

could be undertaken by him. The contract meant, that if he assumed the power of making a new settlement, the heirs mentioned in the contract should be preferred by it; or if it should be ascertained, that the entail was not obligatory on him, that they should nevertheless succeed. Independently of the contract, the heirs-male of the marriage had no security of succeeding to Gordonston, as Sir Robert held it in fee-simple. And if the pursuers were to be allowed to substitute "and" for "or," the obligation undertaken by him would be made to rest entirely on his after inclination, and would, therefore, have been wholly inadequate to the obvious intention of the parties.

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That an actual alteration of the entail was intended by the contract, is further evident, from its relating to other lands besides Gordonston; and its being meant that the whole should be held on the same terms.

The construction of the contract cannot be affected by the subsequent deeds of Sir Robert, particularly as they were afterwards revoked by him; and besides, he seems at one time to have thought, that the deed 1697 was binding on him; and no argument can be drawn from what he did under that misapprehension.

The Lord Ordinary assolizied the defender.

Upon advising a petition, with answers, the Court thought the decree in the year 1777 no bar to the present action; but they were unanimous in thinking that decree well founded, because Sir Robert, as institute, was not subject to the fetters of the entail, and had accordingly altered it by his marriage-contract, an obligation to settle being in reality a settlement.

The Lords, (23d January, 1798,) repelled the defence of *res judicata*, but sustained the other defences.

A petition against this interlocutor having been followed with answers, one Judge considered the contract not as an actual alteration of the entail, but as intended to fix the rights of parties, in case an alteration of it should afterwards be made by Sir Robert; and that as no other deed had been executed by him, that of 1697 must regulate the succession.

But the rest of the Court remaining of their former opinion, the interlocutor was adhered to. See APPENDIX.

Lord Ordinary, *Swinton.* Act. Lord Advocate *Dundas, H. Erskine, Mat. Ross et alii.*

Alt. Solicitor General *Blair, Geo. Fergusson, et alii.* Clerk, *Pringle.*

D. D.

*Fac. Coll. No. 74. p. 168.*

1799. February 12.

THOMAS MILLER *against* JAMES CATHCART and Others.

Colonel Cathcart executed an entail of his lands of Carbiston, and others, to take effect at his death, by which, under the conditions to be afterwards mentioned in the deed, he disposed them to his niece, Mrs. Jean Campbell, in life-rent, and to her son, James Taylor, in fee; whom failing, to certain substitutes.

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The first destination in an entail being to one person in life-rent, and to an-

No. 74. other *nominatim* in fee, the restrictions were found not to be binding on the creditors of the latter, although some of them were directed against him, and the "other heirs of entail," and the rest against "the said heirs."

"The said James Taylor, his grand nephew, and all the other heirs of entail," were enjoined to bear, without addition, the name of Cathcart Rochhead, and arms of Carbiston, or such other name and arms as the Colonel or his sister should afterwards appoint, "the fore-mentioned heirs of entail to use."

In a subsequent clause, this condition imposed on "the said heirs of entail" is dispensed with, provided "the said James Taylor, or any of the before-mentioned heirs of entail," should succeed to any other estate, by an entail which should make it impracticable "for such heir or heirs of entail" to assume the name of Cathcart Rochhead, &c. without some addition; in which case the "said heirs" were to have power to make what addition should be necessary to enable them to hold both estates.

The usual prohibitory clauses were directed against "the said heirs of entail."

Liberty was given to grant leases of a certain description; "but" (it was added) "it is not to be understood, that the said James Taylor, nor any of the said heirs of entail," should have power to grant leases of the mansion-house and offices, with thirty acres adjoining, beyond their own lives.

The obligation to possess under the deed, was laid on "the said James Taylor, and all the other heirs of entail;" and "the said heirs of entail" were taken bound to insert the restrictions in the investitures expedite by them.

