

glected to give due notification, lost his recourse in all events. To lay the proof of damage upon the drawer, they thought was hard, and the other proof of no damage they thought impossible; therefore found that Ouchterlony had lost his recourse against Hunter. Actores, Alexander Lockart, Charles Maitland.

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1743. November 17. LORD MURRAY against CHARLES ROSS.

[Elch., No. 22, *Tailyie*.]

IN the year 1685 David Ross of Balnagowan, being encumbered with debts, and having no children of his own, did convey to Mr Francis Stuart, second son of the then Earl of Murray, father of the present, and nephew of Balnagowan's lady, and the heirs-male of his body, (reserving his own liferent and his lady's,) the lands of Balnagowan, with strict irritant and resolute clauses *de non contrahendo* and *alienando*. After Mr Francis Stuart and his heirs-male, there is a long series of substitutions, most of them gentlemen of his own name and family, with a clause of redemption in favours of his own heirs-male of his body. In consideration of this settlement, Balnagowan received from the Earl of Murray £10,000 Scots, and Mr Francis Stuart became bound, by the acceptance of the deed, to pay all Balnagowan's debts, provide his daughters if he should have any, and bear the arms and name of Ross.

In consequence of this settlement, apprisings were purchased in, and debts paid by Mr Francis Stuart and his father, till the year 1706, that it was thought proper to alter this settlement, and convey the estate in favour of Lord Ross, author of the defender, Charles Ross. This was done by joint consent of Balnagowan and Mr Francis Stuart, who, upon a recital that Lord Ross had paid to Mr Francis Stuart 63,000 merks, and bound himself to relieve him of all debts for which he stood engaged with David Ross, and of all the obligations he was under by the tailyie 1685, disposed to David Ross in liferent, and Lord Ross in fee, and the heirs-male of his body; which failing, to such heirs as David Ross should name, with a clause likewise of redemption in favours of the heirs-male of David Ross's body. The question was, Whether Balnagowan and Mr Francis Stuart had a power of altering the settlement 1685, and alienating in favours of Lord Ross? The general point was debated, whether the maker of an entail with the first institute could alter?

It was said, that an alteration was expressly contrary to the prohibitory clauses in the entail, and to the Act of Parliament 1685, giving force to tailyies: that, where the prohibitions are intended not to be binding upon the maker, there is a power to alter reserved to him: where that is omitted, it is supposed to be left out *dedita opera*, and the common rules of law must take place: that there is a *jus quæsitum* to the substitutes, as in this case to the heirs-male of Francis Stuart and the after substitutes, which cannot be taken from them without their consent; as in the case of provisions in a contract of marriage to children, which it is thought could not be taken from them even with the

consent of all the parties-contractors in the marriage settlement. It was ANSWERED, that the Act 1685 related only to heirs of entail, and did not speak of the maker and institute; that it was absurd to say that a man could prohibit himself unless where some other person had an interest, as in the case of a contract of marriage, or mutual tailyie, where the heirs of the marriage and the heirs of entail have a direct interest, and *hoc agitur* to give them such an interest: that the prohibitory clauses of the entail in question were solely calculated for the benefit of Balnagowan, and without any consideration of the after heirs: that Balnagowan is not to be considered as another man who voluntarily tailyies his estate; he was in some measure forced to do it by the burthen of his debts, and adjected the prohibitive clauses only to secure the estate for the payment of his debts and daughter's provisions, and likewise to secure a redemption to the heirs-male of his body if he should have any: and, as to Francis Stuart, it cannot be supposed that he meant to come under any obligations to his own heirs-male, much less to the remoter heirs of entail, and it must be presumed that he would rather choose to have the estate in fee-simple; therefore in all such cases, where no third parties have any direct interest, a tailyie ought to be considered as an *ultima voluntas quæ est ambulatoria usque ad ultimum vitæ spiritum*. See Forbes, 23d June 1713, *Scot* against *Scot*.

The general point was not determined; but it carried, that, all circumstances considered, the settlement 1685 might be altered.

N.B. Some of the Lords, who did not think that the maker and the institute could alter or alienate, were of opinion that they could transact, and that in this case there was *res dubia* and ground for a transaction, the settlement 1685 being liable to reduction on the head of imbecility and weakness in David Ross; and, besides, the estate of Balnagowan was, in the original rights, burdened with a clause of return to the heirs-male of the family of Ross.

N.B. President Craigie gave it as his opinion, in the case of *Lord Cromarty's Entail*, 11th December 1755, that this decision was to be defended upon the principle of the institute having repudiated, in which case the subsequent heirs cannot take, and the tailyie becomes destitute, like a Roman testament upon the repudiation of the heir; and he said it had been so decided in a case that came before the House of Peers.

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1743. November 18. BINNING against EARL of LAUDERDALE.

[Elch., No. 18, *Tailyie*.]

JOHN Earl of Lauderdale tailyied his estate with strict irritant and resolute clauses *de non alienando et non contrahendo*, and under several limitations and conditions, particularly, that the heir should ratify all the deeds granted by the Earl in favours of his lady or her son, before he could enter; that he should be bound to pay all the Earl's debts then due, and all that he should