THE HON. MISS NORTON, . . APPELLANT.
STIRLING, ET AL., ... RESPONDENTS.

1855. *May 1st, 11th, 14th, and 22d.*

Question of Registration under the Entail Act, 1685, *c.* 22 :—1. A deed of strict entail, whereby the maker, reserving to himself a liferent merely, calls to the succession in the first place his eldest son and the heirs male of his body, whom failing a series of other heirs. The deed is recorded in the Books of Session. Afterwards the maker presents a petition for authority to register the entail in the proper Register of Entails, but in such petition represents the entail as being *in favour of himself and the heirs male of his body*. Upon the ground of this error : *Objection* that the authority to register was bad, and that the registration pursuantly thereto was insufficient under the Act. *Objection overruled.*

2. In the resolutive clause were the words, "in case the "said J. S. shall fail, or neglect to obey or perform the "said conditions ;" but in the Register the words were different, being "shall fail *to* neglect *or* obey or perform." Reasoning upon which, this discrepancy *held immaterial.*

3. Under a power reserved, the maker of the entail revoked the nomination of an heir. *Objection* by a creditor of the heir in possession, that the deed of revocation was not recorded in the Register of Entails. *Answer*, that the heir displaced was an heir who could not have come in until *after* the heir in possession.

Held, by the Lord Chancellor, that the entail stood upon both instruments (the deed of creation and the deed of partial revocation), and therefore that both must appear upon the Register.

Dissent by Lord St. Leonards, agreeing with the Court of Session. Decision below consequently affirmed.

THIS case is fully reported in the second series of the Court of Session Cases (*a*). The question, one of con-

(*a*) Vol. 14, p. 944.

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veyancing, and extremely technical in its character, is stated with much detail by the *Lord Chancellor* (*a*).

The *Solicitor General* (*b*) and the *Dean of Faculty* (*c*) for the Appellants, cited *Broomfield* v. *Patterson* (*d*), *Lumsden* v. *Lumsden* (*e*), the *Hoddam case* (*f*), *Bontine* v. *Graham* (*g*), *Cathcart* v. *McLaine* (*h*), *Holmes* v. *Campbell* (*i*).

Mr. *Rolt* and Mr. *Anderson* for the Respondents, cited *Turnbull* v. *Hay Newton* (*k*), *Eglinton* v. *Montgomery* (*l*).

Lord Chancellor's opinion.

The LORD CHANCELLOR (*m*) :—

My Lords, this is an appeal to your Lordships from the decision of the Court of Session upon an action of Declarator, which was brought by Miss Norton, as holder of a certain security for 600*l.*; and the object of her summons was to charge the estate of Renton, in the hands of Sir Samuel Stirling, with the payment of that sum, upon the ground that he was the absolute owner of the estate, and that she, having this security, was entitled to charge it. He, on the other hand, contending that he was an heir, protected by a certain deed of entail, which he set up as rendering the estate not liable to the debts to which it might otherwise have been subject.

The summons of declarator states the title of this lady to the bond, which I need not go into; and then it states that Sir Samuel disputed the liability of his estate to the payment of this money, upon the ground that he held the estate as tenant in tail under a deed of entail created on the 28th of June 1788, which was recorded

(*a*) Lord Cranworth. (*b*) Sir R. Bethell. (*c*) Mr. Inglis.
(*d*) 29 June 1784; Morr. 15,618. (*e*) 2 Bell, 104.
(*f*) *Sharpe* v. *Sharpe*, Sh. & McL. 618. (*g*) 13 Sh. & D. 905.
(*h*) 8 Dunlop, 970. (*i*) 13 Dunlop, 689.
(*k*) 29 June, 1836; 14 Dunlop, 1031.
(*l*) Bell, App. Ca. 149. (*m*) Lord Cranworth.

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in the Books of Council and Session on the 29th of December 1789, and also recorded in the Register of Tailzies on the 5th of March 1790. The summons sets out the deed of entail at great length, whereby the then owner of the property, Sir Alexander Stirling, settled the estate, first, upon his eldest son, John Stirling, for life, and after the death of John Stirling upon the several sons of John Stirling in succession and the heirs male of their bodies, one of such sons being Samuel, who, upon the death of the preceding son, without male issue, succeeded to the property; and then failing these sons, the estate was limited to go to Mary Stirling, his eldest daughter, and the heirs whomsoever of her body, whom failing to Jean Stirling, the second daughter, and the heirs of her body, and then over to others. The settler and maker of the entail, Sir Alexander Stirling, reserved to himself, not only the liferent, but also "full power and faculty at any time in his life to revoke, burden, qualify, explain, or in any way to alter the said procuratory of resignation and deed of entail," and to make a new disposition instead.

