

[18th May 1838.]

JAMES OCHTERLONY LOCKHART MURE, Esquire, of Livingston, and GEORGE M'CALLUM, W. S., his Mandatory, Appellants. — *Sir William Follett* — *Dr. Lushington*.

JAMES OCHTERLONY LOCKHART MURE, younger, of Livingston, and others, Respondents. — *Attorney General (Campbell)*—*Burge*.

Entail.—Held (affirming the judgment of the Court of Session), that although there was no exclusion of heirs portioners in an entail under which an heir male succeeded as the heir of the body of a nominatum substitute, the entail was effectual against him.

THE late Robert Mure, the great grandfather of the appellant, was possessed of two separate properties in the stewartry of Kirkcudbright,—Livingston, lying in the parish of Balmaghie, and Glenquicken, in the parish of Kirkmabreck. He had one son, Adam Mure, and two daughters, Jean and Margaret Mure. Upon the son, and the heirs male and female of his body successively, he settled both properties as one estate, excluding heirs portioners, and under all the fetters of a strict entail; but failing the son and his descendants, he separated the properties, giving Livingston to Jean, his eldest daughter, and the heirs of her body generally, without any exclusion of heirs portioners, and Glenquicken to the younger daughter, Margaret, and

1ST DIVISION.

Ld. Cranstoun.

MURE
v.
MURE
and others.

18th May 1838.

the heirs of her body, also without any exclusion of heirs portioners.

The deed then proceeds to reserve the granter's life-rent, and to provide that all the heirs of entail shall take the name of Mure as their proper surname, but without obliging them to assume any particular arms, and that they shall hold the lands by virtue of the deed of entail, and by no other title.

On the death of the granter he was succeeded in the whole lands by his son Adam Mure, the institute, who was base infest upon the precept contained in the deed, and possessed upon that title until 1802, when he died leaving no issue. By that event the succession to the lands of Livingston, in the parish of Balmaghie, opened to Jean Mure, the appellant's grandmother, in terms of the destination in favour of her and the heirs of her body, and she proceeded to make up titles in the following manner:—Having expedite a general service, as nearest and lawful heir of tailie and provision of her deceased brother Adam Mure, and having thus carried right to the unexecuted procuratory of resignation in the deed of entail, in so far as regarded these lands, she thereupon obtained a crown charter of resignation in favour of herself and the heirs lawfully procreated or to be procreated of her body; whom all failing, to the nearest heirs and assignees whatsoever of Robert Mure, the entailer, under all the conditions and provisions of the deed; and upon the precept contained in this charter she was infest, and her infestment duly recorded. She then granted a precept of clare constat to herself as heir, in conformity with the terms of her general service to her brother; and having been infest upon this precept she thereafter completed her title,

consolidating the property and superiority by resignation ad remanentiam in her own hands. Upon this title she continued to possess the estate of Livingston till her death in 1811; and the succession then devolved on the appellant as lawful son of the deceased James Lockhart, Esquire, who was the eldest son of Jean Mure; and he thereupon made up his title by infestment upon a precept from Chancery, following on the retour of his special service as nearest and lawful heir of tailie and provision to his grandmother, Jean Mure.¹

MURE
v.
MURE
and others.
—
18th May 1838.

¹ With regard to Glenquicken, it may be mentioned that the succession to that estate opened, upon the death of Adam Mure in 1802 without issue, to Adam Thomson, the second son of Margaret Mure, she having deceased some time before. Adam Thomson was then long past the years of majority, and he immediately proceeded to make up titles to the lands by service and infestment in common form. He thereafter assumed the name of Mure, and continued in possession until 1822, when he died without issue; and as he had been predeceased by his elder brother, who, on account of his imbecility, had been passed over in the original settlement, the estate of Glenquicken fell, in terms of the destination, to the heirs procreate or to be procreate of Margaret Mure. These were six in number,—all daughters, or descendants of daughters; namely, three surviving unmarried daughters; David M'Culloch of Torhouskie, son and representative of Margaret Mure's eldest daughter, deceased; and two other persons, who were single children of other two daughters, also deceased.

