that he considers his relations of the half blood equally with those of the full blood as his relations. Indeed the expression he uses is rather more marked perhaps in the one case than in the other; for in speaking of the children of the brother, he speaks of them as the children of his brother so and so, while in speaking of the children of the sister he speaks of his nephews and nieces. The simple question in this case is, whether your Lordships can possibly exclude those whom he has described, in the plainest terms, as relations of an equal degree with the others. I think the question is one that admits of so little doubt, that it really involves nothing in the shape of argument; and therefore I agree with my noble and learned friend that the decision of the Court below should be affirmed, with costs.

Interlocutor affirmed, with costs.

Appellants' Agent, James Burness, S.S.C.—*Respondents' Agents*, Hope, Oliphant, and Mackay, W.S.

MAY 22, 1855.

THE Hon. MARY ELLEN NORTON, *Appellant, v.* SIR SAMUEL HOME STIRLING and Others, *Respondents.*

Entail, Recording—Misdescription of Deed—Clerical Error—Diligence—*A deed of strict entail, perfect in all its clauses, was recorded in the Register of Tailzies on a petition and warrant describing it as an entail in favour of the entailer and his heirs, whereas the institute in the destination was not the entailer himself, but his eldest son.*

HELD (affirming judgment), *That this misdescription did not void the recording of the entail, so as to leave the estate open to the diligence of creditors,—the entail challenged being actually recorded entire in its whole clauses.*

Entail, Recording—Clerical Error—Fetters—Entail Amendment Act, § 43—*The resolutive clause of a deed of entail bore, "in case the said J. S. or any of the heirs of tailzie shall contravene the order herein before written, or the conditions, provisions, restrictions, or limitations contained in this deed of tailzie, or any of them—that is, shall fail or neglect to obey or perform the said conditions," &c. In the register this clause was transcribed thus:—"that is, shall fail to neglect, obey, or perform the said conditions," &c.*

HELD (affirming judgment)—1. *That the discrepancy did not void the recording of the entail, so as to leave the estate open to the diligence of creditors.* 2. *That the 43d section of the Entail Amendment Act of 1848 did not apply.*

Entail, Recording—Alteration, Deed of—*The destination of an entail was in favour of A and his heirs; whom failing, B and his heirs; whom failing, M and her heirs. Before recording the deed the entailer executed a deed of alteration, whereby M and her heirs were struck out of the destination. The entail was nevertheless recorded as it stood, and the deed of revocation was not recorded. The estate being in possession of an heir of the first branch of the destination, a creditor raised a process of declarator and adjudication as against an heir possessing under an entail not duly recorded.*

HELD (affirming judgment), *That, in a question between these parties, the omission to record the exclusion of M and her heirs was immaterial.*[1]

On appeal it was maintained that there ought to be a reversal, because,—1. The requirements of the Statute 1685 in reference to the registration of deeds of entail, had not been observed with reference to the deed in virtue of which it is sought to exclude the appellant's diligence. 2. The non-recording of the true heirs of tailzie constitutes a substantive and an insuperable objection to the validity of the entail, in a question with creditors. Sandford on Entails, p. 167; *Logiealmond*, i. e. *E. Mansfield* v. *Stewart*, 5 Bell's Ap. 154, 161. 3. The entail is subject to the additional objection that the combined irritant and resolutive clause, as appearing upon the face of the register, is blundered and incongruous. Mor. 15,539; *Rennie* v. *Horne*, 3 S. & M'L. 173; *Lumsden*, 2 Bell's Ap. 115; *Hoddam*, i. e. *Sharp* v. *Sharp*, 1 S. & M'L. 618. 4. The discrepancy between the entail as recorded and the principal deed, is in itself fatal to the validity of the entail. *Cathcart*, July 1, 1846, 8 D. 970; *Holmes* v. *Cuninghame*, 13 D. 689.

The respondents maintained that there ought to be an affirmance, because—1. The objection

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[1] See previous report 14 D. 944; 24 Sc. Jur. 590. S. C. 2 Macq. Ap. 205: 27 Sc. Jur. 372.

stated by the appellant to the procedure in the application for warrant to record the entail of 1788 was groundless, in respect there is sufficient evidence that the entail was produced to the Court, and that authority was given to record it in the Register of Tailzies, in terms of the act 1685. *Lockhart*, 3 D. 904. 2. The entail of 1788 is duly recorded in the Register of Tailzies, and the alleged error in transcribing the resolutive clause cannot affect the validity of the entail, or render it ineffectual to protect the estate from the diligence of creditors. *Henderson* v. *Dalrymple*, 5 Brown's Sup. 586; *Gordon* v. *Brodie*, 5 Brown's Sup. 587; *Munro*, 4 S. 467, 3 W.S. 344; Mor. Ap. Tailzie, No. 13; Opinions of the Court in *Murray*, 4 D. 804; and *Dingwall*, 4 D. 816; *Lumsden*, 2 Bell's Ap. 104; The *Hoddam case*, (*Sharpe* v. *Sharpe*,) 1 Sh. & M'L. 594. 3. The original entail of 1788 having been recorded in the Register of Tailzies, it was not necessary to record the subsequent deed of revocation, which simply recalled the nomination of Mary Stirling, a remote substitute, and the heirs of her body, and the failure to do so cannot affect the validity of the entail, or render it ineffectual to protect the estate from being attached by the creditors of Sir Samuel Stirling. *Moore*, 1 S. 173; *Bontine* v. *Graham*, 13 S. 1032.

