Interlocutor affirmed, and appeal dismissed with costs.

Appellant's Agents, Steele and Sons, Bloomsbury Square, London.—*Respondents' Agents*, Adam, Kirk, and Robertson, W.S.; Loch and Maclaurin; J. Graham, Westminster.

AUGUST 10, 1869.

JAMES HOWDEN, Accountant, and Others, *Appellants*, *v.* CHARLES HENRY ALEXANDER, FREDERICK CAMILLO EVERARD, JAMES JOHN ROCHEID of Inverleith, and Others, *Respondents*.

Entail—*Pro indiviso* Right to Lands—Defects in Clauses of Entail—*E., one of the heirs portioners of R., in* 1753, *executed an entail of her* pro indiviso *right to the lands of I. Afterwards the estate of I. was divided by the Sheriff under decree of division in* 1773, *but no deeds were executed as between the owners of the* pro indiviso *shares.*

HELD (affirming judgment), (1) *That a* pro indiviso *right to an estate may be the subject of an entail, at least where the estate is capable of division, as was the case here.* (2) *That if such estate be divided by a decree of division, no further deeds by the other co-owners as to the specific parts thereby apportioned need be executed.*

Comments *as to the language of the prohibitory, irritant, and resolutive clauses, and the words "deeds," "conditions and provisions," "restrictions and limitations."*[1]

This was an appeal from the interlocutor of the Lord Ordinary (adhered to by the First Division) finding, that the entail of the lands of Inverleith and others was a valid and effectual entail under the provisions of the Act 1685, c. 22.

Two actions of declarator and of declarator and adjudication were conjoined, and the pursuer, James Howden, accountant, trustee on the sequestrated estate of James Rocheid of Inverleith, sought to have it found and declared, that the deed of tailzie dated 1749, and recorded 1753, made by Mrs. Elizabeth Rocheid, daughter of Sir James Rocheid, was not valid in regard to the prohibitions against alienation and contraction of debt and alteration of the order of succession, and that the pursuer had power to sell and alienate the subjects, and that he had full title to obtain charters or writs of resignation or confirmation, &c. Mrs. Elizabeth Rocheid was one of the heirs portioners of Sir James Rocheid, and had right to two fourth parts *pro indiviso* of the lands of Inverleith, near Edinburgh, and others. The Court held the entail to be valid, whereupon the pursuer appealed to the House of Lords.

The *appellant* in his *printed case* stated the following reasons for reversing the interlocutors:—1. Because the subjects alleged to be entailed described in the deed of taillie, and which description is contained in the whole subsequent titles, being subjects held by the entailer *pro indiviso*, or in joint ownership with other persons, could not be validly entailed. And further, the fetters of the entail not being directed at least to a specific half of the lands allocated under the decree of division to the deceased James Rocheid, and belonging to him at the time of his death, there was no valid entail of said lands, and the same were possessed by him in fee simple, and were and are subject to his debts and deeds. 2. The entail is invalid in respect that the prohibitory, irritant, and resolutive clauses are not validly framed so as to lay the estate under the fetters of a strict entail.

The *respondents* in their *printed case* gave the following reasons for affirming the interlocutors:—1. Because it is competent to entail a *pro indiviso* right to lands. 2. Because the entail of a *pro indiviso* right to lands is not altered or affected by a subsequent division of the estate among the joint owners. 3. Because the prohibitory, irritant, and resolutive clauses of the Inverleith entail are complete and effectual, in terms of the Act 1685, c. 22. 4. Because these clauses were all fully inserted in the titles made up by the first James Rocheid to the entailed estate, in terms of the said Statute.

Lord Advocate (Moncreiff), *Anderson* Q.C., and *J. Pearson* Q.C., for the appellants.—It is not competent by the law of Scotland to make a *pro indiviso* right the subject of an entail. In the present case the estate, of which one half belonged to the entailer, was afterwards divided

---

[1] See previous report 6 Macph. 300; 40 Sc. Jur. 166. S. C. L. R. 1 Sc. Ap. 550; 7 Macph. H. L. 110; 41 Sc. Jur. 588.

