COCHRANE ET AL., ... APPELLANTS.
BAILLIE, ... RESPONDENT (*a*).

1857.
9th, 10th, and 12th March.

Entail, Deed constituting.—A charter of resignation, having the provisions and restrictions of an entail at length, but proceeding on a procuratory which contained them only by reference, does not constitute a binding entail.

Obligation to entail.—An obligation to make an entail, followed in the same instrument by a procuratory defective in itself as an entail, though meant to constitute one, affords no ground for an action to have a valid entail executed.

A disposition of lands taken to the heirs, and under the restrictions of an entail of other lands, but not setting forth the restrictions at length, affords no ground for an action to have a valid entail executed.

Prescription.—Whether an obligation to execute an entail, contained in a deed by which the succession to the estate is regulated, although the entail itself was never executed, can be extinguished by the lapse of the years of prescription, *Quære.*

Defective Entail: Bar to a valid one.—An entail good *inter hæredes*, but bad against creditors, is a bar to the execution by the heir in possession under it of a new deed of strict entail.

Lord Rutherfurd's Act.—An entail good *inter hæredes*, but bad against third parties, is made void to all intents and purposes by the Stat. 11 & 12 Vict. c. 36.

Semble, that an action of declarator of nullity under the 11 & 12 Vict c. 36. in such a case is unnecessary.

Parties.—Remarks by the Lords as to making unnecessary Defendants, and suggestions for an Act of Sederunt.

BY his marriage contract of 1703, William Baillie bound himself to resign and take the destination of his

(*a*) Reported at length in 17 Court of Session Reports, Second Series, 659.

COCHRANE ET AL. v. BAILLIE.

whole estates to himself and his heirs male, whom failing his heirs female, without division; whom failing, to such persons as he should appoint by bond of taillie, disposition, or destination, and under such provisions, conditions, and restrictions as he should think fit; whom all failing, to his heirs whomsoever.

In 1707, the said William Baillie executed a deed of strict entail of his estate of Lamington, which entail was admittedly valid, and infeftment was taken upon a charter of resignation obtained from the Crown upon this deed.

William Baillie had no sons. In 1715, on the marriage of his eldest daughter, Margaret, to Sir James Carmichael, of Bonnington, he became a party to the marriage contract; and in consideration of the provisions made by Sir James, he bound himself to make some alterations in the provisions of the entail of Lamington in favour of his daughter, in virtue of a power of alteration it contained; and also, "under the conditions, reservations, burdens, provisions, and clauses irritant contained in the tailzie and settlement of the estate (of Lamington), except in so far as altered by this present settlement, and under the other reservations, burdens, and conditions particularly after specified, to provide his whole other lands, fortune, heritage, and estate in favour of his said daughter" and Sir James Carmichael, in liferent; and to the heirs of the marriage, the eldest heir female secluding heirs portioners; whom failing, to his own heirs of tailzie after mentioned, "and for that effect to make, grant, subscribe, and deliver sufficient dispositions and conveyances of his said fortune and estate, containing procuratories of resignation, precepts of seisin, and other clauses needful." The deed then went on to bind himself and his daughter to resign their whole

lands in favour of the heirs, and under the conditions, &c. after mentioned, "which are appointed to be contained in the instruments of resignation, charters, infeftments, retours, and others to follow hereupon, and for that effect," they granted procuratory in the usual terms of the lands of Lamington, and also of those of Hyndshaw and Watstown, which had not been included in the Lamington entail, the same being held of a subject superior. But the conditions and restrictions of an entail were not set forth at length in the procuratory; the only clause referring to them being the following:—"Providing always, like as it is hereby specially provided and declared, that the heirs, as well of this marriage as others succeeding in the said estate, by virtue of this and the other rights and settlements thereof, shall be always subject and liable to the conditions, restrictions, provisions, limitations, and clauses irritant specified and contained in the foresaid charter of tailzie (of Lamington), and which are herein held as repeated *brevitatis causâ*."

The Lamington entail of 1707 was recorded in the register of tailzies in 1726, after the entailer's death. But the deed of 1715 was never recorded. It remained personal till 1779, when Lady Ross Baillie, the aforesaid William Baillie's great granddaughter, succeeding to the estates in virtue of it, obtained a charter of resignation of the lands of Hyndshaw and Watstown, proceeding upon the procuratory it contained. In the charter were set forth at length the conditions and provisions of the Lamington entail, with the alteration made in the deed of 1715. Infeftment was taken on the charter, and the sasine also contained these conditions at length.