Solicitor-General (Bethell), and *Dean of Faculty* (Inglis), for the appellants.—The Statute of 1685, c. 22, authorizing and protecting entails, must be strictly construed, and especially in a case like the present, where a creditor is seeking payment of a just debt, the Court will shew the least possible favour to the defender. (1) The first objection is, that there is no proper warrant for recording the entail. The petition on which the warrant proceeded describes the deed of entail as one in favour of the entailer and the heirs male of his body; whereas the real deed was one giving the fee to the entailer's sons, and reserving only a liferent to himself. This is a material discrepancy, and the warrant given by the Court was thus to record a deed of entail substantially different from what was actually recorded. We can look to nothing beyond the warrant itself, and that must *in gremio* identify the deed, for the only mode of proving that the deed was registered is by producing the warrant. The Lord Ordinary seemed to think that it was enough if the right deed got anyhow on the register, and that no one could inquire into the terms of the warrant; but that is an entire mistake.

[LORD CHANCELLOR.—But the petition to the Court refers to the deed as a deed already registered in the Books of Council and Session; was that not a sufficient identification?]

No, for the statute does not authorize the Court to correct the Register of Tailzies. (2) The second objection is, that the irritant and resolutive clause, as it stands on the register, is inept and ineffectual; and is not the same as what is found in the original deed. The registered deed, in substance, says this—that, whether the heir neglect or obey the conditions of the deed, he is to forfeit the estate. The one alternative neutralizes and extinguishes the other, and the result is an absolute blank. It is not an effectual clause within the meaning of the Statute 1685. It is not, however, mere nonsense, for what it means is quite intelligible, and the grammatical structure of the sentence is correct. There is no ambiguity in the meaning, however unlikely it may be that a rational man would write such a sentence. It is not sheer nonsense. And this is not a case where, by omitting some words, you can arrive at what must have been the true meaning. Thus, if after the words "that is," the writer had inserted a verse of the ballad of the Chevy Chase, it might be possible for the Court to pass over that verse, and treat it as if it was no part of the sentence; but here you cannot safely omit any words; and the vice or error, whatever it may be called, vitiates the entire structure of the sentence, and the result is zero.

[LORD ST. LEONARDS.—There was once a case in Lord Mansfield's time, where a party sued on a bond, and the bond, when produced, ran thus:—"I bind myself and my heirs, executors, &c., *not* to pay," and the Court held it was obvious on the face of the bond the word "not" was put in by some clerical error, and they read the bond as if that word was omitted, and the plaintiff recovered his debt.]

That might have been very good law, for it is obvious if A grant B his bond to secure a debt, and thus fraudulently leads B to rely on it as an effectual instrument, he cannot afterwards turn round when sued, and evade payment by relying on such a pretext as that the bond said he bound himself *not* to pay. But here all the presumptions of the Court are against the validity of the deed of entail, and the Court will not help a defect in it, however trifling. Thus, in the Eglinton entail, though the word "redeemably" had been written for the word "irredeemably," the Court would not hold that it was a mere clerical error, and the entail was defeated in consequence. So the same principle runs through a variety of cases.—*Sharpe* v. *Sharpe*, 1 Sh. & M'L. 594; *Cathcart*, 8 D. 970; *Holmes* v. *Cuninghame*, 13 D. 689; *Turnbull* v. *Hay Newton*, 14 S. 1031. So in an analogous case as to the Register of Inhibitions.—*Malcolm* v. *Northern Reversionary Co.*, 8 D. 1201.

[LORD ST. LEONARDS.—Here the important difference is, that the part of the sentence preceding that in which the mistake occurs is in itself perfect and complete, and clearly shews the entailer's meaning; and he is then going on to amplify and explain what he had before said. Now if part of this explanation is nonsense, surely that could not defeat the preceding part of the sentence, which was good sense.]

(3) The third objection is, that the deed of revocation was not put on the register. That was

clearly an operative deed, and materially altered the heirs of tailzie by striking out Mary Stirling and the heirs of her body. By not registering this deed of revocation the true heirs were not stated, and thus creditors consulting the register were apt to be deceived and misled. The two deeds taken together constituted the deed of entail, and both ought therefore to have been recorded. The statute has therefore not been complied with, and the Court will hold the entail invalid.

Mr. Rolt Q.C., and *Mr. Anderson* Q.C., for the respondents.—[The chief points of their argument are so fully stated and adopted by the House in the judgment, that it is unnecessary to state them here.]

LORD CHANCELLOR CRANWORTH.—My Lords, this is an appeal to your Lordships from the decision of the Court of Session upon an action of declarator, which was brought by Miss Norton, who was the holder of a certain bond or security for £600, and the object of her summons was to charge a certain estate of Renton, in the hands of Sir Samuel Stirling, with the payment of that sum of money, upon the ground that Sir S. Stirling was the absolute owner of that estate, and that she, having this bond, was entitled to charge it; and that Sir S. Stirling was not an heir protected by a certain deed of entail, which he set up as making the estate not liable to the debts to which he should be subject.

The summons of declarator states the title of this lady to the bond, which I need not go into. She was entitled to a sum of £600 from Sir S. Stirling, and then it states that he disputed the liability of his estate to the payment of this money, upon the ground that he held the estate as tenant in tail, under a deed of entail executed on 28th June 1788, which was recorded in the Books of Council and Session on the 29th December 1789, and also recorded in the Register of Tailzies on 5th March 1790. The summons sets out the deed of entail at great length, whereby the then owner of the property, Sir Alexander Stirling, settled the estate first upon his eldest son John Stirling, for life, and after the death of John Stirling, upon the several sons of John Stirling in succession, and the heirs male of their body, one of such sons being Samuel, who, upon the death of the preceding son without male issue, succeeded to the property; and then, failing these sons, the estate was limited to go to Mary Stirling, his eldest daughter, and the heirs whomsoever of her body; whom failing, to Jean Stirling, the second daughter, and the heirs of her body, and then over to others. And the settler and maker of the entail, Sir Alexander Stirling, reserved to himself not only the liferent and the use of the life estate, but also "full power and faculty at any time in his life to revoke, burden, qualify, explain, or in any way to alter the said procuratory of resignation and deed of entail," and to make a new disposition instead.

