issue of the marriage—Ersk. 3, 8, 38-9; *Mackay* v. *Campbell's Tr.* 13 S. 246; Sandford, Entails 46-7; *Sharpe* v. *Sharpe*, 1 Sh. & M'L. 594. If the substitution, then, was binding, it was so not as a marriage contract, but as a taillie, and by § 43, taillies not executed in accordance with Stat. 1685 are struck at. The object of Rutherfurd's Act was to cut down all entails which were defective in any point, and if such entails as the present had been intended to be excepted, there would have been an express exception to that effect. If, therefore, there had even been any *jus quæsitum* in the heirs, that act, *ipso facto*, cut it off.

Sol.-Gen. Bethell, and *Anderson* Q.C., for respondents.—Homologation has no place here. The respondent, finding that his ancestors' title had been feudalized under the entail, naturally made up his title under it. He did so in ignorance of his real position, but he was not thereby precluded from afterwards objecting to the validity of the fetters, and the thing is done every day. He did not thereby contract any obligation to the other heirs of entail. In fact, the making up titles is purely an *ex parte* proceeding. In *Munro* v. *Munro*, 13th Feb. 1810, F.C., a plea like this was overruled. In *Lord Reay* v. *Mackay*, 2 S. 520; 1 W. S. 306, though possession had been had for upwards of 40 years under a fettered deed, it did not prevent a title being made up under an unfettered deed. So in *Gardner* v. *Gardner*, 9 S. 138; *Cathcart* v. *Gammell*, ante. p. 192; 1 Macq. Ap. 363; 25 Sc. Jur. 146. Indeed, if such an objection were listened to, every person making up a title under an entail would be equally liable to it, and could not afterwards try the question as to the extent of the powers competent to heirs. As to the deed of 1825, containing certain superiorities over which James Urquhart had full power to deal, that difficulty was obviated by the minute lodged by the respondents in the process. The other alleged ground of homologation is, that as the respondent had taken a benefit under the will disposing of the moveables, he is barred from disturbing the settlement of the heritable property. But the one

instrument had no connection with the other. It is true the will contained a condition that the respondent was to allow James Urquhart's widow to reside during her life in the mansion house, but she predeceased James Urquhart, and so the condition never came into effect. As to the *merits*. The marriage contract contained a tailzied destination to a series of heirs, subject to certain conditions and restrictions, and a prohibition against altering the order of succession, fenced with irritant and resolutive clauses. It was a complete entail against altering the succession, and therefore every heir under it had a *jus crediti* and not a mere *spes successionis*. James Urquhart had therefore no power to extend the fetters of the entail by the deed of 1825. It is well settled by a train of decisions, that a prohibition against altering the order of succession prevents the heir of entail from imposing new fetters: *Menzies* v. *Menzies*, *supra*, which case afterwards came to the House of Lords in 1801, and a remit was then made to the Court of Session, which would have been utterly frivolous unless the law had been held to be as we contend. The case was finally decided by this House in 1811. *Meldrum* v. *Maitland*, *supra*; *Earl of Fife* v. *Duff*, *supra*; *Carrick* v. *Buchanan*, 3 Bell's App. C. 384, where *Sharpe* v. *Sharpe*, *supra*, is explained.—As to the effect of Rutherfurd's Act. The summons in this action was signeted in 1847, and the act passed in 1848, therefore litigiosity had previously attached to the subject matter—*Bogle and Co.* v. *Cochran*, 11 D. 908. The general rule of construction is, that statutes are prospective in their operation, and a retrospective effect is odious to the law.—2 Coke's Inst. 292; *Gilmore* v. *Shuter*, 2 Mod. 310; *Ashburnham* v. *Bradshaw*, 2 Atk. 36; *Moore* v. *Phillips*, 7 M. & W. 536; *Moon* v. *Durden*, 2 Exch. Rep. 22; *D. P.* v. *R. T.*, 7 Moore's Privy C. Rep. 239. *Towler* v. *Chatterton*, 6 Bing. 258. But independently of the legal presumption against a retrospective operation of the act, the plain and only construction of § 43 is, that the invalidity of the entails there struck at cannot commence sooner than *from and after* the passing of the act.

LORD CHANCELLOR CRANWORTH.—My Lords, there are several questions raised in this case, one being of a more general nature, and two or three more especially relating to the particular circumstances of the case now before your Lordships.