In 1722 William Baillie had purchased the lands of Wiston. The disposition was taken to himself and a series of heirs substantially the same as those in the

COCHRANE ET AL. v. BAILLIE.

destination in the entail of Lamington and the marriage contract, and "under the restrictions, limitations, clauses irritant, &c. contained in the said entail." Seisin was taken in similar terms, and the succeeding heir made up feudal titles, referring to, but not setting forth at length the conditions, &c. of entail. But in 1792 Lady Ross Baillie, for the first time, included these conditions *expressivé* in a seisin following on a precept of clare. This seisin also contained the conditions, &c. of a deed of strict entail of her whole lands, including Lamington and Hyndshaw and Watstown, as well as Wiston, which Lady Ross Baillie executed in 1789. This deed bore to be in terms of the Lamington entail, but was in some respects different from it, particularly in reserving to Lady Ross Baillie power to alter the succession, to sell, or to contract debt. It was recorded in the register of taillies, but except in the seisin of Wiston it was not referred to in any subsequent title deeds of any part of the estates.

On Lady Ross Baillie's death in 1826, the next heir of her estates was Sir Charles Ross, of Balnagown. But he being already in possession of the estates of Balnagown, under an entail, the provisions of which as regarded the bearing of name and arms were incompatible with those of the deeds regulating the succession to the Baillie estates, his younger brother, the Pursuer of this action, obtained decree of irritancy against him, and entered into possession of the latter estates. He made up his title under the decree, and set forth in the infeftment of the lands of Hyndshaw and Watstown the conditions and provisions of the entail of Lamington, as altered by the deed of 1715; and in the infeftment of Wiston, the conditions and provisions of the entail of Lamington, and also of the entail of 1792.

The action was brought to have it found and declared that as regarded the lands of Hyndshaw and Watstown the marriage contract of 1715 was not a good entail under the Statute of 1685; and that therefore the lands were subject to the debts and deeds of the Pursuer in terms of 11 & 12 Vict. c. 36. s. 43. or at least that the deed of 1715 was not sufficient to protect the estate from sale or contraction of debt; and as regarded Wiston, that the disposition of 1722 was not a good entail in consequence of defects in the investiture following thereon; and Lady Macdonald Lockhart instituted a counter action, concluding to have it declared that the deed of 1789 was a valid entail of the whole lands; that the Defender Mr. Cochrane Baillie should be ordained to make up his title under it.

The *Lord Ordinary* (Rutherfurd) decided in favour of the Pursuer in the first of these actions, and for the Defender in the second; thus finding in effect that there neither was a valid and existing entail of any of these lands, nor a subsisting obligation to make an entail. The Second Division of the Court of Session having unanimously affirmed this judgment, the present appeal was brought against their decision.

Mr. *Anderson* and Mr. *Boyd Kinnear* for the Appellants. The deed of 1715 is admitted by the Respondent to be a valid entail *inter hæredes*, but they maintain that on the authority of a series of decisions (*a*) it was invalid against creditors, from containing the prohibitions by reference only, instead of setting them out *ad longum*. But the intention of the 11 & 12 Vict. c. 36. was only that where an entail was

(*a*) *Broomfield* v. *Paterson*, M. 15,618; *Lindsay* v. *Aboyne*, 4 Court of Sess. Rep., 2nd Ser., 843; *Cathcart* v. *Gammel*, *ante*, vol. 1, p. 362.

COCHRANE ET AL v. BAILLIE.

defective in some particular, which made it a bad entail alike against heirs and creditors, the heir in possession might have it declared invalid *in toto*. To hold that where it was confessedly good *inter hæredes*, but bad as against creditors, the Statute came in to set it wholly aside, would be to introduce a new principle—a principle which would make every unrecorded entail, every unfeudalised entail, nay, every destination with prohibitory clauses merely, utterly worthless, even amongst the heirs themselves.

But there was still the question, whether the standing investiture of the estates did not make a good entail against all parties? As to Hyndshaw and Watstown, the case of the Appellants was not, as the Respondents desired to make out, rested on the deed of 1715 solely, but it rested on the deed of 1715 taken together with the charter of 1779. The deed of 1715 contained a procuratory, which, as containing the conditions of entail by reference only, might be admitted to be invalid. But the existence of that procuratory did not bar the granting of another procuratory, which might contain the conditions at length. That point was expressly settled by the House in *Renton* v. *Anstruther* (*a*). Therefore in the present case the validity of the charter of 1778 was unimpeachable, for it proceeded upon a good procuratory; and although it contained more minute provisions than the procuratory did, it contained none which, on the principle of that case, were not validly inserted.