by the Sheriff pronouncing decrees of division, which decrees, however, were never acted upon in expeding the subsequent titles, and therefore the rights still remained *pro indiviso* for forty years and upwards. It is well settled in the case of property held in common, that one of the joint proprietors cannot deal with the property without the consent of the others—Bell's Prin. § 1072; Stair, xi. 9, 43; Ersk. xi. 6, 53; *Bruce* v. *Hunter*, 16th November 1808, F. C.; *A.* v. *B.*, M. 2448; *Anderson* v. *Dalrymple*, M. 12,831; *Sandy* v. *Innes*, 2 S. 221. It is at the same time true that each may insist upon a division, if a division is possible—Bell's Prin. §§ 1079, 1080, 1081; *Milligan* v. *Barnhill*, M. 2486; Hailes' Dec. 897. If, therefore, one of the *pro indiviso* proprietors could insist on a sale, this would be inconsistent with the very idea of an entail. Besides, a *pro indiviso* owner has no right to any specific part of the whole estate; hence there is no certainty about the subject matter entailed, and the creditors cannot discover which is the part protected. The true construction of the Entail Act 1685 is, that no property could be entailed, of which the entailer is not the sole owner; and such was the rule adopted in construing the contemporaneous Act of 1681, as to election of members of Parliament. The details of the law of entail as to allowing improvements, leases, building of villages, planting and draining, providing for widows and children, would be unworkable, and would lead to absurdities, if a *pro indiviso* right could be the subject of the entail. There is no hardship in holding, that the owner of a *pro indiviso* right cannot entail it, for he can insist on a division, and he should do this before he seeks to entail. Here he did obtain a decree of division, but he did not follow it up, and execute the proper deeds as to the part so divided, and held by him separately and exclusively. To take this course would be according to sound views of the proper practice—*Livingstone*, 13 S. 1033; 3 Jur. Styles, 146. As to the case of *Stirling* v. *Dunn*, 3 W. S. 462, where this point was alleged to have been decided against the view of the appellant, the subject there, being a loch, was incapable of division, and therefore was an exception to the rule. But here the subject was divisible. The only decision against the appellant is that of *Stewart* v. *Nicolson*, 22 D. 72, but it was contrary to principle, and ought to be overruled. Even if this entail were good, the prohibition against selling or alienating was bad, and vitiated the entail—*Speid* v. *Speid*, 15 S. 618; *Graham* v. *Murray*, 10 D. 380; 6 Bell's Ap. 447; and the irritant clause omitted to annul written instruments in violation of the entail—*E. of Kintore* v. *Inverury*, 4 Macq. Ap. 527, *ante*, p. 1179; *Lumsden* v. *Lumsden*, 2 Bell's Ap. 125; *Sharpe* v. *Sharpe*, 1 Sh. & M'L. 618; *Ogilvie* v. *Earl of Airlie*, 2 Macq. Ap. 271, *ante*, p. 470; *Buchan* v. *Erskine*, 4 Bell's App. 38; and the resolutive clause is defective for not annulling acts of restriction and limitation.

Sir R. Palmer Q.C., *E. S. Gordon* Q.C., and *Marshall*, for the respondents.—The interlocutor was right. The point that a *pro indiviso* right may be entailed has been conclusively settled by authority, if it needed authority to settle it— *Stirling* v. *Dunn*, 3 W. S. 462; *Stewart* v. *Nicolson*, 22 D. 72. Even when the estate is divided, this does not necessarily cause the entail to fly off. The effect of a division is not to substitute a new and different estate, but only to define within narrow limits what was formerly spread over wider limits—Balfour, Prac. 440, c. 91. There is no authority for saying that, when a decree of division is made, there must be an execution of new deeds between the quondam co-owners. The objections to the prohibitory and other clauses are merely technical, and are entirely unsound, being opposed to many recent cases.

Cur. adv. vult.

LORD CHANCELLOR HATHERLEY.—My Lords, the appeal in this case is an appeal against the interlocutor of the Lord Ordinary of the 8th of June 1867, so far as such interlocutor finds that the entail to which the action of the appellant related is a valid and effectual entail under the provisions of the Act 1685, chapter 22, and so far as it sustains defences on the merits; and also an appeal against two interlocutors of the First Division of the Court of Session dated respectively the 31st of January and the 18th February 1868, in substance affirming the interlocutor of the Lord Ordinary.

The appellant, as sustaining the rights of the creditors of James Rocheid, whose estate was under sequestration at his decease, seeks by his action to have it declared, as against the respondents, that the deed of entail under which the estate of Inverleith is alleged by the respondents to be held, did not, during the possession of the estate by the bankrupt James Rocheid, and does not now, constitute a valid and effectual tailzie, pursuant to the Act of 1685. Other supplementary proceedings were had after the original action, which it is not necessary to refer to, and a defence of *res judicata* raised by the respondent was disposed of in favour of the present appellant, a decision which has not been questioned by the respondents.

The history of the devolution of the property is as follows: Sir James Rocheid, sometime before the year 1749, was the owner of the estates of Inverleith, in the county of Edinburgh, and Darnchester, in the county of Berwick, which on his death descended to his four daughters. Elizabeth, one of those daughters, acquired another fourth part in addition to her original share, before making the disposition of the 14th January 1749, on which this case mainly turns. Her sister Lady Kinloch held one other fourth part, and her nephew Mr. Cathcart the remaining