The summons then states, that that power was exercised by Sir A. Stirling very shortly afterwards, this deed having been executed on the 28th June 1788; and upon 21st August 1788 he executed a deed revoking the entail in this way. He "revoked and recalled the said disposition and deed of entail," and declared all hopes or chance of succession in the said lands and estate by the said Mary Stirling (she was the first daughter taking after the failure of all the sons) or the heirs of her body, in consequence of the destination in the said disposition or deed of entail thereof, frustrated and removed, and all sums of money or provisions or others contained in the said deed of entail or trust deed above mentioned, and which otherwise would have been payable to her or them in no way eligible by the said Mary Stirling or her heirs, from him, or his, all in the same manner as if no such deeds had ever been executed in her or their favour. Then he makes certain provisions for her, which it is not material to consider.

Then the summons goes on to state that the procuratory of resignation and deed of entail, and relative deed of revocation, have not been duly and validly recorded, and are not valid and effectual in terms of the act of parliament 1685, c. 22. Then it gives three reasons, upon which it alleges that the registration of that deed was invalid.

The first reason is—that in the registration of the deed it is erroneously described that the deed submitted, according to the provisions of the act, to the Lords of Session, and by them directed to be recorded, is there described as a deed which settled the estate upon Sir A. Stirling and the heirs male of his body; and that the authority of the Lords of Session was to record a deed by which Sir A. settled the estate upon him and the heirs of his body, and that that did not warrant the recording of the deed in question, because there was no such settlement upon Sir A. and the heirs of his body. Consequently, in that respect the registration was wrong, inasmuch as there was no warrant for recording that which actually was recorded.

The second objection is—that the deed which was registered does not correspond in certain material particulars with the actual deed. The passage of the deed which declares irritancy, in the case of failure to comply with certain provisions of the deed, is thus expressed:—"It is hereby expressly conditioned and provided, that in case the said John Stirling, or any of the heirs of tailzie and provision succeeding to the said lands and others hereby tailzied, shall contravene the order herein before written, or the conditions, provisions, restrictions, or limitations, contained in this deed of tailzie, or any of them—that is, shall fail or neglect to obey or perform the said conditions and provisions, or any of them, or shall act contrary to the said restrictions and

limitations, or any of them, or shall contravene any other conditions or restrictions to be hereafter added and appointed by me, excepting as herein before excepted." Then certain consequences are to ensue to the effect of making void the entail, and whereas the deed recorded is, that "in case the said John Stirling, or any of the heirs of his body, &c., succeeding to the said lands, shall fail *to* neglect *or* obey or perform the said conditions, provisions, and restrictions, or any of them"—that is, instead of using the words in the actual deed, "fail *or* neglect *to* obey or perform the said conditions," in the record in the register it is "shall fail *to* neglect or obey or perform"—the "to" and the "or" being evidently misplaced. It is said that that is a fatal objection, because the register ought to shew the real deed, whereas in that respect it shews a deed different in its terms.

The third objection is—that the deed of entail is invalid, and consequently the appellant ought to be let in to charge the property, because, although the original deed of 1788 was recorded, the deed which created the entail in the first instance, yet the deed of revocation, whereby Mary Stirling and the heirs whomsoever of her body were struck out, never was recorded. Therefore the pursuer says, that, having a right against the estate of Sir S. Stirling, unless that right was barred by the fetters of that entail, there being these three objections to the fetters of the entail, she is entitled to have some proceedings which shall enable her eventually to obtain adjudication against the estate, and to receive payment out of it.

The question, therefore, turns upon whether or not all or any of these objections are well founded. The Lords of Session held that neither of them was well founded—that they were all, in short, immaterial, and, consequently, that the entail was good; so that the pursuer had no title, and the defenders were entitled to be assoilzied. That was the decision of the Lord Ordinary, and that decision was confirmed by the First Division of the Court of Session.

Now the first objection rests upon an alleged non-compliance with the terms of the Statute 1685. That statute declares, that "it shall be lawful to His Majesty's subjects to tailzie their lands, and to substitute heirs in their tailzies with such provisions and conditions as they shall think fit, and to effect the said tailzies with irritant and resolutive clauses, whereby it shall not be lawful to the heirs of tailzie to sell, annailzie, or dispone the said lands, or any part thereof, or contract debt, or do any other deed whereby the same may be apprized, adjudged, or evicted from the other substitutes in the tailzie, or the succession frustrate or interrupted; declaring all such deeds to be in themselves null and void, and that the next heir of tailzie may, immediately upon the contravention, pursue declarators thereof, and serve himself heir to him who died last infeft in the fee, and did not contravene, without necessity anywise to represent the contravener." Then it goes on—"It is always declared that such tailzies shall only be allowed in which the foresaid irritant and resolutive clauses are insert in the procuratories of resignation," and so on. "And the original tailzie, once produced before the Lords of Session judicially, who are hereby ordained to interpose their authority thereto, and that a record be made in a particular register book to be kept for that effect, wherein shall be recorded the names of the maker of the tailzie, and of the heirs of tailzie, and the general designations of the lordships and baronies, and the provisions and conditions contained in the tailzie, with the foresaid irritant and resolutive clauses subjoined thereto, to remain in the said register *ad perpetuam rei memoriam*."