Where was the authority for holding that entails could not be constituted by charter? The case of *Irvine* v. *Earl of Aberdeen* (*b*) was cited on the other side as establishing this, but it really established no more than that the original entail, in whatever form it might be, was that which must be recorded. Here

(*a*) 2 Bell, App. Ca. 214. (*b*) M. App. v. Tailzie, No. 1.

the charter was actually the original deed, and therefore was that which the Act 1685, c. 22. required should be recorded. It was true, in fact, that the charter had not here been recorded, but it was in the power of any heir substitute of entail, however remote, at any time to present a petition to compel its registration, and that right being inherent in the entail, could, not so long as possession was had under it, be worked off by prescription (*a*).

Then there was the unexecuted obligation to make a valid entail contained in the marriage contract of 1715. This obligation was in a highly onerous deed and perfectly unambiguous in its terms; and the Court had in several cases recognised the principle that there might be a valid obligation to possess under an entail, although no deed of strict entail was in existence (*b*). The case of *Lawrie* v. *Spalding* had often been referred to, but never overruled. There the deed was a mere disposition in general terms to the heirs, and under the conditions of an entail of other lands. Yet the Court set aside even a sale by the heir in possession to a third party, and found that the estate must be held according to the intention indicated in the disposition. In *Fraser* v. *Lovat* (*c*) the Court ordered an entail to be made to carry out the intention, and this House affirmed the decision. The rule, therefore, was that where an intention plainly appeared the Courts would compel execution.

The cases of Broomfield, Lindsay, and Cathcart did not contradict this rule, but only established along with it the other, viz., that if not merely intention was indicated, but an actual attempt made to carry it

(*a*) Ker, 7th July 1804, F.C.; Nairne, M. 15,605.

(*b*) *Lawrie* v. *Spalding*, M. 15,612; *Fraser* v. *Lovat*, 1 Bell, App. Ca. 105; *Carmichael* v. *Carmichael*, 15 November 1810, F.C.

(*c*) 1 Bell, App. Ca. 105.

COCHRANE ET AL. v. BAILLIE.

out, and a deed executed professing to be an entail, its validity must stand or fall by its own correctness.

It was said that there was an actual attempt to execute an entail in the procuratory which the deed of 1715 contained. But that was only inserted for the purpose of enabling a charter to be obtained, without having recourse to an adjudication in implement, and as it did not prevent a fuller procuratory being afterwards granted, or a fuller charter being otherwise obtained, it was impossible to say that it discovered the limits of the intention of the granters.

The last objection to the validity of the existing obligation was that of prescription; on that head, however, the Judges of the Court of Session had been much divided, and the majority inclined to the opinion that it was not a sufficient objection. The cases of *Murray* v. *Ramsay* (*a*), and *Cunningham* v. *Cunningham* (*b*) established that where possession was had under a certain deed, the obligations which it contained could not be got rid of by prescription. The case of Porterfield (*c*) was different, for there had been no possession at all under the deed which contained the obligation, but on the contrary, an adverse possession. In the present case, the possession had all along been under the deeds of 1715 and 1722, for they were the only foundation of the right which the eldest heir female had exercised of excluding heirs portioners; they had been all along referred to in the title deeds, and their conditions had been the sole ground of the declarator of irritancy against the brother of the Respondent, in virtue of which he possessed the estates.

If, however, there had been here no valid entail prior to 1789, the entail executed by Lady Ross

(*a*) 17 January 1811, Fac. Coll.
(*b*) 14 Court of Sess. Rep. Sec. Ser. 1065. (*c*) Morr. 10,698.

Baillie in that year was impregnable. It had been recorded, and regularly feudalized as far as Wiston was concerned, and might still be feudalized as regards Hyndshaw and Watstown on the application of the heirs substitute; *Maxwell* and *Maxwell* (*a*), *Lumsdaine v. Balfour* (*b*). No prescription had barred this right, for the entail was expressly revocable during Lady Ross Baillie's life, and therefore not capable of being made the subject of an action, and she did not die till 1817.

