

1804. January 19. FLEMING against LORD ELPHINSTONE.

In the year 1741, John, Earl of Wigton, executed an entail of his estates of Biggar and Cumbernauld, by which he became bound to resign them in favour of himself, and the heirs-male lawfully procreated of his body; which failing, to Mr. Charles Fleming, his brother-german, and the heirs-male lawfully procreated of his body; which failing, to the heirs-female lawfully procreated of the body of the said Earl; which failing, to other substitutes. This entail contains the usual prohibitions against changing the order of succession, contracting debt, or alienating the estate, under the usual irritant and resolute clauses.

Among other conditions contained in this entail, it is provided and declared, "That the heirs-male of my body, and the said Mr. Charles Fleming, and the heirs-male of his body, who shall succeed to my said lands and estate by virtue hereof, shall be holden and obliged to assume the surname of Fleming, and the honour, title, and dignity of the Earls of Wigton, and to bear, use, and carry the cognisance, arms, and coat armorial of the Earls of Wigton, and no other title, name, or arms, in all time after their succession."

It is also provided, that upon the failure of heirs-male of the body of Mr. Charles Fleming, his brother, whereby the title and dignity of the Earl of Wigton might become extinct, "if it shall be found that any of my other heirs of tailzie above mentioned have right, as representing me, to the title and dignity of Lord Fleming, then, and in that case, the heir so succeeding, and having right as aforesaid, shall be bound and obliged to assume and carry the foresaid title, name, arms, and designation, of Lord or Baron of Fleming, and none other."

But in the event of their not having right to that title or dignity, then it is declared, that the heirs of tailzie shall be holden and obliged to assume the surname of Fleming, and "to use and carry the title, cognisance, and arms of my family of Fleming of Biggar and Cumbernauld, and no other name, arms, title, or designation, after their said succession."

There is then the following condition: "And farther, providing, That in case it shall happen any of the heirs of tailzie above mentioned, other than the heirs-male of my body, or of the body of the said Mr. Charles Fleming, to succeed to the title and dignity of Peerage, then, and in that case, and how soon the person so succeeding, or having right to succeed to my said estate, shall also succeed, or have right to succeed to the said title or dignity of Peerage, they shall be bound and obliged to denude themselves of all right, title, or interest, which may be competent to them of my said estate, and the same shall from thenceforth, *ipso facto*, accrue and devolve upon my next heir of tailzie for the time being, sicklike as if the person so succeeding, and bound to denude, were naturally dead: And also providing, that in case it shall happen any of the heirs, male or female, succeeding to my said lands and estate, as said is, also to succeed to any other estate burdened with the like resolute, prohibitory, and irritant clauses, as to using the name,

No 116.

A clause forfeiting the heir of entail if he succeed to a Peerage, applies to the case of a Peer succeeding to the entailed estate.

No. 116. arms, or title thereto belonging, so that it might happen my said family to be sunk, suppressed, or confounded with the said other name, estate, or title to which the said heir may happen to succeed; in that case, the said heir, whether male or female, so succeeding, shall be holden and obliged either to relinquish the said other name, title, and estate, in all time after his or her succession to my said lands and estate, and to bear, use, and carry my said name, title and arms allenary, as said is, or otherwise they shall be holden and obliged to denude themselves of my said lands and estate in favour of the next immediate heir of tailzie, who shall happen to be in life for the time, and that with and under the burdens, reservations, provisions, limitations, and irritancies, contained in the present tailzie."

The irritant and resolute clauses in support of these prohibitions, are as follows: "And further providing, as it is hereby further expressly provided and declared, that if it shall happen any of the heirs of tailzie above mentioned to contravene the provisions and limitations above-written, or any of them, as the same are above expressed, then, and in that case, all such acts and deeds of contravention are not only hereby declared to be void and null to all intents and purposes, sicklike as if the same had never been made, but also the heir so contravening shall, *ipso facto*, amit, lose, and tyne all right to the said lands and estate above-written, and the same and hail right thereof, shall fall, accresce, pertain, and belong to the next heir of this present tailzie substitute to the contravener who shall happen to be in life for the time; to whom it shall be lawful to serve himself heir to the contravener's immediate lawful predecessor, who died last vest and seised in the said lands and estate before the contravention, sicklike as if the contravention had never existed, or otherwise to prosecute and establish the right of the said lands and estate by reduction and declarator, or *ex capite contraventionis*, or by adjudication or any other manner of way, as accords of the law; nor shall it be competent for the person so contravening, and incurring the irritancies in manner above expressed, to purge the same after once duly incurred."

The entailer died without male issue, but left one daughter, Lady Clementina, who was married to Charles, Lord Elphinstone.

The entailer was succeeded by his brother Charles Fleming, who died without issue, and without having made up titles.

