URQUHART, ... APPELLANT (*a*).

URQUHART AND HIS ELDEST SON, . RESPONDENTS.

The opinion of Lord Justice-Clerk Macqueen, that a person holding an estate under an entailing deed is at liberty to do every thing with it which he is not by the instrument expressly interdicted from doing, held to be erroneous.

The instrument under which he takes, though not in all respects perfect, will be the measure of his dominion, and the law of his enjoyment. Hence he cannot alter the order of succession or impose new fetters on those who succeed him.

Where an heir of entail has erroneously made up his title under an instrument which he subsequently finds to be invalid, he is not thereby precluded from instituting proceedings to have it set aside, and to have the proper instrument established.

Menzies v. *Menzies*, (the Culdares case), Haile's Rep. 969, approved.

The 43rd section of the 11 & 12 Vict., c. 36, commonly called "Lord Rutherfurd's Act," is not retrospective.

In general, Courts of justice will be slow to ascribe a retrospective operation to any statute.

1853. 11*th*, 14*th*, *July*.

ON the 22nd February, 1847, Beauchamp Colcough Urquhart brought an action in the Court of Session for the purpose of reducing a deed of entail made in 1825, as containing fetters unwarranted by the original entail of 1753.

The defence was: 1. That the Pursuer had ratified the deed which he sought to set aside by having made up his title under it. 2. That the maker of the deed of 1825 was entitled to do all that the original entail did not

(*a*) Sec. Ser., vol. xiii. p. 742.

interdict him from doing; and that as he was not prohibited from imposing new fetters he had liberty to do so.

The Court of Session decided in favour of the Plaintiff, thereby reducing and setting aside the deed of 1825 as ultra vires. Hence this appeal.

Mr. *Rolt* and Mr. *Kerr*, for the Appellant. The *Solicitor-General* (Sir *Richard Bethell*), and Mr. *Anderson*, for the Respondents.

The arguments and authorities appear fully from the following opinions.

The LORD CHANCELLOR (*a*):

Lord Chancellor's opinion.

James Urquhart being heir of entail in possession of the lands of Meldrum and others under a contract of marriage of his parents made in the year 1753, and being subject to the fetters of such entail, and to no others, and those that were to come after him being as substitutes also subject to those fetters, and to no others, he took upon himself, in the year 1825, to execute a new deed creating more onerous fetters.

Under the original instrument the parties who were to succeed from time to time to the estates thereby entailed were under no restriction as to mortgaging or disposing of these estates, and under no restrictions as to the incurring of debts. But, by the deed of 1825, James Urquhart declared that it should not be in the power of any of the heirs succeeding to the said estate "to sell, alienate, underset, impignorate or dispose the same or any part thereof, either irredeemably or under reversion, or to burden or affect the same;" and he restrained them from contracting debts or doing any act civil or criminal which might affect the property; and, my Lords, those new restrictions were duly fenced by proper irritant and resolutive clauses.

(*a*) Lord Cranworth.

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After the death of James Urquhart the person who was next in succession, both under the marriage contract and under the deed of 1825, made up his title under the latter. That was done in the year 1836; and after discovering, it would seem, that he had taken a title in a more onerous way than he need have done, he instituted the present action of reduction and declarator to get the deed of 1825 set aside, in order, as we should say in this country, that he might be "in of his better title."

Now the first question for consideration is, what was the effect of this deed of 1825? And here I must confess that I was struck in the course of the argument with the remark of Lord *Braxfield* (*a*) in the case of *Menzies* v. *Menzies* (*b*), that when a party is in such a situation that he may absolutely dispose of an estate, —may he not be held capable of doing something less than absolutely disposing of it? But I cannot help feeling the infinite force of what is said in some of the subsequent cases; that whatever was the origin of the rule, or whether the law was wise or unwise, it would be indeed much to be deplored if Courts—particularly if your Lordships' House—consented to set aside a course of decision, and an understanding of the law, which has prevailed now for more than seventy years. In *Menzies* v. *Menzies* the party in possession as heir of entail sought to do two things:—to alter the destination, and to impose new fetters. His right to do so was very much discussed. There was another question, whether he was an institute or a substitute? The Court of Session eventually held that he was an institute and not a substitute, and consequently not subject to the fetters of the entail; and therefore the law which would have been applicable to a substitute was not applicable

(*a*) Afterwards Lord Justice-Clerk Macqueen.
(*b*) Haile's Rep. p. 969.

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to him. That case was brought by appeal to your Lordships' House, and it seems to have been here argued for three days; the point of appeal was upon the decision that he was an institute and not a substitute. The House remitted the case to the Court of Session in order to have that question further investigated (*a*). If this House had not been satisfied, that as a substitute Menzies had not the power which as an institute he had, they never would have so remitted the case. Therefore I think the judges of the Court of Session treated that as a decision of what was understood by them as being the law of the ultimate Court of Appeal.

