

1760. *February 27.*

WILLIAM EARL of MARCH, *against* SIR THOMAS KENNEDY of Culzean, Baronet.

No. 40.

An entailed estate becomes an unlimited fee in the person of the last substitute, when, failing him, it devolves upon heirs whatsoever.

John Lord Kennedy, in the year 1697, married Elisabeth Hutchison of the county of Nottingham. Upon this occasion, articles of agreement were entered into betwixt Lord Kennedy, with consent of his father John Earl of Cassilis, and the said Elisabeth Hutchison, by which these Lords bound themselves to provide lands, of the yearly value of £.1000 Sterling, to the said Lord Kennedy, and the heirs-male of his body, in such manner as that it should not be in the power of any of them to hinder these lands from devolving in that way, or to sell or alienate them, or to contract debts whereby the same might be incumbered or evicted. It was further provided, That in case, upon failure of heirs-male of the body of Lord Kennedy, the lands should come to his father the Earl of Cassilis, it should be in his power to dispoise or burden them as he thought proper; subject always to the payment of certain portions provided to the daughters of the marriage.

In implement of these articles, a post-nuptial contract of marriage was executed in 1698, by which the lands were provided to John Earl of Cassilis in liferent, and to John Lord Kennedy in fee, and the heirs-male of his body; whom failing, to the heirs-male of the Earl's body; whom failing, to a number of other substitutes; whom all failing, to any person whom the Earl of Cassilis should appoint by a writing under his hand; whom failing, to any person who should be so nominated by Lord Kennedy; whom all failing, to Lord Kennedy, his heirs and assignees whatsoever: And upon this deed a charter was taken out and the parties were infest.

John Earl of Cassilis, the only son of the marriage, was infest upon this contract. As he had no children, and as all the other substitutes in the contract of marriage had failed, the estate, upon his death, would have devolved to the heirs whatsoever of his father Lord Kennedy. In this situation, upon the 29th March 1759, he executed a deed of entail, by which he provided the estate to himself, and the heirs of his body; whom failing, to Sir Thomas Kennedy of Culzean, his nearest heir-male, and to the heirs-male of his body; whom failing, to certain other substitutes; under prohibitory, irritant, and resolute clauses.

John Earl of Cassilis having died in 1759, without issue, the Earl of March, as nearest heir whatsoever of John Lord Kennedy, took out brieves for serving himself heir in special to the late Earl, in virtue of the charter and infestment which passed upon Lord Kennedy's contract of marriage. This service was opposed by Sir Thomas Kennedy before the Macers, and the cause was taken to report by the Lords assessors; and Lord March, at the same time, brought a process for reducing the disposition in favour of Sir Thomas.

The relation in which Lord March stood to the family of Cassilis was as follows: John Lord Kennedy had an only sister, Lady Anne, who was married to

John Earl of Selkirk and Ruglen. By him she had two daughters; Lady Anne, mother to the Earl of March; and Lady Susan, widow of the deceased Earl of Cassilis.

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Pleaded for the Earl of March: The contract 1698 is a strict entail, fenced with prohibitory, irritant, and resolute clauses, against contracting debt, or altering the succession. After a number of other substitutes, the entailer calls expressly the heirs-female of Lord Kennedy, under the description of his heirs whatsoever. Though he preferred his heirs-male, yet it was undoubtedly his will and intention, that, upon failure of them, his heirs-female should succeed. They are plainly called as members or branches of the substitution. It is impossible, therefore, that any of the preceding substitutes could have it in their power to dispoise away the estate gratuitously, to the prejudice of their right. Had the heirs whatsoever of a stranger been substituted, they could not have been disappointed in this manner; and it cannot alter the case, that they are the heirs of Lord Kennedy.

Lord Cassilis was certainly a limited fiar. Both his father Lord Kennedy, and he, had made up their titles upon the entail; and therefore he could not execute a deed so contrary to the right upon which he possessed. If he had had a son, Lord Cassilis was certainly bound by the entail; and as there were always hopes till the day of his death, that he might have had an heir-male, he never could be an unlimited fiar.

