cation made by the reverend principal, the great man whose name I have before mentioned, Dr. Robertson, to the Town Council, for leave to enable the professor of moral philosophy to take fees instead of being dependent solely upon his salary. The Town Council having directed that the professors should be paid by salary and not by fees, the principal applies to the Town Council to make an exception in favour of this gentleman as a professor, and to allow him, for some special reasons, in exception to the rule laid down by the Town Council, to be paid by the fees of the students. Now, observe, this was done by the principal, as representing the Senatus Academicus,—it was done, of course, after full consideration by the Senatus Academicus —it was done, because they knew that without the leave of the Town Council they could not legally accept fees—it was done, because they knew that they could not infringe upon the regulation of the Town Council, which directed the professors to be paid by salary and not by fees. Therefore, anything more clear than that, at the very time when some of their acts might lead to some doubt as to their pursuing a different course, cannot be imagined. It is then clear, that, since the beginning of the present century, those acts which might have raised some little doubt upon the question, can leave no doubt when coupled with the admissions and proceedings, not only of the Town Council, but of the College itself.

My Lords, I have nothing more to add to the observations of my noble and learned friend, and the arguments which have been urged by the learned Judges in the Court below upon both the occasions when this question came before them, except this—that I see that an attempt is made to represent Lord Jeffrey as having differed from the other Judges in respect of the decree of 1829. A case arose, that of *Tullis* v. *Macdowall* and the Magistrates of Edinburgh, and my Lord Jeffrey said, "I am inclined to think that the charter and the act of 1621 do constitute the College, as apart from the patrons. The patrons have great and extraordinary powers, but they are not the College. The College, in many respects, no doubt, is subordinate to the patrons, but it has powers and privileges quite independent of theirs," (no doubt that is so,) "as, for instance, that of conferring degrees." It must, however, be observed, that some of the Judges seemed to think, and Lord Glenlee among others, that the mere appointing of the professors gave them, from the fact of their appointment, the power of conferring degrees. I should doubt that, and certainly the instances of the other Scotch Universities would rather go against it, for every one of those which have been cited—St. Andrews, Aberdeen, and Glasgow—have the power to confer degrees by express grant—by grant of the Pope, in the case of St. Andrews and Glasgow, and by grant of the Estates of Parliament in a much later case, at the end of the sixteenth century —that of Marischal College, Aberdeen, founded by the Earl Marischal. It is quite unnecessary to enter upon that here, for this is perfectly independent of all question of the power of granting degrees; it is totally different. The question here is as to the power of making rules and regulations for the government of the College.

My Lords, much has been said in this case respecting the difference between intramural and extramural interference. For my own part, I am inclined to think that the power of the Town Council to make regulations for the government of the College and the discipline of its members is much greater considered merely as to their intramural authority than as to their extramural. I think it is a much greater stretch of power for a municipal body to interfere with the details of the discipline and conduct of the University within its own walls, which this Town Council most clearly has done from the very first, than to exercise the mere power of prescribing what shall be the qualification for professorships, where the candidates are extramural.

Upon the whole, therefore, I have no doubt whatever that the College of Edinburgh, differing from the other Colleges in Scotland, stands upon this footing, that it is the College of the town, and that the Town Council have the government of that College.

*Interlocutors affirmed, with costs.*

Richardson, Loch and Maclaurin, *Appellants' Solicitors.*—Maitland and Graham, *Respondents' Solicitors.*

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## JUNE 12, 1854.

## ROBERT KERR, *Appellant, v.* THE MARQUESS OF AILSA, *Respondent.*

Entail Amendment Act (1848)—Process—Petition to Sell—Pupil—Tutor ad Litem—*An application under this Act, for authority to sell part of an entailed estate, to pay off debt affecting the fee, was served on the three next substitutes, the first of whom was in pupillarity. Fifteen months after moving the petition in Court, and subsequent to various material steps, preparatory to fixing the price of the lands, a* tutor ad litem *was appointed to the pupil, who, after entering on his office, judicially stated his approval.*

HELD (affirming judgment), *that the delay in appointing the* tutor ad litem *was not a valid objection (taken by the purchaser) to the regularity of the procedure.*

Jurisdiction—Entail Amendment Act—Justice of Peace—Affidavit, Competency of.

HELD (affirming judgment), *that an affidavit in reference to this Act may be competently taken in England before a Scotch Justice of the Peace resident at the time there.*[1]

The following case setting forth the facts was prepared and laid before English counsel: "By the statute 11 and 12 Vict. c. 36, for the Amendment of the Law of Entail in Scotland, it is enacted, § 6, 'that where any heir of entail in possession of an entailed estate in Scotland shall apply to the Court of Session under this act in order to disentail such estate in whole or in part, or to sell, alienate, dispone, charge with debts or incumbrances, lease, feu, or excamb the same, or any part thereof, he shall make and produce in such application an affidavit setting forth that there are no entailer's debts or other debts, and no provisions to husbands, widows or children, affecting, or that may be made to affect, the fee of the said entailed estate, or the heirs of entail; or if there are such debts or provisions, setting forth the particulars of the same, with the amounts thereof respectively, principal, interest, and expenses, and the vouchers by which the same are instructed, and the names, designations and residences, of the parties in right of the same, and the Court shall not proceed with such application until such affidavit is lodged; and if the Court shall see cause, intimation of such application may be ordered to be made to the parties in right of the said debts or provisions, or any of them, with a view to such parties appearing for their interest, if they shall see fit; and it shall be lawful for the Court to order such provision as may appear just, to be made for such debts or provisions, or for the protection of the parties in right of the same, before granting the authority sought for in such application, or as the condition of granting the same; and any person who shall wilfully make such affidavit falsely, shall be deemed to be guilty of perjury, and be punishable accordingly.'