Now the first objection set up is this, that the deed as to which the Lords of Session, in the language of the act of parliament, ordained to interpose their authority to have it recorded, was not a deed corresponding in truth with the real deed, for that the order of the Lords of Session was, that they ordained "the deed of entail executed by Sir Alexander Stirling of Glorat, Baronet, of the lands of Renton, lying in the shire of Berwick, in favour of himself and the heirs male of his body; whom failing, the other heirs and substitutes therein mentioned." That that was not a correct description of the actual deed, and consequently there was no valid authority for recording it. I think that that argument was hardly pressed eventually; and I must confess, that when the matter is looked into, it appears to me that it is an argument utterly untenable, and which it is hardly necessary to say much about, because the petition presented on the 2nd of March 1790, for interposing the authority of the Lords of Session—the petition of Sir Alexander Stirling—stated that he had executed a deed of entail of the lands there described in favour of himself and the heirs male of his body; whom failing, the other heirs and substitutes. Then it goes on to say—"The petitioner, on the 29th of December 1789, recorded the foresaid deed of entail, and trust disposition relative thereto, in the Books of Council and Session;" so that the actual deed was recorded in the Books of Council and Session. There it was, and there is no question as to the identity of the deed; and then the order was that that deed—the deed referred to in that petition—shall be recorded. Supposing it is inaccurately described as a deed in favour of himself and the heirs male of his body, it is capable of identification, being the deed which is ordered to be recorded in the Books of Session, and is so recorded; and therefore it seems to me to be not a matter of inference, but capable of absolute demonstration, that it was the real deed which the Lords of Session ordered to be recorded. I think, therefore, there is no weight whatever in that objection, and, indeed, it was not much relied upon.

The next objection is one that was very much argued, but which, upon full consideration, I

confess I think is equally without foundation. It is this:—It is said that the deed actually recorded is a deed in which the irritant clause is described as a clause which is to take effect, "in case the heir of entail shall fail to neglect or obey or perform" certain conditions; whereas in the deed it is, "shall fail or neglect to obey or perform." And it is said that the doctrine of the Courts in Scotland, and of your Lordships' House, has always been to hold very strictly the necessity of accurately recording those deeds upon the Register of Entails, so as to give effect to the fetters of the entail, and that this is an important difference—that "failing *or* neglecting to obey or perform," is a different thing from "failing *to* neglect or obey or perform;" and, consequently, the real deed has never been validly recorded.

In support of this doctrine cases were alluded to. There was the case of *Lord Eglinton.* In that case, in the prohibitory clause there was a prohibition against alienating "redeemably, or under reversion." It was said that that must be a clerical error, because the common form is "irredeemably, or under reversion;" and it was said that the "ir" must have been left out, and that it was patent that it must have been a clerical error. Looking at it, and knowing the forms of conveyancing, one cannot help having a very strong conviction that that was a mere clerical error; but there was nothing nonsensical in the way in which it was actually written. And it was held by the Court of Session, and ultimately by your Lordships' House, that you could not put the two letters "ir," and make "irredeemably" of what was written "redeemably;" that you had no power to alter it. It might be that that was what the parties meant, but there was a sensible meaning attributable to it. But it was not in conformity with what the deed really was, and therefore it was not a correct putting of that deed upon the Register of Tailzies.

So, again, the case which was argued when, I think, Lord Brougham was Lord Chancellor, or in which he took a leading part. I think it is spoken of by the name of the *Hoddam case.* There, in truth, a whole line had evidently been left out, and it was said—You see what the line must have been. You cannot but form a very strong conjecture what it was. But the noble and learned Lord held, and the House adopted the same view, that there were 20 ways in which the line might have been filled up quite sensibly; and although you might have felt it extremely probable that the way to fill it up was the particular mode pointed out, still that was a matter which you could not act upon. And therefore that, again, was a bad register.

But these cases having been so decided, nevertheless there were several others in which the doctrine of common sense, of course, prevailed, as it would always prevail, if you could see what the words left out must have been, or what the alteration is, if there is a difference between the record and the deed. In such a case the difference becomes absolutely immaterial, and you have no right to say, and pretend not to understand what it is impossible not to understand.

Now, that, I think, is the doctrine that is applicable to the present case; for here it appears to me that it is a mistake to say that there is any error in the statement of the irritancy at all, because the irritancy is, that "in case the said John Stirling, or any of the heirs of tailzie and provision succeeding to the said lands and others hereby tailzied, shall contravene the order herein before written, or the conditions, provisions, restrictions, or limitations contained in this deed of tailzie, or any of them." That is what creates the irritancy—doing any of these things; that is quite correctly copied in the terms of the deed. It is true that the framer of the deed goes on to do that which is mere surplusage, namely, to explain certain circumstances which he says will be contraventions of the order herein before written, or the conditions, restrictions, provisions, or limitations contained in this deed of tailzie—"that is," he says in his deed, "shall fail or neglect to obey or perform the said conditions or provisions, or any of them." Now I very much doubt whether, if that had been entirely left out of the register, it would have made any material difference in the deed, because it would only be, that the register does not contain an explanation of something which the maker of the deed says will come within the description which has gone before. After all, the irritancy making the deed void must result from the previous passage in the sentence, namely, contravening or violating or not obeying the conditions, restrictions, and limitations. And, therefore, I am strongly inclined to think, that if the whole of that sentence, "shall fail or neglect to obey or perform the said conditions or provisions, or any of them," had been entirely left out, it would have been utterly immaterial, because it is merely the enlargement or explanation of what had gone before.