The general question is this:—James Urquhart being tenant in tail in possession, in the year 1825, under a contract of marriage of his parents in 1753, and being, as such heir of entail, subject to the restrictions in the marriage contract of 1753, and to no other, and those that were to come after him being, as substitutes, also liable to those fetters, and to no other, James Urquhart, in this state of circumstances, took on himself to execute a new deed creating more onerous fetters. Under the original marriage contract of 1753, the parties who were to succeed from time to time, were under no restrictions as to mortgaging or disposing of the estate, and under no restrictions as to the incurring of debts. By this settlement, made in 1825, James Urquhart stipulated in that deed as follows:—"And with and under this restriction and limitation, as it is hereby expressly conditioned and provided, that it shall not be lawful to, nor in the power of, any of the said heirs, succeeding to the said lands and estate hereby disponed, to sell, alienate, wadset, impignorate, or dispone the same, or any part thereof, either irredeemably or under reversion, or to burden or affect the same; and with and under this limitation and restriction also, that the heirs succeeding to the said lands and estate are, and shall be, hereby limited and restrained from contracting debts, or doing or committing any act, civil or criminal, which may affect the property." My Lords, those restrictions were duly confirmed by proper irritant and resolutive clauses:—"And it is provided and declared that, if any of the heirs succeeding to the aforesaid lands and others, shall contravene or act contrary to any of the provisions, conditions, limitations and appointments above written, or shall neglect or omit to obey and perform the same, or any part thereof, then, and in that case, all deeds and acts contrary to the said limitations, restrictions and appointments, shall be, and are declared not only absolutely void and null, and of no force, strength or effect against the said lands and others, on the heirs succeeding to the same, by virtue of the foresaid substitution and destination." And upon the general question I should state, that after the death of James, the parties who were next in succession under both of these deeds, the son, I think, of James, entered into—he is the heir male, the one that would come in under the other deed, he would be next in succession,—he made up his title under—the second deed, and that was done, I think, in the year 1836; and after discovering, it would seem, that he had taken a title in a more onerous way than he need have done, he instituted the present suit—a summons of reduction—in order to get the deed of 1825 set aside, that he might be, as we should say in this country, "in of his better title."

Now, the first question is independent of anything arising from the acts of the parties after the death,—what was the effect of the deed—how far or not was it an operative deed when it was executed in 1825? That is the more general question. I confess I was struck in the course of the argument, with the judgment or opinion that was given by Lord Braxfield, in the argument of the *Menzies case*, decided in 1784. His argument there was, why, when a party is in a situation that he might absolutely dispose of the estate, may he not be held capable of doing something less than absolutely disposing of it? I confess I was struck with that as having a good deal of weight; but I think, on further consideration, that it is not entitled, independent of

authority, to all the weight that I was at first inclined to attribute to it. But if it had the greatest possible weight, supposing it is put as an abstract question, I cannot but feel the infinite force of what is said in some of the subsequent cases, that whatever was the origin of the rule, or whether the law was wise or unwise, it would be indeed much to be deplored, if courts of law, particularly if your Lordships' House, consented to set aside a course of decisions, and an understanding of the law which has prevailed now since that decision for more than seventy years, and which, no doubt, parties have been acting upon on the assumption "that that which everybody understood as having been laid down as the law, was the law, and upon which, therefore, they might safely act. The question is, how far, therefore, there has been a decision to warrant this construction."

