

No. 57.

1796. March 1.

GIBSON *against* KER REID.

When an entail fixes the *maximum* of the provision, which an heir can give to his widow, and he dies without making any settlement, a greater sum cannot be awarded to her in name of aliment.

Fac. Coll.

* * * This case is No. 108. p. 5891. *voce* HUSBAND AND WIFE.

1796. November 12.

ROBERT BRUCE HENDERSON *against* SIR JOHN HENDERSON.

No. 58.

An heir of entail who holds the estate in virtue of an adjudication from the person last in possession, obtained in consequence of a clause of devolution in the tailzie in his favour, is equally fettered by the restrictions laid upon heirs of tailzie, as if he had taken the estate by service as heir of provision under the entail.

James Henderson, in 1740, executed an entail of his estate of Earlshall, "in favours and for new infeftment of the same, to be made and granted to myself, and Helen Bruce, my spouse, in conjunct fee and life-rent, and the heirs of my body in fee;" and after various substitutions in favour of Sir Robert Henderson of Fordel, "my nephew, and the heirs of his body; which failing, any other heirs I shall hereafter nominate and appoint by a writing under my hand; and failing such appointment and nomination, my own nearest heirs and assignees whatsoever."

The entail contained prohibitory, irritant, and resolute clauses, for preventing "the said Helen Bruce, and the heirs of tailzie and provision above written," from selling the estate, or contracting debt upon it.

By a subsequent part of the deed, it is provided, that "in case any of the heirs of tailzie above written shall happen to succeed to, and be in possession of, the lands and estate of Fordel, then, and in that case, the said heirs shall be obliged to make up proper titles in their person to the lands and estate herein contained, and to make over and convey the same to and in favour of their second son; and failing their second son, or younger sons, to their eldest daughter, and the heirs of their bodies; which failing, to the second son; and failing of him and younger sons, the eldest daughter of the next generation who does not succeed to the estate of Fordel; and so on successively in the family of Fordel, while there are second or younger sons or daughters in the said family, whereby the said estates may be enjoyed by two separate and distinct persons, and the said lands of Earlshall not absorbed in the estate of Fordel; and when it shall happen that there are no second or younger sons or daughters in the said family, but only one son or one daughter, who is to succeed to the said estate of Fordel, or in possession thereof, then the only son or only daughter may hold and enjoy the lands and estate contained in this present tailzie, until a second son, and failing him, a daughter, shall exist, to whom he or she shall be bound and obliged to convey the said estate, as aforesaid, but without being liable to account for the rents and profits of the said estate during their possession; but always with and under the provisions, conditions, clauses

irritant and resolute, contained in this present tailzie, which shall be inserted and engrossed in every such deed of conveyance, otherwise the same to be null."

The succession under this entail opened, in 1774, to Sir Robert Henderson; but as he was in possession of Fordel, he ought, in terms of the clause of devolution, to have conveyed Earlshall to Robert Bruce Henderson, his second son,

He died, however, without doing so, and was succeeded by his eldest son Sir John Henderson, who entered into possession of both estates.

His brother Robert afterwards obtained a decree, ordaining Sir John to make up titles to Earlshall, and convey it to him, in terms of the clause of devolution, 20th January, 1790, Henderson, No. 54. p. 15439; and in implement of this decree, Robert adjudged the estate.

Robert after this sold part of it, and, at the same time, brought an action against Sir John, for having it declared, that as judicial disponee under the clause of devolution, he was not bound by the fetters imposed on Helen Bruce and the other heirs of tailzie; while Sir John brought a counter action of reduction, improbation, and declarator, for having it found, that his brother could not sell the estate to their prejudice.

The Lord Ordinary conjoined the actions; and in respect "the said Robert Bruce Henderson attained the possession of the estate as an heir of entail, in virtue of and conform to the clause of devolution contained in the entail of the said estate, executed by James Henderson of Earlshall in the year 1770; and in respect it is therein declared, that the heirs of tailzie, or others succeeding to and possessing the said estate in virtue thereof, shall hold and enjoy the said estate, under the whole conditions, provisions and limitations, and clauses prohibitory, irritant, and resolute, contained in said deed of entail; therefore, in the process of declarator, assolzies the defenders therefrom, and decerns; and in this process of reduction, reduces, decerns and declares, in terms of the conclusions of reduction."