"On or about the 5th of March 1849, the Most Honourable Archibald Marquis of Ailsa, as heir of entail in possession of the entailed estates of Cassillis and Culzean, in the county of Ayr, made application to the Court of Session, in the form prescribed by the statute, for authority to sell such parts of the said estates as should seem most suitable and proper, for the purpose of paying off certain debts affecting, or that might be made to affect, the fee of the said estates. Lord Ailsa's petition, besides setting forth the various particulars required by the statute, contained the following statement:—'The petitioner has, in terms of § 6 of the said first recited statute, (the said 11 and 12 Vict. c. 36,) made, and there is produced herewith in process, an affidavit setting forth the particulars of all debts or provisions to husbands, widows or children, affecting, or that may be made to affect, the fee of the said entailed lands and estates, or the heirs of entail, with the amount thereof respectively, principal, interest and expenses, and the vouchers by which the same are instructed, and the names, designations and residences, of the parties in right of the same.' A portion of the entailed estates having been exposed for sale by the authority of the Court obtained under this petition, certain of the selected lands were purchased on the 23rd of April 1851 by Robert Kerr, Esquire, of Lagary, Row, in the county of Dumbarton, and some others of them by other parties. These purchasers having consigned in bank the purchase moneys of the portions of the estate respectively acquired by them, shortly afterwards discovered, and brought under the notice of the Lord Ordinary and of the Court, certain objections which they conceived to lie against the procedure adopted by the petitioner in the course of his application: and they prayed for such redress as in the circumstances should appear to their Lordships to be competent and necessary.

"On considering these objections, which were fully stated in the processes mentioned in the title of this case, the Court, on 18th December 1851, repelled all of them, 'excepting the objection that the affidavit was taken by a Scotch justice of the peace resident at the time in England;' and they, 'before answer,'—that is to say, before determining whether or not the solution of this question depends on the law of England,—directed the present case to be prepared 'for the opinion of English counsel in regard to that point.'

"It will be seen from the affidavit that it was emitted by Lord Ailsa 'at London, the 11th day of June 1849, in presence of Sir David Baird of Newbyth, Baronet, one of Her Majesty's justices of the peace for the county of Haddington.' The late Sir David Baird's appointment as a justice of the peace was in a commission of the peace for the county of Haddington. It is maintained on the part of the purchasers, that the paper founded on by Lord Ailsa is not an affidavit in the sense of the 6th section of the statute. This clause bears, 'that any person who shall make such affidavit falsely shall be guilty of perjury, and be punishable accordingly.' But this oath bears to have been sworn before a Scotch justice of the peace resident out of the county and the kingdom in which his office of magistrate is to be exercised; and as his authority does not extend to

[1] See previous reports 14 D. 240, 864; 24 Sc. Jur. 521. S. C. 1 Macq. Ap. 736: 26 Sc. Jur. 525.

England, the oath was not regularly sworn, and does not carry with it the sanction expressed in the act, because a prosecution on a charge of perjury would be incompetent in the English courts. The circumstance of the commissions of the peace for Scotch counties being under the great seal of Great Britain, can have no bearing on the question, as such commissions do not confer jurisdiction in England. On the part of the Marquis of Ailsa it is maintained, that the statute above recited does not state *before whom* the affidavit thereby required is to be emitted, and therefore it may be emitted before any functionary who is by law entitled to administer an oath; and that a justice of the peace is confessedly such a functionary. That, moreover, a person duly vested with the office of a justice of the peace may legally officiate in such a matter wherever he may be; for although the commission containing his appointment may be issued in reference to a particular county, and he might not have authority to act as a judge in the ordinary courts held by justices of the peace of other counties, yet the emission of such an affidavit is not a proceeding in such courts, and is indeed not, properly speaking, a judicial proceeding, but a mere voluntary act of the party deponing; and the oath may be administered to him privately and anywhere, and by any functionary who is legally qualified to officiate in such a matter, wherever he may happen to be: That, accordingly, it has been decided in the Court of Session, that an affidavit, to entitle a party to rank on the estate of a sequestrated bankrupt, may be lawfully emitted before any justice of the peace, although he be not in the commission of the peace of the county where the affidavit is sworn to, if he be in the commission of the peace of any other county.—*Vide* the case of *Turnbull*, 1st March 1828, 6 S. & D. 676. And since a person vested with the office of a justice of the peace can thus lawfully officiate in such a proceeding beyond the territory of the county in reference to which his commission has been issued, there does not appear to be any reason why his so officiating should not be legal in whatever part of Great Britain the proceeding may take place. The objection cannot be supported by alleging that the commission of the justice of the peace is issued under authority limited to Scotland; because, by the statute 6 Anne, c. 6, which was passed to render more complete the union between England and Scotland, it was enacted, that commissions to justices of the peace for Scotch counties should issue, not under the great seal of Scotland, but under the great seal appointed by the articles of union to be kept in England for the whole of the united kingdom; and, accordingly, the commission of the peace under which Sir David Baird acted was issued at Westminster under that seal, and in name of Her Majesty as Queen of *the united kingdom*: And that the objection in the present case was peculiarly inapplicable,—inasmuch as both the party emitting the affidavit, and the justice of the peace administering the oath, were Scotchmen, although they happened to be in England at the time,—and it was in reference to a proceeding which was to be carried through in Scotland the affidavit was required. In these circumstances, the opinion of counsel is requested on the following point:—

