

[M. 15404.]

1756.

ROSS
v.
LOCKHART.

Sir ALEXANDER ROSS, formerly }
GILMOUR, Bart., - - - } *Appellant.*
Colonel JAMES LOCKHART, assum- }
ing the surname of Ross, } *Respondent.*

House of Lords, 12th February 1756.

CLAUSE IN ENTAIL.—A devolution clause in an entail, which contemplated the party favored possessing the estate disposed first, and then afterwards succeeding to another estate. Held that the devolution clause was effectual, though the party succeeded to the latter estate first, then afterwards to the estate disposed by the entail.

Ap. 28, 1683. SIR ALEXANDER GILMOUR of Craigmiller, by deed of entail, settled his estate of Craigmiller upon his eldest son, John Gilmour, and the issue male of his body; whom failing, to the issue male lawfully to be procreated of Sir Alexander's own body, with other substitutions, reserving his own liferent. Infestment passed upon a charter obtained under the great seal, whereby Sir Alexander was divested of the fee of the property of his estate of Craigmiller.

Aug. 5, 1727. General Charles Ross of Balnagowan, who was connected with the Craigmiller family and the Great-uncle to the appellant, also executed an entail of his estate of Balnagowan "To myself and the heirs to
" be procreated of my body, the eldest of my heirs,
" female succeeding without division; whom failing,
" to Charles Ross, second son to George Master of
" Ross, who is only son to William Lord Ross, my
" brother, and the heirs male to be procreated of
" the said Charles Ross his body; and the heirs
" male of their bodies; whom failing, to George Ross

“ third son to the said Master of Ross.” &c. Including in the series of substitutes, the second son and his descendants, also others of the family of Gilmour, subject to a devolution in case of their succeeding both to Craigmiller and Balnagowan. Then follows the clause in General Ross’ entail, upon which the present question arises:—“ It is hereby
 “ expressly provided and declared, that whensoever
 “ the said Charles Gilmour, or his heirs above mentioned, *succeeding* to, and *possessing my estate*, shall
 “ also succeed to the estate now belonging to the said
 “ Sir Alexander Gilmour, then and from thenceforth,
 “ the right of my estate in their favours shall cease,
 “ and be extinct, void, and null, and the same shall
 “ fall and pertain to the next heir of entail appointed to succeed.”

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It happened that Charles Gilmour succeeded *first* to the *estate* of *Craigmiller* by the predecease of his elder brothers without issue, an event not contemplated by General Ross’s entail; and his son (the appellant) afterwards succeeded to Balnagowan.

He contended that, as the event contemplated by General Ross’s entail had not taken place; namely, his father Charles Gilmour *first* “ *succeeding* and *possessing my estate* ” of Balnagowan, and afterwards succeeding to the estate of Craigmiller, he was not bound to denude Balnagowan and entitled to make up titles to and retain both estates. This was opposed by the respondent, who claimed to succeed to the estate of Balnagowan, in virtue of the clause of devolution by which the appellant’s right to the same was rendered null and void by his succession to the estate of Craigmiller.

The Lords, on a full argument, pronounced this 26th Nov. interlocutor:—“ Find that the said Lieutenant-Colo-^{1755.}

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“ nel James Lockhart is the person entitled to be
“ served heir in special to the deceased George Lord
“ Ross in the lands and estate of Balnagowan in
“ virtue of the said tailzie, and decern and declare
“ accordingly.”

Against this interlocutor the present appeal was brought to the House of Lords.

Pleaded for the Appellant:—The event provided for and supposed to take place by General Ross’s entail never did take place; namely, Charles Gilmour first being in possession of the estate of Balnagowan, and afterwards succeeding to the estate of Craigmiller, on which event alone, their right to the estate of Balnagowan was to cease and determine. But the opposite event occurred; namely, the succession first to the estates of Craigmiller; and the maker of the entail not having declared that he was to denude the estate on this latter event which has occurred, the appellant has a right to retain possession of both estates. At all events this is clear, that the entailer left an election to Charles Gilmour, to say whether he would retain the one estate or the other; but this election was only to be exercised in the event contemplated by the entail; namely, of succeeding first to Balnagowan, so that unless he were to succeed to the latter first, and then to Craigmiller, he would be deprived of the election so conferred upon him. This shows the intention of the entailer himself, if intention were to be admitted to aid the construction; but here, in an entail, which must be strictly construed, no evidence of intention can be admitted. It may have been the probable intention of General Ross to enforce the devolution in whatsoever manner the two estates may become joined in one and the same person; but not having done this

in so many words, this defect in the entail cannot be supplied by construction.

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Pleaded by the Respondent:—This is merely a question of construction upon a voluntary deed of the nature of a testamentary disposition, wherein the will of the donor must be the rule. General Ross's obvious intent was to keep the estates of Balnagowan and Craigmiller separate, and never to unite them in the same family. He therefore anxiously provides, that if, the possessor of Balnagowan should afterwards succeed to Craigmiller, then and in that case Balnagowan was to cease to belong to him, and was then to devolve on the next heir of entail. The mere fact of the heir succeeding first to Craigmiller, is immaterial, for the condition ought to hold whether he succeeded first to the one or to the other. It is not likely that he would succeed to both at the same moment, and in any view succession to the one must have preceded succession to the other. The appellant's construction of the clause is therefore contrary to the whole scope and evident meaning of the entail, as well as to the words referred to,—that intent being, to preserve the General's family-estate and name separate and distinct, and prevent it from being united with another, in which his name might be sunk.

After hearing counsel, it was

Ordered and adjudged that the said appeal be dismissed, and the interlocutor complained of be, and the same is hereby affirmed.

For Appellant, *William Murray, Robert Dundas.*

For Respondent, *Al. Forrester, Gilbert Elliot.*