Entail Amendment (Scotland) Act 1868

1868 CHAPTER 84 31 and 32 Vict

An Act to amend in several particulars the law of entail in Scotland. [31st July 1868]

Modifications etc. (not altering text)

C1 Act: repealed (*prosp.*) by ss. 76(2), 77(2)(a)(d), Sch. 13 Pt. 1 (with ss. 58, 62, 75)

C2 Preamble omitted under authority of Statute Law Revision Act 1893 (c. 14)

C3 Words of enactment and certain other words repealed by Statute Law Revision Act 1893 (c. 14)

C4 Acts cited or referred to by their short titles under authority of Statute Law Revision Act 1893 (c. 14), **s. 3**

C5 A dagger appended to a marginal note means that it is no longer accurate

1 Short title.

This Act may be cited for all purposes as The Entail Amendment (Scotland) Act, 1868.

2 Interpretation of terms.

The following words occurring in this Act shall, except where the nature of the provision shall be repugnant to such construction, be construed as follows; that is to say, the words "Court of Session," or "the Court," shall be construed to mean either division of the Court of Session, or the Junior Lord Ordinary, or the Lord Ordinary on the Bills, as the case may be; the word "sheriff" shall include "sheriff substitute;" the words "heir of entail" shall include "institute;" the word "lands" shall extend to and comprehend all heritages; the words "entailed estate" shall extend to and comprehend all heritages which by the law of Scotland may be made the subject of entail; and the words "feu charter" shall comprehend a feu contract, a feu disposition, and every other grant of a like kind.

3 Power to grant feus, building leases, &c.

It shall be lawful for any heir in possession of an entailed estate, notwithstanding any prohibitions of limitations in the deed of entail or in any Act of Parliament, in the manner and subject to the conditions herein-after mentioned, to grant leases for the

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purpose of building for any number of years not exceeding ninety-nine years, or feus of any part of such estate (but reserving the minerals therein and the right of working the same), except the garden, orchards, policies, or inclosures adjacent to or in connexion with the manor place, in so far as such garden, orchards, policies, or inclosures are necessary to the amenity of the manor place, or, if the estate be held by burgage tenure, to dispone any part thereof, reserving and excepting as aforesaid, subject to a ground annual: Provided always, that the feu duty, rent, or ground annual to be stipulated for shall not be less than the amount ascertained as herein-after provided: Provided also, that it shall not be lawful for such heir to take any grassum or fine or valuable consideration other than the feu duty, rent, or ground annual for granting any such charter, lease, or disposition; and in case any such grassum, fine, or consideration shall be taken, such charter, lease, or disposition shall be null and void; but nothing herein contained shall prevent any heir of entail in possession from exercising any power of granting feu charters, leases, or other grants which may be contained in the entail under which he possesses, more extensive than the powers hereby conferred.

4 Procedure in granting feus, building leases, &c.

For ascertaining whether the land so proposed to be feued, leased, or disponed may be feued, leased, or disponed in terms of the provisions of the preceding section, and the value of the same, an application shall be made by the heir in possession of the entailed estate to the sheriff of the county within which the entailed estate, or the portion thereof proposed to be feued, leased, or disponed, is situated, who thereupon shall direct notice to be given to the next heir of entail entitled to succeed to the entailed estate in such manner as shall seem proper (and in the event of such next heir of entail being under age or subject to any legal incapacity, the sheriff shall appoint a tutor ad litem or curator ad litem to such heir), and shall appoint one or more skilful persons to inquire and report as to the value of the lands proposed to be feued, leased, or disponed, and whether from their position or otherwise they may or ought to be feued, leased, or disponed in terms of the preceding section either in whole or in lots; and upon such person or persons reporting that the feu duty, rent, or ground annual offered is in their opinion, having regard to all the circumstances, fair and adequate, and that such land may, from its position, be feued, leased, or disponed in terms of the preceding section, either in whole or in lots, the sheriff, on consideration of the whole circumstances, may and is hereby empowered to authorize such heir in possession or his successor in the entailed estate at any time within ten years from the date of such deliverance to feu, lease, or dispone the said land in one or more lots at such rate of feu duty, rent, or ground annual as he can obtain for the same, not being less than the rate fixed by the said skilled persons, subject to such conditions as the sheriff may think essential to secure such feu duty, rent, or ground annual, and any other conditions he may see fit, and also subject to a nominal taxed sum of one penny sterling in lieu of all casualties on the entry of heirs and singular successors, and to grant the necessary feu charter, lease, or disposition, and which being executed and recorded in the register of sasines shall be effectual to all intents and purposes; and the lands so feued, leased, or disponed shall, from the date of recording the feu charter, lease, or disposition in the register of sasines, and so long as such feu charter, lease, or disposition shall remain in force, be held as out of the entail, and be liberated from all the prohibitory, irritant, and resolutive clauses or clause of registration thereof: Provided always, that the superiority of the lands so feued, leased, or disponed, and the feu duties, rents, and ground annuals thereof, shall be and shall remain subject to the said entail in the same manner as the lands themselves were subject thereto previous to the granting of such feu charter, lease, or disposition; and it is hereby provided, that the decree of the sheriff pronounced on such application and proceeding shall not be subject to review by suspension, advocation,