"Whether, according to the law and practice of England, and having reference to the terms of the said 6th section of the act of parliament, and particularly to that part of it which declares that 'any person who shall wilfully make such affidavit falsely shall be deemed to be guilty of perjury, and be punishable accordingly,' the affidavit produced would or would not be objectionable, and could or could not be made the ground of a prosecution for perjury on the charge of the oath having been made falsely, seeing that it was administered by a Scottish justice of the peace resident at the time in England?"

The following opinion was returned:—"1. We are of opinion, that according to the law and practice of England, a justice of the peace for any English county, having jurisdiction to administer oaths for any specific purpose, might for that purpose administer an oath, not only out of his county, but out of England; and that the affidavit or deposition sworn before him out of his county or out of England would be receivable in every court, and for every purpose in or for which it could have been received, if it had been sworn before him within his own county. For an act so merely ministerial, his jurisdiction would not be affected by his being out of the locality in which his judicial duties as a magistrate are alone to be discharged.

"We offer no opinion upon the question, (which might possibly be raised,) whether, if the affidavit had been sworn before a justice of the peace in his own county in Scotland, it would have been receivable in the Court of Session in support of the petition; but we may observe, that by the law and practice of all the superior courts in England, an affidavit to found proceedings therein must always be sworn in such courts, and the oath administered by the Court or its officers.

"Assuming, however, that an affidavit sworn before a justice of the peace is receivable in the Court of Session, and that the circumstance of its being sworn out of the justice's jurisdiction would have no other effect in Scotland than it would have in England, we are of opinion that an indictment for perjury might be maintained upon the affidavit in question, if false, in London or Middlesex, where it was sworn. But, independently of the provisions of the statute, the falsely swearing such an affidavit is a misdemeanour, and punishable accordingly.

FITZROY KELLY.
JOHN ROLT."

The Court of Session refused the note of suspension as to all the objections taken.

An appeal was taken against the judgment of the Court of Session on the following grounds:—" 1. Because the procedure in the petition for the respondent, prior to 5th June 1850, which was material to the object of that application, was not merely in absence of the next heir of entail, Lord Cassillis, but taken without his having been legally called as a party to the application; the number of heirs required by the statute was not in Court; and the whole proceedings, as well those before as after the appointment of the tutor *ad litem*, and the sales to the appellants, were, therefore, informal and invalid.—Bell's Principles, p. 762, § 2067; Ersk. Inst., B. i. tit. 7, § 13; *Macturk, &c.* v. *Marshall, &c.*, 7th Feb. 1815, F. C.; *Sinclair, &c.* v. *Stark*, 6 S. 336; Shand's Practice of the Court of Session, vol. i., p. 143; Juridical Styles, vol. iii., p. 19; 13th and 14th Vict., cap. 36, § 22. 2. Because the examination into the amount of the debts, and the inquiries and reports of the valuers as to the situation and value of the lands to be sold, and the other evidence on which the warrants of sale proceeded, were made and taken *ex parte*, and are exposed to challenge at the instance of the pupil.—*Dick* v. *M'Ilwham*, 7 S. 364. 3. Because the respondent, as petitioner in the application, failed to comply with the requirement of § 6 of the statute, by lodging an affidavit; the pretended affidavit in process being informal, as having been taken in London before a Scotch Justice of the Peace, who had no jurisdiction beyond the kingdom.—Ersk. Inst., B. i. tit. 2, § 4; Dig. L. 2, t. 1, § 20; *Helier* v. *Hundred de Benhurst*, Cro. Car. 212. 4. Because the Justice of the Peace who subscribed the affidavit was called as a party to the application, for his interest, as the husband of one of the creditors in the provision debts.—Ersk. Inst., B. 1, t. 6, § 27."

