JUNE 12, 1857.

WHITE, *Appellant*, *v.* DEMPSTER, *Respondent.*

Entail—Fetters—Erasure—Reduction—Act 1685; Stat. 11 and 12 Vict. c 36, § 43.
HELD (affirming judgment), *That an entail with an irritant clause containing erasures in the words "deeds granted, and acts done and committed," was vitiated in essential prohibitions, and was ineffectual, in terms of the Act* 1685, *and the heir in possession found entitled to deal with the estate as proprietor in fee simple.*[1]

The respondent is the heir of entail in possession of the lands of Skibo and others, in virtue of a disposition and deed of entail executed by John Hamilton Dempster, Esq. of Pulrossie, dated 15th day of October 1799.

The irritant clause is in these terms:—"But also that all debts contracted, *deeds granted, and acts done or committed*, contrary to the conditions and restrictions before written, and to the true intent and meaning of these presents, shall of themselves be of no force, strength, or effect, and absolutely void, null, and unavailable against the said lands and estates, and against the other heirs of entail called to the succession thereof, and who, as well as the said estates, shall noways be burdened therewith, but free therefrom, in the same manner as if such debts had not been contracted or granted, or such crimes, acts, or omissions, had never been done or happened."

In the irritant clause the words "deeds granted and," on the 34th line, and the words "acts done or," and the letters "commit" of the word "committed," on the 35th or bottom line of the 11th page of the deed of entail, were written upon an erasure, and the erasure was not noticed in the testing clause of the deed. The presumptive heir to the pursuer, under a destination contained in the said disposition and deed of entail, was his sister, the defender Mrs. Helen Dempster or White.

In these circumstances the respondent brought an action, concluding to have it found that he held the lands in fee simple.

The Lord Ordinary pronounced the following interlocutor, on 15th November 1854:—Finds that the deed of entail libelled is erased in the important part of the irritant clause set forth in the second and third articles of the pursuer's condescendence: Finds that, in consequence of this erasure, the deed contains no complete irritant clause, and that the entail is not valid and effectual in regard to several of its essential prohibitions under the Act 1685, cap. 22: Finds that, in these circumstances, it falls under the enactments of the Statute 11 and 12 Vict. c. 36, § 43.—On a reclaiming note, the First Division of the Court adhered on 23d November 1855.

The *defender* appealed, maintaining in her *printed case*, that the judgment of the Court of Session ought to be reversed—1. Because, according to a sound construction of the enactment contained in the 43d section of the Statute 11th and 12th Vict. c. 36, the invalidity there declared to follow in consequence of an entail being defective as regards any one of its prohibitions is not, as the Court below have held, an absolute and total invalidity, but one which operates only so far as the prohibitions are dependent for their efficacy upon the provisions of the Act 1685; and no alteration was thereby made upon the law as it previously stood, relative to the rights and interests of the substitute heirs in a question with the heir of entail in possession. 2. The judgment of the Court below is erroneous, in so far as decree is thereby given generally, and without qualification, in the wide terms of the conclusions of the respondent's summons, which are founded on the provisions of the 43d section of the Entail Amendment Act.

The *respondent*, in his *printed case*, supported the judgment on the following grounds:—1. Because the irritant clause of the entail in question is erased *in substantialibus*. 2. Because, in consequence of the erasure in the irritant clause, the prohibitions in the entail against sales, alienations, and alterations of the order of succession, are not fenced by a valid irritant clause. 3. Because, the entail not being valid and effectual, in terms of the Act 1685, in regard to the prohibitions against sales, alienations, and alterations of the order of succession, the entail is invalid and ineffectual under the Act 1848, and the respondent is entitled to hold the estate in fee simple.

Lord Advocate (Moncreiff), and *Rolt* Q.C., for the appellant.—The decision of the Court below was wrong in this case. Even assuming there was a defect in one irritant clause, it did not follow that the whole deed was null and void. It has been always held, notwithstanding the

[1] S. C. 3 Macq. Ap. 62: 29 Sc. Jur. 394.

