

1801. *March 6.*WILLIAM LITTLE GILMOUR, *against* CAROLINE HUNTER.

No. 9.

An heir of entail found to be barred from insisting in the reduction of a deed of contravention by one of his ascendants in the direct line, where the entail provided, that not only the contravener himself, but the descendants of his body, should forfeit their right to the entailed estate.

IN 1682, William Little executed an entail of his estate of Liberton, containing *inter alia*, the following clauses : ‘ And farther, it is hereby expressly provided and declared, that it shall nowise be lawful to the heirs of tailzie and provision above specified, at any time hereafter, to sell, anailzie, or dispone the lands, barony, teinds, tenements, annualrents and others above rehearsed, or any part thereof, either irredeemably or under reversion, by granting wadsets, or infestments of annualrent, or to burden the samen with any servitude or other burden ; or to set tacks or rentals for longer space than during their lifetimes or interest ; neither shall it be lawful, nor in the power of them, or any of them, to contract debt, or to do any other deed whereby the said lands, baronies, and others, or any part thereof, may be comprised, adjudged, or otherwise evicted or forfeaulted, in prejudice of this present tailzie, or any designation which shall hereafter be made by me, and those who are to succeed by virtue of the samen ; and if they, or any of them, contravene the provision above mentioned, either by disposing, or committing any crime or delinquency, or by contracting any debt, or doing any deed, the said deeds, and all and every one of them, shall not only be void and null, in so far as concerns the lands, barony, teinds, tenements, annualrents, and others above mentioned, so that they shall not be affected therewith, in prejudice of the succeeding heirs of tailzie and provision, but also the contraveners, and the descendants of their bodies, shall lose and forfeit their right to, and interest in, the said estate, and the same shall be devolved upon, and descend and pertain to the person who shall be next, and have right to succeed to the samen, by virtue of this present tailzie, free of all deeds and debts done or contracted by the contravener, and free of all tacks set by him ; and it shall be lawful to the person having right to succeed, to obtain declarators, upon the committing and contravening of the foresaid clauses irritant, and provisions, declaring and adjudging the foresaid lands, barony, teinds, tenements, annualrents, and others above specified, to pertain to them and their foresaids,’ &c.

On the 7th June 1734, Gabriel Little, (the heir in possession,) and his eldest son Walter, granted a lease of a large portion of the entailed estate to James Hunter, his subtenants and assignees, for ‘ three nineteen years next and immediately following his entry thereto ; which is hereby declared to be and begin at the first term of Martinmas next and immediately following the decease of Mrs. Helen Gilmour, relict of the deceased William Little of Liberton, life-rentrix of the said lands.’

The clause of warrandice in the lease is conceived in the following terms : ‘ Which tack, during the currency thereof, the said Gabriel and Walter Littles bind and oblige them, their heirs and successors, to warrant, acquit and defend, to be good, valid and sufficient to the said James Hunter and his fore-

‘sai'ds, at all hands, and against all deadly, as law will, and to free, and relieve
 ‘him of all cesses, public burdons and others, imposed or to be imposed upon
 ‘the said lands of Over Liberton; *declaring hereby, that this present tack and*
 ‘*warrandice thereof*, SHALL NOT SUBSIST TO INCUR ANY IRRITANCY OF THE
 ‘TAILZIE of the lands of Over Liberton, conceived in favours of the said Gabriel
 ‘Little, and the heirs of tailzie therein specified, NOR TO COME IN CONTRAVEN-
 ‘TION THEREOF ANY MANNER OF WAY.’

Mrs. Gilmour, the liferentrix, died in February 1758, consequently the entry of the lessee, commencing only at Martinmas 1758, the lease will remain current till Martinmas 1815.

In 1799, the right to this lease was vested in Miss Caroline Hunter.

At this time, the estate of Liberton belonged to Walter Little Gilmour, great-grandson of Gabriel, and grandson of Walter, the granters of the lease. He held the estate under the entail, but did not otherwise represent the granters of the lease.

In these circumstances, Mr. Little Gilmour brought a reduction of the lease, as being granted contrary to that condition of the entail, which prohibits the heirs ‘from granting leases for longer space than during their lifetimes or interest.’

In defence, Miss Hunter

Pleaded: Even admitting the lease to be a contravention of the entail, the pursuer is barred from stating the objection. For the entail declares, that not only the heir contravening, but the descendants of his body, shall forfeit their right to the estate. Now, the pursuer being a descendant of the granters of the lease, he cannot found on an act of contravention which is destructive of his title to the estate. He cannot approbate the entail to the effect of establishing a contravention, and reprobate the same deed, to the effect of saving his own right; see Gordon, No. 23. p. 15384; 16th January 1740, Mackean against Russel, No. 9. p. 616; 17th January 1758, Cunningham against Gainer, No. 10. p. 617; 20th June 1786, Gibson against Macbain, No. 11. p. 620.

Answered: 1st, The clause of warrandice in the lease expressly provides, ‘that it should not subsist to come in contravention of the entail any manner of way,’ the true construction of which clause is, that the lease shall in no event endure above three nineteen years, and that it shall terminate sooner *si res devenit in eum casum*, that it can no longer subsist without inferring contravention of the entail. Now, while the granters lived, or even heirs of entail who represented them generally, the lease was not substantially objectionable, but by the succession to the entailed estate opening to the pursuer, the event foreseen by the granters of the lease has occurred, and therefore the tenants might be removed even without the form of a reduction.

