[25th *April*, 1845.]

COLVILLE GEORGE COLVILLE, ESQ., *Appellant*.

ANDREW COLVILLE, ESQ., *Respondent*.

Tailzie.—It is so settled, that, when an entailed estate comes into the possession of the last member of the entail previous to heirs whatsoever, the fetters are evacuated, that the House refused to hear an argument, whether the the character of the particular heirs whatever called in this case made any distinction between it and the cases on which the rule is founded.

IN 1727, Robert Lord Colville executed an entail of his lands of Crombie in favour of himself and the heirs male, lawfully "to "be procreate of our body, and the heirs of their bodys; which "failing, to the heirs female lawfully to be procreate of our body, "and the heirs of their bodys; which failing, to Robert Ayton, "our nephew, eldest lawful son of the second marriage of Sir "John Ayton of that ilk, deceased, procreate betwixt him and "Dame Margaret Colville, Lady Ayton, our eldest sister, and "heirs male of his body, and the heirs male of their bodys; "which failing, to the heirs female to be procreate of the heirs "male of the said Robert Ayton, his body, and the heirs of their "bodys; which failing, to Andrew Ayton, our nephew, second "son of the second marriage of the said Sir John Ayton, and "the heirs male of his body, and the heirs male of their bodys; "which failing, to the heirs female to be procreate of the heirs "male of the said Andrew Ayton, his body, and the heirs of "their bodys; which failing, to the heirs female to be procreate "of the said Andrew Ayton, his body, and the heirs of their "bodys; all which failing, to our own nearest heirs and assig-"nees whatsoever, heritably and irredeemably, but with and

"under the burden of the provisions, conditions, limitations, "clauses irritant, and reservations after mentioned, which are "appointed to be insert in the charters, seisins, services, retours, "and infeftments." Then followed the fetters of entail.

In 1842 the appellant, as the nearest heir whatsoever of Robert Lord Colville the entailer, after the heirs female of the body of Andrew Ayton, and the heirs of their bodies, and assuming to himself the character as "consequently next heir of entail, failing "the heirs of the bodies of the said heirs female" under the entail, brought an action against the respondent, the grandson of a daughter of Andrew Ayton, and the person in possession of the lands of Crombie, to have it found that Andrew Ayton and his daughter had contravened the entail, and that thereby they and the descendants of their bodies had forfeited all right to the lands, and the appellant was entitled to the possession of these, as if Andrew Ayton and his daughter, or the descendants of their bodies, were actually dead.

The respondent pleaded among other defences that the appellant was not an heir of entail, and had no title to sue.

The Lord Ordinary, (*Murray*,) on the 25th January, 1843, sustained this defence, and dismissed the action; and the Court, on the 3rd March, 1843, adhered to his interlocutor. The appeal was against these interlocutors.

Mr. Turner and *Mr. Anderson* appeared for the appellant.—Mr. Turner, after reading the destination in the entail, was proceeding to shew in what respect it differed from that in the Earl of March *v.* Kennedy, *Mor.* 15412 and 15415, when the House, having caused a search to be made for the papers in that case, and procured the case for the appellant, stopped his further address, observing that the very point had been raised and decided by the House in that case, and again in Mure *v.* Mure, 3 *Sh.* & *McL.* 237, and that they could not allow the matter to be argued.

LORD CAMPBELL.—My Lords, in moving that the interlocutor

should be affirmed, I most exceedingly regret that the case should have been brought before us. I am sure I have a great respect for the Bar of Scotland. I do not know who signed this case, and I will not now inquire who signed it; but I do think that this honourable House ought to have some check upon these appeals. There is now a check which the House has interposed, —it requires the certificate of counsel, in whom we repose confidence, that it is an arguable question; and that certificate is intended to prevent vexation, and to prevent the perverse feelings of parties urging them to do that which they cannot sustain, and which must bring great expense upon themselves, and upon defendants; but in a case such as this, really your Lordships are without protection.

Now, in the law of Scotland or in the law of England, I believe there is no position better settled than this, that if there be a strict entail with proper fettering clauses, when the estate comes into the possession of the last substitute the fetters are at an end; and it is in his hands to operate as a simple destination, so that he may end it if he pleases; and it is only by his not exercising the power that the limitation with the general words comes into effect. That was determined in the year 1760 by the Court of Session, and it was declared so in your Lordships' House in 1838.