Now, my Lords, let us see more clearly what is the difference between the two. The words are, "shall fail or neglect to obey or perform the said conditions;" in the register they are, "shall fail to neglect or obey and perform." In the first place, if the words "or neglect" had been left out, it would have made absolutely no difference—failing to do a thing of necessity includes neglecting to do it; neglecting to do it, means, at least, if there be any distinction, failing culpably, or not doing what you ought to do—not being sufficiently alive and alert, and so failing to do it. Failing is the generic word, and includes *inter alia* neglect; therefore, if instead of "fail or neglect to obey or perform," it had been "fail to obey or perform," it would have been just the same thing, for that would have included the other if the words had been left out. They were words which were necessarily included in the word "fail." But what is in the register? "Shall fail to neglect or obey or perform." Now you have "fail to obey or perform," but you have also "fail to neglect;"

that is absolutely insensible; it is just as if you had put any other transitive verb, because there is no meaning in failing to neglect the obligations imposed upon you; it is absolutely insensible, and therefore we must see whether that has not crept in *per incuriam*. Supposing we are not at liberty to say that it is merely a clerical transposition, it appears to me that it is capable of being treated as merely surplusage, because, in order to be rational, it must be a word which is a possible illustration of what has gone before, namely, a contravention of the order before written, or of the conditions, provisions, restrictions, or limitations contained in the deed of tailzie. Now, if the word is a word which is utterly inapplicable to that sort of explanation, it appears to me that it must be treated as something which has crept in *per incuriam*, a mere clerical error, and which has no bearing whatsoever upon the real clause of irritancy, and therefore may be rejected *in toto*. I agree therefore with the Lords of Session in thinking that that also is an immaterial variation.

My Lords, I wish, as far as one can have a wish in such a case, that I could have said that I also agreed with them upon the third point. But upon that point I confess that I cannot concur with the Court of Session. The third point, as it appears to me, is one not of form, but of substance. The Act 1685 requires a register to be kept, wherein shall be recorded the names of the maker of the tailzie, and the heirs of tailzie, and the general designations of the lordships and baronies, and the provisions and conditions contained in the tailzie, and so on, to remain in the said register *in perpetuam rei memoriam;* and no tailzie is good as against creditors unless the provisions of the statute have been strictly pursued. The question here is—whether the names of the heirs of tailzie have been duly recorded in the Register of Tailzies. There is no doubt that they were so recorded, if the deed of the 28th June 1788 is to be treated as the only deed creating the entail; but if the subsequent deed of the 21st August is the deed, or one of the deeds creating the entail, then the requisitions of the statute have not been complied with, for that latter deed never has been recorded. I am of opinion that the entail subsists not under the original deed only, but under the two deeds taken together. Both deeds were, it must be recollected, deeds executed *mortis causa*. They were not to have any operation during the life of Sir A. Stirling, the entailer, who reserved to himself, in both deeds, the most complete powers to revoke and alter as he might think fit. By his death these powers came to an end. The destination of the heirs who were to succeed was then finally established, but established by the two deeds taken together, and Mary Stirling and her heirs were for ever excluded from the succession.

The policy of the statute was to make void as against creditors every tailzie in which the heirs of tailzie were not recorded; that, of course, means correctly recorded in the register. Here the register would represent to a creditor searching it, that on failure of the heirs of the body of George Stirling, the lands would go to Mary Stirling and the heirs of her body; whereas, in fact, they would go to Jean Stirling and the heirs of her body. This is not a correct record of the tailzie. It is true that this is an inaccuracy (so far as it is inaccurate) subsequent to the line of heirs, against whom the creditor is seeking to obtain adjudication; but I do not think that is material. The enactments of the statute are matters *juris positivi*, and if its provisions have not been duly complied with, a deed, whose operation as to creditors depends on such compliance, is, as against them, void to all intents and purposes.

Now one of the requisites of the statute is, that the heirs of tailzie shall be correctly recorded. If this has not been done, it can be no answer to the creditor, that this inaccuracy does not affect him any more than if there had been an error in the record of prohibition against alienation. It would have been a good answer to the creditor to say, that the prohibition against contracting debts was correctly set out in the register. The statute requires entire accuracy throughout, and as a penalty upon inacccuracy, makes the deed void in favour of third persons, without permitting any inquiry, whether in fact the inaccuracy was or could be prejudicial to them. I do not suppose that this principle is disputed. If the inaccuracy occurs in the deed which is in fact recorded; if, for instance, Mary Stirling's name had not been recorded in the original deed, but had, from some oversight, been inserted in the register, it would not have been argued that the entail was good against a creditor seeking to affect the estate of an heir prior to Mary Stirling, merely because the register was correct so far as related to that estate. This is not contended, and therefore the question recurs—whether what the statute requires to be recorded is in this case the one deed or both deeds. I think it requires both deeds; both together concur in creating the entail, and it is the entail which the statute requires to be recorded, whether created by one deed or by two deeds. If the first deed had not been put on the Register of Tailzies in the lifetime of the maker of the entail, surely after his decease both deeds must have been registered, as together creating the entail; and I see no difference from the fact that one of the deeds was registered in the settler's lifetime, leaving the other to be registered afterwards.

This appears to me to be the fair result of the statute, looking at it independently of authority. But I think further, that the question, even if it were doubtful, is settled by decision, for I cannot distinguish the present case in principle from that of *Bloomfield* v. *Paterson*, Mor. 15,618, and also more satisfactorily reported in a note to *Turnbull* v. *Hay Newton*, 14 S. 1031. In that case Sir John Paterson created an entail in 1743, reserving to himself unlimited power of revoca-

tion and alteration. In 1758 he made a new entail, referring to the former deed of 1743, but varying from it, by omitting wholly from the designation James Paterson and the heirs of his body. There were two other slight variations from the former deed, but Lord Jeffrey, in observing on the case, treated the omission of this line of succession as quite sufficient to make the register of the deed of 1743 inoperative against creditors, and so to make a new registration necessary. I am aware that in that case (as I collect from the report) the deed of 1758 was a complete resettlement of the estate, and not, as in this case, a mere deed altering and revoking a part of the former destinations; but I think that makes no difference. What the statute requires to be registered is not any particular deed, but the name of the maker, the names of the heirs, and the other provisions and conditions contained in the tailzie. If these particulars can only be ascertained by reference to two deeds, both must, I think, be recorded. Any other construction would enable the maker of an entail to defeat what was the plain intention of the statute, viz., that all the material provisions of the entail should be at any time capable of being ascertained by third persons.