Robert Bruce Henderson, in a reclaiming petition,

Pleaded: *1st*, The restricting clauses of an entail, affect those persons only who are described either *nominatim* or by the legal character under which they take the estate; 14th February, 1758, Erskine, No. 58. p. 4406.; House of Lords, 15th April, 1771, Edmonstone, No. 59. p. 4409. In this case, those clauses are directed solely against Helen Bruce and the other heirs of tailzie. But the petitioner is not an heir of tailzie. He takes the estate not by a service, as heir of provision to the person last in possession, but as judicial disponee, in consequence of the clause of devolution. And although the prohibitory and other clauses of the tailzie are ordained by that clause to be inserted in the disposition to be granted under it, still they are not declared to be imposed on the disponee, and they cannot operate against him by implication.

2dly, By the clause of devolution, no heirs are substituted to the disponee, who shall take the estate under it; consequently the petitioner, as ultimate disponee, or last substitute, is entitled to hold the estate in fee-simple; 27th February, 1760, Earl of March, No. 40. p. 15414.

No. 58.

Observed on the Bench: All the descendants of Sir Robert Henderson are heirs of tailzie. The clause of devolution merely anticipates the succession of the second son, who must therefore take the estate under the limitations of the entail. The form of making up titles is of no consequence.

The Lords unanimously refused the petition, without answers.

Lord Ordinary, *Justice-Clerk Braxfield.* For the Petitioner, *Honyman.* Clerk, *Pringle.*

R. D.

*Fac. Coll. No. 1. p. 1.*1797. *January 31.*

ROBERT HENDERSON *against* GEORGE WILSON and CATHARINE and CHRISTIAN MELVILLES.

No. 59.

A person, after making a regular entail of his estate, executed a second in England, altering some of the substitutions, and at the same time a relative will, both tested according to the law of England; the first substitute under the first entail having taken benefit under the will, his doing so was found obligatory on the substitutes in the first deed excluded by the second, to the effect of obliging them to make up titles, and denude in favour of the heirs under the second.

Walter Bowman died in 1782, in England, where he had long resided, possessed of his paternal estate of Logie, in Scotland, and personal property worth about £.10,000.

His heirs-at-law were the representatives of his two sisters, Jean and Isabel Bowman. Jean had a son, George Melville, (afterwards represented by his son, James), and three daughters, viz. Isabel, (afterwards represented by her grandson, George Wilson), Catharine, and Christian Melvilles.

Isabel, Walter Bowman's other sister, was represented by her grandson, Robert Henderson.

In 1757, Walter Bowman executed a procuratory of resignation, in the Scots form, of the lands of Logie, in favour of himself, and the heirs of his body; whom failing, in favour of James Bowman, his brother consanguinean, and the heirs-male of his body; whom failing, to the heirs-male of the body of George Melville; whom failing, to certain other substitutes; whom failing, to the heirs-male of the body of Isabel Melville; under which substitution, George Wilson would have succeeded; whom failing, to various other substitutes, among whom Robert Henderson would have come in; whom all failing, to any other person to be afterwards named by him. The deed contained prohibitory, irritant, and resolutive clauses, particularly directed against holding the estate by any other title than itself; but it reserved power to the granter to alter the order of succession, and conditions contained in it, and in general every power which he possessed before it was executed.

The testing clause bore, that " I the said Walter Bowman have to the eleven first sides of this my procuratory of resignation, contained in three sheets of paper, set my hand, and to the last side thereof my hand and seal;" of the date and before the witnesses therein mentioned.

Of the same date, he executed another deed, authenticated in the English form, and referring to the former, conveying his other property to trustees, who were directed to convert it into money; and, after paying his debts and legacies, to purchase lands with the residue, as near as possible to those of Logie, and to entail