Now, it appears to me that the ground of that decision is irresistible. In the first place, there was the case of *Menzies* v. *Menzies*, in 1784. In that case the party in possession as heir of entail sought to do two things—to alter the destination, and to impose additional fetters. His right to do so was very much discussed; and there was also another question—whether, if he was an heir of entail, he was not an institute, instead of a substitute? The Court of Session eventually held that he was an institute, and not a substitute, and consequently the law which would have been applicable to a substitute was not applicable to him. As has been represented in one of the cases, afterwards they thought the matter so important, so essential that the doctrine on the subject should be set at rest, that they went out of their way to express that which no doubt was extrajudicial, if they were right in saying that he was an institute, though if he were a substitute he could not deny what he sought to do—that it was not competent to him to alter the course of destination, or to impose new fetters; but they held him to be an institute, so that that doctrine would not apply. That case was brought by appeal to your Lordships' House, and it seems to have been elaborately argued for three days. The point of appeal was upon the decision that he was an institute, and not a substitute. Now, what was done by the House of Lords was this—that they remitted it to the Court of Session, in order to have the matter in some way further investigated. I do not recollect what the exact decision was, but they proceeded in that decision on the assumption that that was the important point to be decided; but, impliedly, that was a decision that if a substitute he could not do those acts, because this House would never have remitted to the Court of Session a tedious and expensive inquiry—a further process that actually lasted many years afterwards—if that had been all *nihil ad rem;* that is, in truth, if this House had not been perfectly satisfied, that if as a substitute he had not the power, which as an institute he had, they never would have remitted it back to have further proceedings taken, in order to inquire whether he was an institute or a substitute. Therefore, I confess I think the Judges of the Court of Session treated that very naturally as a decision of what was understood by them as being the law of the ultimate Court of Appeal. But it does not rest on that decision, because subsequently to that, in 1825, arose the case of *Meldrum* v. *Meldrum*, or, as it is sometimes called, *Meldrum* v. *Maitland Macgill*, in which the same question, or nearly the same question, having been raised, the question as to a substitution, not as to fetters, which was not in the least material, the Court of Session said—"We did not expect that this point would ever have been raised. We thought that was entirely settled;" and so they acted upon that. Then comes, in the year 1828, the case of *Lord Fife* v. *Duff*, in which exactly the same question arose. There the question arose thus:—The party who was entitled as tenant in tail, took on himself to endeavour to alter the course of succession—to endeavour to impose new fetters. The matter was argued before the Court of Session—all the Judges were consulted, and though, certainly, Lord Balgray and one of the other Judges expressed the same sort of doubt that Lord Braxfield had expressed in 1784, whether, if the matter were entirely *res integra*, the decision might not have been different, yet eventually all the Judges seem to have entirely concurred. And I cannot but rely on what Mr. Rolt has referred to as the judgment of Lord Gillies, which seems to contain so much good sense, and so clearly and distinctly to lay down the law as to leave no possible doubt upon the subject. Lord Gillies must have been perfectly familiar with the case of *Menzies* v. *Menzies*. He must have been at the bar at that time; and what he says is this:—"When I took up these papers, and saw the general question that was raised from the propositions stated at the outset, I felt disposed to lay aside the papers in regard to the rest of the argument, for I considered the question as completely settled." Then afterwards, going to another point, the effect of a matter having been certified in a particular way, he says:—"But I go upon the broad principle, that a general service, by which nothing is taken, cannot bar the heir from bringing the action. That being the case, the question comes to the merits. There are two objections taken—the one is that of leaving out certain of the original substitutes. Upon that point I need say nothing—that was clearly *ultra vires*. The first objection is the imposing of additional fetters upon the heirs. This point was completely settled in the *case of Culdares*." That certainly shews at least the mode in which Lord Gillies interpreted that case, "so much so, that when the *case of Macgill* was started, we all considered that point as completely settled, and that the question was now finally decided." He confesses he does not concur in the doubts of Lord Balgray, and then he goes on to say:—"The entail gives every

substitute the power to possess the estate *tantum et tale*, as his predecessors did. The *jus crediti* which the pursuer had, was to get the estate *tantum et tale*, as the former Lords Fife had. He was entitled to hold it precisely on the same terms, and under the same conditions. The estate stood free from all fetters, except altering the order of succession, and the pursuer is entitled to reduce the deed which attempts to introduce additional fetters."

It appears to me that these cases completely settle the law. But then it is argued at the bar, that all these cases are at least mixed up with something beyond the attempt to impose additional fetters, viz., the endeavour to alter the course of succession—either to remove certain of the substitutes whom the old deed placed in the succession, or to place others there who are not to be found. Assuming that to be so, in my opinion that cannot make the least difference, for the principle applies to one attempt as well as to the other. The principle is this: That by the law of Scotland the entail in each particular estate is as it were the law of the enjoyment. If you take to an estate that is entailed, (I am speaking of entails before the Lord Advocate's Act,) you must take it *tantum et tale;* the donor, the settler, has imposed the law as to succession to the estate; you must take it just as he gives it; you add nothing, you subtract nothing, so long as the entail remains in existence. That being so, it is just as much a violation to say, that a party who comes into succession after me shall not have that which by the law giving the estate up to him he has, as to say that some other person shall take it into his possession. There may be difference in degree, but the principle is violated as much in one case as in the other.

Therefore, that seems to me at once to dispose of any imaginary difference that there is between the one case and the other—between the endeavour to place new parties in the line of succession, and the endeavour to fetter or alter the rights which those who come into the line of succession should have. But here there is a narrower ground on which this may be justified, for this, in truth,—and it will be the same in every case,—does impose a new order of succession. What is done here is this:—new restrictions are introduced, clauses irritant and resolutive are introduced, there is a prohibition that is not in the original settlement, restraining those who come into enjoyment under the original settlement from doing something which, under the original settlement, they might have done. What follows? It is provided and declared that if that is done, what is to happen? That it shall be then lawful for the next heir to enter. What is that? That is, in truth, under certain circumstances, altering the course of succession, because it is striking out of it somebody who, according to the original deed, would have been in the enjoyment. It was therefore necessary to find out that that which was done was substituting a new order of succession. It appears to me that every deed that introduces a new restriction, properly fenced with irritant and resolutive clauses, does of necessity do so; because, whenever that new restriction is violated, it places somebody else in succession than those who would have been under the precise terms of the deed as originally constituted. I do not rely much upon that. The principle under which the party is restrained from altering the course of succession, applies just as much to imposing restrictions on those who were to come in under the original settlement, as to those who were substitutes in the new one.