Pleaded for Sir Thomas Kennedy: Heirs of tailzie are always considered as unlimited proprietors, unless so far as they are expressly tied up in the entail. Though it should appear that the entailer clearly meant to impose a limitation; yet if he has not done it in proper words, it will not be effectual. This has been decided in the cases of Hepburn of Keith, Sinclair of Carlowrie, Leslie of Findrassie, and many others. And, *a fortiori*, when there appears no intention in the entailer to limit his heirs, a limitation will not be presumed, if the words can admit of another construction. Deeds executed by heirs of tailzie, in contravention of prohibitory, irritant, and resolute clauses, are not *ipso jure* void; but are only reducible at the instance of substitutes, to whom that privilege was given by the entailer. These deeds are good against every other person.

Lord March has no title to bring such challenge. He is not called by any of the substitutions, nor by any nomination executed by the Earl of Cassilis or Lord Kennedy. He is not called as any of the heirs, who are either to have a benefit, or to be bound by the entail, or to answer the views and purposes of it, by carrying on the representation of the family, or bearing the name and arms. His only claim is as one of two heirs-portioners of line to Lord Kennedy.

It is admitted, that when the estate devolves to heirs whatsoever, the fetters fly off. The reason is, because the succeeding heirs do not stand in such a character as to qualify themselves creditors under the limitations. They are neither bound nor capable to carry on the representation intended, to preserve which only

No. 40. the limitations were devised. The family was to be represented by one heir of tailzie only ; but when the succession opens to heirs whatsoever, it must of course divide among heirs portioners. The very same reason demonstrates, that the last substitute ought to be under no obligation to the first heir whatsoever, or to the first set of heirs portioners, who succeed in the present case, upon the failure of the whole substitutes particularly called by the entail.

The design of the maker of every entail, is to continue a representation of his family in a connected series of heirs ; and therefore every substitute is under an obligation to those more remote. But when the whole series of heirs called by the entailer is exhausted, when the estate is about to devolve on a set of heirs portioners, no wise man could mean to debar the last substitute from continuing the representation, and thereby saving the estate from being parcelled out.

Prohibitory clauses are only intended to secure the estate to the heirs of tailzie ; but heirs portioners, who come in by the last termination, do by no means fall under that description. The whole heirs of tailzie are bound, under an irritancy, to bear the defunct's name and arms : The heirs portioners must acknowledge, that they are under no such obligation ; and consequently they are not heirs of entail in the sense of the settlement.

This doctrine is strongly supported by the act 1685, which provides that those who think proper, may entail their estates with clauses irritant and resolute, to prevent the substitutes from doing any deeds whereby the lands may be appraised, adjudged, or evicted from the other heirs substituted in the entail ; that is, from the other branches or members of the entail, whom the proprietor was allowed, by the former part of the clause, to substitute, under such provisions and conditions as he thought proper. This is further confirmed by the following clause, which enacts, " That upon contravention, the next heir of tailzie may pursue a declarator, and serve himself heir to him who died last infeft, and did not contravene, without any necessity of representing the contravener." This privilege is here given to the next heir of tailzie, who is to represent the entailer, and to pass by the contravening heir. Were Lord March's plea well founded, if the Earl's settlement had been made public in his own lifetime, it would have been competent to the remotest heir whatsoever to have forfeited him of his estate. The absurdity of this is evident.

This doctrine is further supported by the opinion of Sir George Mackenzie, in his treatise of Tailzies ; and of Lord Stair, B. 4. Tit. 18. § 8.

It was further observed, that it is very much against the inclination of every entailer, that his estate should divide among heirs portioners. It is impossible, therefore, that he can mean any favour to them. Lord Cassilis' view was to perpetuate the representation of his family, and to prevent his estate from being divided : He reserved power to himself and to his son to nominate such heirs as they thought proper, after the substitutes contained in the deed. It was not therefore his intention to give his estate to the heirs whatsoever ; but it is evident, that they were brought in as mere words of style, and to exclude the fisk.

It was further said, That the heirs whatsoever are in no sense heirs of entail : That it is impossible that one should be an heir of entail *activè*, and not *passivè* ; and therefore it is incongruous, that the heirs whatsoever should insist to have the privileges of heirs of tailzie, and yet refuse to be subject to the fetters of the entail. Had Lord Cassilis intended, that the heirs whatsoever should succeed, he would have provided, that the eldest should take the estate without division. The substitution under which Lord March claims, is to heirs and assignees. This is by no means a branch of succession, but merely words of style. It was formerly the practice, that the entailer substituted his own heirs whatsoever ; but now the heirs of the last incumbent are commonly called. But this makes no sort of difference.