The summons then states that the power thus reserved was exercised by Sir Alexander Stirling very shortly afterwards; for that upon the 21st of August 1788, he executed a deed, whereby he "revoked and recalled the said disposition and deed of entail," and declared "all hopes or chance of succession in the said lands and estate by the said Mary Stirling (she was the first daughter taking after the failure of all the sons) or the heirs of her body, in consequence of the destination in the said disposition or deed of entail thereof, frustrated and removed, and all sums of money or provisions or others, contained in said deed of entail or trust deed above mentioned, and which otherwise would have been payable to her or them, in no way

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exigible by the said Mary Stirling or her heirs, from him or his, all in the same manner as if no such deed had ever been executed in her or their favour." Then he makes certain provisions for her, which it is not material to consider.

The summons next goes on to state, "that the procuratory of resignation and deed of entail, and relative deed of revocation, have not been duly and validly recorded, and are not valid and effectual in terms of the Act of Parliament, 1685, chapter 22." Then it gives three distinct reasons, upon which it alleges that the registration of that deed was invalid.

The Lords of Session have held that neither of them was well founded; that the objections were all immaterial, and that consequently the entail was good, so that in their opinion the Pursuer had no case, and the Defenders were entitled to be assoilzied. Such was the decision of the *Lord Ordinary*, and that decision was confirmed by the First Division of the Inner House.

Now, my Lords, the first objection rests upon an alleged non-compliance with the terms of the statute of 1685. That statute "declares that it shall be lawful to His Majesty's subjects to tailzie their lands and estates, and to substitute heirs in their tailzies with such provisions and conditions as they shall think fit, and to affect the said tailzies with irritant and resolutive clauses, whereby it shall not be lawful to the heirs of tailzie to sell, annalzie, or dispone the said lands or any part thereof, or contract debt, or do any other deed whereby the same may be apprized, adjudged, or evicted from the others substitute in the tailzie, or the succession frustrate or interrupted, declaring all such deeds to be in themselves null and void, and that the next heir of tailzie may immediately, upon the contravention, pursue declarators thereof, and serve himself

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heir to him who died last infeft in the fee, and did not contravene without necessity anywise to represent the contravener." Then it goes on, "It is always declared that such tailzies shall only be allowed in which the foresaid irritant and resolutive clauses are insert in the procuratores of resignation," and so on; "and the original tailzie once produced before the Lords of Session judicially, who are hereby ordained to interpone their authority thereto, and that a record be made in a particular register book to be kept for that effect, wherein shall be recorded the names of the maker of the tailzie, and of the heirs of tailzie, and the general designations of the lordships and baronies, and the provisions and conditions contained in the tailzie, with the foresaid irritant and resolutive clauses subjoined thereto, to remain in the said register *ad perpetuam rei memoriam.*"

Now, the objection is, that the deed as to which the Lords of Session, in the language of the Act of Parliament, are ordained to interpone their authority to have it recorded, was not a deed corresponding in truth with the real deed, for that the order of the Lords of Session was that they ordained the deed of entail executed by Sir Alexander Stirling, of Glorat, Baronet, of the lands of Renton, lying in the shire of Berwick, in favour of himself and the heirs male of his body, whom failing, the other heirs and substitutes therein mentioned." Whereas, that was not a correct description of the actual deed, and, consequently, there was no valid authority for recording it. I think that that argument was hardly pressed eventually, and I must confess, that when the matter is looked into, it appears to me that it is an argument utterly untenable, and which it is hardly necessary to say much about, because the petition presented on the 2d of March, 1790, for interposing the authority of the Lords of Session,—the petition of