The view I take of the law is quite consistent with the case of *Turnbull* v. *Hay Newton*, and other similar cases, where, in truth, there was no alteration in the course of succession, but merely a propelling of the fee. That is an act done by an heir of entail; an act which he may do according to the law of his entail, as it stands recorded in the register. Nor do I at all dispute the doctrine, that if, between the date of the deed creating the entail and its being recorded in the register, one of the substitutes had died without issue, still the whole deed must be registered. Or, if, during that period, the maker of the entail has sold a part of the property, still the whole of the lands included in the deed must be noticed in the register. What the statute requires to be registered is the entail as it is created by the maker of it. This can only be done by recording the deed in its integrity, as executed by the settler. If, after the creation of the entail, a line of heirs becomes extinct, that is the act of God, and it is a contingency which is inherent in the very nature of an entail. So in the case of a sale of part of the land, that is no alteration of the entail. The entail still subsists, and a withdrawal of part of the property only puts the case as if a settler had originally purported to settle that, to some part of which he had no title.

The short ground on which I rest my judgment is—that what the statute requires to be registered is the entail created by the settler, that is, the names of the maker and of the heirs of entail, and the designation of the lands, and the provisions and conditions, with the irritant and resolutive clauses. In this case, in order to get at these particulars, recourse must be had to both deeds, and both, therefore, ought, in my opinion, to have been registered. This, however, is not the view of my noble and learned friend, and consequently the appeal will be dismissed.

LORD ST. LEONARDS.—My Lords I entirely concur with my noble and learned friend in his view upon the first question. Indeed the first point, I consider, was given up by the counsel at the bar; but I may just observe, that everything was done that was necessary to establish the identity of the deed of entail. The description was not wrong. It is quite a mistake to say that the description of the deed was wrong in point of fact; the granter had reserved to himself a life interest, and had settled the estate upon his heirs male. Therefore, to say that this was a settlement upon him and his heirs male was perfectly correct, so far as to satisfy the act of parliament.

As to the second point, which my noble and learned friend has so much discussed, as I entirely agree with him upon it, it is not necessary for me to go into it at any length. But there is nothing in the Act 1685 to prevent a Court of Justice from putting a sensible construction upon what is found upon the face of the register. Now the clause in question contains the whole substance of the irritant clause of the deed, both before and after the words that have introduced the difficulty, and I think that we are at liberty in this case to treat these words as a mere clerical error. The cases which have been referred to do not at all touch this case. This is manifestly a clerical error, upon the face of the document itself. But if there be any difficulty in the construction, the first part is conclusive without this description, and what follows these words is equally conclusive; and the whole clause admits of a sensible construction without giving effect to these words, which really have no sensible meaning. I think it therefore perfectly clear, that the Court of Session were right in their conclusion upon these two points.

Now, my Lords, after a very anxious consideration of the third point, upon which my noble and learned friend and myself are not agreed, I think the Court of Session were perfectly correct in the decision at which they arrived. The Judges were unanimous; and I observe that Lord Cunninghame treated the objection as a perfectly novel one, and not capable of being sustained; so that, so far as their knowledge of the practice and general opinion went, they thought that this was an attempted innovation which had never been made before.

Now it is necessary to be very distinct in order to come to a right conclusion upon this subject. There is nothing in the law of Scotland, or in the act of 1685, which affects the original settlement as a mere settlement in this case. The settler might have made the settlement which he has made without the Statute of 1685. He could not introduce fetters—he could not make

prohibitions and irritant and resolutive clauses except under that act of parliament. But the settlement itself was a valid settlement, irrespective of these prohibitions, and of irritant and resolutive clauses. Now the Act of 1685 requires just as much a statement of the parcels of the estate for example, as it does of the heirs of tailzie, and nobody disputes, as I understand, the argument, (indeed nobody can dispute it, because it has not been disputed by the learned counsel at the bar, who are so competent to consider the case,) that the original settlement was properly recorded. Where the parties have died between the execution of the deed and the record of it, or where a part of the estate has been sold or lost by adverse title, whatever may have intervened between the period of the execution of the deed of tailzie and the record of it—these were facts that could not be put upon the record in connection with the register of that deed. That deed of tailzie, therefore, was properly recorded, and, with the prohibitions, and the irritant and resolutive clauses, was a deed binding upon all creditors, and all persons who were within the prohibition, fenced as the deed was by irritant and resolutive clauses.

If that be so, what is there to affect that valid deed? That deed could, by the law of Scotland, be defeated, irrespective of the prohibitions, and the irritant and resolutive clauses, if they did not intervene, by persons entitled just in the same way as any person having an estate conveyed by the law of Scotland might have his title defeated. The Statute of 1685 does not prevent you, if you have an estate, from making any settlement of that estate. And therefore, supposing that settlement to exist, and another deed to be executed subsequently to that settlement, it must be simply a question—did that second deed or not operate as a new settlement? If it did, then the Statute of 1685 will attach upon that new settlement, and it must be registered. I am assuming it to be a new settlement, but it cannot be considered to be a new settlement unless it defeats the former one. If it defeats it, then it comes in its place, and it must be registered in order to bind creditors.