The respondents defended the judgments for the following reasons:—" 1. Because the tutor *ad litem* to the Earl of Cassillis was appointed *tempestivè* in the course of the application, in due compliance with the requirements of the statute, and has approved of and homologated the whole proceedings. 2. Because the taking of an affidavit being an act of voluntary jurisdiction, which may be done by a Judge *extra territorium*, it is not a good objection to the affidavit in question that it was made before a Scotch Justice of the Peace when in London.—Ersk. B. i., 1, 2, 4; Feb. 3, 1688, Mor., p. 729; Tait, p. 272. 3. Because the Justice of the Peace before whom the affidavit was sworn was not disqualified, by interest or otherwise, from administering the same."

*Sol.-Gen. Bethell* and *Anderson*, Q.C., for appellant.—The minor here was not properly cited before the Court, and most important steps were taken behind his back. The Court was bound to observe scrupulously the solemnities of the Entail Act, 11 and 12 Vict., cap. 36; for this was a proceeding to sell a man's estate *in invitum*. When, therefore, the act says the proceedings are to be commenced by an application for a tutor *ad litem*, this was imperative, and the defect could not be cured by any subsequent appointment. The Court has not shewn sufficient care of the minor's interest throughout the proceedings, and to delegate its authority to a tutor subsequently appointed, and to accept his unsupported assertion that the minor's interest had not been prejudiced, is not a proper mode of carrying out the act. The act, however, does not authorize any other citation than that which exists at common law, and the Act of Sederunt was *ultra vires*, in so far as it dispensed with that mode. If, therefore, the minor has never been properly brought before the Court, subsequent heirs of entail might come against the purchaser. —*Agnew* v. *Earl of Stair*, 1 Sh. Ap. 333. Accordingly no purchaser ought to be expected to be satisfied with such a title. It may be said, that since this proceeding commenced the act of 1853 (16 and 17 Vict., cap. 94, § 1) had cured any irregularity that may have been committed. The words, however, of that section are not retrospective. The general rule is that all statutes are prospective in their operation; and mere implication is not sufficient, but express words are required to make a statute retrospective.—*Moon* v. *Durden*, 2 Exch. 22; *Moore* v. *Phillips*, 7 M. & W. 536; *Towler* v. *Chatterton*, 6 Bing. 258; *Pettamberdass* v. *Thackoorseydass*, 7 Moore's Pr. Ca. 239. Even if the words are retrospective, they cannot affect the rights of parties, where the matter was already litigious before the act passed.—*Urquhart* v. *Urquhart*, *ante*, p. 264: 1 Macq. Ap. 658: 25 Sc. Jur. 537. II. But not only are the proceedings irregular, but the affidavit on which they are founded is invalid, inasmuch as it was made by a Scotch Justice of the Peace in London, *i. e.*, out of his jurisdiction. The affidavit does not even shew that the Justice resided within the county of which he is Justice. A Scotch Justice loses his power to act as such in a foreign country, which England is in this respect. The affidavit is not even good by the *lex loci*, for it has no jurat. It may be said that the case of *Helier* v. *Hundred of Benhurst*, Cro. Ch. 212, is against this; but all that that case shews is, that in England, if a Justice of Peace is accidentally absent from his own county, where he usually resides, he may act as Justice of Peace while so accidentally absent. Moreover the affidavit is invalid, because the Justice of Peace who officiated was personally interested in it.— *Wood* v. *Harpur*, 3 Beav. 290; *Re Hogan*, 3 Atk. 812; *Dimes* v. *Grand Junction Canal Co.*, 3 H. L. Cas. 794.

*Rolt* Q.C., and *R. Palmer* Q.C., for respondent.—The common law mode of citing a minor is no doubt to cite him and his tutors; but if the tutors are not duly cited at first, and afterwards come forward and express themselves satisfied, that is enough. The proceedings were however

quite regular, being warranted by the Act of Sederunt, which was warranted by the Statute 11 and 12 Vict., cap. 36. Besides, there is no pretence for saying that the minor was in any respect prejudiced. But even assuming an irregularity had been committed, the late act, 16 and 17 Vict., cap. 94, § 1, completely cures it. We admit the general rule to be, that a statute is prospective; but it is equally clear that it may be retrospective, if the words plainly bear that construction which we say they do. Nor can there be any valid complaint as to the validity of the affidavit. It is well settled in Scotland by *Turnbull* v. *Smellie*, 6 S. 676, and *Cochrane*, Mor. 7294, that a Scotch Justice of Peace may act as such out of his own county, in any other part of Scotland; and if so, why not in England, since the form of the commission is the same all over the kingdom. As to the Justice of Peace being interested, the act being merely ministerial and not judicial, and the interest being that of his wife and not of himself, there can be no objection on that ground.

LORD CHANCELLOR CRANWORTH.—My Lords, this case, being one entirely of form, has unfortunately occupied your Lordships for several days, and the conclusion at which I have arrived is, that there really never was any foundation for the appeal in the state of the law, as the law was at the time the appeal was presented, and that, if there had been, all ground of appeal was removed by the act of the last session. It is necessary to come to a conclusion upon both these points—at all events upon the first point. Because, if it had been the view of your Lordships that there was a foundation for the appeal when it was presented, but that that ground had been removed by the subsequent act of parliament, it would then probably have been unjust to make the parties pay any costs for having presented an appeal which would, upon that hypothesis, have been good at the time that it was presented.