Therefore, upon the general question, the law seems to me to be most clearly with the respondents. Then, it is said in this particular case, that there are circumstances that take the case of these appellants out of the general rule. In the first place, it is said that the party who succeeded made up his title under the new entail, and not under the original contract of 1753. Now, there are abundance of authorities, *Gardner* v. *Gardner*, and many others, which shew that the mere circumstance of making up your title under a particular instrument does not preclude you afterwards from applying that feudalized title, as it may be called, to your better title to the demesne—you place yourself in seisin of the property to do that which you are bound to do as between the Crown and yourself, or any other lord from whom you hold; and that being done, that does not preclude you from saying my title to enjoyment is something different from what I put forward when I feudalized my title. That is not the way in which it was argued by Mr. Rolt. He said it was a case of homologation, for this reason, that you took under the deed under which you made up your title to some small properties not included in the original settlement, and your mode of making up your title gave you a title to those as well as to what you took under the deed of 1753. The answer to that is, that in point of truth that is evidently a mistake, because, when his attention is called to it, he repudiates all that a party may, by homologation,—by election, as we should say in this country,—choose to take under a deed that gives him some small benefit, and deprives him of the benefit that he had previously enjoyed under a better title. No doubt he cannot approbate and reprobate, as they say in Scotland; he must confirm all that the party giving him the benefit intended he should confirm; but the circumstance that a party has done an act, is only evidence that he meant to do it—in order to bind himself by election, he must have intended to take under the deed these small properties given by the deed of 1825 that are not included in the deed of 1753, and so lose his rights under the deed of 1753. It would have been a most strange conclusion, in point of fact, to arrive at, that there was any such intention, and the Judges had not the slightest doubt that was not the view of the party. If he merely took it up, probably putting it into the hands of his law advisers, then they took up the title in the way

which seemed most obvious, but never with the intention of relinquishing his larger rights under the prior instrument, as a consideration for altering those smaller rights that he might have taken under the deed of 1825. When his attention is called to it he abandons all these smaller rights: it stands just as if he had made up his title, as they call it, under that particular deed, which is not the deed on which he chooses now to rely. The cases of *Gardner* v. *Gardner*, and several others, will shew that that is utterly immaterial. Therefore, on that ground, I think there is nothing whatever to take this out of the ordinary rule.

The next case is one of a similar nature. It was said, You have homologated your title by reason of your having taken the personal property under the will. Now, really, when that is looked at, it is quite obvious that that argument is founded entirely on a mistake. It is true that Keith Urquhart, the present respondent, is, no doubt, general residuary legatee under the will, and it is very true that in that will the testator, James, says—"Whereas I have called the said Beauchamp Urquhart to the succession of my estate of Meldrum by a deed of tailzie, to take effect after my death, it is my wish, in the event of my wife surviving me, that she shall enjoy the use of the mansion house." He says, I have made a deed of settlement. Under that deed of settlement, it is my wish that whoever takes under that deed shall allow my wife to have the enjoyment of that which is provided for her under my will. Nobody taking under this will could have taken anything without enabling the wife to have the enjoyment there provided for. I need not say that that does not apply at all; she died in the lifetime of the testator, therefore such a question never arose; and the mere circumstance that he takes under a will in which the testator mentions that he has made that settlement is utterly immaterial. That is a consideration that has no bearing whatever on this case.

Then the third point, the only remaining point on which reliance has been placed, as taking this case out of the general rule, is the late statute—Mr. Rutherfurd's Act—altering the law of entail in Scotland. What is contended for is, that the 43d section of that statute has a retrospective effect, and operates therefore, although not only the transactions to which it relates were all prior to the passing of that act, but actually the case was pending in Court twelve months before that act received the royal assent. On that subject I think it is fair, as a general proposition, to say, that although no doubt cases may arise in which the legislature will enact matters retrospectively, yet, *primâ facie*, that is not to be presumed to be the intention of the legislature, and great injustice is often occasioned by such a course, and courts of justice are slow to hold the legislature to mean to operate retrospectively on the rights of parties, unless the language is such as leaves no doubt upon the subject. Let us see whether the language is so clear that we may suppose they meant to make it operate retrospectively, and not to make it a prospective enactment. The terms of the act are—"That where any tailzie shall not be valid and effectual, in terms of the said recited act of the Scottish Parliament, passed in the year 1685, in regard to the prohibitions against alienation and contraction of debt, and alteration of the order of succession, in consequence of defects either of the original deed of entail, or of the investiture following thereon, but shall be invalid and ineffectual as regards any one of such prohibitions, then, and in that case," (that will be a case applicable to the present 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." Then what is said is, Stop there. What will be the construction if you stop there? I am not at all clear it would, if it had stopped there, have been invalid and ineffectual as regards all prohibitions with reference to past transactions. But we must not stop there. It goes on to say—"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." Now I read that just as if it is written—"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, so that no action of forfeiture shall be brought." It is plain that is the meaning. Indeed, looking at the matter literally, as I observed to the learned counsel in the course of the argument, if you construe it in any other mode, you will necessarily be defeating the intention of the legislature; because you cannot be secure, if it is to be made retrospective, that the party then in possession would have any rights at all. If it is to be made retrospective generally, you may set up a transaction prior to the person then in possession. I do not know to what extent the argument might not go; but it might very easily be so carried as to defeat that which is expressly declared to be the object, namely, to give rights to the party then in possession. I think, therefore, that there is not only nothing in the language of this act that necessarily leads to the construction that it was to be retrospective in the sense which the appellants contend for, but that the act would be violated by being so construed. I think further, unless you are bound by such language, that there would be no other means of interpretation; the improbability that the legislature meant to legislate retrospectively, so as to affect the rights of parties actually in litigation, is so great, that it would be a very dangerous thing indeed so to construe an act of parliament.