fourth part. All those shares were held *pro indiviso*. On the 14th January 1749, Elizabeth Rocheid entailed or purported to entail upon Alexander Kinloch (third son of Sir Francis Kinloch by the above mentioned Lady Kinloch) and the heirs whatsoever of his body, whom failing, to other heirs specified in the deed, all and whole her equal half or two fourth parts of the property therein described, being the lands at Inverleith and Darnchester, which had descended as above mentioned from her father. The deed contained numerous conditions and provisions, amongst others, the usual name and arms clause with reference to the name of Rocheid, and also provisions against altering the destination of the estate, and against burdening the property or allowing it to be burdened. It contained also irritant and resolutive clauses in the following words. It was declared thereby, that "if the said Alexander Kinloch or the heirs whatsoever descending of his body, or the other heirs before specified and the descendants of their body, and succeeding to the said lands and estate hereby disponed, shall contravene or fail to fulfil, obey, or perform the several conditions and provisions above exprest, or any one of them, or shall act contrair to the said restrictions and limitations or any of them, that then, and in these or any of these cases, not only such facts, deeds, debts, omissions and commissions done, contracted, neglected, or committed contrary hereto, with all that may follow thereupon, shall be in themselves void, null, and of no avail, force, strength, or effect as if the same had never been done, contracted, neglected, or committed, in so far as concerns the lands and estates above written, which nor no part thereof shall be any ways affected, burdened, or hurt therewith in prejudice of the said Alexander Kinloch, and the heirs descending of his body, or of any other of the heirs above specified appointed to succeed by virtue of their presents." Then comes the resolutive clause: "But also the person or persons so contravening or *failing* to fulfil the before written conditions and provisions, or any of them, shall for themselves only *ipso facto amit*, *lose*, and tyne their right and interest in my said lands," following the usual form.

An objection has been raised to the deed of entail, on the ground that the resolutive clause is not co-extensive with the irritant clause, because the irritant clause speaks of "contravening, or failing to fulfil, obey, and perform the conditions and provisions above expressed, or any one of them, or acting contrary to the said restrictions and limitations, or any of them," and directs "that then *such facts*, *deeds*, *debts*, *omissions*, and commissions, done, contracted, neglected, or committed, contrary hereto, shall be void;" whilst the resolutive clause says, that "the persons so contravening or failing to fulfil the before written conditions or provisions, or any of them, shall lose their right in the estate," without adding the words, "or acting contrary to the said restrictions and limitations," and it has been argued, that the acting "contrary to the restrictions and limitations" would have a wider effect than merely contravening the conditions and provisions.

Without forgetting the caution given in some of the authorities which have been cited before your Lordships in this part of the argument, against straining the construction of the words in order to effectuate the supposed intention of the creator of the tailzie, I confess I am unable to discover in this deed any "restrictions or limitations" different from and beyond the conditions and provisions of the deed, and if so, the "contravening of such conditions and limitations" would necessarily be an acting "contrair to them."

It was further said, however, that the irritant clause itself was not sufficiently extensive to fence the deed of entail, as against written instruments executed in contravention of it, and authorities were cited to shew, that "facts and deeds done" might be limited to acts committed, so as not to include instruments executed. It cannot, however, be denied, that the words "deeds done" may include, though they do not necessarily include, the execution of a written instrument, and in order to restrict that meaning, something should be shewn in the context to indicate the intent of the entailer so to restrict it. But what are the deeds here struck at by the relative word "such?" They must be deeds referred to by the immediately preceding sentence, namely, "deeds in contravention of the conditions and provisions of the instrument." But amongst those conditions and provisions we find at page 61 a prohibition against disponing, altering, innovating or changing the tailzie or order of succession thereby prescribed, "also a general prohibition against selling or disponing," and against any "wadset." It is clear, therefore, that the conditions involve a prohibition against written instruments which would affect the entail, and therefore such written instrument would be a "deed" in contravention of the conditions, and would be struck at by the irritant clause. To carry back the relative "such" to the words occurring some ten sentences back, so as to restrict the facts and deeds to those there mentioned, would be contrary to the most ordinary rules of grammatical construction, and would in fact be forcing the language, in order to destroy the instrument. On these two objections we did not hear the counsel for the respondents, it appearing to us, that they were clearly unfounded.

But two other questions have been put very forcibly in the argument before us, which were not discussed in the Court below, namely, *first*, that there can be no valid tailzie within the Act of 1685 of a share held *pro indiviso* in lands; *secondly*, that even if such a tailzie can be created, yet that the tailzie would not affect the entire interest in a portion of the same lands when they have been allocated to an heir in the succession under a decree of division in respect of his *pro*

indiviso interest. It was supposed, that the Court below would adhere to its decision on a similar question in a recent case of *Stewart* v. *Nicolson*, and that it was more respectful to the Court simply to submit to them those points without argument. They have now been fully argued before us on both sides.

In order to appreciate the arguments, we must first consider the leading facts which have occurred between 1749 and 1824, the date of the death of James Rocheid. In 1755, James Rocheid, on the death of his father, became the owner of the two fourths of the Inverleith and Darnchester estates *pro indiviso* as heir under the entail created by the deed of 1749, assuming its validity. He was also at the same date the owner in fee simple, as was determined after some litigation, of another one fourth *pro indiviso* of the same estates derived from Lady Kinloch and the sister of Elizabeth Rocheid, and Mr. Cathcart was the owner of the remaining one fourth. On the 2d July 1773, by a decree of division of the Sheriff of Edinburgh, a specific one fourth of the Inverleith estate was allocated to Mr. Cathcart, and the remaining three fourths specifically allocated to James Rocheid. As to Darnchester, James Rocheid acquired Mr. Cathcart's one fourth, and conveyed it to a Mr. Anderson as a trustee for himself, in order, in effect, as it appears, to make a division, and by a decree of division of the Court of Session in February 1785, one fourth was allocated specifically to Anderson, and three fourths to James Rocheid.