Upon the first point I am of opinion, that there is no doubt that this act was meant to be retrospective. I do not in the least recede from the observation attributed to me (I dare say quite correctly) in the Court of Exchequer (in *Moon* v. *Durden*), that the strong presumption in every act of parliament is, that it is meant to be prospective only. Not that there may not be enactments that are evidently upon the face of them intended to be retrospective, but that, unless there be something in the language, and in the context, and in the object, to shew clearly that that was the intention of the legislature, the duty and the practice of every Court is to suppose, in conformity with the adage of Lord Coke, that the legislature enacts prospectively and not retrospectively. Still that common principle must yield, when you see that the language is too strong to allow you to apply such a principle, and when you see from the subject matter that it was the object of the legislature that its enactments should be retrospective as well as prospective.

Now, let us consider what the subject matter is, to which this act of last session refers. A few years ago, at the time of the passing of the 11 and 12 Vict., cap. 36, in 1848, the legislature gave facilities for the purpose of disentailing estates, and for the purpose of enabling persons having entailed estates with charges upon them, to get rid of the charges upon them by selling a competent portion of those entailed estates. They directed a course of procedure to be adopted for that purpose, of which the substance was, that the petitioner and the three next heirs of entail should be consenting parties to that which was to take place. That was the substance of the enactment, and when that substance was complied with, all the rest was mere machinery for enabling the object to be satisfactorily carried into operation. The act pointed out a certain course that was to be pursued in such cases. A petition was to be presented, verified by an affidavit, and certain persons were to be served with notice—the object of which was to bring before the Court those persons who might interpose a *veto*, and say that the estate should not be disentailed.

Now, since it might in some cases turn out, that a person, having complied with what was the substance of the requisition, had incautiously or carelessly omitted, or might be supposed to have omitted, to comply with some of the matters of detail, it was the object of the legislature, for the security of all persons, not only of those who had sold an estate tail, but much more of those who had purchased it, to put an end to all possible doubt arising from questions of non-compliance with that which was the mere machinery of the case. If the requisite consents had been given, if all the parties competent to effect the sale had consented to it, then the object of the legislature was to put an end to all doubt, and to make good such titles. That object would not be effected without making the operation of the act retrospective; and therefore, in that view of the probable intention of the legislature, I will proceed shortly to read to your Lordships what the words of this enactment are, leaving out that part which is clearly prospective:—"No interlocutor or decree that has followed upon any petition presented under the said recited act, shall be questionable upon the ground of any want of compliance with the provisions of the said recited act, in so far as such provisions regard applications to the Court under the authority of the act, and the matter set forth in the petitions, the making or producing of affidavits therein, and the matter to be set forth in such affidavits."

The words are—"No interlocutor or decree that has followed." Now, if we are to construe that according to its natural meaning, and with reference to the probable intention of the legislature, there is no doubt whatever that, supposing there to have been an error in the presenting of the petition, or serving notices upon the parties, (which was one of the matters also required

by the act, although I omitted to read it,) or in the making of an affidavit, it is expressly enacted, that no decree or interlocutor made shall be questioned in respect to any error of that sort. In other words, my Lords, the legislature enacts, that all those enactments in the prior act shall be deemed to have been in the nature of directory regulations,. and not matters that were necessary and essential to the validity of the proceeding. This is an extremely common course of enactment in regard to matters which are not of substance but of mere form.

In my opinion this goes to the very root of the case; and even assuming there to have been some ground for this petition of appeal at the time that it was presented, that ground is now removed, and it will become your Lordships' duty to dismiss the appeal, and to affirm what was done in the Court below. But, as I have already indicated, it would not be just to the appellant, if your Lordships should proceed upon the ground of that enactment to dismiss his petition, making him pay the costs of it; because, if your Lordships proceeded upon the ground that, since the presentment of the petition of appeal, something has happened which removes the ground which he had before, it would then be very unjust to make him pay the cost of having so proceeded. I am, however, clearly of opinion, that if this act of parliament had not been passed, there is abundance to shew that the Court of Session were perfectly right in the conclusion at which they arrived.

Three objections have been made to their decision. The first is, that the decree, which is a decree in the nature of a disentailing order, (as we should call it in this country,) was made in the absence of the *tutor ad litem* of the first tenant in tail, who was an infant. I cannot see, in any sense, that that is strictly true. The course of proceeding was this: The infant was regularly served. That is not disputed. It is admitted that he was called, and service was made upon him in time. He was a boy, and it was necessary, in order to get at him, that his tutor should be served. But in this case his tutor, or the person who was in the nature of a tutor, namely, his father, was himself the petitioner. What is to be done in that case? The act is silent upon that point, but the act says that the Court of Session may, by their order, by an Act of Sederunt, direct what is to be the course of proceeding in carrying the act into execution. The Act of Sederunt which has been referred to, states that where the party served is an infant, but the petitioner is his father or guardian, as in this case, then it shall not be necessary to have any form going on, such as citation at the market cross, and so on; but that the party may be served in the ordinary way personally, and it shall be lawful for the Court at any time in the course of the proceedings to appoint a *tutor ad litem*.