The irritant and resolute clauses were directed against "the said heirs;" but, "notwithstanding the before-written conditions, limitations, and restrictions, put upon the said James Taylor, and the other before-mentioned, heirs of entail," power was given to the said heirs, "in right of the estate for the time, in case of the heir apparent or presumptive being under any legal incapacity to hold the estate, to renew the entail, passing him by, and likewise to grant provisions to their wives.

Mrs. Jean Campbell's life-rent was to be restricted to one half, upon the fee opening "to the said James Taylor, or the other heir or heirs of entail, the descendants of" her body. In case of her dying before her husband, the deed contained a life-rent assignment of one-fourth of the rents in his favour, which was declared binding "on the afore-mentioned heirs of entail and disponees;" and it was recommended "to the institutes and substitutes before-written, to get themselves duly infeft in the subjects."

James Taylor, (afterwards Cathcart) made up titles in terms of the entail.

After his death, Thomas Miller, for himself, and as trustee for James Cathcart's other creditors, brought an action for payment against his son James Cathcart, as representing his father, in consequence of his succeeding to the entailed estate. The other heirs of entail were afterwards made parties.

The point at issue came to be, How far the restrictions of the entail applied to James Taylor, the institute?

The Lord Ordinary reported the cause on informations.

The arguments of the parties were substantially the same with those in the case, 22d May, 1798, Marchioness of Titchfield against Cuming, No. 73. p. 15467. and prior decisions there quoted.

The Lords considering the present to be completely settled by those cases, found, "That the late James Cathcart Taylor being institute in the entail, was not affected by the fetters thereof; and that, therefore, the defender cannot plead the entail in bar of payment of the debts contracted by his father, the said James Cathcart Taylor."

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Lord Reporter, *Eskgrove.* Act. Lord Advocate Dundas, R. Craigie, Hope.  
Alt. Solicitor-General Blair, Rolland, Monypenny. Clerk, Gordon.

D. D.

Fac. Coll. No. 111. p. 253.

1799. February 27.

JOHN SYME *against* ANNE RANALDSON DICKSON.

Andrew Ranaldson executed an entail of his lands of Blairhall and others, containing a procuratory of resignation in favour of himself in life-rent, and of John Ranaldson his eldest son, and the heirs-male lawfully to be procreated of his body, in fee; whom failing, to his younger children, and certain other substitutes.

The prohibitory, irritant, and resolute clauses, were as follow :

"*Sexto*, Providing and declaring always, as it is hereby expressly provided and declared, That it shall not be lawful to, or in the power of the said John Ranaldson my son, or any of the other heirs of tailzie above mentioned, whether male or female, or the descendants of their bodies, to sell, alienate, wadset, dispone, or grant in feu-farm, either redeemably or irredeemably, except as hereafter mentioned, the lands and estate above resigned, or any part or portion thereof, or to contract debts, or grant bonds, or other securities of whatever nature, whether heritable or moveable."

"*Octavo*, Providing and declaring always, as it is hereby expressly provided and declared, That in case "my said son, or any of the heirs of tailzie appointed to succeed him," in manner before mentioned, shall fail in the performance and observance of all or any of the conditions, provisions, limitations, declarations and others specified in the *second, third, fourth, fifth, sixth, and seventh* articles of this present deed of entail, which are held as word by word repeated for the sake of brevity, or in the performance of any one article thereof; then, and in either of these cases, not only shall all such acts, facts, deeds, conveyances, bonds, adjudications, or other writs of whatever nature, executed, subscribed, led, deduced, or permitted to be deduced, done or executed, contrary, or inconsistent with the fore-said provisions, conditions, and others contained in the said six articles, be in themselves absolutely void and null, and of no force, strength, or effect, to affect, evict, burden, encumber, hurt or prejudice the lands and others above resigned, or the heirs succeeding, or entitled to succeed to the same, agreeable to the order and course of succession before established, and make no faith in judgment or outwith the same; but also *the person or persons heirs of tailzie foresaid* so contravening these conditions, provisions, and others, by doing, executing, subscribing, leading,

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The resolute clause under mentioned, found to apply to the institute in the entail.