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or reduction, or in any other form, except by a short note of appeal to be presented to the Court of Session in one or other of the divisions thereof, which appeal shall be disposed of by such division as a summary cause: Provided always, that unless such note of appeal shall be lodged with the clerk of the division of the Court of Session, and notice thereof given in writing to the opposite party, or his known agent, or lodged with the sheriff clerk, within six months of the date of the decree of the sheriff, such decree shall be final and conclusive; and in the event of an appeal being duly taken and lodged, the judgment of the Court of Session thereon shall be final and conclusive.

Modifications etc. (not altering text)

C6 S. 4 amended by Land Registration (Scotland) Act 1979 (c. 33, SIF 31:3), **s. 29(2)(3)**

5 Feu charters, &c. to be void unless buildings of certain value erected and kept in repair.

Provided always, that every such feu charter, lease, or disposition shall contain a condition that the same shall be void, and the same is hereby declared void, if buildings of the annual value of, at the least, double the feu duty, rent, or ground annual therein stipulated shall not be built within the space of five years from the date of such grant upon the ground comprehended therein, and that the said buildings shall be kept in good, tenantable, and sufficient repair, and that such grant shall be void whenever there shall not be buildings of the value foresaid, kept in such repair as aforesaid, standing upon the ground so feued, leased, or disponed.

6 Power to grant provisions to wife and children of heir apparent.

It shall be lawful for the heir apparent to any entailed estate, with the consent of the heir in possession of such estate, to grant provisions in favour of his wife, and of the lawful child or children of such heir apparent who shall not succeed to such entailed estate, to the same extent, in the same manner, and subject to the same conditions to, in, or under which it is now competent for the heir in possession of such entailed estate to grant such provisions, either under the [M1]Entail Provisions Act, 1824, or under the powers of the entail: Provided that such provisions shall not exceed in any case the amount authorized to be charged on the entailed estate and rents thereof, either under the said Act or under the entail of the said estate, and that the same shall become payable at the death of such heir apparent; and provided also, that such provisions to be granted by such heir apparent shall not interfere with or affect any provisions which have been granted by the heir in possession of such estate, and shall be postponed to the provisions granted by such heir in possession; and that the provisions to be granted by such heir apparent shall be calculated under the said Act, or under the provisions of the entail on the footing of the rental of such entailed estate, after deducting the burdens and provisions directed to be deducted by the said Act or by the deed of entail, and also after deducting the burdens and provisions granted by the heir in possession to his or her wife or husband and child or children, so far as chargeable on such entailed estate, or on the rents thereof.

Marginal Citations

M1 1824 c. 87.

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7 . . . . . [F1]

Textual Amendments

F1 S. 7 repealed by Statute Law Revision Act 1893 (c. 14)

8 **†Repeal of 11 & 12 Vict. c. 36. s. 12. and 16 & 17 Vict. c. 94. s. 12. 10 G. 3 c. 51. and 5 G. 4. c. 87, to apply to all entails.**

. . . [F2] the Entail Improvement Act, 1770, and the Entail Provisions Act, 1824, shall be applicable to all entails, whether dated before or after the first day of August one thousand eight hundred and forty-eight, and to all trusts, of whatever date, under which land is held for the purpose of being entailed, or by which money or other property, real or personal, is invested in trust for the purpose of purchasing land to be entailed; and the powers conferred by the said two last-mentioned Acts, or either of them, may be exercised with reference to such land, money, or other property by the person who if such land had been entailed in terms of the trust would be the heir in possession of the entailed land, and by the person who if such money or other property had been invested in the purchase of land to be entailed would be the heir in possession under the entail to be executed of such purchased land if such entail had been executed; and the apparent heir of such person who would be heir of entail in possession of such land if it were entailed, or if it were purchased and entailed, shall have the same powers with reference to such land, money, or other property as are conferred on heirs apparent under the sixth section of this Act with reference to granting provisions to their wives or husbands and child or children: Provided always, that where the operation of the said two last-mentioned Acts, or the power granted by the sixth section of this Act, are, or any one of them is, expressly excluded by the deed of entail or trust deed, the powers conferred by the said Acts, or by the Act so excluded, or by the sixth section of this Act when so excluded, shall not be competent to the heir of entail in possession under such entail, or to the person who would be heir of entail in possession under the entail directed to be made if such entail were executed as aforesaid, or to the heir apparent of such heir of entail or person.