James Rocheid, however, being ultimately declared to be entitled in fee simple to the one fourth in both estates, which he had derived from Lady Kinloch, became desirous of separating the two fourths of the estates derived from Elizabeth Rocheid from the one fourth derived from Lady Kinloch, and he conveyed the latter one fourth to Mr. Dundas, as a trustee for himself. He accordingly obtained a decree of the Court of Session on the 5th July 1796, which allocated specific property to James Rocheid, in respect of the two fourths of Inverleith and Darnchester, purporting to be held under the deed of 1749, and the remainder was specifically allocated to Mr. Dundas. It appears, that owing to some subsequent litigation, new decrees of declaration and division were pronounced in March 1803 and March 1817. The property specifically allocated in respect of Elizabeth Rocheid's two fourths, has ever since the above mentioned proceedings of division been held distinct and apart from the property allocated in respect of the other shares. But no instruments have been executed for the purpose of giving any further or other effect to the decrees of division, and the titles have been expede as under the deed of 1749, and by the description therein contained of the *pro indiviso* two fourth parts.

James Rocheid died in December 1824, and several successions have taken place, by which parties claiming as heirs designated under the deed of 1749 have held possession of the specifically allocated property, the present respondent being now in such possession, and the appellant claiming as trustee under the sequestration against James Rocheid.

The first contention, then, under this state of circumstances, is, that the original attempt to entail two fourth shares of estates *pro indiviso* was futile, and that, according to the law of Scotland in this matter, as is regulated by the Act of 1685, a *pro indiviso* share in an estate is not the proper subject matter for an entail. No authority has been adduced in support of any such proposition. The words "lands and estates" of themselves have been held sufficient to include property of a heritable character, such as fisheries and teinds not being strictly lands. But it is suggested, that the words "lands and estates" point to an entire subject, and not to a partial interest in a subject. It may be considered that the word "estate" is not in this particular Statute directed to the amount of interest in the subject, (such as fee simple, or for life or the like,) but to the subject itself. But I can see no ground for holding, that the half of an heritable estate is not itself a definite subject, as much as the whole estate, whether held *pro indiviso*, or whether at any time it may be actually divided.

Mr. Anderson, in his argument, said, that he did not doubt that an entail might be created *inter hæredes* of a share held *pro indiviso*. But if that be so, then we should have expected this Statute, finding such entails in existence, or capable of being so, to have struck at their continuance, and to have prohibited them, as regards having any validity in the view of the Statute. On the other hand, in the case of *Stirling* v. *Dunn*, the very question now brought forward was raised, and decided adversely to the view of the appellant by your Lordships' House. It is said, that the subject matter there was an appurtenant only to an estate, being an interest *pro indiviso* in a loch adjoining the estate, and that it passed therefore in that respect as an appurtenant. Still it was argued, on the broad ground of an alleged unfitness of such a subject for an entail, not only in the Court of Session, but in your Lordships' House, as appears very plainly by the appeal case, part of which is set forth in (page 10 of) the respondents' case now before us.

This decision in *Stirling* v. *Dunn*, was adopted unanimously in *Stewart* v. *Nicolson*, by the four eminent Judges who decided that case. Lord Curriehill, in this part of the case, did not express any doubt as to the competency of such an entail. Lord Deas says, "that there are few entailed estates in the country which have not at one time or another consisted partly of shares in an undivided community or other *pro indiviso* property, and it never was supposed that this part of the estate was not validly entailed equally with the rest."

It seems to me, that the *onus* of shewing by decision, that property which can be sold, mort-

gaged, and dealt with in all other respects like other property, and which can even, as Mr. Anderson admitted in the argument, be entailed as *inter hæredes*, is not land or estate capable by the Act of 1685 of being entailed, is clearly thrown on those who assert that proposition.

The Lord Advocate, in his very able argument, has greatly relied on the authorities which have decided, that if an entire estate be entailed, the fetters of the entail drop off as soon as the estate falls to heirs portioners. But surely this only shews, that when the subject of the entail is divided, the entail ends, because its subject is destroyed. This does not afford any ground for inference, that when the original subject is a share held *pro indiviso* the entail is bad *ab initio*. The author of the entail deals as he pleases with his property, and points out one entire subject of entail, though that subject may be his *pro indiviso* share in an estate, and it is only when that subject ceases to exist, that it must be assumed, that his intention, as expressed in the deed, is at an end; in fact, the instance that was put proves that an entail may be good *ab initio* though liable to destruction by subsequent events, and this was very ably urged by Mr. Gordon in his argument for the respondent, as affording an answer to many of the difficulties which have been suggested in argument as to the rights of the several portioners in regard to undivided property. Take, for instance, the case which was much pressed upon us, of a house or other heritable property, incapable of division. If a first sale should take place, at the instance of one of the co-owners, it would necessarily destroy a previous entail of a moiety held *pro indiviso* by destroying its subject, supposing such an entail to have been created. But I do not see why the entail made originally of a moiety should not be good until the event happens, as in the case of an entail which is good until an estate falls to heirs portioners. As regards the inconveniences which it has been suggested might be occasioned by an entail of an undivided share with reference to modern Acts of Parliament, I think no inference can justly be raised from that circumstance, adverse to the right of entailing the shares, for the inconvenience would be the same *inter hæredes*, and might occur in any other portion of the undivided property than an entail.