But, 2dly, and independently of the specialty arising from the terms of the clause of warrandice, the defender’s assumption that the pursuer cannot reduce the lease without forfeiting his own right, is unfounded. It is a settled point, that an heir of entail can bring a challenge founded on the irritant clause of

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an entail, of all deeds inconsistent with it, without at the same time founding on the resolute clause, to the effect of declaring a forfeiture against the granter of such deeds. It is equally settled, that the resolute clause of an entail divests the contravener, not from the date of the act of contravention, but only from the date of the decree declaring the forfeiture. All deeds done by him during the intermediate period in consistency with the entail are valid; 13th February 1725, Lothian, No. 108. p. 15554. And as the substitutes alone can benefit by founding on the resolute clause, it is *jus tertii* to all other persons to do so. While the pursuer's title to the estate therefore remains unchallenged by those who alone can call it in question, he must be entitled to exert the unquestioned right of an heir of entail to reduce all deeds granted in contravention of it. On the other hand, the defender not being a substitute of the entail, can have no right to found on the resolute clause, for the purpose of establishing a forfeiture against the pursuer.

Besides, it has been decided, 23d November 1798, Mackay against Dalrymple, No. 361. p. 11171. that, after the death of the contravener, a forfeiture cannot be declared against his heirs, even when the entail provides that he shall forfeit for his descendants as well as himself. Matters, therefore, are now in such a predicament, that it is impossible to declare a forfeiture against the pursuer; but it must nevertheless be competent to reduce the contravened deeds, otherwise, it is obvious, that a door would be opened for effectually defeating every entail which provided that the contravener should forfeit for himself and his descendants.

Replied: *1st*, The clause of warrandice in the lease means nothing more, than that if a declarator of forfeiture should be on that account brought against the granters or their descendants, the lease should terminate rather than that they or any of them should forfeit; but as no such action has been yet brought, the pursuer cannot at present avail himself of this provision in the clause of warrandice.

2dly, It is a fixed principle with regard to entails, that no one can challenge a deed granted in contravention of them, except those to whom that right is specially granted by the entail; 25th February 1762, Creditors of Cromarty against the King's Advocate, No. 42. p. 15417. But so far is the pursuer from being entitled, in terms of the entail, to bring the present challenge, that in an action duly brought for that purpose, he ought to be a defender in place of a pursuer. The heir challenging must be entitled to found upon both irritant and resolute clauses, which is not the case of the pursuer.

3dly, The sole point decided by the case 23d November 1798, Mackay, was, that where the deed of contravention is purged by the contravener's death, the forfeiture cannot be declared against his descendants; but it by no means follows, that the same rule will take place where the deed of contravention, as in this case, remains after the contravener's death. Supposing, however, that the law so stood, the only consequence would be, that entails which forfeit the

contravener's descendants might sometimes prove ineffectual, which would in no respect be adverse to public expediency, or the general principles of jurisprudence.

The Lord Ordinary sustained the reasons of reduction.

A reclaiming petition was followed with answers, and the Court afterward ordered a hearing in presence.

When the cause was advised, the Judges were far from being unanimous; but on the grounds stated for the defender, the Court, by a majority, 'altered the judgment of the Lord Ordinary,' and 'sustained the objection to the pursuer's title.'

And on advising a reclaiming petition against this judgment, with answers, they 'adhered.'

Lord Ordinary, *Armadale.*

Act. *H. Erskine, M. Ross, Rae.*

Alt. *Solicitor-*

General Blair, Wolfe-Murray, P. Murray.

Clerk, *Menzies.*

R. D.

Fac. Coll. No. 226. p. 513.

1802. *November 17.*

SIR WILLIAM FORBES, J. HUNTER and Company, *against* LORD DUNCAN.

By contract of marriage, (6th May 1766,) between George Cockburn Haldane and Bethia Dundas, Robert Haldane of Gleneagles 'bound and obliged himself, his heirs, executors and successors, to content and pay to the said George Cockburn, his heirs, executors or assignees whatsoever, all and hail the sum of £5000 Sterling, and that at the first term of Whitsunday or Martinmas next, after the death of the said Robert Haldane, with annualrent, penalty, &c. And for the more security anent payment of the said sum of £5000 Sterling, the said Robert Haldane obliges himself and his foresaids to grant good and sufficient heritable security therefore upon his lands and estate of Gleneagles, or other lands and heritages belonging to him, in the terms herein after specified,' for securing the provisions stipulated in favour of his future wife; the fee to go to the children; 'whom failing, to the said George Cockburn, his own heirs and assignees whatsoever.'

Robert Haldane (9th June 1776) executed the following settlements:

1. A strict entail, prohibiting alienation, burdening, &c. of Gleneagles and others, in favour of 'himself, and the heirs-male of his body; whom failing, to the said Mr. George Cockburn, advocate, his nephew, and the heirs-male of his body; whom failing, to Lieutenant-Colonel Alexander Duncan, younger of Lundie, his nephew, and the heirs-male of his body; whom failing, to Captain Adam Duncan, (now Lord Viscount Duncan,) his brother-german, and the heirs-male of his body.'

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No. 10.

A debt due by the entailor to the heir of entail, extinguished in his person, on his succeeding to the unentailed as well as entailed property of the entailor.