The arguments against the validity of this deed were founded on the case of *Urquhart* v. *Urquhart* (*c*.) That case decided that a party holding an estate under an entail could not add to the fetters of the entail. But in the view of Lord *Cowan* there was here no holding under an entail, for he held that the deed of 1715 gave a *jus crediti* only to the immediate heirs of the marriage, no stronger than every marriage contract gives, and that the immediate heirs not having exercised that right, it could not pass to their successors. If this were true, the deed could not be dealt with as an entail; which, however imperfect, gives to the remotest substitude a *jus crediti*. If that *jus crediti* did not exist, there was no entail to bar the execution of a new one. If, on the contrary, there was a *jus crediti*, that established the existence either of an entail or of a binding obligation to make one, and in either case the judgment of the Court of Session must be reversed.

The *Attorney General* (*d*) and Mr. *Rolt* for the Respondents: We admit that the deed of 1715 constituted a good entail *inter hæredes*, but the cases of Broomfield and others following on it have made it

(*a*) 21 June 1808, Fac. Coll.
(*b*) 13 June 1811, Fac. Coll.
(*c*) *Suprà*, vol. 1., p. 289.
(*d*) Sir R. Bethell.

COCHRANE ET AL. v. BAILLIE.

perfectly clear that it is bad against creditors. This, then, is exactly one of the cases referred to in Lord Rutherfurd's Act (*a*), the object of which was to enable an heir in possession, when by circuitous means he could break through an entail, to break through it by direct means. This point was considered and expressly decided in *Urquhart* v. *Urquhart* (*b*).

Then the deed of 1715 being ineffectual as an entail, could it be made into a good entail by the subsequent charter? This could not be, for a procuratory is a power of attorney to get a charter, and will not warrant a charter in any other terms than those in the procuratory. But the Act 1685, c. 22. distinctly requires that the procuratory shall be recorded, and if not recorded the entail is void. This was also the point fixed in *Irvine* v. *The Earl of Aberdeen*. Here the procuratory was invalid as an entail, and therefore there were no possible means of afterwards making it a good one. But yet being good *inter hæredes* until Lord Rutherfurd's Act was passed, it was sufficient on the principle laid down in *Urquhart* v. *Urquhart* to prevent a new entail being made with additional fetters, and was therefore an effectual bar to the validity of the entail of 1789. Nor was this a good implement of any obligation under the deed of 1715, for it was contrary to any such obligation. It set Lady Ross Baillie herself free from the fetters of that obligation, and at most imposed them on those who were to succeed herself. She thus assumes that she was fee simple proprietor, the only title, indeed, under which she could have right to make an entail at all. But she was wrong in this, for she was bound by the former deeds as regards the heirs, and therefore her attempt was ineffectual.

(*a*) 11 & 12 Vict. c. 36. (*b*) *Suprà*, vol. 1, p. 289.

On the question of obligation in the deed of 1715, it was plain that it could at most apply only to Hyndshaw and Watstown, for Wiston was afterwards acquired—and the deed of 1715 applied in its terms only to *acquisita* and not to *acquirenda*. But as regards the former estates, there are four distinct answers to the alleged equity to have it performed:— 1st, the Statute 11 & 12 Vict. c. 36, gives no countenance to such an equity. Being introduced for the purpose of giving facilities to the setting aside of defective entails, it is impossible to maintain that it could have introduced an equity to have a defective entail made a good one. 2nd, the decision in *Cathcart* v. *Gammel* is contrary to any such equity. The deed of 1715 was not an executory deed, but itself defined and contained the deed by which its purpose was to be executed. It was accepted by all the parties as a complete feudal conveyance, and therefore, being not an effectual entail, there is no equity remaining to have another made. 3rd, the claim here is brought against the heir of the marriage in possession, not against the heir of line on whom any obligation incurred by his ancester would really have descended. As against the heir of the destination, the only equity is, that he must permit the estate still to flow down the channel through which he has received it. If that channel be imperfect, the equity only extends to have it preserved as it is, but does not go to have a new and perfect one made. 4th, prescription has extinguished any such equity, if it ever existed.

[Lord ST. LEONARDS: I observe that there are here no less than 163 persons called as defendants. That is a great abuse or a great defect of the law.]

Mr. *Anderson:* My Lord, it is not usual now to call in such cases more parties as defendants than the heirs who might consent to a disentail. Before Lord

COCHRANE ET AL. v. BAILLIE.

Rutherfurd's Act, the practice was to call all the substitutes in existence.

[Lord ST. LEONARDS: It is a very bad practice, and ought without delay to be altered.]