Among these parties a competition for the estate arose upon the death of Adam Thomson Mure. Mr. M'Culloch, conceiving that the exclusion of heirs portioners was an absolute and general exclusion applicable to the separate destinations, as well as to the undivided succession, took out a brieve for serving himself heir of tailie and provision to his uncle in the whole lands of Glenquicken, as being the son and representative of Margaret Mure's eldest daughter. The other parties also, conceiving that the exclusion did not so apply, took out a brieve for serving themselves, without any reference to the fetters of the entail, as heirs portioners of provision to Adam Thomson Mure in these lands. The question between them came finally to be tried in a mutual advocacy of brieves; and in the end, the Court decided in favour of the right of the heirs portioners to succeed, finding that they were "preferable, and entitled to be served heirs portioners of provision under the settlement of the said Robert Mure of Glenquicken," and to this judgment they adhered, upon a reclaiming petition and answers.

MURE
 v.
 MURE
 and others.

18th May 1838.

The appellant, conceiving himself entitled to hold the lands of Livingston free from the fetters of the entail, raised an action against the heirs substitute for having it found that he had right to the lands in fee simple, on these two grounds:—1st, that the fetters were applied only to the united estates, and not to the estates when separated; and, 2d, “ the said tailzie in favour of the
 “ heirs lawfully procreate of the body of the said Jean
 “ Muir, being a tailzie, upon heirs portioners, or not
 “ excluding heirs portioners, and therefore implying
 “ the division of the tailzied lands and estate, and con-
 “ sequent inefficacy of the said tailzie, is not a tailzie,
 “ as authorized by the said statute (1685), affectable or
 “ affected with irritant and resolute clauses, and
 “ whereby it shall not be lawful to the said heirs pro-
 “ created, of the body of the said Jean Muir to sell,
 “ analzie, or dispone the said lands, or any part
 “ thereof, or contract debt, or do any other deed
 “ whereby the samen may be apprized, adjudged,
 “ or evicted from the other substitutes in the tailzie, or
 “ the succession frustrate or interrupted; that the pur-
 “ suer having succeeded and made up titles to the said
 “ lands and barony of Livingston, and others under the
 “ foresaid tailzie conceived in favour of the heirs pro-
 “ created or to be procreate of the said Jean Muir’s
 “ body, which, as aforesaid, is not legally affectable or
 “ affected by the foresaid conditions, provisions, de-
 “ clarations, and clauses irritant and resolute, is
 “ consequently, as proprietor and in right of the said
 “ lands, barony, and others contained in the said dis-
 “ position and deed of tailzie in fee simple, entitled to
 “ do, exercise, and perform every act and deed, faculty
 “ and power relative thereto, in the same manner in all

“ respects as if he were proprietor thereof in fee simple,
 “ or as if the said conditions and provisions, and clauses
 “ irritant and resolute, were not contained in the said
 “ disposition and deed of tailzie ; or at least, he is en-
 “ titled to do, exercise, and perform such acts and
 “ deeds, faculties and powers, as the Lords of our coun-
 “ cil and session shall find to be competent to and in
 “ the power of the pursuer.” And he concluded
 accordingly.

MURE
 v.
 MURE
 and others.
 —
 18th May 1838.

The Lord Ordinary, on the 12th November 1836,
 pronounced the following interlocutor :—

“ The Lord Ordinary having considered the revised
 “ cases for the parties, productions, and whole process,
 “ assoilzies the defenders from the conclusions of the
 “ libel and decerns ; finds no expenses due.

“ *Note.*—Anciently it was the law of Scotland, as it
 “ was of most of the other states of Europe which
 “ adopted the feudal system, that when all the heirs
 “ expressly called to the succession of lands in the
 “ grant or charter to the vassal had failed, the fee
 “ returned to the superior, or failing him and his
 “ heirs, to the crown. To prevent that rule from
 “ taking effect, a clause was early introduced in this
 “ country, as matter of style, by which all grants were
 “ made to terminate by a limitation to the heirs and
 “ assignees whatsoever, either of the grantee or of some
 “ other person suggested by him. After strict entails
 “ were authorized by statute, an attempt was made to
 “ convert this clause to a different purpose from that
 “ for which it was intended, the remoter heirs what-
 “ soever of the entailer maintaining that it imposed
 “ the fetters of the entail on the nearer heirs whatso-
 “ ever. But the attempt was successfully resisted, as

MURE
 v.
 MURE
 and others.

18th May 1838.