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Sir Alexander Stirling,—stated that he had executed a deed of entail of the lands there described in favour of himself and the heirs male of his body, whom failing, the other heirs and substitutes. Then it goes on to say "The petitioner on the 29th of December 1789 recorded the foresaid deed of entail and trust disposition relative thereto in the books of Council and Session;" so that the actual deed was recorded in the books of Council and Session. There it was; and there is no question as to the identity of the deed. And then the order was that that deed, the deed referred to in that petition, should be recorded. Supposing it is inaccurately described as a deed in favour of himself and the heirs male of his body, it is still capable of identification, being the deed which is ordered to be recorded in the books of Session, and is so recorded. And, therefore it seems to me to be, not a matter of inference, but capable of absolute demonstration, that it was the real instrument which the Lords of Session ordered to be recorded. I think therefore there is no weight whatever in that first objection, and, indeed, it was not much relied upon.(*a*)

(*a*) On the first objection (above considered by the Lord Chancellor) the Lord President M'Neill made, in the Court of Session, the following remarks:—"The authority to record the entail is a statutory requisite. But the form of the petition, and the other parts of the machinery for obtaining that authority, are not statutory. The statute merely requires the entail to be produced, and authority to be given; and it appears to me that there is evidence that this entail was produced, and that authority was given to record it. No doubt the deed is called in the petition a deed of entail in favour of the petitioner himself and the heirs of his body; and in the strict language of conveyancers this is not correct. But there were conditions in the deed in favour of the granter himself; and, therefore, although in strict technical language it was not a deed in favour of the petitioner himself, the expression was not altogether erroneous, or so clearly indicative of another deed as to come into competition with the evidence of identity which the proceedings afford."

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The next objection is one that was very much argued, but which upon full consideration I confess I think is equally without foundation. It is this:—It is said that the deed actually recorded is a deed in which the irritant clause is described as a clause which is to take effect, "in case the heir of entail shall fail to neglect or obey or perform" certain conditions; whereas in the deed it is "shall fail or neglect to obey or perform." And it is urged that the doctrine of the courts in Scotland, and of your Lordships' House, has always been to hold very strictly the necessity of accurately recording these deeds upon the Register of Entails, so as to give effect to the fetters of the entail, and that this is an important difference—that "failing *or* neglecting" to obey or perform, is a different thing from "failing *to* neglect or obey or perform;" and consequently that the real deed has never been validly recorded.

In support of this doctrine decisions were cited. There was the case of *Lord Eglinton* (*a*). In that case, in the prohibitory clause, there was a prohibition against "alienating redeemably or under reversion;" it was said that that must be a clerical error, because the common form is "irredeemably or under reversion," and it was said that the "ir" must have been left out, and that it was patent that it must have been a clerical error. Looking at it, and knowing the forms of conveyancing, one cannot help having a very strong conviction that that was a mere clerical error; but there was nothing nonsensical in the way in which it was actually written, and it was held by the Court of Session, and ultimately by your Lordships' House, that you could not put the two letters "ir" and make "irredeemably" of what was

(*a*) 2 Shaw, 425.

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written "redeemably:" that you had no power to alter it. It might be that that was what the parties meant, but there was a sensible meaning attributable to it, but it was not in conformity with what the deed really was, and therefore it was not a correct putting of that deed upon the Register of Tailzies.

So, again the case, which was argued, I think when Lord *Brougham* was Lord Chancellor, or in which he took a leading part—I think it is spoken of by the name of the *Hoddam* case (*a*). There in truth a whole line had evidently been left out, and it was said,—You see what the line must have been; you cannot but form a very strong conjecture what it was. But the noble and learned Lord held, and the House adopted the same view, that there were twenty ways in which the line might have been filled up quite sensibly, and although you might have felt it extremely probable that the way to fill it up was the particular mode pointed out, still that was not a matter which you could act upon, and therefore that again was a case in which the record was held bad.

But these cases having been so decided, nevertheless there were several others in which the doctrine of common sense prevailed, as it would always prevail, if you could see what the words left out must have been, or what the alteration is, if there is a difference between the record and the deed. In such case the difference becomes absolutely immaterial, and you have no right to pretend not to understand what it is impossible not to understand. Now that, I think, is the doctrine applicable to the present case, for here it appears to me that it is a mistake to say that there is any error in the irritancy at all, because the irritancy is that "in case the said John

(*a*) *Sharpe* v. *Sharpe*, 1 Sh. & McL. 594.