[The LORD CHANCELLOR (*a*): In looking over this list of names one finds a number of one's own friends, who can have no possible interest in the case. Cannot the Court of Session pass an Act of Sederunt to remedy this practice?]

Mr. *Anderson:* My Lord, in this case the greater part of the parties reside out of Scotland, and therefore, being cited edictally, the expenses will be very small. None of them entered appearance except the immediate heirs.

[Lord ST. LEONARDS: Yes, but when a man is served with a summons, he at all events generally goes to the expense of consulting his solicitor to see what it is about. I can only say that if the present state of the law makes such an abuse necessary, no time should be lost in altering the law.]

[Lord WENSLEYDALE: Cannot the Court of Session regulate it by Act of Sederunt?]

Mr. *Anderson*: I do not know, my Lords, if they would consider themselves to have power to do that. Any of the substitutes have a right to appear in such an action.

Lord ST. LEONARDS:

Lord St. Leonards' opinion.

My Lords, with the permission of my noble and learned friend (*b*), I will state very shortly the grounds upon which I arrive at an opinion in this case. I must say that I think Mr. *Anderson* has argued the case remarkably well in his reply, and has certainly met

(*a*) Lord Cranworth.

(*b*) The Lord Chancellor ordinarily leads in giving judgment, but in this instance Lord St. Leonards was called away, and therefore gave his opinion before the Lord Chancellor.

every point fairly with the means which he had before him. But I am clearly of opinion that the decision of the Court below was right. I think there is not a point in the case which is not concluded by the decisions of this House, unless it be the question last argued arising upon the obligation.

The settlement of 1715 is admitted to be defective as regards the Statute of 1685. That point was clearly settled by the case of *Irvine* v. *Lord Aberdeen*, and is not now open for discussion. It was a very good settlement in itself; and we have seen that the estate has been enjoyed under it ever since 1715. There is nothing therefore the matter with the settlement *qua* settlement; but as far as fetters were attempted to be placed upon the estate under the Statute of 1685, there was a defect in the registration which rendered those fetters inoperative, in so far as they sought the aid of the Statute; and without the aid of the Statute they were null and void.

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

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

Then, as regards the other point, the case of *Urquhart* v. *Urquhart* is equally conclusive; and, there-

COCHRANE ET AL. v. BAILLIE.

Lord St. Leonards' opinion.

fore, those points upon which the legal validity of the prohibitory, irritant, and resolutive clauses depends are, in point of fact, all concluded by that decision.

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

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

Then comes the question upon the supposed obligation in the settlement, which is called (and properly enough) the contract of 1715, and Lord Rutherfurd's Act. And again, in the way in which Mr. *Anderson* has put it, whether, supposing an obligation to be found to exist, there is, independently of Lord Rutherfurd's, Act, a performance now to be had of that existing obligation, I see nothing myself in the settlement of 1715 which bound future estates. When a man talks of all his estate his property at that period, he cannot mean future property, although in this country, where there is a settlement which includes all a man's property at the time, if he never

acquires anything afterwards, but he attempts to deal with the property in such a way as to avoid his obligations; if, for example, he lays out personal estate bound by the settlement in the purchase of real estate, the Court will hold that that real estate is subject to the settlement, because it was bought with money which was bound by the settlement. But here, speaking now of the Wiston estate, there is nothing to show that the Wiston estate was an after-acquired estate in the sense in which we view the contract. But even if it were, for the reasons I have stated, a title could not be made out by the Appellant.

Now, as I understand Mr. *Anderson*, he says that there were two contracts in the settlement of 1715. He says that there is a contract to provide the lands to the series of heirs called, and afterwards there is a contract to resign the lands in favour of these heirs, and he says that there is no performance of that contract, because it does not go far enough. Independently of the argument upon the general question, the point arises, whether upon the settlement of 1715 this case does or does not come within Lord Rutherfurd's; Act I do not myself see where a doubt can arise. I am not now speaking of the obligation, the last point argued; but I am speaking of the general taillie. I do not see where a question can arise. I have read the Act very often, and I have been reading it over and over again now, and I cannot raise any question upon it. The whole of it amounts to this, that if there is a defect in any of the prohibitions of the settlement then the settlement shall be wholly ineffectual and void, because the heir of entail, or the substitute, is at liberty to deal with the estate as if it were his own. Here is a case in which the settlement is good. There is nothing the matter with the settlement; the settlement is a good settlement, according to the law of Scotland, but it is not a good settlement as regards

COCHRANE ET AL. v. BAILLIE.