“ the clause was plainly intended not to be a nomi-
 “ nation of heirs of entail under the restrictions of
 “ the deed, but merely to let in heirs general to the
 “ exclusion of the fisc. Among other arguments to
 “ prove this, it was observed, that if the clause in
 “ question had been intended to prolong the entail,
 “ heirs portioners would have been excluded, for it is
 “ inconsistent with the nature and object of an entail
 “ that the estate should be exposed to unlimited divi-
 “ sion, by which the representation of the family by
 “ an individual is destroyed.

“ But the present case is of a totally different nature.
 “ The clause which gives rise to this question is a
 “ distinct substitution, expressly confined to the heirs
 “ of the body, and followed by the clause of style to
 “ heirs whatsoever, which indicates that then, and not
 “ till then, it was the intention of the entailer that his
 “ entail should come to an end. The fetters, there-
 “ fore, must be effectual, unless, 1st, they are not
 “ imposed in apt and legal terms; or, 2dly, unless
 “ they are applied to persons incapable of being so
 “ fettered. No objection is made to the terms in
 “ which the prohibitory, irritant, and resolute clauses
 “ are expressed; they are framed in the usual and
 “ appropriate style. But there are two classes of sub-
 “ stitutes called in this clause,—heirs male of the body,
 “ on whom the fetters may be imposed, and heirs
 “ portioners of the body, on whom they cannot be
 “ imposed; for, as has just been observed, it is incon-
 “ sistent with the nature of a strictly entailed fee that
 “ it should be vested in heirs portioners. The con-
 “ clusion, therefore, is, that as long as the first class of
 “ substitutes, that is, heirs male of the body, remains

“ unexhausted, the tailzie is good, and as soon as the
 “ succession opens to heirs female of the body, heirs
 “ portioners not being excluded, the estate becomes
 “ a fee simple.

MURE
 v.
 MURE
 and others.

18th May 1838.

“ The ingenious argument of the pursuer rests upon
 “ the obvious fallacy of confounding the last limitation
 “ or clause of style, to which a special rule applies,
 “ with a preceding substitution, to which effect must
 “ be given according to the ordinary principles of
 “ entail law. In the clause of style, heirs, whether
 “ male or female, are not fettered, because it was not
 “ intended to fetter either the one or the other. In
 “ the prior substitution heirs female are not fettered,
 “ whatever the intention may have been, because in
 “ the character of heirs portioners they cannot be
 “ fettered. The precedents on which the pursuer relies
 “ do not touch the question. In the cases of Cassels
 “ and Leslie the action was brought to enforce the
 “ entail against the last substitute by parties called
 “ merely under the clause of style. Thus also in the
 “ case of Watt; by the failure of Robert Watt, and
 “ the heirs male of his body, the substitution to his
 “ heirs and assignees whatsoever, that is, to these
 “ called by the common clause of style, opened; and
 “ it was in the character of heirs under that clause
 “ exclusively that the defenders in that case attempted
 “ to enforce the tailzie against Henry. In the present
 “ case the defender, James Ochterloney Mure younger,
 “ is called by an express substitution, and not by the
 “ clause inserted to exclude the fisc. He is capable
 “ of being fettered, and may be succeeded by a series
 “ of heirs male with the same capability.

“ It is thought unnecessary to take notice of the

MURE
v.
MURE
and others.

18th May 1838.

“ pursuer’s argument, that the entailer did not mean
“ to continue the fetters after the succession divided.
“ The words are too express to admit of that construc-
“ tion, and more particularly the clause with regard
“ to bearing the name of the entailer.

“ No expenses have been found due, because this
“ appears to be the first case which the precise ques-
“ tion at issue has been tried; and it is a family suit,
“ rendered necessary from the inaccurate style in
“ which the settlement has been framed.”

To this interlocutor the First Division of the Court adhered, on the 16th of February 1837.

Mure appealed.

Appellant.—¹ The substitution under which the appellant is called is not a substitution which is capable of being brought under fetters at all, inasmuch as it is to “ the heirs of Jean Muir’s body ” generally, without any exclusion of heirs portioners, or any departure from the order of law.

Every entail is, in its essential character, a deed whereby the legal course of succession is cut off, and an arbitrary one substituted in its place. For an entail is not created by the mere imposition of fetters and restrictions, these being only the machinery or the accessory helps employed in order to constitute a valid entail under the provisions of the statute. They have been found, in the course of legal experience, necessary

¹ An argument was maintained that the fetters did not apply to the estates in their divided form; but as it was founded on special clauses, and not much relied on, it is not reported.

for securing the granter's purpose of transmitting his estate unimpaired to the series of heirs whom he has favoured; but the entail itself, as the term clearly denotes, and as is further proved by the definitions given of it by all the institutional writers, is nothing more than a destination to others than the heirs at law.