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Stirling or any of the heirs of tailzie, and provision succeeding to the said lands and others hereby tailed shall contravene the order herein-before written or the conditions, provisions, restrictions, or limitations contained in this deed of taillie or any of them." That is what creates the irritancy, doing any of these things; that is quite correctly copied in the terms of the deed. It is true that the framer of the deed goes on to do that which is mere surplusage, namely, to explain certain circumstances, which he says, will be contraventions "of the order herein-before written, or the conditions, restrictions, provisions, or limitations contained in this deed of taillie." "That is," he says, in his deed, "shall fail or neglect to obey or perform the said conditions or provisions or any of them." Now, I very much doubt whether, if that had been entirely left out of the register, it would have made any material difference in the deed, because it would only be that the register does not contain an explanation of something which the maker of the deed says will come within the description which has gone before. After all, the irritancy making void the deed must result from the previous passage in the sentence, namely, contravening or violating, or not obeying the conditions, restrictions, and limitations. And, therefore, I am strongly inclined to think that if the whole of that sentence—"shall fail or neglect to obey or perform the said conditions or provisions or any of them"—had been entirely left out, it would have been immaterial; because it is merely the enlargement or explanation of what had gone before.

Now, my Lords, let us see more closely what is the difference between the two. The words in the deed are—"shall fail or neglect to obey or perform the said conditions," and so on; in the registry they are "shall

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fail to neglect or obey or perform." If the words "or neglect" had been left out, it would have made no difference; failing to do a thing, of necessity includes neglecting to do it; neglecting to do it means, at least if there be any distinction, failing culpably, or not doing what you ought to do, not being sufficiently alive and alert, and so failing to do it. "Failing" is the generic word, and includes *inter alia* neglect; therefore, if instead of "fail or neglect to obey or perform" it had been "fail to obey or perform," it would have been the same thing, for that would have included the other, if the words had been left out. They were words which were necessarily included in the word "fail." But what is in the register: "shall fail to neglect or obey or perform." Now, you have fail to obey or perform, but you also have "fail to neglect;" that is insensible. It is just as if you had put any other transitive verb, because there is no meaning in failing to neglect the obligations imposed upon you. It is insensible, and therefore we must see whether that has not crept in *per incuriam*. Supposing we are not at liberty to say that it is merely a clerical transposition, it appears to me that it is capable of being treated as merely surplusage; because, in order to be rational, it must be a word which is a a possible illustration of what has gone before, namely, a contravention of the "order before written, or the conditions, provisions, restrictions, or limitations contained in the deed of taillie." Now, if the word is a word which is inapplicable to that sort of explanation, it appears to me that it must be treated as something which has crept in *per incuriam*, a mere clerical error, and which has no bearing whatsoever upon the real clause of irritancy, and therefore may be rejected *in toto*. I agree, therefore, with the Lords of

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Session in thinking that that also is an immaterial variation, and that the second objection is therefore unsustainable.

I wish, as far as one can have a wish in such a case, that I could have said that I also agreed with the learned Judges of the Court of Session upon the third point. But, I must confess that I do not concur with them. The third point, as it appears to me, is one not of form, but of substance. The Act of 1685 requires a register to be kept, wherein shall be recorded "The names of the maker of the tailzie, and the heirs of tailzie, and the general designations of the lordships and baronies, and the provisions and conditions contained in the tailzie," and so on; "to remain in the said register *in perpetuam rei memoriam;*"—and no tailzie is good as against creditors unless the provisions of the Statute have been strictly pursued. The question here is, whether the names of the heirs of taillie have been duly recorded in the Register of Taillies. There is no doubt that they were so recorded, if the deed of the 28th June 1788 is to be treated as the only deed creating the entail; but if the subsequent deed of the 21st of August 1788 is the deed, or one of the deeds, creating the entail, then the requisitions of the Statute have not been complied with, for that latter deed never has been recorded. I am of opinion that the entail subsists, not under the original deed only, but under the two deeds taken together. Both deeds were, it must be recollected, deeds executed *mortis causa.* They were not to have any operation during the life of Sir Alexander Stirling, the entailer, who reserved to himself in both deeds the most complete powers to revoke and alter as he might think fit. By his death these powers came to an end. The destination of the heirs who were to succeed was then finally established, but established by the two deeds taken together, and

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Mary Stirling and her heirs were for ever excluded from the succession.

