

No. 52.

Observed on the Bench: In order to render entails effectual, it is necessary that the right of the contravener should be resolved; in which case the statute directs the next heir of tailzie, "to serve himself heir to him who died last infeft in the fee, and did not contravene;" a provision totally inconsistent with the predicament of an entailer imposing restraints upon himself. As to the tailzie in question being a mutual contract, the sole effect of that circumstance is to bar revocation *ad libitum*; agreeably to the decision respecting the entail of Macculloch of Barholm. See APPENDIX.

The Lord Ordinary having reported the cause to the Court,

The Lords found, "that the entail was not effectual against any of Mr. Van's creditors."

Reporter, Lord Justice-Clerk.

Act. Maconochie.

Alt. Honyman.

Clerk, Home.

S.

Fac. Coll. No. 150. p. 235.

1785. June 25.

JOHN MENZIES *against* ELIZABETH MACKENZIE MENZIES.

No. 53.

Powers of an heir of entail, not being the last substitute, to impose new fetters.

The estate of Culdares was limited by a deed of entail executed in the year 1697, which contained the usual prohibitory, irritant, and resolute clauses.

The devise was, to James Menzies and his heirs-male; whom failing, to John Stewart of Cardneys and his heirs-male; whom failing, to George Stewart, the brother of the former, and his heirs-male; and these all failing, to the entailer's heirs-male. After this followed a destination in favour of the entailer's heirs whatsoever, and their assignees.

James Menzies, and the late Commissioner Menzies, his only son, who had no male-issue, agreed to execute a supplementary entail; whereby, in addition to the substitutes specified in the former deed, their own heirs, including, in the *first* place, the Commissioner's daughter, were called to the succession, before the heirs whatsoever of the original entailer.

After the death of Commissioner Menzies, who survived his father, John Stewart of Cardneys, now Menzies of Culdares, made up his titles by a service, under the original entail. He afterwards brought an action against Elizabeth Mackenzie Menzies, the daughter of Commissioner Menzies, for setting aside the additional settlement, which had been completed by charter and infeftment. In this manner the general question occurred, How far a person possessing an estate under a strict entail, himself not being the last substitute, could make a suppletory entail, to take effect when the subsisting one should come to an end.

Pleaded for the defender; An heir of entail, unless where particular limitations occur, and these too guarded by the statutory clauses requisite for creating a proper *jus crediti* in the after heirs, is as much an absolute proprietor as the entailer himself. Erskine, B. 3. Tit. 8. § 29; 8th November, 1749, Sinclair against Sinclairs, No. 22. p. 15382; January, 1744, Gardener and Creditors of Dunni-

pace against Primrose, Sect. 3. *h. t.*; 8th February, 1758, Creditors of Humble against His Children, Sect. 3. *h. t.*; 27th February, 1760, Earl of March against Sir Thomas Kennedy, No. 40. p. 15414; Creditors of Cromarty against the Officers of State, in 1760 \*.

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If, therefore, where a direct infringement of the order of succession is alone prohibited, the testator's purpose may be entirely frustrated by the heir's selling the lands, or by the contracting of debt, his power of giving complete efficacy to it, by the insertion of additional prohibitions, surely cannot be supposed to be taken away. Or, if being unrestrained with regard to leases, he may, by these means, greatly reduce the value of the estate, for any length of time, he must *a fortiori*, enjoy the lesser right of preventing any future dilapidation of that sort. Nor is this reasoning applicable only to deeds of entail in which some prohibitory, irritant, or resolute clause has been omitted. Even in those of a more perfect kind, no reason can be given why such new restrictions as are not inconsistent with the original settlement, but rather tend to enforce it, or to explain the testator's meaning, ought not to be equally effectual. To prolong an entail, it may be farther remarked, without imposing any new conditions on the original substitutes, instead of counteracting the former settlement, seems most agreeable to its avowed object, of perpetuating the testator's name and family. It is true, that in this manner the last substitute will not have an opportunity to alter the succession, or to dispose of the estate; but that right is not secured to him by any particular provision, nor indeed derived from the will of the entailer, who certainly intended no preference in this respect to the person last called to his succession. It arises solely from the operation of the law itself, which will not authorise a limitation on property longer than is necessary to render effectual the interest of the heirs of entail. It cannot, therefore, have the smallest influence in the present question.

Answered for the pursuer: The power of regulating the transmission of property in succession, and of thus controlling, in the persons of the most remote heirs, the free administration of it, arises not from natural right, but from positive institution, and by this, of consequence, it must in all respects be governed. In Scotland, accordingly, it is the statute 1685 which alone authorises proprietors effectually to limit the descent of their lands, and to impose fetters and restrictions, according to the rules therein prescribed, on the persons called by them to the succession. Those two rights, of nominating heirs, and of laying restraints on the persons so named, are the counter parts of each other, and vested by the statute in one and the same person. It belongs not, therefore, to an heir of entail, who transmits nothing to his successors which it was in his power to take away, to add one limitation to those already established.