It appears to me, therefore, on all these grounds, that the decision of the Court of Session is perfectly right *in omnibus*, and I shall humbly move your Lordships that it be affirmed.

LORD BROUGHAM.—My Lords, I take exactly the same view of this case as my noble and learned friend. I have no doubt whatever that the decision is right, and ought to be affirmed at once upon all the grounds; both on the ground of the preliminary objection as to the homologation, and also as to the merits upon the main point itself.

It appears to me that some doubt has arisen upon the import of the decision in the *Culdares case*. It is said that there were two matters there in the supplementary deed of entail, attempted to be challenged. That there was, in the first place, an alteration in the order of succession, and fetters sought to be imposed. Now, undeniably, that may exist in that case; but how has the case been always considered—how has it been received in the Court below, and how has it been acted upon in the singularly uninterrupted line of judicial decisions in this House? We have it cited in the case of *Meldrum* v. *Macgill;* there the Court clearly put the construction on it, as if it were a general decision against the power of the heir to avail himself of his freedom from fetters to the extent of imposing new fetters upon the subsequent heir. We find it also so considered in the case of *Lord Fife* v. *Duff*—distinctly so considered by one of the learned Judges, Lord Gillies, who, I think, is not quite of such standing at the bar as I led my noble and learned friend to suppose. My noble friend asked me if Lord Gillies had been at the bar when the *Culdares case* was argued. I doubt whether that was the fact. I think Lord Gillies must have taken that case from what he understood to be the opinion of the profession regarding it. I think Lord Balgray takes the case exactly in the same view; and he adds, that it had been followed in other cases, particularly the *Argyle case*, and the case of *Meldrum* v. *Macgill.*

Now take the *Fife case*, before coming to *Meldrum* v. *Macgill*, which is free from all difficulty arising from the alterations of the order of succession coming into question. In *Fife* v. *Duff*, no doubt, there was an attempt to alter the order of succession, that was resisted and overruled; but mark the grounds on which it was overruled. It was overruled on no other ground except that which would apply to this case, and to every case of an attempt to impose new fetters. And in *Douglas* v. *Johnson*, as has been observed by the learned counsel, no reasons were given by the learned Judges in those days. You are driven to gather what the ground of the decision is from the argument on the side in favour of which the decision was pronounced. Therefore, in *Douglas* v. *Johnson*, we can only take the reference to the *Culdares case* from the argument at the bar, and from seeing it cited, and relied upon to that effect, not from what passed from the Court. How was it in *Lord Fife* v. *Duff?* The Court there held that the *Culdares case* applied; that there is this difference between an undeniable possession and an entail fenced with the proper irritant and resolutive clauses, that in the case of an entail the successive heirs of entail have a *jus crediti*, and that none of the rights of any successive heir of entail can be infringed upon, according to the principle adverted to by my noble and learned friend, as the principle which runs through all the Scotch law of entail.

Then comes the case of *Meldrum* v. *Macgill*, and there no question arises as to the alteration of the order of succession. The attempt made by the deed of 1719 was to tie up the same series of heirs, and I do not understand that any question was ever raised as to the altering the order of succession; but it was an attempt made to impose "new fetters upon the same series of heirs by the original deed." I thought at one time, when that case was cited, that the fetters sought to be imposed were less strong than the prohibition to sell; but I rather believe that in that case there was an attempt to impose a prohibition to sell, and to fence that prohibition with irritant and resolutive clauses, and it was held that that could not be done—that the estate could not be so dealt with, although the heir of entail himself was not subjected to any restriction as to the sale or alienation of the estate, or the contraction of debts.

