

1857.
June 12th.

DEMPSTER, APPELLANT.
DEMPSTER, RESPONDENT.

Entail.—Lord Rutherford's Act.—An entail defective in any one of its prohibitions is bad in all.

The rule is the same, although the question may be *inter hæredes*.

The consequence may be that an entail cannot be made otherwise than under the Act of 1685. But this consequence is not mischievous, because the policy of the law is not to encourage, but to discourage, entails.

THE Summons was one of Declarator by the Respondent as heir of entail in possession of the estate of Skibo; and it alleged that the entail of that estate was defective under the Act of 1685, c. 22, for that certain words occurring in the irritant clause thereof were engrossed on an erasure. The words in question were "Deeds granted, and acts done or committed." The heir in possession sought by the Summons to have it declared that he was entitled to sell the estate, and that the succeeding heirs of entail had no right to object.

The Pursuer further relied on Lord *Rutherford's* Act (a), which declares that when an entail is defective as regards any one of the prohibitions mentioned therein, it shall be deemed and taken to be defective as regards *all* the prohibitions.

The Appellant, on the other hand, contended that the alleged erasure was immaterial in a question (which this was) *inter hæredes*.

The Court of Session decided in favour of the Pursuer. The Defender appealed.

(a) 11 & 12 Vict. c. 36. s. 43.

In support of the Appeal, the Lord *Advocate* (a) and Mr. *Rolt* were heard.

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The *Attorney-General* (b) and Mr. *Anderson* for the Respondent were informed that the House did not deem it necessary to hear them; the *Lord Chancellor* (c) and Lord *Wensleydale* delivering the following opinions:

The LORD CHANCELLOR:

*Lord Chancellor's
opinion.*

My Lords, This is a case which does not admit of the least doubt in the world, not merely because the point here raised has been already decided in this very year by your Lordships, in the case of *Baillie v. Cochrane* (d), removing all shadow of doubt, if there was any doubt before upon it; but I think it is perfectly clear, from the 43rd Clause of the Act, that the great evil which Mr. *Rolt* suggests may arise from parties not being able in Scotland to make an entail disposition otherwise than according to the terms of the Statute of 1685, that great evil has been incurred, if it was an evil, but I do not see that there is any evil in it at all. Certainly, the object of that Statute was not to encourage Scotch entails, quite the reverse, and the language of the 43rd Clause (e) seems not to admit of the least possible doubt, for not only does it say, that if the deed is invalid and ineffectual in any one of the irritant clauses, it shall be invalid and ineffectual as regards all, but it goes on to state that "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 said 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

(a) Mr. Moncreiff.

(b) Sir R. Bethell.

(c) Lord Cranworth.

(d) Vol. ii., p. 529.

(e) 11 & 12 Vict. c. 36.

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*Lord Chancellor's
 opinion.*

reason of any contravention of all or any of the prohibitions." I do not see how those words can receive any other meaning than that which has been put upon them by the Court below. If it is meant to be said that notwithstanding these words, still the heir substitute may have a right to say that the heir in possession shall not contravene the prohibitions, by making a gratuitous disposition, that cannot be a matter that admits of any doubt upon the simple words and language of the Statute.

In this case the *Lord Ordinary* first, and the Court of Session afterwards, came to the only conclusion at which they could arrive, and so far as appears upon these papers, they came to that conclusion without any hesitation and without much argument addressed to them upon it.

*Lord
 Wensleydale's
 opinion.*

LORD WENSLEYDALE :

My Lords, I entirely concur with my noble and learned friend, that the decision of the Court of Session in this case is right, and that the Appeal must be dismissed.

*Interlocutors affirmed, and Appeal dismissed
 with Costs.*