The policy of the Statute was to make void as against creditors every taillie in which the heirs of taillie were not recorded—that of course means correctly recorded in the register. Here the register would represent to a creditor searching it, that on failure of the heirs of the body of George Stirling the lands would go to Mary Stirling, and the heirs of her body, whereas, in fact, they would go to Jean Stirling and the heirs of her body. This, therefore, is not a correct record of the taillie. It is true that this is an inaccuracy (so far as it is inaccurate) subsequent to the line of heirs against whom the creditor is seeking to obtain adjudication; but I do not think that is material. The enactments of the Statute are matters *juris positivi*, and if its provisions have not been duly complied with, a deed, whose operation as to creditors depends on such compliance, is as against them void to all intents and purposes.

Now, one of the requisites of the Statute is that the heirs of Taillie shall be correctly recorded. If this has not been done, it can be no answer to a creditor that this inaccuracy does not affect him, any more than if there had been an error in the record of prohibition against alienation, it would have been a good answer to the creditor to say that the prohibition against contracting debts was correctly set out on the register. The Statute requires entire accuracy throughout, and as a penalty upon inaccuracy makes the deed void in favour of third persons without permitting any inquiry whether, in fact, the inaccuracy was or could be prejudicial to them. I do not suppose that this principle is disputed. If the inaccuracy occurs in the deed which is in fact recorded—if, for instance, Mary Stirling's name had not been recorded in the original

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deed, but had, from some oversight, been inserted on the register, it would not have been argued that the entail was good against a creditor seeking to affect the estate of an heir prior to Mary Stirling, merely because the register was correct, so far as related to that estate. This is not contended, and therefore the question recurs, whether what the Statute requires to be recorded is in this case the one deed or both deeds. I think it requires both deeds—both together concur in creating the entail, and it is the entail which the the Statute requires to be recorded, whether created by one deed or by two deeds. If the first deed had not been put on the Register of Taillies in the lifetime of the maker of the entail, surely after his decease both deeds must have been registered as together creating the entail. And I see no difference from the fact that one of the deeds was registered in the settler's lifetime leaving the other to be registered afterwards.

This appears to me to be the fair result of the Statute, looking at it independently of authority. But I think further that the question, even if it were doubtful, is settled by decision, for I cannot distinguish the present case in principle from that of *Broomfield* v. *Paterson* (*a*), and also more satisfactorily in a note to *Turnbull* v. *Newton* (*b*).

In the former of these cases Sir John Paterson created an entail in 1743, reserving to himself unlimited power of revocation and alteration. In 1758 he made a new entail referring to the former deed of 1743, but varying from it by omitting wholly from the designation James Paterson and the heirs of his body. There were two other slight variations from the former Deed, but Lord Jeffery, in observing on the case, treated the omission of this line of successors

(*a*) Morr. 15,618. (*b*) 14 New Series, 103.

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as sufficient to make the register of the deed of 1743 inoperative against creditors, and so to make a new registration indispensable. I am aware that in that case (as I collect from the Report) the deed of 1758 was a complete re-settlement of the estate, and not, as in this case, a mere deed altering and revoking a part of the former destinations; but I think that makes no difference. What the Statute requires to be registered is not any particular deed, but the name of the maker, the names of the heirs, and the other provisions and conditions contained in the tailzie. If these particulars can only be ascertained, by reference to two deeds, both must, I think, be recorded. Any other construction would enable the maker of an entail to defeat what was the plain intention of the Statute, namely, that all the material provisions of the entail should be at any time capable of being ascertained by third persons.

The view I take of the law is quite consistent with the case of *Turnbull* v. *Newton*, and other similar cases, where, in truth, there was no alteration in the course of succession, but merely a propelling of the fee. That is an act done by an heir of entail—an act which he may do according to the law of his entail as it stands recorded in the register. Nor do I at all dispute the doctrine, that, if between the date of the deed creating the entail and its being recorded in the register, one of the substitutes has died without issue, still the whole deed must be registered. Or if during that period the maker of the entail has sold a part of the property, still the whole of the lands included in the deed must be noticed in the register. What the Statute requires to be registered is the entail, as it is created by the maker of it. This can only be done by recording the deed in its integrity as executed by the settler. If after the creation of the entail a line of heirs be-

comes extinct, that is the act of God, and it is a contingency which is inherent in the very nature of an entail. So in the case of a sale of part of the lands—that is no alteration of the entail. The entail still subsists, and the withdrawal of a part of the property only puts the case as if the settler had originally purported to settle that to some part of which he had no title.