Now, if after a question of that sort has been so settled, at the end of seven years the very same question is to be raised here, it is not, I think, very respectful to your Lordships, and it is very mischievous to the parties concerned. I therefore must express my own individual hope, and I believe that my noble and learned friends agree with me, that there will be a little more caution in future exercised before these certificates are granted, to see that there is probable ground for arguing the case at your Lordships' Bar.

This, my Lords, is the third case within two days,—three successive appeals within these last two days at your Lordships' Bar,

in none of which have there been any probable grounds of argument. My Lords, the time of the House has been wasted, and the parties have been involved in useless expenses. I therefore, in moving that this interlocutor be affirmed with costs, throw out the suggestion which I have made, in order that it may be communicated in the proper quarter.

[*Mr. Turner.*—Your Lordship, perhaps, will allow me to make one observation.]

Lord Brougham.—No; you are not now at the Bar of the House.

Lord Campbell.—You cannot be heard now.

LORD BROUGHAM.—My Lords, in entirely expressing my concurrence in every observation that has fallen from my noble and learned friend, I do so with the utmost possible kindly feeling towards whoever signed these cases; but I say that it is the duty of the counsel to consider that it is not a mere matter of form. I am afraid, in signing certificates which are never in the hands of counsel themselves, but the draftsmen and the ingrossers, that they are apt to put their names to them as a matter of course. I consider that it is the duty of counsel not to put their names to a certificate, if there is no arguable point for us to consider. I think that it is a great grievance that we should have our time occupied by such an absolutely desperate appeal as this. The third case has been now before us, in which we have not called upon the respondent to say a word, being perfectly clear in each case in succession. We are bound by our own decisions upon the point, which, when you look into them, turn out to be on all-fours with the present, there is no specialty whatever in this case, we are therefore now called upon to hear our own decision re-argued. I entirely approve of the course which your Lordships have taken in refusing to hear this case. We have had two cases in which we have not called upon the respondent, and this, the third, is a case in which not only do we not call upon the respondent, but we do not hear the appellant himself.

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[*Lord Campbell.*—We are barred.]

LORD BROUGHAM. Nothing but an Act of Parliament can alter our previous decision. I find the judges in the Court below are of the same opinion; Lord Jeffrey, (than whom a more skilful, and ingenious, and learned Judge never existed,) says, that if he had been called upon to decide before the Cassilis case, he might have felt a doubt, but that he is bound by that and the other case. Now the Cassilis case is not a case of the first impression—the Leslie case was before it—and we have the authority of Lord Mc Kenzie, (that being likewise of great weight,) and we have the authority of Lord Stair—there is a word or two which may be supposed to qualify his opinion, but nevertheless he appears to have thought that the last substitute held the fee simple, and that the tail in fee was gone. We have, therefore, all these cases, and the opinions of text writers, and the authority of the learned Judges with that of the Lord President Dundas, and another Judge, who originally differed from the decision in the Cassilis case, but who came round and said, we are now bound by it because it is decided, and that being so, why should not the parties in this case be bound by it.

I therefore do hope, for the future, certificates will not be given as a matter of course, and that it will be seen that it is meant for a kind of protection for this House, otherwise this House will require other protection to prevent every one point being brought before it, for really these cases we have had to-day and yesterday go the extreme length. We shall next have an appeal from a decision on an action to obtain the payment of 100*l.* with interest upon a bill of exchange, (an undefended cause,) or from a decision that a man's eldest son has a right to the estate as heir at law; all these cases may be brought before us the day after to-morrow, for anything I know. I see no reason why we should not be told that these are arguable points.

My Lords, I entirely concur in the decision of my noble and learned friend, that this appeal be dismissed, and the judgment appealed from affirmed with costs.

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LORD COTTENHAM.—My Lords, I fully concur in all my noble and learned friends have said, and in the opinion that this appeal should be dismissed.

Although there appears to be no exact evidence of what took place in the Cassilis case, it appears to be universally assumed in Scotland to have decided this very point. Now it is impossible to distinguish the cases, and the learned counsel ought not to have allowed this case to come before your Lordships' House to review a point decided here eight years ago. One cannot understand it, there is no distinction between the cases, and it was no secret that the point had been disposed of, on the contrary, it was well known.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the Interlocutors therein complained of be affirmed with costs.

DUNN and DOBIE—DEANS, DUNLOP and HOPE, Agents.