Now, strictly according to this, what is the Court to do? Why, at any time in the course of the proceedings, if it appoint a *tutor ad litem*, it will have complied with the literal requisitions of the act of parliament. In this case, after the amount of the debts had been ascertained, and pending the inquiry as to what property ought to be sold, or, if you please, after the reference on that subject, and before the final adjudication upon it, it was discovered that there had been no *tutor ad litem* appointed to the first tenant in tail, who was to give his consent—what was then done? A *tutor ad litem* was appointed in the course of the proceedings. That was exactly what the act said should be done. Then, six days after his appointment for that purpose, the final order was made, and proceedings took place upon that order. Strictly speaking, therefore, the act was complied with.

But then it is said, that although the act was in terms complied with, it was not complied with in substance, because the tutor ought to have been present at all the previous inquiries. I do not think it is competent for your Lordships to inquire into those facts, of which you have no means of forming a judgment. The tutor, when appointed, had six days to inquire, and he might well have inquired as to all those matters in the course of six days; in truth, the matters to be inquired into were matters patent upon the surface. The first point was as to the debts. There were but four or five debts. One of those had been constituted by act of parliament. And there were three or four other debts, amounting to between £38,000 and £40,000. There can be no real question about it. The only question could be—whether, in point of form, the *tutor ad litem* ought to have been before the Court at the time the debts were inquired into? But that the debts existed no one can doubt, or ever pretended to raise a doubt. Therefore, that the statute was complied with in substance is clear beyond question.

Then, my Lords, what is the other point? The other inquiry had been as to what were the proper portions of the estate to be sold. It is said, perhaps truly, that the tutor was not appointed until after that had been settled. Perhaps that may not be quite correct. But even supposing it to have been so, I do not know who this gentleman, Mr. Somerville, was. He was probably some family solicitor, or some person connected with the parties, who had known, during the whole progress of the inquiry, what was going on. But whether that was so or not, all that he could have done would have been to refer the matter to proper and competent surveyors, to report what were the proper parts of the estate to be sold. It had already been referred to persons whose integrity and competency could not be questioned. There is no suggestion made that any one else would have said or done anything different on the subject. Therefore, in substance, that is not a matter about which there is any question or difficulty to be raised, that upon that

point the statute had been in terms complied with. Therefore the entail was effectually barred, at least as far as this matter is concerned. And therefore there is nothing on the part of the purchaser to complain of.

Then, my Lords, we come to the question as to the affidavit. That is the only point upon which, I confess, at one time I had some little doubt, but not upon the point as to the interest; for it seems to me that that is quite out of the question. A Justice of the Peace, or a magistrate, in taking an affidavit, is not exercising a judicial function. If he were, it does not appear to me that he had any interest in this case. He is merely taking the affidavit of a person who says that the only charges against the estate are those of A, B, C, D. But it is urged that one of these sums, which the party making the affidavit says is a charge against the estate, is a sum which belongs to his wife—a person with whom the magistrate is intimately connected. But if it is true that the party has the charge, *she* has the charge. The affidavit does not give her the charge, or take away from her the charge. It leaves it just where it was before. It seems to me that that is a matter which does not admit of any doubt whatever.

But I had a doubt at first, whether an affidavit taken by a Scotch Justice of the Peace for the county of East-Lothian could be validly taken out of Scotland. But, upon considering the case, I think that it is not a matter that is really to be disputed; and for this reason I assume, that it is a matter of clear law upon the Scotch authorities, that in that country a Justice of the Peace is a proper person before whom to make an affidavit to be used in the Court of Session. That would be the case here. That I assume to be clear by the law of Scotland. I assume also, from what is stated by one or two of the authorities that have been referred to, that it is a matter of undoubted law in Scotland, that in order to make such an affidavit valid, it is not necessary that it should be taken by the Justice within the county for which he is a Justice of Peace. Assuming that to be the law, I see no limit that is to confine the place within which the magistrate is to exercise his jurisdiction. The conclusion which I come to is, that the authority to take an affidavit, which is a mere ministerial act, according to the law of Scotland, at all events vested in the person by reason of his character of Justice of the Peace. He is a Justice of the Peace for the county of East-Lothian. If his power to take an affidavit were confined within the county of East-Lothian, then I could understand that view of the law. But if you once get beyond East-Lothian, to which alone his magisterial functions are confined, you can only go beyond it, because it is a power which he can exercise as one personally inherent in him as a Justice of the Peace. That being so, it seems to me to make no difference whether it is done in Scotland or in any other portion of Her Majesty's dominions over which the Great Seal exercises jurisdiction in appointing Justices of the Peace.

It appears to me, therefore, upon all these grounds, that the Court of Session was right in its original decision, and that therefore we are not driven to have recourse to the other act of parliament. And, consequently, in that view of the case, I shall have no hesitation in moving your Lordships to affirm the decision of the Court below, and to dismiss the appeal, with costs.