Mr. Anderson, however, raised another question in the course of his argument, as to the construction of the Act 1685, as compared with that of 1681, regulating the qualification of electors of Members of Parliament. It has been held, it appears, under the latter Act, that a share *pro indiviso* would not be a good qualification of land or estate although its annual value may greatly exceed the value required. But the decisions on this point may well have proceeded partly on the Act itself, which, in a case of property, adjudged by several creditors, allows only the first in date to vote, and therefore shews an indication in the Act itself, that persons who are in the position of co-owners shall not all participate in the privilege. And those decisions may have been founded partly also upon the character and intent of the Act, which might be fraudulently evaded by the multiplication of shares purporting to be held *pro indiviso* without any actual division of the estates. We are not favoured with the reasons upon which those decisions were founded, except, I think, in one case, where President Blair refers to the propriety of strictly following adjudged cases in election law, but does not otherwise announce any special ground as forming the reason for his judgment. I therefore come to the conclusion, that an estate in tail may properly be created under the Act of 1685, in a share held *pro indiviso* of land.

But another point has been raised as to the effect of the decree of division. It has been argued, that the effect of those several decrees is to destroy the entail. It is said that the subject itself has no longer any existence; that the *pro indiviso* right referred to lands situated both in Edinburgh and Berwick, two distinct counties, and that the allocated share might in a very possible case be in one of those counties alone, whilst the other *pro indiviso* owner took the land held in the other county. Again, it is said that the *pro indiviso* owner had no interest, at the date of the entail, in one moiety of that land, the entirety of which he now holds; that the register thereafter gave notice of the real title especially in this case, when on the face of the register the entail still appears as of the *pro indiviso* share which James Rocheid, before and at his death, held in the entirety of the lands allocated to him. This is no doubt the gravest portion of the inquiry upon which your Lordships have had to enter in this case. It does not appear to be touched distinctly by decision otherwise than by the case of *Stewart* v. *Nicolson*, and in that case Lord Curriehill appears to have doubted, whether or not he could, as then advised, concur in the views expressed by the other three Judges. The appellant contends, that new deeds were necessary on the division of the property, and in fact the creation of a new entail, involving necessarily the doctrine that the original feudal title of James Rocheid was gone. The question seems really to turn on this point. We are here *inter apices juris*, and I shall not attempt to avail myself, even by way of illustration, of any maxims of English law. The case must rest upon Scottish authorities alone. First, is there any conveyance necessary on a decreet of division, or is the act of the Sheriff or of the Court simply an act marking out the limits within which each proprietor *pro indiviso* is for the future to exercise his original right of ownership over his share of the property? On merely looking to the first principles of reason upon this subject, it would appear that there is nothing necessarily in common between the titles of the co-owners. Each of them respectively may derive a title from a distinct ancestor, or from a distinct vendor, and how then, on the first blush of the case, can it be necessary that a title should be made from one

co-owner to the other, when succession takes place under a decreet for division? For greater certainty and by way of evidence, under certain circumstances, it may be desirable that some such instrument of disposition should be executed, but the one owner cannot confer any title in reality upon the other, neither can one owner be required to take any part of the lands allotted to him, affected by a title or burdened with charges which have been created by the other co-owner on his moiety, though it may be, that the division itself might be reduced, if any of the parties interested in a *pro indiviso* share were not parties to the division.

Then as regards the authority, the appellants have cited only two—Lord Bankton, iii. 5, 35, and the Style Book. In the passage cited from Lord Bankton he refers to the case of division, where part of the subject matter is indivisible, namely, a superiority, and he says, that it will be adjudged to the eldest heir portioner, and the rest must denude of their shares in her favour, and the Style Book suggests, that the pursuer and defender, in a summons for division and sale, should be "decerned to execute such deeds and writings as may be necessary to complete the titles of the parties to their respective portions."