Lord St. Leonards' opinion.

those perpetuity clauses, which alone are authorized by the Statute of 1685. And then Lord Rutherfurd's Act amounts to this, that instead of being compelled to take the circuitous course of selling, for example, in order to get rid of the settlement, if there be in those prohibitory clauses an omission which renders any one of them inoperative, the whole settlement shall be at the mercy of the heir of entail. Here is a case which, in my opinion, taking the whole together, falls directly within the Act of Parliament; and, therefore, the Act of Parliament ought to have full operation.

But then it is said, and I think with very great reason, that Lord Rutherfurd's Act could not affect a positive contract. I am not prepared to say that it could. If there was an actual and independent contract, it would require further consideration before I would venture to say that that was my opinion. But I cannot find a contract in the sense in which it has been here put forward in argument, that is to say, a contract going beyond that which was actually executed between the parties. And it would be rather a strong thing to say, after 140 years' possession under a settlement, and a very good one, all the heirs in succession enjoying the estate according to the settlement, that it is now found out that that settlement was not effectually made, and that you want something further. In point of fact, I have no doubt that the settlement did everything which the parties at that time meant to do. They meant to do exactly what they have performed, for this reason. At the time that settlement was executed it was not doubted that by the law of Scotland you might, by references to proper clauses in another deed, create an effectual entail. It was not till long afterwards that it was settled that you could not by reference create proper

prohibitory clauses with irritancy and so on. And, therefore, in point of fact, the parties made the exact settlement which they meant to make. Subsequent decisions have given to that which they did perform a meaning which may or may not have been in their minds, but they meant to do exactly what they did do, and if parties in settling an estate have used apt words as the law then stood, it is not because a subsequent train of decisions has given to those words a different interpretation, and the estate therefore would be of different quality or of different extent, that you can therefore call upon the heir substitute in possession to give to those words the operation of creating an estate tail, which the law has subsequently said is not the true operation of those words. You cannot do that, but you must take the settlement as you find it, subject to all the accidents which may arise from the decisions of the Courts.

But I do not find in the settlement of 1715 anything approaching to what I may call an independent contract. They first speak of what they intend to do—to provide the lands. Then they go on, still speaking of what they intend to do, to resign the lands; and then when they come to the operative part, to implement that, observe the very words used. They say, "And for that effect" they do so and so. "That effect." What do those words mean? Those words clearly mean to carry into operation that which is to have "that effect." And they proceed to do what? They proceed to do all that they could do at that time. Mr. *Anderson* says that there are no words of disposition. He does not mean to deny that that charter of 1715, and what followed, operated as a positive transfer of the estate. That is perfectly clear law. Therefore what they do is as valid a conveyance of the estate, by the law of Scotland, as any form or

COCHRANE ET AL. v. BAILLIE.

Lord St. Leonards' opinion.

forms could possibly accomplish. Then they have executed their own purpose. Remember, that if this contract was an independent contract in point of fact, then supposing the estate had been sold and the money spent,—you might, in the way in which it has been argued, have a right of action against the original settlor, and say, You did not settle the estate as you ought to have done under your contract. Here am I, B; I come in succession after A. In consequence of your making an informal deed, A has sold the estate, and has spent the money, and I am disappointed in that which I was entitled to receive. Therefore I bring an action against you. That, if it was an independent contract, would be right enough. It is not merely that you can come upon the estate and say that those who took the estate were bound to take it *cum onere*, and therefore they must make a settlement of it; but you would have a right to bring an action, which would not be barred by time, if it was a continuing contract,—a contract of assurance for example; you would have a right to bring an action against the party for not having done that which he undertook and covenanted to do.

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

There being no independent contract, it is the common case of a marriage settlement. I have never seen a marriage settlement (and I have seen as many

as most people in the course of my life), which did not begin with the recital that the parties had agreed to make a settlement of the property herein-after mentioned. And then they proceed to do it. This is no more than that, and they have done it ineffectually, that is, they have done it ineffectually for the purposes which the Act of 1685 did not give power to effect, unless in a particular form. They thought they had accomplished it, but they have not done it, and therefore the settlement is gone.

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

Upon these grounds, which I have stated very shortly, I beg to move your Lordships that this Appeal be dismissed.

Mr. *Attorney-General*: My Lord, we do not ask for any costs.