LORD BROUGHAM.—My Lords, I take entirely the same view of this matter with my noble and learned friend. I had originally some hesitation upon the question of the affidavit; not as regards the interest of the magistrate taking it—that I hold to be clearly out of consideration in this case—but as to the question of jurisdiction. And the grounds of my opinion, that the Court below was right in the judgment which they gave on this matter, as well as upon the other matters in the case, are nearly the same with those which have been stated by my noble and learned friend. I think it is clear, from the cases that have been referred to, that a Justice of the Peace in Scotland can take an affidavit out of his own county, within which otherwise his jurisdiction is confined. Nay, a case has been mentioned—the case of *Cochrane* (Mor. 7294)—in which a stronger act than this has been done in a matter of voluntary jurisdiction, as contradistinguished from contentious jurisdiction, viz., where the ratification by a married woman of a contract which required her consent, had been taken by the Sheriff out of the bounds within which he is a judge, and yet that has been held, in respect of its being a matter not of contentious but of voluntary jurisdiction, to be competent to the Sheriff out of his own jurisdiction. I therefore consider it clear, that in this case, upon the ground of the Scotch course of decisions having been in favour of such voluntary jurisdiction, as contradistinguished from contentious jurisdiction, being capable of being duly exercised out of the bounds of the Justice, an affidavit might duly be taken by a Scotch Justice of the Peace, acting under the commission from the Great Seal of Great Britain out of Scotland, if it could have been so taken (as it cannot now be contended that it might not have been taken) out of the county for which he was such Justice.

My Lords, upon the other matters in this case I really entertain no doubt whatever. The grounds that have been stated by my noble and learned friend are perfectly satisfactory. With respect to the act of 1853, I hold also, with him, that the 1st section of that act has a retrospective operation; and if anything were wanting besides the words of that section to convince me that it was intended to be retrospective, I should find that, if required, in the different language used in the subsequent sections compared with the 1st section, those subsequent sections clearly not being intended to have a retrospective operation.

LORD ST. LEONARDS.—My Lords, I am of the same opinion as my noble and learned friends who have preceded me. As regards the objections themselves, it is needless to go over them again I think it cannot be denied that the tutor was properly served, and that a *tutor ad litem* was appointed within the clear terms of the authority given during the course of the proceedings in this matter; and I think it is perfectly clear that this House must consider that the tutor performed his duty, not simply on account of the memorandum of answer which he put in at the requisition of the Court; but I should have been of that opinion even without that, unless grounds had been stated to the House, supported by evidence to shew that he had not performed his duty. He states most expressly that he had a knowledge of, and examined, the proceedings, and found them to be correct, and that he approved of what had been subsequently done. In point of fact, he was appointed before anything material was done, except those matters which he might properly examine into and give his assent to after such examination. He could not have been better qualified to decide what should be sold, or the value of what was to be sold, or the manner of sale, if he had been appointed before the referees undertook the duty referred to them, than he was by being appointed after that had been done. He could judge just as well from the report made on the reference as if he had been appointed before the reference was made. Indeed, he then would have what he could not have had originally, namely, the only matters before him upon which he could form a judgment. It appears to me, therefore, that that objection entirely falls to the ground.

Then there really is nothing else in the case. I have looked very carefully into the proceedings, and I think there cannot be the least doubt about the sufficiency of everything but the affidavit. And I think that grounds have been stated to shew that that is not a valid objection. In this country it constantly happens, that, in the merely ministerial act of taking an affidavit, Justices of the Peace act out of their counties every day and every hour. You are bound by some act of parliament to make an affidavit entitling you to such and such payments. No one ever supposed that that constituted a particular jurisdiction in any particular magistrate, although each magistrate is appointed for a particular locality. Those are acts common to all magistrates, and you may make the affidavit before any magistrate anywhere. Considering that the Great Seal has jurisdiction over the whole of the United Kingdom, it does appear to me that this is an objection which ought not to prevail.

But, independently of the act of parliament, there is a question which is only material as affecting the matter of costs. It is, however, satisfactory to me to be able to feel confident, as I do, that this is just as good a title as any man ever had in the world, for it depends upon an act of parliament. The argument, as I understood it, was this—Resting upon the act of the 11th and 12th Vict., cap. 36, before the decision in *Urquhart's case*, it was said that this House had established a rule which prohibited the House itself from giving a retrospective operation to the act 16 and 17 Vict., cap. 94. As I understood the argument, it was not denied. On the contrary, it was admitted that, taking the words grammatically, that act did operate retrospectively; but it was said that the House had put a different construction, and, in short, had established a rule of law upon the previous Statute of 11 and 12 Vict., cap. 36.

Now, my Lords, if you only observe the very different objects of these two acts, you will see at once that the House may with perfect consistency now decide that the 16th and 17th Vict., cap. 94, has a retrospective operation, although it decided upon a former occasion, as regarded the case that was then before it, that the act of the 11th and 12th Vict., cap. 36, had not that operation. The 11th and 12th Vict., cap. 36, § 43, enacts—"That where any entail shall not be valid and effectual as regards any one of such prohibitions, then, and in that case, such tailzie shall be deemed and taken, from and after the passing of this act, to be invalid and ineffectual as regards all the prohibitions." Now, I recollect that, in the argument of the case, the learned counsel stopped there and said that that clearly could have had no retrospective operation beyond what it had before. The argument was—that those words clearly operated retrospectively. Then follow these words—"And the estate shall be subject to the deeds and debts of the heir then in possession, and of his successors, as they shall thereafter in order take under such tailzie."