It will be at once observed, that Lord Bankton refers in the passage cited only to the case where an indivisible subject is handed over to one portioner, and of course, in that case, the shares of the other portioners in the subject matter should be made over by some proper instrument; but the question before us is, whether it is equally necessary to have any such conveyance when the division is actually made, and each portioner takes his aliquot share, and is compelled by the decree itself to withdraw himself into those limits. The respondents complete the citation from Bankton, by adding his reference in the very passage cited to another portion of his work, book iv. title 4, § 6, where he speaks of the necessity of the elder portioner paying for the shares of the others in the indivisible superiority. Of course, therefore, when those shares had to be purchased, it is right and proper that the conveyances of the shares which are so purchased should be made to the party purchasing them, and therefore taking the conveyance of their shares. In no other author, from Sir James Balfour downwards, does there appear to be any distinction as to the conveyance under a decree for division in the case of a brieve of division by the Sheriff. In the other mode of procedure to which the Style Book refers, which is the more recent mode, by the action for division, it seems that directions are contained not always, but frequently, for the execution of proper deeds and writings for carrying the proceedings into effect, but this may well be *ex majore cautelâ*, and certainly there appears no instance, at least none has been produced before us, of any such deeds being either compellable in a division made by the Sheriff, or under a decree. Lord Ivory, in *Stewart* v. *Nicolson*, cites an opinion of an eminent Scottish feudalist, to the effect that such a conveyance would be improper in a case where, singularly enough, (as here,) part of the estate was held *pro indiviso* in tail, and the other part *pro indiviso* in fee simple. I confess I can see no reason for doubting the soundness of the reasoning of Lord Deas in *Stewart* v. *Nicolson*, which led him to his conclusion, "that after the division the lands are not different, but that, anterior to division, the lands of each had not been ascertained." In fact, where the property is in its nature capable of division, as say a single field, the Sheriff simply makes a fence or fences across the field, and delivers to each owner his own share by his own title, and it requires no concurrence on the part of the other owner, by way of deed or instruments to effectuate the transaction.

It struck me at one time, that there might be something more in the argument, that the register did not after division give notice of the title on which the whole is held, but I think that all parties concerned having notice of the moiety of the entail held *pro indiviso* must be taken to know that such moiety was subject to the law which renders the whole property divisible by the Sheriff or the Court at the instance of any person who might so require the division to be made, and therefore having notice of the whole extent of the property, the share in which is entailed. They must be taken to know that in any part of that property an entire separate interest may be, or may have been, at any time allocated out of the whole to the heir in tail.

For these reasons, I venture to submit to your Lordships, though of course with diffidence upon a subject of this character, at the same time, however, feeling greatly confirmed by the concurrence of all the former Judges in the case of *Stewart* v. *Nicolson* upon the first point, and of three of those Judges upon the second point, that the interlocutors complained of be affirmed, and the appeal dismissed with costs.

LORD COLONSAY.—My Lords, as I have arrived at the same result, and very much upon the same grounds, as my noble and learned friend, I shall state my opinion as briefly as possible. I shall begin with the question, whether an estate held *pro indiviso* can be made the subject of an entail protected by the Act of 1685. It was argued to us, that the terms of that Statute "lands and estate" must necessarily mean separate estate, not estate held *pro indiviso*. But that conclusion was only deduced from the argument that was submitted, that if it were otherwise then certain consequences must follow. There is nothing in the words themselves to indicate that. I think it is impossible to contend, that a party holding large landed estate *pro indiviso* is not an owner of lands and estate. But then it is said he is not so in the sense of the Act of 1685.

That conclusion is only arrived at, as I have said, by endeavouring to shew, that if it were the meaning under the Act of 1685, strange consequences would follow.

Now, my Lords, holding that an estate so possessed—an estate held *pro indiviso*—is within the meaning of the Act of 1685, upon what authority is it to be held as not being capable of being entailed? I know of no authority for that proposition. I know of no author who says so. I know of no case which has so decided.

But an argument was deduced by the ingenuity and research of my learned friend, Mr. Anderson, from the Statute of 1681, which was said to be contemporaneous legislation with the Statute of 1685. Now those two Statutes deal with different matters altogether; they are not in reference to the same objects or the same subjects, because the Act of 1681 is in reference to the right of franchise. It is in reference to the rights of superiority, rights held in a particular manner, and which are described as being qualified by a certain valuation. Now it has been held with reference to this, from the words of the Act itself, especially that part of it which has been alluded to by my noble and learned friend on the woolsack, which contemplates the case of adjudgers and apprisers, and which goes even further than he has alluded to, because it says, that in the case of certain adjudgers and apprisers they shall not be entitled to vote until there is a division, thereby contemplating that a division should take place, in order to point out the amount of the valuation which each party has, and there is a subsequent part of the same Statute which points in the same direction. The whole course of decision, I say, in regard to those valuations which admit of being divided has been, that a party coming forward must shew the valuation of the particular lands which he holds to the extent specified in the Statute, and the election law has been held as ruling it in that direction, but there is no authority for saying, that the entail law, under the Act of 1685, has ruled in that direction.

Now, my Lords, an entail of property held *pro indiviso* may be made to descend like any other property. But it is said, that it is subject to the contingency of being divided, and that therefore it cannot be the subject of an entail under the Act of 1685. The contingency of subsequent division is not an objection to the entail, as is shewn by the case of heirs portioners. In the case of an entail of an indivisible subject, an estate that is not held *pro indiviso*, that estate, if the entail does not exclude heirs portioners, is liable to division when the succession comes to heirs portioners, and it has been held under the entail law, that, in those circumstances, for reasons which I shall immediately notice, the entail comes to an end. But the possibility of that occurrence is not a reason why the entail should not be good until that occurrence arrives. And therefore I see no ground for holding, from that circumstance, that this class of estate, because it may afterwards come to be divided, should not in the first instance, at least, be capable of being made the subject of entail. I have not the slightest doubt that there are several entails of this character; there are certainly many in which parts of them are of this character, and we see in the case that has been quoted by Lord Ivory, given as the opinion of one of the most eminent real property lawyers we can boast of, that such a thing occurs occasionally at least, and that it was not considered in former times as at all out of the rule of the Act of 1685. I therefore think that an estate, though held *pro indiviso*, may be made the subject of entail. It may be made the subject of sale, it may be made the subject of mortgage, and it descends. I see nothing in it that has any character different from that of ordinary feudal rights except this, that it may be made the subject of division.