Textual Amendments

F2 Words repealed by Statute Law Revision Act 1893 (c. 14)

9 **When estate may be sold, sale may be by private bargain.**

It shall be competent for the Court of Session, where any entailed estate is subject to or may be charged with debt affecting, or that may be made to affect, the fee of the estate, on a petition to be presented by the heir of entail in possession of such estate, to approve of an agreement to sell by private bargain the whole or any portion of such estate for payment of the whole or any part of such debt; and the Court may authorize such sale under such agreement where they are satisfied, after making such inquiry as they consider necessary, that the sale is advantageous and beneficial for the heir of entail in possession of such estate, and not detrimental to the interests of the succeeding heirs of entail; and the said Court may authorize such sale even though the price to be paid under such agreement is considerably above the total amount of the debt affecting such entailed estate as aforesaid, provided they are satisfied of the

advantage and benefit likely to accrue from such sale as aforesaid; and in the event of such sale being effected as aforesaid, and of any surplus remaining after paying off the said debts and the expenses attending the sale, such surplus, if less than two hundred pounds, shall belong to the heir of entail in possession, and if more than two hundred pounds, shall be applied under the authority of the Court in buying other lands in the neighbourhood of the remainder of the entailed estate, if the whole estate is not sold, or, if the whole estate is sold, in buying lands in Scotland, to be approved of by the Court; and until a suitable purchase of land is found, such surplus may be invested by trustees, to be appointed by the Court, on the application of the petitioner in the course of the proceedings, or in any application to be presented by him for the purpose, on heritable security in Scotland, to the satisfaction of the said trustees, or may be applied otherwise under the provisions of the Acts of Parliament relating to entails in Scotland; and the form of petitions to be presented under this section and the procedure thereon shall, as nearly as may be, be similar to the form and procedure prescribed with reference to petitions presented to the Court under the said Acts; and until such surplus is invested in the purchase of land for the purpose of being entailed, the free annual proceeds thereof shall be paid to the person who would be the heir in possession if such land were purchased and entailed; and it is hereby provided, that it shall be competent to any heir of entail in possession of an entailed estate in Scotland who has or whose predecessors have sold the whole or part of the entailed estate, and where the price or the balance of the price is available for the purchase of land, to apply to the Court in like manner for the appointment of trustees by whom the said price or balance thereof may be invested on heritable security in Scotland, or may be applied otherwise under the provisions of the Acts of Parliament relating to entails in the same manner till the same event and to the same effect in all respects as is hereinbefore provided with reference to the price or the balance of the price of lands sold under the provisions of this section.

10 Provisions as to sale by public roup.

When the upset price of any entailed lands, the sale of which has been authorized by the Court shall have been fixed, the Court may authorize the lands to be exposed by the heir of entail in possession, in presence of the judge of the roup appointed by the Court, at such time and at such upset price, not being under the said fixed upset price, as the heir of entail in possession may arrange, and in the event of the lands not being sold at such upset price, then the heir of entail in possession may re-expose the lands at a reduced upset price, not being under the said fixed upset price, in presence of the judge of the roup, and so on thereafter if the said lands shall not be sold at such re-exposure: Provided always, that such heir of entail in possession shall advertise the land in the first and subsequent exposures, if any, in terms of the interlocutor which shall have been pronounced by the Court on authorizing the sale, and upon the heir of entail effecting a sale in virtue hereof, the Court shall approve of such sale according to the existing law and practice.

11 Entailer's debts, &c. may be charged on entailed estate by bond and disposition in security.

In all cases where there are or shall be entailer's or other debts or sums of money which might lawfully be made chargeable, by adjudication or otherwise, upon the fee of an entailed estate, the heir of entail in possession of such estate for the time being shall have all the like powers of charging the fee and rents of such estate, or any portion thereof, other than the mansion house, offices, and policies thereof, with

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the full amount of such debts or sums of money, and of granting, with the authority of the Court of Session, bonds and dispositions in security for the full amount of such debts and sums of money, as by the [M2]Entail Amendment Act, 1848, and the [M3]Entail Amendment Act, 1853, are conferred with reference to provisions to younger children; and such bonds and dispositions in security may be granted in favour of any parties in the right of such debts or sums of money at the date when such bonds and dispositions in security are executed.