Now, irrespective of the question which arose as to whether this retrospective clause (if it were retrospective) would operate upon a matter already adjudicated upon, there appears to me to be also this distinction between the two cases. You must take the clause altogether. It is not simply that one defect shall open the entail and make it all bad, but that the estate is to be subject to the deeds and debts of the heir in possession and his successors. It did not say that the estate was to be subject to the deeds and debts of the previous owners, if they had made any charges, but it said that the tailzie should be invalid as against the deeds and debts of the person in possession and his successors. Then it was prospective, not retrospective; for if the legislature had meant it to be retrospective, they would have said it should be valid as regards the debts and charges of every person who has taken under the entail. But they did not do any such thing. Besides that, this matter was acting upon the estate, not upon the proceedings with regard to the estate. This was acting upon the matter of title as it existed, and upon that only.

But when you come to the subsequent act of 16 and 17 Vict., cap. 94, you find the provision is a totally different one. It is that no interlocutor, judgment or decree shall be invalidated—the one operating upon the title or upon the actual conveyances creating the title and rendering them invalid, and the other operating upon judicial proceedings in regard to the estate, so that no two things can be more distinct or different. Then this act, in the clearest terms that language can express, declares—"That no interlocutor, judgment or decree following, or that has followed on any petition presented under the said recited act, shall be questionable," upon such and such grounds. The words are, therefore, in the past tense as well as in the future. They provide expressly for what is past as well as for what is to come. It has been argued that it might have been much more clearly expressed. I do not admit that it could have been more clearly expressed. I think that any other words would have been superfluous. It is expressed clearly, and in accordance with grammatical language. Neither this House nor any other Court of Justice is at liberty to reject clear words, to which a plain construction can be given. You must give to words their ordinary import. And what possible meaning can be ascribed to those words, if you do not attach to them their clear and obvious meaning? It is not contended that any other meaning can be given to them. But it is said—you must strike them out of the act. But why are you to strike them out? Is there any more reason in all time to come for saying that what were matters of form should be considered as having been rightly performed after decree, order, and so on, founded upon those proceedings, than there was for providing against matters of form which had been neglected in times already past? Why should parliament have attempted to make all matters that were prospective right, and yet not have made those matters right which had retrospectively occurred? There is much more reason for giving validity to what is past, and only to be remedied by an act of parliament, than for giving relief for that which is to come, which parties, where they are aware of it, could by proper care and caution guard against. Care and caution could operate prospectively, but not retrospectively. But the legislature has said wisely and properly in both cases, that, after a decree made, authorizing the sale of the estate, all matters which were required by the former act to give the Court jurisdiction, shall be considered to have been rightly performed. Then parliament takes great care to say, first of all, that it is not to apply to cases where an injury has been inflicted; next, that there shall be proper consents. That is the substantial thing, that all the proper consents shall be given. No one contends here that any injury has been done. It would be necessary to prove that injury has been done. There is no allegation of the sort. There is no pretence for it, and the proper consents have been given.

Therefore I entirely agree with my noble and learned friends. I am clearly of opinion that there cannot be a shadow of doubt as to the construction of the act of parliament, and that this is as good a title as I have ever seen; because the title depends on the act of parliament, which will give it perfect validity. I have therefore great pleasure in congratulating the purchaser upon what Lord Eldon said gave a more secure title than anything else—having to pay the costs of the appeal.

*Interlocutors affirmed with costs.*

Grahame, Weems and Grahame, *Appellant's Solicitors.*—Richardson, Loch and Maclaurin, *Respondent's Solicitors.*

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## JUNE 13, 1854.

## A. W. DICKSON and OTHERS, *Appellants*, *v.* JAMES DICKSON, *Respondent.*

Entail—Provisions to Younger Children—Clause—Construction—*A deed of entail, containing a destination to the institute and the heirs male of his body, whom failing, to another party and the heirs male of his body, whom failing, to A. D., without any mention of heirs, whom failing, to various other persons, empowered the heirs of entail, on their succeeding to the estate, to grant bonds of provision "to their younger children other than the heir in the said lands and estate." A. D. having succeeded, granted a bond of provision, bearing to be in terms of the entail, in favour of his only son and daughter, to the amount of three years' free rent.*

Held (affirming judgment), (1.) *That the son, not succeeding in any event, could not be considered as a younger child other than the heir.* (2.) *That the daughter was in a similar position, and that the provisions were invalid, as under the entail.* (3.) *That they could not competently be claimed, as under the Stat.* 5 *Geo.* IV., *c.* 87.[1]

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[1] See previous reports 13 D. 1291; 23 Sc. Jur. 606; 24 Sc. Jur. 211. S. C. 1 Macq. Ap. 729; 26 Sc. Jur. 529.