It is said, if this doctrine were sound that I am now venturing to state, then what is to be done in reference to cases of houses where the entail might be put an end to by division? That rather belongs to the other branch of the argument, but I will just notice in passing, that although it might be shewn, that there may be certain particular kinds of subjects which do not admit of division, and although in those cases an entail *pro indiviso* could not be made, it does not follow that all property held *pro indiviso* is to be put beyond the pale of the Statute. A large class of property is not to be put beyond the pale of the Statute because there may be some particular kind of property that will not come within it.

But then there remains a question of great importance, whether the property, when divided, remains under entail. Now that point, I think, is one which runs a little into subtlety, but it is one which must be dealt with. Does the division of the property alter the estate, or does it merely alter the possession of the estate? When the division takes place, it is not necessary, (I hold that to be clear,) that there shall be dispositions by the several parties to each other. The matter of division of one property of this kind is talked of by all our authorities from Sir James Balfour downwards, and not one of them suggests that it is necessary; and the Styles, till a recent date, did not contain any such clause for executing dispositions. The clause which has been lately introduced into the Styles does not necessarily imply, that the conveyances are to be from one to the other of property which admits of division. It may be useful if there is a property concerned which does not admit of division, or it may be useful, if one of the parties has to make a conveyance or a deed in order to complete his own right; but still there is no trace in our authorities, from the earliest to the latest, that a conveyance from one party to another is

necessary to complete the right. On the contrary, the right remains on the original infeftment. The feudal right remains just as before.

Then, if that be so, why should not the entail right remain? It is said, that parties going to the Register of Entails will not know that what they see there as the entail of a *pro indiviso* right is the entail of what is now possessed as a separate right. But if the estate is feudally the same, if it is the same upon the register, which shews the right to the property, the register which parties look at to see who is possessed of the property, to see what the right is which they are going to attack; if it does not require to be altered, why does it require to be altered in the register, which is the place, not where you go to see whether the party has the right, but where you go to see whether the right has been entailed? If the parties see upon the one register that there is a *pro indiviso* right of entail, and no allusion in that entail to a division to be afterwards made, it is the duty of a party who seeks to affect that estate to go and see upon the other register, or to ascertain in some other way, what is the condition of the matter. A decreet of division has always been held to be a complete arrangement of the right requiring no new feudal investiture to be made at the time, and therefore I cannot see why it should require a new entail to be made at the time. If it does not require a new entail to be made at the time, if it does not destroy the old entail, I do not see why there should be any entry in the register of entails, when there is neither an old entail repeated, nor a new entail. If it be a subject which does not admit of division, such as a superiority, which Lord Bankton has alluded to, it may be necessary, in a case where a division takes place among co-heiresses, that conveyances should be made from one to the other.

Now it is true, that when that sort of division among heirs portioners takes place, the entail is held to be destroyed. Why? Is that a parallel case? The division we are now talking of is not a division of the entailed estate; it is not a division within the entail. The estate which is now to be possessed, and which from the beginning must be held to be the property of the party, as to which the mode of possession is now arranged, remains complete. The party has as much as he had before. The whole object of the entailer is accomplished by handing down the estate. But when this estate descends to heirs portioners, then each is to take his own share of that estate, unless the right of heirs portioners is excluded, and the right of the eldest heir established. If the entailer had intended, that the estate should descend to one party after certain circumstances, he would have excluded heirs portioners. But he not having done so, the estate is divided; it comes to be a partition within the entail which destroys the possession of each party, and if these heirs portioners were to be again succeeded by heirs portioners, the estate would be frittered down to a mere nothing. That is not the object of the entail. The object of the entail is to keep the estate entire, and therefore, when there has been an opening of the entail, and the estate has been subdivided, the object of the entail has entirely failed.

For these reasons, without adding more to what has been said by my noble and learned friend upon these points, I think that neither of them can be effectually maintained. I think it is impossible to read the full judgments given by Lord Ivory and Lord Deas in the case that has been referred to without seeing, that the conclusion arrived at is the one which ought to be sustained. I have the greatest possible respect for the opinion of my late learned friend, Lord Curriehill, who was a great authority, but upon that particular point upon which he expressed doubt, I think he was hesitating about small matters, and that he was not taking a broad view of the matter, but going upon particular points and critical views of conveyancing which were not such as I can give my assent to.