Marginal Citations

M2 1848 c. 36.

M3 1853 c. 94.

12 Provisions of Act 10 G. 3. c. 51. to apply to dwellings for the labouring classes.

It shall be sufficient compliance with the provisions of the said Act and of the [M4]Entail Improvement Act, 1770, the Entail Amendment Act, 1848, and the Entail Amendment Act, 1853, therein recited, if it be shown that the cottages in respect of which a charge is proposed to be created, or towards the erection of which monies are sought to be applied, have been completed in a proper and substantial manner, and it shall not be necessary to prove that they are required for the accommodation of the labourers, farm servants, artisans, and others employed on or connected with the entailed estate on which they have been or may be erected.

Modifications etc. (not altering text)

C7 "the said Act" means the Entail Cottages Act 1860 (c. 95)

Marginal Citations

M4 1770 c. 51.

13 Where estate propelled, applications under 11 & 12 Vict. c. 36. and 16 & 17 Vict. c. 94. may be made either in name of life-renter or of fiar.

Where any heir of entail in possession of an entailed estate under an entail dated prior to the first day of August one thousand eight hundred and forty-eight shall have lawfully propelled, or shall hereafter lawfully propel, such estate under reservation of his own liferent to the heir entitled to succeed him therein, any application which has been or shall be made under the Entail Amendment Act, 1848, and the Entail Amendment Act, 1853, and all procedure following thereon, shall be equally effectual in all respects whether made in the name of the heir of entail who has propelled the estate or in the name of the heir to whom it has been propelled; and during the lifetime of such last-mentioned heir it shall be sufficient that the consents of the persons whose consents would have been required to such application if the estate had not been propelled be obtained thereto; and provided also, that where the application is presented in the name of the heir to whom the entailed estate has been propelled, the presentation of such application shall be sufficient evidence of his consent thereto.

14 Repeal of sect. 33 of Act of 10 G. 3. c. 51.

[[F3]So much of the thirty-third section of the Entail Improvement Act 1770 as provides that not more than thirty acres of arable land, nor more than one hundred acres of lands consisting of hills or other grounds incapable or improper by their nature for culture by the plough, of such entailed estates lying together in one place or plot shall be given in exchange, and that an equivalent in land contiguous to the entailed estate with which the exchange is to be made shall be received in place of the land given in exchange, is hereby repealed; and in lieu thereof it is enacted that**]** not more than three hundred acres of lands of such entailed estates lying together in one place or plot shall be given in exchange, and an equivalent in land shall be received in place of the land given in exchange; and the said section shall be read as if this last-mentioned enactment was contained therein.

Textual Amendments

F3 Words repealed by Statute Law Revision Act 1893 (c. 14) but reproduced for the purpose of construing the Act

15 Court of Session may cause entails to be registered for preservation.

It shall be competent to any heir of entail, trustee, or other person interested in any entail to apply to the Court of Session for warrant to register such entail in the books of council and session for preservation, as well as in the register of entails for publication, where not previously so registered; and it shall be lawful for the Court, under such application, to cause such registration to be made at the expense of the applicant, or the heir of entail in possession, as the Court shall direct, and, with a view to such registration, to order production of such entail, or grant diligence for its recovery.

16 . . . . . [F4]

Textual Amendments

F4 S. 16 repealed by Administration of Justice (Scotland) Act 1933 (c. 41), **Sch.**

17 . . . . . [F5]

Textual Amendments

F5 S. 17 repealed by Trusts (Scotland) Act 1921 (c. 58), **Sch.** C

18 11 & 12 Vict. c. 36. ss. 5, 16. to apply to entails dated after 1848, and to all trusts.

The provisions of the fifth and sixteenth sections of the Entail Amendment Act, 1848, shall be extended to entails dated on or after the first day of August one thousand eight hundred and forty-eight, and shall apply to such entails in the same manner and to the same effect in all respects as if these provisions had been by the said sections made to apply expressly to such entails, as well as to entails dated prior to the first

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day of August one thousand eight hundred and forty-eight; and the provisions of these sections shall apply to all trusts, of whatever date, under which land is held for the purpose of being entailed.

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[F6][F6]SCHEDULE

Textual Amendments

F6 Sch. repealed by Statute Law Revision Act 1893 (c. 14)

. . . . . [F6]

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Commencement Orders yet to be applied to the Entail Amendment (Scotland) Act 1868
Commencement Orders bringing legislation that affects this Act into force:

– S.S.I. 2003/456 art. 2 commences (2000 asp 5)