This power indeed would be quite inconsistent with the purposes of the statute. By imposing some new condition, which the subsequent heir either cannot or will

\* By this decision, which is not to be found in any printed collection, it was determined, that where one of the heirs had forfeited an entailed estate for high treason, his debts, because the remoter substitutes had no longer an interest in the limitations, were effectual against it. See APPENDIX.

No. 53. not implement, every heir in possession might at once throw loose the order of succession formerly prescribed. Not only the persons called as heirs whatsoever might be in this manner excluded from the succession by the first substitute, as well as the last, though such an authority has been hitherto understood to arise only upon a total extinction of the heirs of entail; but even those specially called, and in whose behalf the limitations were imposed, might, by this expedient, be deprived of their rights, though expressly warranted to them by the statute.

Other consequences of such a power are not less striking. By the force of repeated limitations, and by a continually increasing series of new substitutions of heirs, the free use and commerce of land would be altogether restrained. A sale of entailed property or securities in favour of creditors might be established, to take effect upon the failure of the original substitutes. As every right capable of voluntary alienation must be attachable by legal diligence, an entailed estate might, in this way, be adjudged for the debts of every succeeding heir. Nay, after one of the heirs had committed treason, or any other crime inferring a confiscation of landed property, the lands, instead of descending to the heirs whatsoever, would escheat to the Crown. From the contingent or eventual tenure of property which this would introduce, the most inextricable embarrassments would ensue.

Neither, surely, is it of any importance, that settlements by entail are confined within the narrowest limits of interpretation. In these, as in many other important deeds, where the use of particular forms or of technical expressions is required, a failure in execution is not less fatal than a total want of intention. Hence it is, that a mere prohibition to alter the succession, though guarded by an irritancy, imports only in the contemplation of law, that the estate shall be inherited agreeably to the testator's injunctions, if not alienated, or burdened beyond its value by the successive heirs. If to this has been added an effectual provision against the contracting of debt, the estate, if not sold, will descend to the substitutes unincumbered with the debts of the anterior heirs. But from such incomplete deeds no argument can arise with regard to an entail perfected, like the present, with all the requisite clauses. Without the sanction of an irritancy, every new limitation must here be altogether nugatory. Should an irritancy be interposed, its effect would be to innovate that rule of succession, which the Legislature has declared to be unalterable.

The pursuer farther contended, That the termination in favour of the entailer's heirs whatsoever, was of the nature of a clause of return, which could not be gratuitously disappointed. That argument, however, seemed to be altogether disregarded by the Court.

It was likewise urged for the defender, That James Menzies, the maker of the suppletory deed of entail, was not an heir of entail, but a disponee, which depended on the construction of the different writings relative to this estate.

The Lords found, " That an heir of entail, under the deed 1697, had no power to make the supplementary entail in question; but that James Menzies was not

an heir of entail under the deed 1697, but a donee, and therefore had powers to make such an entail." No. 53.

Lord Reporter, *Monboddo*.

Act. Lord Advocate *Campbell, Mackintosh, Wight*.

Alt. *Blair, H. Erskine, N. Fergusson*.

Clerk, *Menzies*.

C.

*Fac. Coll. No. 215. p. 337.*

1790. January 20. BRUCE HENDERSON against HENDERSON.

A condition in an entail, that the heirs should denude in the event of their succeeding to a particular estate, found to apply, in a question with the next heir, to the case of an heir already proprietor of that estate, when the tailzied succession opened to him; and found effectual, though not fenced with prohibitory, irritant, and resolute clauses.

No. 54.

*Fac. Coll.*

\* \* This case is No. 16. p. 4215. *voce* FIAR.

1791. December. WEBSTER against FARQUHAR.

Thomas Farquhar, heir of entail in the estate of Pitscandlie, let a nineteen years lease of forty acres to Webster, with liberty to the tenant to build barn, byre, stable, and other houses, which the tenant might judge necessary for the farm, to be appraised at the end of the lease, and the value paid by the granter and his heirs and successors in the lands. Action being brought by the tenant for payment of the value of his buildings, appraised at £.74, against a succeeding heir of entail, the Lords found the defender not liable. See APPENDIX.

No. 55.

*Fol. Dic. v. 4. p. 343.*

1795. May 13.

WILLIAM GRAHAM against The CREDITORS of HARRY GRAHAM.

Harry Graham, senior, in 1737, executed a strict entail of the estate of Hourstoun. In 1738, he was succeeded by his son Charles Graham, who took infeftment on the entail.

In 1744, Charles was succeeded by his son Harry Graham, junior, who possessed the estate in apperency till his death in 1776.

The entail was recorded in the register of tailzies in 1773, upon an application from the substitutes.

No. 56.

A person having for many years possessed in apperency, and having died without making up titles to an