But subsequently, in 1825, arose the case of *Meldrum* v. *Maitland* (*b*), in which (the same question, or nearly the same question, having been agitated) the Court of Session said "We did not expect that this point would ever have been raised again." Then came, in the year 1828, the case of *Lord Fife* v. *Duff* (*c*), in which exactly the same question arose. There the party who was entitled as tenant in tail took on himself to endeavour to alter the course of succession, and to endeavour to impose new fetters. And it was held that he could do neither. I cannot but rely on the opinion of Lord *Gillies*, in that case—an opinion which seems to contain so much good sense, and which so distinctly lays down the rule.

(*a*) Journals, 30th June, 1801. Lord Eldon, C., and Lords Thurlow and Rosslyn present. Upon hearing counsel, &c., upon an appeal from an interlocutor of 24th June, 1785, in so far as it is thereby found that James Menzies, of Culdairs, was not an heir of entail, but a disponee, and therefore had power to make the deed of 1773,—Ordered and adjudged that the cause be remitted to consider whether James Menzies, being nominated an heir of entail by the first part of the deed, although made a disponee or institute by the second part thereof, was not comprehended in the prohibitory irritant and resolutive clauses.

(*b*) 5 Sh. & Dun. 796.

(*c*) 6 Sec. or New Ser. 696.

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Lord Chancellor's opinion.

It appears to me that these cases completely settle the question; and that the principle is *this*, that the entail is the law of enjoyment.

In truth what was attempted to be done in this case would in effect have imposed a new order of succession.

But it was argued that in this particular case there were circumstances that took it out of the general rule. It was said that the party who succeeded made up his title under the new entail, and not under the original contract of 1753. There are abundance of authorities, *Gardner* v. *Gardner* (*a*), many others, which show that the mere circumstance of making up a title under a particular instrument does not preclude the party afterwards from having recourse to a better title.

The doctrine of homologation was next relied upon, but I think equally without good foundation.

But it was contended that the late statute (*b*) had a retrospective operation, and applied to this case; although the transactions to which the suit relates were all prior to the passing of that Act, and the case was actually pending in Court twelve months before it had received the Royal Assent.

Now here, as a general proposition, I think it right to say that although, no doubt, cases may arise in which Parliament will enact retrospectively (*c*), yet *primâ facie* such retrospective legislation is not to be presumed; and great injustice would often be occasioned by it. Courts of justice consequently are slow to hold that Parliament means to act retrospectively on the rights of parties; and they will not so hold unless the language be such as to leave no doubt upon the subject.

(*a*) 9 Sh. & Dun. 138.

(*b*) 11 & 12 Vict., c. 36, entitled "an Act for the amendment of the Law of Entail in Scotland;" commonly called "Lord Rutherfurd's Act."

(*c*) See *Kerr* v. *Marquis of Ailsa*, *infrà*.

The terms of the 43rd section of the Act are:

That where any tailzie shall not be valid and effectual in terms of the Act of the Scottish Parliament, passed in 1685, in regard to the prohibitions against alienation and contraction of debt and alteration of the order of succession, in consequence of defects either of the original deed of entail, or of the investiture following thereon, but shall be invalid and ineffectual as regards any one of such prohibitions, then and in that case such tailzie shall be deemed and taken, from and after the passing of this Act, to be invalid and ineffectual as regards all the prohibitions (*a*).

It is asked, what will be the construction if you stop there? I am not at all clear even if the section had stopped there, that the entail would have been invalid and ineffectual as regards all prohibitions with reference to past transactions. But we must not stop there. The section goes on to say:

And the estate shall be subject to the deeds and debts of the heir then in possession, and of his successors, as they shall thereafter in order take under such tailzie. 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.

If you construe this retrospectively, you will be defeating the intention of the Legislature, because you cannot be secure that the party then in possession would have any rights at all,—for you may set up a transaction prior to him. Indeed I do not know to what extent the argument might not go—but it might very easily be carried so far as to defeat that which is expressly declared to be the object; namely, to give rights to the party then in possession. I think, therefore, that there is not only nothing in the language of this Act that necessarily leads to the construction that it was to be retrospective in the sense which the

(*a*) The marginal note of this section is: "Entail defective in any one prohibition, to be bad as to all."

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Appellants contend for, but that the Act would be violated by being so construed.

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

The Lord BROUGHAM:

Lord Brougham's opinion.

My Lords, I take exactly the same view of this case as my noble and learned friend. I have no doubt whatever that the decision of the Court below ought to be affirmed at once, both on the ground of the preliminary objection as to the homologation, and also upon the merits.