Lord *St. Leonards*: I am very glad to hear it. I am afraid that we must have given them strictly if they had been asked. But it is a point open to great difficulty, as it is a family cause. Therefore, I beg to move your Lordships that the Appeal be dismissed.

The LORD CHANCELLOR:

My Lords, I am extremely glad to have heard the opinion of my noble and learned friend who is not able to stay longer in the House. He has really, together with the judgments which have been de-

COCHRANE ET AL. v. BAILLIE.

Lord Chancellor's opinion.

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

In the first place, with regard to the Hyndshaw estate, the title to that arises out of a contract under the date of 1715. Now, as to that, the title of the present Respondent is a title as heir substitute in possession under an entail validly created by that deed, infeftments or feudalisation not having followed for sixty years afterwards, namely, in the year 1774 or 1775. But the title being now completed, he is the heir substitute in possession; and he being heir substitute in possession, then the question is,—What are his rights as heir substitute in possession? Has he a right to sell the estate? Has he a right to burden it with debts? Why not? The heir substitute in possession can burden the estate with debts, or can sell it unless he is prohibited by fetters properly introduced to restrain him from doing so. Now that he is not restrained by fetters properly introduced for restraining him, is quite obvious from looking at the terms of the Act of 1685, which expressly provides that those fetters must be in terms stated in the procuratory. Here they are not stated in the procuratory, and therefore there are no fetters restraining him from selling the estate or burdening the estate with debts. If there are no fetters restraining him from selling the estate, or burdening the estate with debts, he is free from all fetters, and all restraint by the express terms

Lord Chancellor's opinion.

of the Statute called Lord Rutherfurd's Act, passed in 1848, to the very terms of which I have again referred, in consequence of Mr. *Anderson's* very able argument in reply. But I confess that that argument has failed to raise in my mind any doubt whatever upon the subject. The words of the Statute are (reading them shortly), that where any entail shall not be valid and effectual in the terms of the Act of 1685, in reference to prohibitions against alienation and contraction of debt, in consequence of defects either in the original deed of entail or of the investiture following thereon, if it shall be invalid and ineffectual with reference to any one of such prohibitions, it shall be invalid and ineffectual with reference to all the prohibitions (*a*). The argument of the Appellant is that there is no invalidity in the original deed; but I think there is, because in the original deed there were not contained in the procuratory of resignation that which it was necessary it should contain in order to create an effectual entail. Therefore I think this case comes precisely within the terms of that Act, and certainly within the manifest intention of it.

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

Then with regard to the Wiston estate, the case is exactly the same. The fetters there were created by the deed of 1722 (subject to what I will presently

(*a*) Section 43.

COCHRANE ET AL. v. BAILLIE.

Lord Chancellor's opinion.

state about the contract), which did exactly the same as the other deed. That deed was not feudalised till some years after the other, I think in 1792. But the present Respondent is in just the same position with respect to the Wiston estate as with respect to the other estates; he is heir substitute in possession, under a deed which makes him the heir substitute, but which creates no valid fetters, and therefore he is entitled to dispose of the estate as he thinks fit.

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

Then the other point raised is this. Conceding, as things now stand, according to the deeds that have been made, and the infeftments which have followed thereupon, that the title of the Respondent would be good, yet it is said that there was an onerous contract

by the deed of 1715, which in equity, as we should say in this country, binds the successive owners to make a good entail, even if the entail is bad. Now, my Lords, upon this point I adopt entirely the observations of my noble and learned friend, that, first, with regard to the estates of Hyndshaw and Watstown, the two estates included in the deed made in 1715, it is quite clear that there was no contract to do more than was actually done. The parties recite that they have agreed to do so and so, and in order to effect that, they appoint certain procurators, who are to carry into effect their intention, in the mode that prevailed in Scotland. But the contract has ceased to be a contract, because it was *ipso facto* by the very deed itself performed. They contract to do that which, as my noble and learned friend has observed, they did perfectly, except that probably the intention of the maker was to do something more than he there did. A valid deed was created, and by that deed the parties must be bound. I therefore think that it is quite clear that there was no contract at all, except that which was actually performed.

Now with regard to the other property, the Wiston property, I speak with more hesitation, because I think the opinion of the majority of the learned Judges below seems to have been that there was a contract to settle lands *acquirenda* as well as *acquisita*. If that had been a necessary point to decide, I confess I should have required a little more time to consider it; because (speaking certainly with diffidence according to my present impression) I do not think that was the intention of the parties at all. And I am confirmed in that, by observing that in the settlement actually made in 1722 of the Wiston estate, there is not an allusion to any such contract as binding this gentleman. It is merely that there is a disposition *mortis causâ* of

COCHRANE ET AL. v. BAILLIE.