Now, my Lords, there is running in the argument on the other side, and, it appears to me, in the opinions of Lord Braxfield and Lord Eskgrove, the idea, that in respect of the freedom of any heir from fetters as to selling, he may therefore, in respect of that freedom, impose new fetters so as to further the object, the design, the intent of the maker of the entail. I take that view of the subject to be at the bottom of all those opinions of one class of these learned persons, of the inclination of opinion in others, and of the doubts in a third class.

Now, with the greatest possible respect for the authority of those two most learned Judges, Lord Braxfield and Lord Eskgrove—two of the most eminent lawyers of their day, and who up to this hour are held amongst Scotch lawyers to be of the highest authority upon all questions, and more especially upon questions of a feudal nature—with the greatest possible respect for their authority, I do take leave to say that this case rests upon an erroneous view, that an heir of entail is free, except in so far as he is tied up. He is free to do what? He is free to deal with the property—he may sell it, he may exchange it, he may impignorate it, he may contract debts which will affect it in so far as he is not tied up by positive rights which affect his prohibition to do those acts. And the consequence of that, no doubt, will be, that the entail will be put an end to. But it does not at all follow, that though he has the power to do those acts, and so to deal with the estate, he therefore can lay down a new law of entail, and without altering the estate, so to speak, (borrowing an English phrase rather than a Scotch one,) varying the interest which he has, still having that interest under the entail, yet that, nevertheless, with that interest

under the entail unaltered, he can therefore make a new entail, and a new law which shall alter the position of all the heirs of entail coming after him, and become that which had not previously been the law of entail under which the estate should have been enjoyed. I take it to be quite clear that that is a totally different thing from his having the power to deal with the property, which he undeniably has, except so far as it is tied up. That is not peculiar to the Scotch law, it is exactly the same with respect to the law of this country. Suppose (to make the case more analogous to the case of a defect) there is a clear intent, either in the making of the entail by the entailer's latter will, or suppose there is a manifest intention in the parties to the contract to adhere to the settlement under which this entail arises, or is supposed to arise, that it is quite clear what was intended—quite clear that the deed says, "I am to take an estate only for life," nevertheless I took an estate tail: can I, taking an estate tail, being perfectly clear and satisfied that the intention of the maker of the instrument was not that I should take an estate tail, but that I should take an estate for life, and that all those coming after me should only in succession take estates for life; can I, on that account, notwithstanding the assertion that the deed of settlement has given me an estate tail, immediately proceed (without suffering a recovery,[1] but acting as tenant in tail, and keeping the estate as an estate tail) to make a new settlement, and to say, "Oh! it was meant that this should be in strict settlement?" Most undeniably I could not do any such thing. That would be only pushing forward, as it were, the enjoyment of the estate, in the way that it was understood or supposed by him that there was an intention it should go; and as here Lord Braxfield and Lord Eskgrove seem to have thought that the party could supply the defect of the Scotch entail, when there was no restriction of the power of sale by adding the prohibition, and fencing it with irritant and resolutive clauses, it is quite clear that anything done contrary to the entail—that is to say, the case I was putting, that I should, because I have the power of suffering a recovery, and vesting in me a fee simple, and giving what leases I chose, give a lease for 99 years; that I, by doing that, and continuing to act as the tenant in tail, should give a lease beyond the terms of the statute. It is perfectly clear, in the same way, according to the doctrine which I have hinted at, and indeed rather laid down, and it seems reasonable, that the party in possession under the entail could make it more effectual by adding prohibitions, and fencing it with irritant and resolutive clauses. By the same rule, I do not see what there was to prevent them from going in the other direction and altering the order of succession, as well as increasing the stringency of the entail, merely upon the ground that if they chose, provided that it was not done in fraud of the entail, they might sell the whole; and that, because they might sell it, they might do everything short of selling it.

My Lords, I have been listening a good deal to the topic that has just been adverted to by my noble and learned friend in this case; namely, as to this deed of 1825 really altering the order of succession. I cannot help feeling that it might be contended, if it were necessary, but undoubtedly it is unnecessary in this case, that the prohibitions and the forfeiture do go to alter the order of succession; that if the next heir shall contravene those things not prohibited by the original entail, and consequently the contravention of which could never affect the succeeding heirs of entail, he shall forfeit, and it shall go to the one immediately after, in the same way as if the contraveners were naturally dead. It is wholly unnecessary to dwell upon that, because, independently of that consideration, it appears to me to be perfectly clear, upon the principle of the case, with respect to the nature of the Scotch entail, and the successive rights possessed by heirs of entail under it, and upon the decided cases—it appears to be perfectly clear that such is the law, as the Court below have held it, and upon which they have decided this case.