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The short ground, therefore, on which I rest my judgment is, that what the Statute requires to be registered is the entail created by the settler, that is the names of the maker and of the heirs of entail—and the designation of the lands, and provisions and conditions with the irritant and resolutive clauses. In this case, in order to get at these particulars, recourse must be had to both deeds, and both, therefore, ought in my opinion to have been registered. This, however, is not the view of my noble and learned friend, and consequently the Appeal will be dismissed.

Lord St. Leonards' opinion.

The Lord ST. LEONARDS:

My Lords, I entirely concur with my noble and learned friend in his view upon the first question—indeed, the first point I consider was given up by the counsel at the bar; but I may just observe that every thing was done that was necessary to establish the identity of the deed of entail. The description was not wrong. It is quite a mistake to say that the description of the deed was wrong; in point of fact, the grantor had reserved to himself a life interest, and had settled the estate upon his heirs male. Therefore to say that this was a settlement upon him and his heirs male was perfectly correct, so far as to satisfy the Act of Parliament.

As to the second point, which my noble and learned friend has so much discussed, as I entirely agree with

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him upon it, it is not necessary for me to go into it at any length. But there is nothing in the Act of 1685 to prevent a Court of justice from putting a sensible construction upon what is found upon the face of the register. Now the clause in question contains the whole substance of the irritant clause of the deed, both before and after the words that have introduced the difficulty, and I think that we are at liberty in this case to treat these words as a mere clerical error; the cases which have been referred to do not at all touch this case. This is manifestly a clerical error upon the face of the document itself. But if there be any difficulty in the construction, the first part is conclusive without this description; and what follows these words is equally conclusive, and the whole clause admits of a sensible construction without giving effect to these words, which really have no sensible meaning. I think it therefore perfectly clear that the Court of Session were right in their conclusion upon these two points.

Now, my Lords, after a very anxious consideration of the third point, upon which my noble and learned friend and myself are not agreed, I think the Court of Session were perfectly correct in the decision at which they arrived. The Judges were unanimous, and I observe that Lord *Cuninghame* treated the objection as a perfectly novel one and not capable of being sustained. So that, so far as their knowledge of the practice and general opinion went, they thought that this was an attempted innovation which had never been made before.

Now it is necessary to be very distinct in order to come to a right conclusion upon this subject. There is nothing in the law of Scotland, or in the Act of 1685, which affects the original settlement as a mere settlement in this case. The settlor might have made

the settlement which he has made, without the Statute of 1685; he could not introduce fetters—he could not make prohibitions and irritant and resolutive clauses, except under that Act of Parliament. But the settlement itself was a valid settlement irrespective of these prohibitions and of irritant and resolutive clauses. Now the Act of 1685 requires just as much a statement of the parcels of the estates, for example, as it does of the heirs of taillie, and nobody disputes, as I understand the argument, (indeed, nobody can dispute it, because it has not been disputed by the learned counsel at the bar, who are so competent to consider the case,) that the original settlement was properly recorded. Where parties have died between the execution of the deed and the record of it, or where a part of the estate has been sold or lost by adverse title, whatever may have intervened between the period of the execution of the deed of tailzie and the record of it, those were facts that could not be put upon the record in connexion with the register of that deed. That deed of tailzie, therefore, was properly recorded, and with the prohibitions and the irritant and resolutive clauses was a deed binding upon all creditors and upon all persons who were within the prohibition, fenced, as the deed was, by irritant and resolutive clauses.

If that be so, what is there to affect that valid deed? That deed could, by the law of Scotland, be defeated, irrespectively of the prohibitions and the irritant and resolutive clauses, if they did not intervene, by persons entitled just in the same way as any person having an estate conveyed by the law of Scotland might have his title defeated. The statute of 1685 does not prevent you, if you have an estate, from making any settlement of that estate. And, therefore, supposing that settlement to exist, and

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another deed to be executed subsequently to that settlement, it must be a simple question. Did that second deed or not operate as a new settlement? If it did, then the Statute of 1685 will attach upon that new settlement, and it must be registered. I am assuming it to be a new settlement, but it cannot be considered to be a new settlement unless it defeats the former one. If it defeats it, then it comes in its place, and it must be registered in order to bind creditors.