This point is settled in the case of *Turnbull* v. *Hay Newton*. It was there held that it is not necessary to register a propelling deed. But what is a propelling deed? It is an actual striking out of one of the heirs of tailzie in order to accelerate the estate of another. It takes that heir of tailzie really out of the line of succession, and accelerates the estate of the one in remainder. Such a deed does not require registration; it accelerates, but it does not alter the line of succession. It gives the next in the line of succession, the substitute, a great advantage, because his estate, which is accelerated, but for this propelling deed, might never have taken effect at all. *Non constat* that the first estate that was granted would have ceased, so as to give the party over, as we call it, a right to inherit or to take. Then there is a case in which you actually remove an estate which is upon the record, and you introduce an estate as the immediate estate which might never have come into being in the original order in course of the tailzie, but still that is not necessary to be registered.

Now what was done in this case? The granter having reserved to himself a general power of revocation, revoked an estate subsequent to the estate of the party now in question. He revoked Mary Stirling's estate, so as, leaving everything else untouched, to accelerate the next estate; but it did not touch the estate which is now in question. By the estate I mean the limitation. It did not touch it directly or indirectly. That limitation, confined to the particular estate of Mary Stirling, never could touch this estate, which was well created by the original settlement. The estate was fenced by prohibitory and irritant and resolutive clauses, every one of them being registered and binding upon all creditors and others, so as to insure the settlement as far as that particular party was concerned.

Well, then, the power of revocation having been partially exercised, the effect of a reversal of the decision of the Court below would be this, that that partial revocation operated as an entire revocation of the whole settlement; because it is insisted that that partial revocation, limited to one estate in remainder, operated to defeat the entire tailzie, from the beginning to the end. By the original deed John is to have the estate, then James is to have it, then Mary is to have it, and then Jean is to have it. Mary is struck out by the exercise of the power of revocation, and then the estate stands limited to John, James, and Jean. It is said that John and James cannot take the estate, and the effect of this is, in point of law, to revoke the whole deed. Is there any precedent for that?

Observe what the object of the Statute of 1685 is. The object is not to tell the creditors what events, after the execution of the tailzie or the record, may have happened, or what circumstances may have occurred, such, for instance, as the sale of the estate, the recovery of it adversely, or the revocation; but it is to shew this, that those persons who claim under the original tailzie are or are not prohibited from selling or recovering, and to shew that the prohibitions are or are not guarded and fenced by proper irritant and resolutive clauses.

What would happen in this case? Nobody can deny this, that the power of revocation being executed, this was a perfectly valid instrument as between heirs, and it put an end to the estate of Mary Stirling for ever. Nobody can dispute that, irrespective of the Statute of 1685. The Statute of 1685 does not touch that at all. There is nothing in the Statute 1685 which says, that if you take away one particular limitation you must put it upon record. Why should you put it

upon record? Mary Stirling, being by the effect of that deed, which is a perfectly valid and operative deed, struck out of the line of succession, never could be found in possession of this estate; and therefore the creditors never could have had occasion to resort to the register, in order to see whether there was any prohibition against her; she never could have the estate, and therefore, never being able to serve as heir, and never being able to claim it under the deed, the creditors would know at once that her estate had been in some way defeated.

But it is a mistake to suppose that the Statute of 1685 at all strikes at this deed, which removes this lady. There is no ground for saying so. It does not touch it. My noble and learned friend says very truly, that the Statute of 1685 requires that all the heirs of tailzie should appear upon the record of the deed recorded. The question still remains—is it necessary to record this deed? Nobody doubts that the original deed was properly recorded, and that every person in succession who would take under the deed is not upon the record, and every creditor will be able to go to the record and see whether the person who succeeds to the estate under that tailzie, is or is not within the line of prohibition, and is or is not fenced by the irritant and resolutive clauses. No question can arise; no creditor can ever find Mary Stirling in possession, and therefore the Statute of 1685 has no operation.

Now, supposing the estate had been so limited as that the subsequent deed operated as a new settlement, which it can only do where the second grant is to supersede the first grant, then, no doubt, the law requires that the second deed, in order to have efficacy, should be registered under the Act of 1685. There is no question about that. But whilst the estate remains unaffected, and upon the register, fenced with proper prohibitory, irritant, and resolutive clauses, properly created, there never can be any occasion to register any other deed as it appears to me, with regard to those existing valid estates, which are not affected by that other deed.

Now *Broomfield* v. *Paterson* is, I think, a perfect instance of what I am now advising your Lordships to hold. For there the second deed did operate entirely to defeat the first deed, and therefore it was that the second deed never could be operative, unless it was recorded properly on the Register of Tailzies, as well as the first, so as to bind creditors, purchasers, and others. My noble and learned friend has said that case is perhaps better stated in the Lord Ordinary's note to the case of *Turnbull* v. *Hay and Renton*. But in Morrison it is stated thus:—In 1743 Sir John Paterson made an entail in favour of his grandson John, and reserved power to revoke. He completed the deed of entail, and it was registered in the Register of Tailzies. The Lord Ordinary observed in this case, that the fee was considered to remain in the granter, and that the grandson must be entitled as heir of provision. In 1755 Sir John Paterson renounced his power of revocation. Now that was a mere personal act. It was recorded in the Register of Tailzies only—it could not qualify the right—it was merely a personal act—it was not registered properly, and it had no effect against creditors. The result, therefore, was, that the original tailzie stood on the register within the Statute of 1685, the effect of which was that the fee was in Sir John. Then the deed of 1758 was a deed by Sir John, with the consent of his grandson, which amounted to a new settlement, and there was only a reference to the prohibitions. It was not recorded in the Registry of Tailzies. Upon that the Lord Ordinary made this observation. He said it proceeded upon the recital of the original entail. The fee vested in the grandson Paterson. Then under the deed of 1758 the prohibition against alienation altered the destination, and changed the condition against Sir John Paterson and the heirs of his body, and he goes on to say it amounts to a new settlement. Sir John died, and his grandson Sir John became entitled to the estate; and he executed a procuratory under the last settlement. He (the grandson) had a daughter, and she made out title as his heir; and upon a creditor seeking to charge the estate of Sir John, the question was whose heir she was. And it was held that he was entitled to do so. The case was argued upon this ground:—It was said that the settlement of 1743 was put an end to by the settlement of 1758, and that the latter not being registered in accordance with the Act of 1685, was invalid. To this it was answered, that the settlement of 1758 ought to be considered, not as a new entail, but as a continuation of the prior settlement effected in 1743, and therefore did not require registration. The Lords found "that the disposition of 1758, differing in several particulars from the entail of 1743, and being followed with charter and infeftment, is to be held a new settlement of the estate, and not having been recorded in the Register of Entails is not an effectual entail." And they also found, "that in respect the limitations in the entail of 1743 are not particularly inserted in the said disposition of 1758, the same is not effectual against creditors." To this judgment the Lords adhered, on advising a reclaiming petition and answers. They held, therefore, there, that there was a new settlement, and that the new settlement was not registered; that it did not repeat the limitations, as it ought to have done, of 1743; and that, therefore, the settlement was not valid against creditors. But there the original settlement was actually defeated. It no longer existed, and the new settlement was the only settlement that was operative.