Lord Chancellor's opinion.

Wiston, not because he was under an obligation to make such a settlement, but because he was minded to do so. I do not feel at all satisfied that there was any contract whatsoever to settle it, but if there was, I think the same observations apply to that as apply to the other estates, namely, that all that was meant to be done was that a similar settlement should be made as to lands *acquirenda*, as was there made as to lands *acquisita*. If that was the meaning, that was effectually done.

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

and learned friend, and I do not suppose he takes a different view of this point, he adverted to that which was quite sufficient to justify him in the conclusion at which he arrived; but independently of those considerations, I think that that view of the case taken by Lord *Cowan* is of itself quite sufficient to dispose of this case. I have therefore no hesitation whatever in concurring in the motion made by my noble and learned friend.

COCHRANE ET AL. *v.* BAILLIE.

Lord Chancellor's opinion.

Lord Wensleydale's opinion.

Lord WENSLEYDALE:

My Lords, I do not feel any difficulty in concurring with the recommendation of my noble and learned friend who spoke from the opposite side of the House, and my noble and learned friend on the woolsack, that your Lordships should affirm this judgment. After considering the very able arguments at the bar on both sides, and the extremely able exposition of the subject in the arguments of the learned Judges of the Court below, I must own that I cannot feel any reasonable doubt about the propriety of dismissing this Appeal.

In the first place, I think it seems to be admitted by all the learned Judges in the Court below that the attempts that have been made in this case to create an entail are void. The marriage contract of 1715 is void as against creditors and singular successors, because it does not comply with the terms of the Entail Act of 1685. That is a matter perfectly clear. It is not made better by the deed of 1774, because the true entail was the marriage contract of 1715. And if it be void as against creditors and singular successors, it is, I think, plainly by Lord Rutherfurd's Act void also as against heirs. Though Mr. *Anderson* has argued very strongly that that is not the meaning of the Act of Parliament, I take the meaning of the

COCHRANE ET AL. v. BAILLIE.

Lord Wensleydale's opinion.

Act of Parliament to be perfectly clear. The 43rd section of Lord Rutherfurd's Act says, "And no action of forfeiture shall be competent at the instance of any heir substitute in such tailzie against the heir in possession under the same, by reason of any contravention of all or any of the prohibitions." Therefore if this entail be void in consequence of not complying with the Act of 1685 with respect to creditors and singular successors, it is equally void with respect to heirs. That is the opinion which has been pronounced by the learned Judges in the Court below. That applies to the case of the lands of Hyndshaw and Watstown.

Then with respect to the lands of Wiston, the deed of 1772, which is the original deed, is equally void for the same reasons. Therefore I quite agree, upon the actual state of the title, that the entail is void.

Then we come to the strength of the argument urged by Mr. *Anderson*, that supposing that is so, still there is a contract contained in the marriage settlement of 1715 which binds all the future heirs of entail. I have very great difficulty in supposing that it could be an existing contract for the reasons assigned by my noble and learned friend on the woolsack at the conclusion of his speech. But it appears to me to be perfectly clear that in this case you cannot discover in the deed of 1715 any other contract than that which the parties have fulfilled. If there had been an independent contract and a covenant to settle the estate with a proper form of entail, then there would have been a considerable question, in the first place, whether that bound the successive substitutes, and secondly, whether it could be enforced after this lapse of time? I pronounce no opinion upon the last question, because I have very considerable doubt about it. If there is an actual covenant to settle an estate in a

Lord Wensleydale's opinion.

different mode from that in which it has been settled, whether that would be good as against positive or negative prescription is a matter upon which considerable doubt arises. My Lords, I think it wholly unnecessary to give any opinion upon that part of the case. The ground upon which I proceed is that there is not to be found within the four corners of the deed of 1715 any covenant whatsoever, except that which the parties have performed. There is no other covenant in it unless you say that in every deed constituting an entail which is void, there is an implied covenant to make an entail binding upon substitutes. That proposition cannot for a moment be maintained. I cannot see, after fully considering this case, that there was any other covenant whatsoever except that which the parties have performed. Therefore, even supposing that the heir of entail could be bound at all, I think it is quite clear that there is nothing which binds him in this case.

Interlocutors affirmed.

MAITLAND AND GRAHAM—CONNELL AND HOPE.