Statute 1685, that the entail might be good as to some prohibitions, though bad as to the rest. The heir might, before Lord Rutherfurd's Act, be able to sell the estate for value, and yet he could not alienate it gratuitously.—*Carrick* v. *Buchanan*, 3 Bell's App. 342. The 43d section of Lord Rutherfurd's Act does not repeal that law, and was not intended to do so. The common law right of settlement still exists, whereas the Court below has practically decided, that, if an entail is defective in any one prohibition, it is bad *in toto*, both as between heirs and creditors. It would be a hardship to stretch the law to that extent, and such a construction is unwarranted. The same point was raised, but not decided, in *Cochrane* v. *Baillie*, *ante*, 685; 2 Macq. Ap. 529.

Attorney-General (Bethell), and *Anderson* Q.C., for the respondent, were not called upon.

LORD CHANCELLOR CRANWORTH.—My Lords, this is a case which does not admit of the least doubt in the world, not merely because the point here raised has been already decided in this very year by your Lordships, in the case of *Cochrane* v. *Baillie*, removing all shadow of doubt, if there was any doubt before upon it, but I think it is perfectly clear from the 43d clause of the act; and as to the great evil which Mr. Rolt suggests may arise from parties not being able in Scotland to make an entail disposition otherwise than according to the terms of the Statute of 1685, that great evil has been incurred, if it was an evil; but I do not see that there is any evil in it at all. Certainly the object of that statute was not to encourage Scotch entails—quite the reverse; and the language of the 43d clause seems not to admit of the least possible doubt, for not only does it say, that, if the deed is invalid and ineffectual in any one of the irritant clauses, it shall be invalid and ineffectual as regards all, but it goes on to state, that "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 said tailzie, and no action of forfeiture shall be competent at the instance of any heir substitute in such tailzie against the heir in possession under the same, by reason of any contravention of all or any of the prohibitions." I do not see how those words can receive any other meaning than that which has been put upon them by the Court below. If it is meant to be said, that, notwithstanding these words, still the heir substitute may have a right to say, that the heir in possession shall not contravene the prohibitions, by making a gratuitous disposition, that cannot be a matter that admits of any doubt, upon the simple words and language of the statute.

In this case the Lord Ordinary first, and the Court of Session afterwards, came to the only conclusion at which they could arrive, and, so far as appears upon these papers, they came to that conclusion without any hesitation, and without much argument addressed to them upon it.

LORD WENSLEYDALE.—My Lords, I entirely concur with my noble and learned friend that the decision of the Court of Session in this case is right, and that the appeal must be dismissed.

Interlocutors affirmed, and appeal dismissed, with costs.

Appellant's Agents, Connell and Hope; and Walker and Melville, W.S.—*Respondent's Agents*, Richardson, Loch, and Maclaurin; and Mackenzie and Baillie, W.S.

AUGUST 13, 1857.

ARCHIBALD FINNIE, *Appellant*, v. THE GLASGOW AND SOUTH WESTERN RAILWAY CO., *Respondents*. (No. 2.)

Railway Lease—Contract—Toll—Jus Quæsitum Tertio—*The Kilmarnock and Troon Railway was leased by the Glasgow, Paisley, Kilmarnock, and Ayr Railway Co., now incorporated with the Glasgow and South Western Railway Co., on payment of a fixed sum of rent, and right to charge for the conveyance of coals along that line at the rate of* 1½*d. per ton per mile. It was provided in the lease, that this charge was to be subject to alteration by the mutual consent of both companies; and the Kilmarnock and Troon Railway Act authorized a charge of* 2½*d. per ton per mile. Finnie, a third party, tacksman of collieries on the Kilmarnock and Troon line, and who used the line for the conveyance of his coals, applied for interdict against raising the charge, alleging that both companies had subsequently agreed to fix the charge for the conveyance of coal along the line at* 1⅛*d., and that a list of charges to this effect had been published, and the toll paid for some time at that rate, and that he, as tacksman along the line, had good right to interdict the company from departing from that charge so fixed.*

HELD (affirming judgment), *That this charge of* 1⅛*d. was not fixed in concert by the companies, in terms of the lease; but what the companies had agreed upon was,* 1⅛*d.,* not *as* toll *to be charged on traders, but as* rent, *as between themselves, and therefore that the complainer was not entitled to interdict.*