Now here the original settlement is in perfect existence, and it has been properly recorded, and all the prohibitions and fences are properly upon the record. The party in possession has taken in his order, according to the limitations of the deed. There is no question between

him and his creditors, except with reference to that which strikes at the root of the original deed.

It appears to me, that the Court of Session was quite right in holding, that this second deed was not a new settlement, but merely striking out of one of the heirs, who never could come into possession except in the order of the deed. Under this deed Mary would never come into possession at all. There is no question, therefore, as to her creditors. It was impossible that there should be. They never could find her in possession subsequently. And this limitation not being a new settlement, this is not a case which is required to be registered by the Statute of 1685. If it had been necessary under the statute, then every deed relating to the estate must equally be registered. There were two months between the execution of the first deed and the execution of the second deed. Suppose the first deed duly registered, how could the execution of the second deed before the registry of the first have affected the question? It seems to me that this was considered so clear at the time, (which rather proves what the general opinion has been, according to the statement of Lord Cunninghame,) that the parties purposely kept the second deed off the Register of Tailzies, as being unnecessary to be registered: for they actually took both deeds to the registrar of the Registry of the Council, and had them both regularly registered there, which was right enough as regards the disposition having nothing whatever to do with the Statute of 1685. But when they came to obey the directions of the Statute of 1685, they drew the distinction, and they put upon the Register of Tailzies the original settlement of 1755, and they kept off that register, as being unnecessary to find its place there, the second deed of 1758.

My Lords, I have taken some time to consider this question, and have considered it very minutely, and have looked at it in every point of view, and, with all deference to my noble and learned friend, I have come to a strong opinion upon the point, that the decision of the Court below should be affirmed.

Interlocutors affirmed.

Appellant's Agents, Pearson and Robertson, W.S.—*Respondents' Agent*, John Marshall, S.S.C.

MAY 22, 1855.

JOSEPH MILLER, *Appellant*, *v.* SARAH MARSH and Others, *Respondents.*

Entail—Deathbed—Revocation—Title to Sue—*An entail was executed in favour of a series of heirs, excluding the entailer's heir at law, and reserving full powers of alteration and revocation. On deathbed the entailer executed a deed revoking the fetters of strict entail, but leaving the deed intact as a conveyance and destination.*

HELD (affirming judgment), *That the second deed did not give the entailer's heir at law an interest to challenge the destination and conveyance excluding him from the succession.*[1]

The pursuer appealed, maintaining that there ought to be a reversal of the judgment of the Court of Session—1. Because, by the common and statute law of Scotland, the right of the heir at law to succeed to the heritable estate of his ancestor cannot be defeated, or in any way injured, by deeds executed on deathbed. Bell's Principles, pp. 483-4; Ersk. iii. 8, 97 and 98, p. 695; *Crawford* v. *Coutts*, 2 Bligh, 655. 2. Because, according to the doctrines and principles of the law of deathbed, as expounded by Lord Eldon in the case of *Coutts*, which has ever since ruled the law and practice of Scotland, the deeds of entail, nomination and revocation under challenge, being in substance a conveyance of the estate in fee simple, granted on deathbed to the prejudice of the appellant's rights as heir at law, are on that ground void and reducible at his instance. Ersk. iii. 8, 22; Sandford on Entails, p. 246; *Ogilvy* v. *Mercer*, Mor. 3336; *Black* v. *Watson*, 3 D. 522; *Lawrie* v. *Lawrie's Trustees*, 8 S. 379.

The respondents maintained that the judgment was sound, because—1. The entail of 1829, consisting of the deed of entail, and relative deed of nomination, both bearing the same date, contained a conveyance in favour of the persons therein named and described, which was effectual to exclude the granter's heir at law; and that conveyance was not revoked by the deed of revocation of 1848. 1. Ross's Leading Cases, pp. 566 to 593; *Anstruther* v. *Anstruther*, 14 S. 272; Ersk. ii. 2, 1; Calvin, ad verb.; *Marquis of Breadalbane* v. *Chandos*, 2 S. & M'L. 377; *Smith* v. *Borthwick*, 11 D. 517. 2. The plea of deathbed is inapplicable to the circumstances, and cannot aid the appellant in his attempt to set aside the conveyance in the deeds of entail and nomination executed in the year 1829. Bell's Prin. § 1796. 3. Even if the law of deathbed

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[1] See previous reports 15 D. 823; 25 Sc. Jur. 487. S. C. 2 Macq. Ap. 284; 27 Sc. Jur. 378.