MURE
v.
MURE
and others.
—
18th May 1838.

All the authorities, whether before or after the statute 1685, concur in representing a certain departure from the legal course of succession as an essential element in the idea of an entail. And though, no doubt, the statute itself takes no notice of this characteristic of the deed, but simply declares "that it shall be lawful to his Majesty's subjects to tailzie their lands and estates, and to substitute heirs in their tailzie, with such provisions and conditions as they shall think fit," yet an entail at common law is a deed altering or cutting off, in some part, the legal course of succession; and a statutory entail is just the same deed, aided in its operation by the assistance of irritant and resolute clauses for the enforcement of the prohibitions.

But while there is nothing to prevent the making of an effectual entail upon the "heirs of a man's body," in their order, by providing a constant exclusion of heirs portioners throughout the whole course of succession, it is obvious that without such exclusion there can be no entail: first, because there is no departure from the ordinary course of law; and, secondly, because the admission of heirs portioners, by exposing the estate to unlimited division, is altogether inconsistent with the notion of a settlement of this description. Whatever other deviation, therefore, an entailer may choose to make from the line of legal succession, this is one which is indispensable in order to give his deed the character of an

MURE
v.
MURE
and others.
—
18th May 1838.

entail, if his destination be taken to “ heirs of the body.” Supposing a party were to destine his estate, under the fetters of an entail, to his eldest son, and the heirs of his body generally, whom failing, to his second son, and the heirs of his body, and so on to all the members of his family in their order, with a like general substitution to their descendants respectively, and the whole destination terminating with the usual clause, “ to the granter’s own nearest heirs whomsoever,”—there can be no doubt that a court of law, if called upon to judge of the validity of such a deed, would hold it to be altogether inoperative as an entail,—even in the person of the party first succeeding, though that might happen to be the eldest son, or any other heir male; both because it is not, in form, a tailzeing or cutting off of the legal course of succession, and because, in effect, it exposes the purposes of the entailer to immediate frustration. The same consequences would, of course, attach to a destination to “ heirs of line,” or to “ heirs at law” generally, or to any other class of heirs so comprehensive as to admit heirs female to the succession. But if this be true in the general case of a whole destination conceived in favour of heirs at law in their order, it must be equally true when the question arises, as it does here, with regard to any particular branch of the destination which is conceived in the same general terms.

It is an established rule of law that an entailed estate becomes a fee simple in the person of the last substitute, failing whom, it is provided to devolve upon heirs whomsoever; the chief, if not the only reason of the rule so laid down being, that that class of heirs includes heirs portioners, by whose admission the estate would be exposed to division. Nor is it necessary, in order to

give place for the operation of the rule, that the succession shall, de facto, have opened to heirs portioners; but it is enough that that part of the destination has been arrived at, which admits of the possibility of their succeeding, and the last proper substitute has it in his power to bring a declarator for ascertaining his own freedom from the fetters, even though he should see that the first of the heirs whomsoever is a male or a single female, in whose person the estate would be preserved entire.

Among "heirs whomsoever," it is manifest there is no more immediate risk of the succession of heirs portioners than there is among "heirs of the body," the contingency being just as likely to happen in the one case as in the other; and as, in a substitution to "heirs whomsoever," the actual succession of heirs portioners is never waited for in order to render the entail inoperative, so neither ought the occurrence of that event to be waited for in the case of a substitution to "heirs of the body," which admits the same danger in precisely the same degree. It is, therefore, no answer to the appellant's claim for exemption from the fetters, to say that he is a male heir, and that there is a prospect of his being succeeded by other males, or by single heirs female without the intervention of heirs portioners, since that is an objection which might, with equal force, be urged against the claim of the last substitute, or even of the heir whomsoever, in every case where heirs portioners were not actually in existence. Here, indeed, the appellant is not in the situation of last substitute, failing whom, the estate is to go to a class of heirs among whom heirs portioners are included, but he is in a condition even more favourable than that for having

MURÉ
v.
MURÉ
and others.
—
18th May 1838.

MURE
 v.
 MURE
 and others.