In the year 1751, Lady Clementina Elphinstone was served heir of tailzie and provision to her father. She expeded a charter of resignation under the Great Seal, containing all the conditions in the entail; upon which she was infest.

Her son John, Lord Elphinstone, predeceased her, leaving two sons, John, now Lord Elphinstone, and Charles.

On her death, Lord Elphinstone took possession as heir of entail, and his brother brought an action of declarator, that he is entitled to be served heir of tailzie and provision to Lady Clementina Fleming, his grandmother, upon the ground that his elder brother being a Peer, is expressly excluded by the terms of the entail.

The question was reported to the Court.

The pursuer

Pleaded: In all deeds containing a destination of heirs, the intention of the maker must be the governing rule. By this entail, it is provided, that when any of the heirs other than the heirs-male of the entailer's body, or of his brother's, shall "succeed to the title and dignity of a Peerage, then, and in that case, and how soon the person so succeeding, or having right to succeed to my estate, shall also succeed or have right to succeed to the said title or dignity of Peerage, they shall be bound and obliged to denude." This is truly and substantially a quality affecting the destination or order of succession amongst the different heirs called by the entail.

Now, Lord Elphinstone certainly stands in the situation of an heir of entail having right to succeed to this estate, and he has also succeeded to a Peerage; he cannot therefore bear the name and arms of Fleming of Biggar alone, which it was the entailer's intention, so anxiously provided for, should never be sunk in any other.

It makes no difference in this view, Whether an heir of entail in possession succeed to a Peerage, or a Peer succeed to the estate. The question depends upon the co-existence of the two events, without regard to the priority of the one before the other; Lockhart against Sir Alexander Gilmour, 25th November, 1755, No. 34. p. 15404.; Bruce Henderson against Sir John Henderson, 20th January, 1790, No. 54. p. 15439.

Answered: Entails are to be strictly interpreted, both with respect to the extent and validity of the fetters imposed, as well as with respect to the order of succession pointed out. Effect must always be denied to any alleged restrictions, which the terms of the deed do not expressly warrant. Now, though there be a clause irritating the right of an heir of entail, to whom the succession has opened, in the event of his afterwards succeeding or having right to succeed to a Peerage; yet there is no irritancy in the case of a Peer succeeding to those estates as heir of entail. These are two distinct cases; the one made the foundation of a declarator of irritancy; the other is not provided for at all. Those words in the prohibiting clause, "how soon," denote an interval between the succession of the estate and the succession to the Peerage; besides, the succession to the dignity of Peerage is described as a future event, as one that shall also take place, and not as one which had previously taken place.

The two cases may be essentially the same, and the entailer may have had the one as much in view as the other; but he has not so expressed himself: The words apply to a commoner succeeding to the estate, and a Peerage afterwards devolving to him; but they do not apply to the case of a Peer succeeding as heir of entail. There must be an express and pointed declaration in such terms as must compel a court of law to enforce it, and to forfeit or exclude from his right the person

No. 116. who is declared to have his right forfeited, or to be excluded from the succession.

The Court decerned in the declarator.

Lord Ordinary, *Polkemet.* Act. *Hay, Cathcart.* Agent, *Ja. Gibson, W. S.*

Alt. *H. Erskine, Campbell.* Agent, *Ra. Hill, W. S.* Clerk, *Menzies.*

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Fac. Coll. No. 136. p. 303.

SECT. VI.

Tailzie, when revocable ?

1631. *January 14.*

SHARP against SHARP.

No. 117.

The Lords found, That although a simple tailzie, not depending upon any onerous preceeding cause, was alterable by the maker, as being *donatio mortis causa*; yet that a mutual tailzie, done by way of contract, is not revocable by repentance of any of the contracters, without mutual consent; and found that such contracts were not unlawful, as *pacta de successione viventis*, seeing such pactions by our law, are valid; neither was such a contract found to be *nudum pactum*, but a complete security, obligatory on both parties; *Lastly*, That such mutual contracts of tailzie were not *contractus innominati*, these sorts of securities not being known in this kingdom; nor did they find the doing of deeds by either party, which were contrary to the said contract, did loose the tailzie therein contained, but that notwithstanding thereof, the contract stood effectual.

In the same action the Lords found, That though neither party could break the tailzie without the other's consent, yet that the contracters might sell and dispose on the lands at their pleasure, notwithstanding the contract, which does not pre-judge the parties in any liberties they had before the same, excepting only concerning the succession to their right; and if there be nothing to succeed to, there can be nothing sought by them; and although thereby the force of the contract might seem to be elidable, by making alienations in favours of a stranger to the behoof of another successor; yet if such fraud were intended, it was in law repairable.

Fol. Dic. v. 2. p. 430.