This point is settled in the case of *Turnbull* v. *Newton*, which is reported in 4th Shaw and Dunlop. It was there held that it is not necessary to register a propelling deed. But what is a propelling deed? If it is an actual striking out of one of the heirs of taillie in order to accelerate the estate of another, it takes that heir of taillie really out of the line of succession, and accelerates the estate of the one in remainder. Such a deed does not require registration; it accelerates, but it does not alter the line of succession. It gives the next in the line of succession the substitute; a great advantage, because his estate, which is accelerated, but for this propelling deed, might never have taken effect at all. *Non constat* that the first estate that was granted would have ceased, so as to give the party over, as we call it, a right to inherit or to take. Then there is a case in which you actually remove an estate which is upon the record, and you introduce an estate as the immediate estate, which might never have come into, being in the original order or course of the taillie; but still that is not necessary to be registered.

Now, what was done in this case? The grantor having reserved to himself a general power of revocation, revoked an estate subsequent to the estate of the party now in question. He revoked Mary Stirling's estate, so as, leaving everything else untouched, to

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accelerate the next estate; but it did not touch the estate which is now in question—by the estate I mean limitation. It did not touch it directly or indirectly. That limitation, confined to the particular estate of Mary Stirling, never could touch this estate, which was well created by the original settlement. The estate was fenced by prohibitory and irritant and resolutive clauses, every one of them being registered and binding upon all creditors and others, so as to ensure the settlement as far as that particular party was concerned.

Well, then, the power of revocation having been partially exercised, the effect of a reversal of the decision of the Court below would be this, that that partial revocation operated as an entire revocation of the whole settlement, because it is insisted that that partial revocation, limited to one estate in remainder, operated to defeat the entire taillie from the beginning to the end. By the original deed John is to have the estate, then James is to have it, then Mary is to have it, and then Jean is to have it. Mary is struck out by the exercise of the power of revocation, and then the estate stands limited to John, James, and Jean. It is said that John and James cannot take the estate, and that the effect of this is in point of law to revoke the whole deed. Is there any precedent for that?

Observe what the object of the Statute of 1685 is. The object is not to tell the creditors what events after the execution of the tailzie or the record may have happened, or what circumstances may have occurred; such, for instance, as the sale of the estate, the recovery of it adversely, or the revocation; but it is to show this, that those persons who claim under the original taillie are or are not prohibited from selling or recovering, and to show that the prohibitions are or are not guarded and fenced by proper irritant and resolutive clauses.

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What would happen in this case? Nobody can deny this, that the power of revocation being executed this was a perfectly valid instrument as between heirs, and it put an end to the estate of Mary Stirling for ever. Nobody can dispute that, irrespectively of the Statute of 1685. The Statute of 1685 does not touch that at all. There is nothing in the Statute of 1685 which says, that if you take away one particular limitation, you must put it upon record. Why should you put it upon record? Mary Stirling, being by the effect of that deed, which is a perfectly valid and operative deed, struck out of the line of succession, never could be found in possession of this estate, and therefore the creditors never could have had occasion to resort to the register in order to see whether there was any prohibition against her. She never could have the estate; and therefore never being able to serve as heir, and never being able to claim it under the deed, the creditors would know at once that her estate had been in some way defeated.

But it is a mistake to suppose that the Statute of 1685 at all strikes at this deed which removes this lady. There is no ground for saying so. It does not touch it. My noble and learned friend says very truly that the Statute of 1685 requires that all the heirs of taillie should appear upon the record of the deed recorded. The question still remains. Is it necessary to record this deed? Nobody doubts that the original deed was properly recorded, and that every person in succession who would take under that deed is now upon the record, and every creditor will be able to go to the record, and see whether the person who succeeds to the estate under that taillie is or is not within the line of prohibition, and is or is not fenced by the irritant and resolutive clauses. No question can arise—no

creditor can ever find Mary Stirling in possession, and therefore the Statute of 1685 has no operation.

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Now, supposing the estate had been so limited as that the subsequent deed operated as a new settlement, which it can only do where the effect of the second grant is to supersede the first grant, then no doubt the law requires that the second deed, in order to have efficacy, should be registered under the Act of 1685. There is no question about that. But whilst the estate remains unaffected, and upon the register fenced with proper prohibitory, irritant, and resolutive clauses properly created, there never can be any occasion to register any other deed, as it appears to me with regard to those existing valid estates which are not effected by that other deed.