It appears to me that some doubt has arisen upon the import of the decision in *Menzies* v. *Menzies*. It is said that there were two matters there in the supplementary deed of entail attempted to be defeated; that there was in the first place an alteration in the order of succession; and secondly, that new fetters were sought to be imposed. Now this may have been so; but how has that case always been considered? In *Meldrum* v. *Maitland*, the Court clearly put the construction on it as if it were a general decision against the power of the heir to avail himself of his freedom. We find it also so considered in the case of *Lord Fife* v. *Duff*—distinctly so considered by one of the learned Judges, Lord *Gillies*. I think Lord *Gillies* must have taken that case from what he understood to be the opinion of the profession regarding it, and I think Lord *Balgray* takes the same view. In the case of *Lord Fife* v. *Duff*, an attempt made to alter the order of succession was resisted and overruled; but mark the grounds on which it was overruled. It was overruled on no other ground than that which would apply to the present case and to every case of an attempt to impose new fetters.

Lord Brougham's opinion.

There is, running through the argument on the other side, the idea that in respect of the supposed freedom of any heir from fetters as to selling, he may, in respect of that freedom, impose new fetters, so as to further the intent of the maker of the entail. I take that view of the subject to be at the bottom of all the opinions of one class of those learned persons, of the inclination of opinion in others, and of the doubts in a third class.

Now, with the greatest possible respect for the authority of those most learned and eminent Judges, Lord *Braxfield* and Lord *Eskgrove*, particularly on all questions of a feudal nature, I do take leave to say that this idea of theirs rests upon an erroneous foundation—that an heir of entail is free except in so far as he is tied up. He is free to do what? He is free to deal with the property, he may sell it, he may exchange it, he may impignorate it, he may contract debts which will affect it—and the consequence, no doubt, may ultimately be that the entail may be put an end to. But it does not at all follow that he, without altering the estate, (so to speak, borrowing an English phrase) or varying the interest which he has himself under the entail—he can make a new law, which shall change the position of all those coming after him. It is the same in this country. Thus suppose—in an English case—the intention of the settlor or devisor to have been quite clear that I was to take an estate for life only, but that by law I took an estate tail, could I, by deed, without suffering a recovery, make a new settlement with the view of executing his intention? Most undeniably I could not.

My Lords, I agree with my noble and learned friend with respect to the doctrine of homologation, and also upon the construction of the 43rd section of the Entail Amendment Act.

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Lord St. Leonards' opinion.

The Lord ST. LEONARDS:

I entirely agree with what has been stated by my noble and learned friends.

Upon what is called the great point, namely, whether or not James Urquhart had a right to place new fetters upon the estate, I cannot admit that it is open to doubt. All that I can collect is this—that the views which were originally entertained by two very learned Judges (*a*), have again been brought forward at a distance of seventy years, in order to prove that all the opinions of the other Judges, both at that time and ever since, are to be disregarded, and that we are now to act upon doubts, which in 1785 were rejected by the rest of the Court.

Administering Scotch law, we must take it in general as we find it in the Scotch Courts; and if we find that for three quarters of a century the Scotch Courts have agreed upon a given point, it would certainly not be right for this House to reverse it, and establish a new rule of property. Nothing could be more dangerous.

Having heard all the arguments which have been addressed to your Lordships, and having paid great attention to them, I am, as I have been from the first, clearly of opinion that there is not any ground whatever for the impeachment of the rule as laid down in the Court below.

But, my Lords, looking at this particular case, it appears to me, as I suggested to the learned counsel for the Appellant, that the order of succession is really attempted to be altered by the deed of 1825. There is a difference in the limitations. And the ultimate remainder, as we should call it, is to the party himself, and not to the person to whom it was originally given in 1753.

Can it be said that taking away the power of sale

(*a*) Lord Justice-Clerk Macqueen and Lord Eskgrove.

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from a man who has entered under the original entail, is not a change in the destination? How would the succession lie? If the party taking under the entail of 1753 had remained with these powers, he could have sold the estate. What would have become of the estate then? Under the conveyance it would have gone to the purchaser.

As regards the homologation, upon which so much stress is laid in the papers, I am clearly of opinion, my Lords, that there was no homologation.

Now the last and the only point is that upon the Act of 1848. That again, I think, is not open to the least discussion; I cannot admit that there is any doubt whatever upon the construction of that statute. If you read only one half of that section you may perhaps raise a doubt; but if you do what you should do, which is to read the whole of the section, it admits of no doubt, because the deeds and the debts of the person in possession at the time when the Act came into operation, and of the successor are made good as against the successor, but not a word about predecessor. So that I think it is quite clear upon the grounds stated, without further argument, that the construction put upon the section by my noble and learned friend, ought to prevail (*a*).

Interlocutor affirmed, with Costs.

(*a*) See *Kerr* v. *Marquis of Ailsa*, *infrà*.

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