My Lords, I agree with my noble and learned friend in his argument with respect to the doctrine of homologation, and also upon the construction of the 43d section of the Entail Amendment Act, as it is called. I take it to be quite clear, that it must mean, and that it may be read, as if it were 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." What is the object of introducing the succeeding words—"And the estate shall be subject to the deeds and debts of the heir then in possession, and of his successors, as

[1] This illustration refers to the state of the law of England previous to the passing of the Act 3 and 4 Will. IV. c. 74, commonly called the Fines and Recoveries Act. A fine or a recovery was a fictitious proceeding in Court, by which tenants in tail (heirs of entail) disentailed their estates, and being *quasi* judicial, the matter was considered as ended (hence "fine" from *finis*), and all parties were barred from again setting up the entail. The above act abolished this fictitious procedure, and substituted a simple conveyance or assurance by the tenant in tail. The Scotch Disentailing Act (11 and 12 Vict. c. 36) did not follow this course, but proceeded rather on the analogy of the old system in England, which, after long experience, had been found both cumbrous and costly, and was at length, after many unsuccessful efforts, entirely abolished in 1833.

they shall thereafter, in order, take under such tailzie"? Clearly, the substance and meaning of it is, that it shall be held ineffectual to prevent the estate from being subject to the deeds and debts of the heir then in possession, and his successors, and that no action of forfeiture shall be competent at the instance of any heir substituted in respect of his deeds and debts.

My Lords, I hold it to be perfectly clear, therefore, that the Court below have come to a right conclusion in this case upon all the points, and I agree with my noble and learned friend that this judgment ought to be affirmed.

LORD ST. LEONARDS.—My Lords, after the very elaborate discussion which this case has undergone, and as there is no difference of opinion between any of your Lordships, I shall certainly very shortly state the grounds upon which I entirely agree with what has been stated by my noble and learned friends who have preceded me.

Upon what is called the great point, namely, whether or not James had a right to place new fetters upon the estate, I cannot admit that that is at all open to doubt. All I can collect, after listening to all the arguments which have been very elaborately addressed to your Lordships, is this—that the opinions which were originally entertained by two very learned Judges have again been brought forward, at a distance of 70 years, in order to prove that all the opinions of the other Judges, both at that time and ever since, are to be disregarded, and that we are now to act upon doubts which in 1783 were rejected by the rest of the Court.

We sit here, upon this occasion, as a Scotch Court of Justice, and we have simply here to ask, what is the Scotch Law upon the subject? If an appeal is brought before your Lordships upon the ground of an improper decision, we have a right, sitting as a Scotch Court, and only as a Scotch Court, and administering Scotch law, to review that decision; but we must take the law in general as we find it in the Scotch Courts, and if we find that for three quarters of a century all the Scotch Courts have agreed upon a given point, it would certainly not be right for this House to reverse the rule as established in the Court below, and to give a new rule of property. Nothing could be more dangerous. Having heard all the arguments which have been addressed to your Lordships, and having paid great attention to them, I am, as I have been from the first, clearly of opinion, that there is not any ground whatever for the impeachment of the rule as established in the Court below on the principal point.

My Lords, not merely resting upon the general question, but looking to this particular case, in the first place, it appears to me, as I suggested to the learned counsel for the appellant, that the order of succession is really altered—that the destination is altered—that there is a difference in the limitations (and I must look to the case as I find it)—that certainly the heirs of line, of kin, are not the same persons as by the first disposition of 1753 are provided for, they being the persons taking under a particular settlement in 1749; whereas in the other, that of 1753, it is generally "heirs of line," and the ultimate remainder, as we should call it, is also in a different destination; it is to the party himself, and not to the person to whom it was originally given in 1753. I find, therefore, myself an actual alteration in the object to take. But independently of that, if I look to the prohibition contained in the settlement, I have not been able to form any judgment upon that without asking what the general rule of law is—without asking what it would be in Scotland with respect to a case where there is no prohibition to alter.

In the contract of 1753 I find, "that it shall be noways lawful to, nor in the power of, the said Keith Urquhart, or any of the heirs and substitutes above specified, by any gratuitous deed, or even by contracts of marriage, to alter, innovate, or change the substitution, destination, and order of succession above specified, so far as the same is conceived in favour of, or may be intended to or affect the descendants of the body of the said Keith Urquhart, or of the body of the aforesaid William Urquhart, his father, specified herein, or in the deed of settlement above mentioned, and charter and sasine following thereon."

Now, can it by possibility be said, that, taking away the power of sale from a man who has entered under the original destination is not an alteration, an innovation, or a change of the destination in favour of the heirs of William Urquhart? How would the succession be? Just try it, if it stood upon the original settlement of 1753, in a few words. If the party taking under the settlement of 1753 had remained with these powers, he could have sold the estate. What would have become of the estate then? Under the deed of sale the succession would have gone to the purchaser. How is it under the settlement of 1825? That any such attempt not only takes it from the purchaser who would have had it, but actually breaks in upon the line of settlement of 1753, and substitutes a party in remainder, as we should call it, in lieu of the person who would previously have taken it. Without looking further into the case, I confess that I cannot bring my mind to entertain any doubt that this was a point already closed by the facts of the case, and by the legal decisions in Scotland, and was not open for discussion regularly in this House.