“The Lords found, that the deceased John Earl of Cassilis could lawfully execute the settlement under reduction in favour of Sir Thomas Kennedy ; and therefore repelled the reasons of reduction, and assolizied the defender therefrom, and decerned ; and stopped all further procedure in the service at the instance of the Earl of March.”

* * Both parties having claimed the titles of Earl of Cassilis and Lord Kennedy, and presented petitions to his Majesty, the question was remitted to the House of Lords ; who found, That Sir Thomas Kennedy’s right to the honours was preferable.

1760. *May* 19.—This judgment was affirmed upon an appeal.

For Lord March, *Alex. Murray, Montgomery, Ro. Dundas, and Miller.*

For Sir Thomas
Clerk, *Home.*

P. M.

Fac. Coll. No. 217. p. 393.

* * Lord Kames reports this case :

The Earl of Cassilis, *anno* 1698, entailed his estate with prohibitory, irritant, and resolute clauses, to the heirs of entail therein mentioned ; which all failing, “ to the heirs or assignees whatsoever of John Lord Kennedy, his son.” The entailer’s grandson, John Earl of Cassilis, survived all the other heirs of entail ; and as he had long lived in a married state without issue, and foreseeing that, failing his own issue, the estate would descend to the heirs whatsoever of his father, Lord Kennedy, who were heirs-portioners, not bound by the clauses of the entail, nor bound to represent the family, by which means his estate would have split into parts, and the memory of his family be lost, he, when he was drawing towards his end, and had lost all hopes of issue, made an addition to his grandfather’s entail, in the very spirit and intendment of it, calling to the succession Sir Thomas Kennedy, his heir-male, obliging him to represent the family of Cassilis, and subjecting him to all the clauses, prohibitory, irritant, and resolute, contained in the original entail.

After his death, the Earl of March, one of the heirs-portioners, called to the succession as heir whatsoever, brought a reduction of the said settlement to Sir Thomas Kennedy, insisting, that the Earl of Cassilis, the maker, being an heir

No. 40. of entail, was prohibited from acts of alienation. It was answered for Sir Thomas, That the heirs whatsoever, being put upon the same footing with voluntary assignees, were evidently added with no other view but to prevent the estate from falling to the fisk as *ultimus hæres*: That the clauses in the entail were not contrived for their benefit, but for the benefit of the heirs of entail, in order that each of them might enjoy the estate: That it could never be the intention of the entailer to limit any of his heirs of entail for the benefit of the heirs whatsoever, who themselves were not to be limited; and, *lastly*, That the deed challenged, so far from being contradictory to the will of the donor, is done in the very spirit of the original entail, and pursues most accurately the views and purposes of the entailer.

“ The defender accordingly was assoilzied from the reduction.”

Sel. Dec. No. 162. p. 222.

1762. February 16.

SIR PETER HALKET of Pitfirran and his CURATOR AD LITEM, *against* WEDDERBURN of St. Germain's.

No. 41.

Where the eldest son of a tenant in tail happens to be an idiot, can his father set him aside?

In the entail of Pitfirran, the heirs of entail are laid under no prohibition to alienate or contract debt. They are only prohibited to alter the order of succession under the following irritancy, “ That the contravener, for himself and the heirs of his body, shall forfeit all right to the estate, which shall devolve upon the next substitute.”

Sir Peter Halket of Pitfirran, having the misfortune of an idiot for his eldest son, settled the estate upon his second son, and the subsequent heirs called to the succession by the deed of entail. The disponee survived his father, but died young, without issue. After his death, a process was brought, in name of the idiot, for reducing the said settlement, which barred him from the succession; and the deed was accordingly reduced, by the narrowest plurality.

To clear the reasons that occur against this judgment, it must be premised, that, in our entails, every tenant in tail, being proprietor, is empowered *qua* such to exercise every act of property; and that the restraints he is under proceed not from any limitation in his right of property, but from the personal prohibitions contained in the entail, to which he ought to submit, because he accepted the succession under that condition; which holds more especially in the present entail, authorising, in express terms, every act of property, except that of altering the order of succession.

Keeping this in view, the question is, Whether Sir Peter Halket, proprietor of the estate, was barred, by the prohibition above-mentioned, from exheridating his eldest son, upon the account of idiocy? And that he was not barred, may appear from the following reason: The entailer, prohibiting an alteration in the order of succession, had only in view to secure the estate to the heirs of entail named by him.