18th May 1838.

his freedom from the fetters declared, for he is already in the substitution by which heirs portioners are as directly called as he himself is. Under the general substitution to the “heirs of Jean Mure’s body,” he has succeeded simply because he was her nearest heir in the line of descent, and not at all because he chanced to be a male.

Respondents.—In the present case the question does not relate to a substitution to Jean Mure and her heirs and assignees whatsoever, and still less to a last substitution in an entail to the nearest heirs and assignees of the entailer. It is a special destination to Jean Mure, and the heirs procreated or to be procreated of her body. It is thus a destination to her, and the heirs of her body in their legal order; and it calls them all in that order just as effectually as if it had been broken down into separate classes. Although it is true that a last substitution to the heirs and assignees of the granter operates as an extinction of the entail, yet it bears no similarity to a special destination to a particular individual and the heirs of his body. In the one case it is irreconcilable with the clauses of an entail, and can only receive effect by holding that the entail is at an end. But the other is an ordinary substitution, by which a particular class of heirs is introduced, though under a very general form of expression; such heirs, however, being always under the fetters of the entail as much as any of the other who are called to the succession under a more restricted clause of destination. The respondents, as the son and daughter of their father, are, in their order, equally called to the succession under this general form of substitution as the appellant. They are two of the

heirs of the body of Jean Mure, to whom, in their order, the estate of Livingston has been conveyed. It was for the preservation of the estate to them, and to those who may succeed them as heirs of their bodies, that the fetters were imposed. They have a jus crediti that entitles them to insist on the enforcement of the fetters. Hence, the appellant can never maintain that the entail is at an end in his person, because, as coming after him, and having an interest to enforce the conditions of the entail, the respondents have a right to require that the estate shall be transmitted to them without dilapidation.

The accidental circumstance of the entail admitting of being defeated on a certain contingency can never render the deed void before that contingency has occurred.

LORD CHANCELLOR.—My Lords, the question in this case arose in an action of declarator, the appellant, the father, seeking to have it declared against the defender, his son, that he was entitled to hold certain estates free from the fetters of a deed of tailzie of 30th June 1757. The owner of the estate had one son and two daughters. The limitations were to his son Adam and the heirs male of his body; whom failing, to the heirs female of his body and the heirs male of their bodies, the eldest heir female always succeeding without division, and excluding heirs portioners; whom failing, as to part of the estate, in favour of his daughter Jean and the heirs of her body; whom all failing, to his own nearest heirs and assigns whatsoever; and as to the other part of the estate, to and in favour of his other daughter Mar-

MURE
v.
MURE
and others.

18th May 1838.

MURE
 v.
 MURE
 and others.
 —
 18th May 1838.

garet, until Adam, her second son, attained twenty-one, and then to him and the heirs of his body; whom failing, to the heirs of the body of Margaret; whom all failing, to his own nearest heirs and assigns whatsoever.

Adam, the settlor's son, died in 1802; whereupon Jean possessed the portion of the estate settled upon her; and she died in 1811. She had a son, who died in her lifetime leaving a son, the pursuer; and the principal defender is the son of that son. The pursuer contends that he is entitled to hold the estate discharged of the fetters upon two grounds: First, that the fetters were not, by the provisions of the deed, imposed upon those who might be called to the succession after the failure of the descendants of the body of Adam the son, it not being disputed that they are in due form imposed upon Adam and the heirs male and female of his body; that is, that upon the true construction of the deed of tailzie the intention to impose them upon the daughters and their issue is not to be inferred, or is not sufficiently expressed: Secondly, that if it be held that such intention is sufficiently expressed, then it must fail by operation of law, because, as the limitation is to the heirs of the body of Jean, without any restriction to the eldest heir female, without division, the succession might open to heirs portioners, as to whom the fetters cannot apply, and that they are therefore inoperative as to all claiming under the destination.

The Lord Ordinary decided against this claim of the pursuer, which was adhered to by the Judges of the Inner House, and I concur in that decision, upon both grounds. The first point does not appear to have been much relied upon or to have been

thought of much weight below. It is not disputed that the daughters and their descendants are included in the clause respecting the name. In that clause the settlor speaks of Adam Mure and the whole heirs of tailzie descending of him. He then speaks of the heirs descending of the bodies of his daughters and the other heirs of tailzie, and then speaks of the heirs of tailzie above mentioned. From this it is clear he described the descendants of his daughters as heirs of tailzie, a term most properly applicable to them. If, therefore, in the other clauses he speaks of heirs of tailzie, he uses a term correctly describing the descendants of the daughters, and in which it is shown that he included them ; but in the other clauses the terms used are, “the whole heirs of tailzie above mentioned,”—“any of the heirs of tailzie above mentioned,”—“any others of the heirs of tailzie foresaid.” So far, then, it would be impossible to raise a doubt of the intention to include the descendants of the daughters in those clauses.