Looking at the pleadings, it does not appear to me as if it had been intended to be brought prominently before the House; but the appellant seems to me to rely upon the other point, that other point lying in a very few words.

Now, as regards the homologation, upon which so much stress is laid upon the papers; in the

first place, it is said that you cannot approbate and reprobate; as we say in England, that you cannot take under and in opposition to the same instrument. Of course you cannot. But that turns upon this peculiarity, that James had parted with the superiority over certain small portions, which evidently was for the purpose of creating votes, and that he afterwards brought back those rights; so that he meant to restore them to the settlement of 1753. However, he included them in the settlement of 1825, and I do not observe that he drew any distinction between them; and, as far as my recollection goes, there was nothing to draw the attention of a person claiming under the settlement of 1825, who was also entitled under the settlement of 1753, to the fact, that part of the property acquired under the settlement of 1753 had been parted with, and again acquired and settled as part of the original property; so that there is nothing to call the attention of the parties claiming under that settlement of 1825 to that alteration. If you meant to establish a case of approbation or reprobation, or of election, as we call it in this country, you must put a party to his election. Either here or in Scotland the doctrine is in effect the same,—you cannot take a party by surprise and say, "You have elected," unless a party were to do an act such as admits of no doubt that he has elected, with full knowledge of his right to affirm or disaffirm—to elect or not elect—to take or to reject—or when he has full notice of the fact, when you put him to his election, and call upon him to do so. When the pursuers here are called upon to elect, what do they do? They do elect to take under the settlement of 1753, and they abandon any claim to that additional property, and reject it altogether in the course of the litigation. The consequence is, that that rejection takes place at the very moment at which they are called upon to elect. They are called upon then to say, whether they will or will not accept the property under the settlement of 1825 or 1753, and they elect to take under the settlement of 1753, and to reject the additional property under the settlement of 1825.

I am clearly of opinion, my Lords, that that was no homologation; that by that deed of 1825, up to the time of that rejection, they were at perfect liberty to reject—that they did regularly in the course of litigation reject—and that it is not now competent to the parties at your Lordships' bar to take that objection against them.

Now, the other question arises upon the will, upon which really there is no question at all, as far as the testator has told you what he is doing with the property under the settlement. He imposes a condition upon the party under the settlement—his own settlement, as he calls it, of 1825—that the party shall allow his widow to enjoy a part of the property. He does not raise a case of rejection as against the settlement of 1825, and for the settlement of 1753; but he actually says, that if they do not do what he desires them, they shall not take the property under his will. It is the will, therefore, that raises the question of election as to the property under the will, and there is no question of election raised in any other way. And then the learned counsel for the appellant argued in this way: Admitting, he said, what I have stated to you, the very circumstance that he states in his will that he has called this party to his succession under the settlement, is of itself a declaration that the party must be bound by that settlement.

My Lords, I utterly deny any such doctrine, because here the party himself, the testator, does not put it upon that ground; but so far as he acts upon the doctrine at all, he directs the party who takes the property under his will, not to touch the property under the settlement.

I apprehend, therefore, that the doctrine of homologation has no bearing whatever upon this case. And then there are but two other points. One is, whether, taking the title under the deed of 1825, in any manner affects his right to reduce the deed in effect, and to take under the better title of the contract as regards the beneficial enjoyment of 1753. That I take to be so settled a point in the law of Scotland, that I should merely state to your Lordships that I consider it not open for discussion, and that that doctrine admits of no doubt.

Now, the last and the only point is that upon the act of 1848. That, again, I think, is not open to the least discussion. I cannot admit that there is any doubt whatever upon the construction of that statute. If you read only one half of that section, you may perhaps raise a doubt; but if you do what you should do, which is to read the whole of the section, it admits of no doubt, because the deeds and the debts of the person in possession at the time when the act came into operation, and of the successor, are made good as against the successor, but not a word about predecessor; and I think it is quite clear upon the grounds stated, without further argument, that the construction put upon the section by my noble and learned friend ought to prevail. I am bound to say, that although it has been very elaborately argued, and the parties will have the satisfaction of knowing that everything which could be argued has been addressed to your Lordships, yet I have seldom seen a case where the points were less open to argument, both upon the construction of the instrument, and the words to be found in the act of parliament, than in the case which your Lordships have been considering.

Mr. Rolt.—My Lord, the costs are arranged between the parties.

LORD CHANCELLOR.—The interlocutor is affirmed with costs.

Interlocutor affirmed with costs.

First Division.—James Davidson, *Appellants' Solicitor.*—Durnford and Co., *Respondents' Solicitors.*