Now, *Broomfield* v. *Paterson* is, I think, a perfect instance of what I am now advising your Lordships to hold. For there the second deed did operate entirely to defeat the first deed, and therefore it was that the second deed never could be operative unless it was recorded properly on the Register of Taillie, as well as the first, so as to bind creditors, purchasers, and others. My noble and learned friend has said that that case is perhaps better stated in the *Lord Ordinary's* note to the case of *Turnbull* v. *Newton*. But in Morrison it is stated thus—In 1743 Sir John Patterson made an entail in favour of his grandson John, and reserved power to revoke. He completed the deed of entail, and it was registered in the Register of Taillie. The *Lord Ordinary* observed in this case that the fee was considered to remain in the grantor, and that the grandson must be entitled as heir of provision. In 1755 Sir John Paterson renounced his power of revocation. Now that was a mere personal act. It was recorded in the Register of Taillie only—it could not qualify the right—it was merely a personal act—it

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was not registered properly, and it had no effect against creditors. The result therefore was, that the original register stood as the register within the Statute of 1685, the effect of which was that the fee was in Sir John. Then the deed of 1758 was a deed by Sir John, with the consent of his grandson, which amounted to a new settlement, and there was only a reference to the prohibitions. It was not recorded in the Registry of Tailzies. Upon that the *Lord Ordinary* made this observation. He said that it proceeded upon the recital of the original entail; the fee vested in the grandson Patterson. Then, under the deed of 1758 the prohibition against alienation altered the destination, and changed the condition against Sir John Patterson and the heirs of his body; and he goes on to say, it amounts to a new settlement. Sir John Patterson died, and his grandson Sir John became entitled to the estate, and he executed a procuratory under the last settlement. He (the grandson) had a daughter, and she made out title as his heir; and upon a creditor seeking to charge the estate of Sir John, the question was, whose heir she was? And it was held that he was entitled to do so. The case was argued upon this ground. It was said that the settlement of 1743 was put an end to by the settlement of 1758, and that the latter, not being registered in accordance with the Act of 1685, was invalid. To this it was answered, that the settlement of 1758 ought to be considered, not as a new entail, but as a continuation of the prior settlement effected in 1743, and therefore did not require registration. The Lords found, "That the disposition of 1758, differing in several particulars from the entail of 1743, and being followed with charter and infeftment, is to be held a new settlement of the estate; and not having been recorded in the Register of Entails, is not an effectual entail." And they also

found, "That in respect the limitations in the entail of 1743 are not particularly inserted in the said disposition of 1758, the same is not effectual against creditors." To this judgment the Lords adhered on advising a reclaiming petition and answers. They held, therefore, there that there was a new settlement, and that the new settlement was not registered, that it did not repeat the limitations as it ought to have done of 1743, and that, therefore, the settlement was not valid against creditors. But there the original settlement was actually defeated—it no longer existed—and the new settlement was the only settlement that was operative.

Now here the original settlement is in perfect existence, and it has been properly recorded, and all the prohibitions and fences are properly upon the record. The party in possession has taken in his order according to the limitations of the deed. There is no question between him and his creditors, except with reference to that which strikes at the root of the original deed.

It appears to me, my Lords, that the Court of Session was quite right in holding that this second deed was not a new settlement, but merely a striking out of one of the heirs who never could come into possession except in the order of the deed. Under this deed Mary would never come into possession at all. There is no question, therefore, as to her creditors. It was impossible that there should be. They never could find her in possession subsequently. And this limitation not being a new settlement, this is not a case which is required to be registered by the Statute of 1685. If it had been necessary under the Statute, then every deed relating to the estate must equally be registered. There were two months between the execution of the first deed and the execution of the second

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deed. Suppose the first deed duly registered, how could the execution of the second deed, before the registry of the first, have affected the question? It seems to me that this was considered so clear at the time (which rather proves what the general opinion has been according to the statement of Lord *Cuninghame*) that the parties purposely kept the second deed off the Register of Taillies as being unnecessary to be registered, for they actually took both deeds to the registrar of the registry of the Lords of Council and Session and had them both regularly registered there, which was right enough as regards the disposition, having nothing whatever to do with the Statute of 1685. But when they came to obey the directions of the Statute of 1685, they drew the distinction, and they put upon the Register of Tailzies the original settlement, and they kept off that register the second deed as being unnecessary to find its place there.

My Lords, I have taken some time to consider this question, and have considered it very minutely, and have looked at it in every point of view, and with all deference to my noble and learned friend I have come to a strong opinion upon the point that the decision of the Court below should be affirmed.

Interlocutors affirmed.

DEANS & ROGERS—MAITLAND & GRAHAM.