But then there remain other objections (which I do not mean to go into in detail) to the entail as it stands. Supposing, then, all that I have said to be right; supposing that an estate held *pro indiviso* was a good subject of entail; supposing that the partition of that estate is not a destruction of the entail, still there remains the question, whether this particular deed of entail, as applied to any estate, is a good entail, or whether it is defective in any cardinal clause. Now the objections that have been stated to these clauses, I think, are very critical indeed. The first objection is the one stated to the prohibitory clause of the entail. How is it that that does not prohibit sale? Now I really think that it is a remarkably critical objection. It is this: "It shall not be lawful to nor in the power of Alexander Kinloch or his heirs," and so forth, "to alter, innovate, or change this present tailzie and settlement, or yet the order of succession hereby prescribed, nor to do any other deed that may import or infer any alteration, innovation, or change of the same, directly nor indirectly, nor to sell, anailzie or dispone either irredeemably or under reversion, nor yet to wadset or burden with infeftments of annual rent, or any other servitude or burden, my lands and estate above written, or any part thereof."

Now the objection is founded upon these words "nor to sell, anailzie or dispone either irredeemably or under reversion." "To sell and dispone" what? "My lands and estate above written, or any part thereof." Another objection is, that the clause does not sufficiently prohibit the contraction of debt. I cannot see that there is any force in that; it says, "nor yet to contract debts upon the said estate," which it is said applies only to contracting debts in a particular

manner. That is a point which has been so often decided, that it is quite in vain to struggle against it now.

These objections are taken to the irritant clause. These objections are both as regards sales and as regards debts. The objection has reference to this provision of the entail, that if any person "shall contravene, or fail to fulfil and obey, and perform the several conditions and provisions above expressed, or any one of them, or shall act contrary to the said restrictions and limitations or any of them, that then, and in these or any of these cases, not only such facts, deeds, debts, omissions, and commissions, done, contracted, neglected, or committed contrary hereto, with all that may follow hereupon, shall be in themselves void, null, unavailing," and so on. It is said, that this is not good, because it does not say, that if they "contract debts" or "commit deeds" contrary to the conditions and provisions above expressed, or any one of them, they shall be void. Now if the prohibitory clause is good, it contains a provision, that if they shall contravene, or fail to fulfil the provisions above expressed, or any one of them, or shall act contrary to them, then in any of those cases, what is to happen? Such facts, deeds, debts, omissions, and commissions, and so forth, shall be bad; but facts, deeds, and debts are expressions which, I think, in their collocation here, and in the position in which they stand in the context, admit of no doubt at all. Facts and deeds are words of very large application, and must be applied with reference to the subject matter of the clause, and when we see that this clause relates to any contravention, any failure to obey, or any acting contrary to the restrictions and limitations before mentioned, or any of them, I think there can be no doubt that the words are sufficient.

But then the resolutive clause must also be looked at, which is said to be imperfect. It says, that any person so contravening, or failing to fulfil the conditions and provisions, shall lose the estate; but it does not say, "any person contravening the restrictions and limitations." It is attempted to be shewn, that, according to the particular use of the words in this deed, "restrictions and limitations" mean one thing, and "conditions and provisions" mean another. Now I cannot go with that distinction. I think that "conditions and provisions" cover everything. In the first place, they are the words of the Act 1685. And in the next place, I see that every one of the prohibitions is under a special provision. In every one of them there is a provision, and this clause says, that any person failing to fulfil the before written conditions and provisions, or any of them, shall lose their right and interest in the estate. I therefore think, that there is no ground for maintaining these critical objections. I think that they cannot possibly receive effect; and upon the whole I fully concur in the conclusion of my noble and learned friend on the woolsack, that this appeal must be dismissed with costs.

Interlocutors affirmed, and appeal dismissed with costs.

Appellants' Agents, Scott, Moncreiff, and Dalgetty, W.S.; Holmes, Anton, Greig, and White, Westminster. — *Respondents' Agents*, J. and F. Anderson, W.S.; Connell and Hope, Westminster.

FEBRUARY 17, 1870.

GEORGE KELLIE MACCALLUM, Esq. of Braco, *Appellant*, *v.* SIR W. D. STEWART of Grandtully, Bart. and J. DUNDAS, C.S., his Trustee.

Sale of Land—Consignation of Price—Articles of Roup—Stipend—Relief of Purchaser—*M. purchased an estate from S., one of the articles of roup stipulating, that part of the price should be consigned to meet the event of certain undecided questions, as to an obligation of relief from future augmentations of stipend, and should remain until those questions were finally determined. S. raised an action, and obtained decree to the effect, that he as vassal was entitled to relief from A.* qua *superior, and then claimed payment of the consignment.*

HELD (affirming judgment), *That S. was entitled to the money, having fulfilled the condition, and that he was not bound to raise another action to settle the liability in other ulterior events.*

Superior and Vassal—Feu Contract—Clause of Relief against Augmentation of Stipend.

SEMBLE—*An obligation in a feu contract on the granter, his heirs and successors, to relieve the vassal of future augmentations of stipend is binding only on the successors* qua *superiors.*—*Per* LORDS CHELMSFORD, WESTBURY, and COLONSAY.[1]

---

[1] See previous reports 6 Macph. 382; 40 Sc. Jur. 206. S. C. 8 Macph. H. L. 1; 41 Sc. Jur. 206. See also *D. Montrose* v. *Stewart*, 4 Macq. Ap. 499; 1 Macph. H. L. 25; 35 Sc. Jur. 420; *ante*, p. 1168.