MURE
v.
MURE
and others.

18th May 1838.

But it is said that some of the provisions are not applicable to the state of the property after the division between the families of the daughters, as to the estate of the heirs portioners who might be called to the succession. And to show the strictness with which clauses enforcing fetters are construed, those cases were referred to in which it has been decided that the institute cannot be bound under the description of heir of tailzie, and that other parts of the deed cannot be resorted to for the purpose of showing that the settlor intended to include him under that description. Those cases appear to me to be essentially different from the present. In those cases the terms used do not properly

MURE
 v
 MURE
 and others.
 —
 18th May 1858.

describe the institute; and if he were to be bound, he would be so under terms not applicable to him, for inferences are drawn from other parts of the deed that the settlor intended to include him. This inference the strict rules of construing such deeds forbid; but in this case the most appropriate description is used, and the attempt is, from other parts of the deed, to raise a construction contrary to the obvious meaning of the words used, and thereby to lead to a conclusion that the settlor did not intend to include the descendants of the daughter in the clauses, although he has used words which in terms include them. But do the provisions relied upon raise any doubt as to the intention to include the descendants of the daughters in those clauses? I think not. Certainly, terms might have been used more appropriate to the situation of the parties, and to the state of the property, after failure of the descendants of the son Adam; but in all attempts in one sentence to provide for a variety of events and a different position of parties, there is great probability that the expression will not be found correctly to apply to all the circumstances which may arise. I do not, however, find any such inconsistency in any of the provisions, or any such inapplicability to the state of things, after the division of the property between the families of the daughters, as to raise a doubt in my mind of the settlor's intention to include the descendants of the daughters in those clauses. I find, therefore, apt terms used to include them, and no sufficient inference, arising from other parts of the deed, that it was not the settlor's intention that they should be so included.

The question remains, whether, though included in

these clauses, they can be bound by the provisions of them? That is, are the clauses, and the fetters intended to be imposed by them, inoperative against heirs of tailzie who might have been bound, because the denomination includes a description of them, namely, heirs portioners, who, if called to the succession, would not be so bound?

MURE
v.
MURE
and others.

18th May 1838.

In support of this proposition no authority has been cited which appears to me at all applicable. The case of the Earl of March v. Sir Thomas Kennedy, the passage from the third book of Erskine, tome 8, section 32, the cases of Leslie v. Dick, Morrison 15,358, and Henry v. Watt, Shaw and Dunlop, were quoted; but those authorities only prove that the ultimate limitation to heirs, or heirs and assigns whatsoever, is not considered as part of the entail; and that those who claim under such ultimate limitation, therefore, are not entitled to enforce the fetters of the entail against the last heir of tailzie; who, consequently, is entitled to hold the estate, as against them, discharged of the fetters. And those decisions furnish authorities very inconsistent with the doctrine contended for. They assume that the entail to any denomination of heirs may be good as to all others, although the fetters may become inoperative as to some one of the denomination, if he should prove to be the last of the entail. Why, then, is the entail in the present case to be bad as to all the denomination of heirs? Because, possibly, some of the denomination, namely, heirs portioners, may be called to the succession who would hold the lands discharged from the fetters.

In the passage from Erskine, the possibility of heirs portioners becoming entitled under the general de-

MURE
 v.
 MURE
 and others.

18th May 1838.

scription of heirs whatsoever, is used only in an argument to prove that there was no intention to include such heirs in the entail; but that cannot apply where the denomination in which they may possibly be found is expressly included in it.

In the absence, therefore, of all authority in support of the doctrine contended for, and with so much of principle and analogy against it, I cannot hesitate to concur in the decision that the Court of Session have come to in holding, that as between the parties litigant the provisions and restrictions of the deed of tailzie are subsisting and in force. I do not, however, think that this is a case in which the appeal should be dismissed with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors and note therein complained of be and the same are hereby affirmed.

A. M'CRAE—HAY and LAW, Solicitors.