

1798. *May 22.*

The MARCHIONESS of TITCHFIELD and her HUSBAND, for his Interest, *against*
ALEXANDER PENROSE CUMING.

In 1697, Sir Robert Gordon executed a procuratory for resigning his title and estate of Gordonston to himself in life-rent, and to his son Robert, and the heirs-male of his body in fee; whom failing, to other substitutes, under the restrictions after mentioned in the deed.

By the prohibitory clause, it was declared, that it should not be lawful "to the heirs of tailzie above designed, male or female, nor to the heirs who shall happen to succeed to the said lands and dignity," to defeat the entail, in any of the ways therein specified, "it being always understood, that although the fore-named persons be designed heirs of tailzie, and be to succeed to my said estate as such, yet they shall have no farther power to affect and burden the same, nor (than) if they were life-renters only."

The irritant and resolute clauses were directed against "the said heirs."

The deed contained a power of revocation. In 1698, a charter of confirmation was obtained on it, with a clause of *novodamus*, proceeding on a sign-manual, both as to title and estate. Infeftment was taken on it.

Sir Robert died in 1704, and his son, Sir Robert II. took possession as fiar.

In 1734, he entered into a contract of marriage, by which it was declared, "that, at present, by the right and investitures of his whole lands and estate, the same stand settled upon, and provided to himself, and the heirs-male of his body, which, if not altered, secures (secure) the heirs-male of the marriage in the succession to his said estate; but in case the said Sir Robert Gordon shall, at any time hereafter, think fit, or that it shall be in his power to alter, innovate and change, or to reduce and set aside" the present titles, and particularly the entail 1697, "then, and in either of these cases," he obliged himself "to provide, secure, and resign," the whole lands contained in the deed of entail and all other lands then belonging to him, to the heirs-male of the marriage, and the series of persons therein mentioned, which was not precisely the same with that of the entail.

No restrictions were laid on the heirs appointed to succeed under the contract.

In 1762, Sir Robert executed a bond of provision to his second son William, which bore, "That it is my intention, that the entail, dated 26th day of January, 1697 years, made and granted by the deceased Sir Robert Gordon, my father, shall be and continue the rule of succession to the said lands and estate of Gordonston, and others therein contained." The bond was for £.2157, "computing the same to amount to two years rent of the said tailzied estate for the time, in terms of the powers in the said entail." It was added: "If in any particular it should be found that this bond is not altogether consistent with the conditions of the said entail, yet still it shall subsist, and be effectual, in so far as it shall be found agreeable thereto, and consistent therewith."

No. 73.

A person having resigned his title of Baronet, and his lands to himself in life-rent, and his son *nominatim*, and the heirs-male of his body, in fee; whom failing, to other substitutes, under the conditions of an entail; the son, as institute, was found to be unlimited fiar, the restricting clauses being directed solely against heirs of entail.

No. 73.

In 1767, he entailed the lands of Gerboytas, which had descended to him in fee-simple from his father, on himself, and the heirs-male of the marriage, whom failing, on the heirs called by the deed 1697.

The entail of Gerboytas and the bond of provision were afterwards revoked by him.

Sir Robert having died in 1772, his eldest son, Robert, expedé a general service as heir of provision to him under the contract, and raised a reduction of the entail 1697, and declarator of his right to hold the lands in fee-simple.

In this process, all the heirs of entail then in existence were called as defenders, and among others Miss Scott, now Marchioness of Titchfield, then under puberty, and her father, as her administrator in law; but no appearance was made, except for a more remote substitute, and although Miss Scott's father died during the dependance of the action, her tutors were not made parties to it.

The pursuer having died before decree, his brother, Sir William, expedé a general service as heir of provision to him, and insisted in the action.

In 1777, the Court found, "That Sir Robert Gordon, the pursuer's father, being the institute, and not an heir of entail under the bond or deed of tailzie executed by the pursuer's grandfather in 1697, was not bound by the prohibitory, irritant, and resolute clauses therein contained, but had power to settle the estate of Gordonston, and others therein contained, by his contract of marriage in terms thereof; and that the pursuer, as heir of provision to his said father, under his said marriage-contract, is entitled to take up the succession to the said lands and estate of Gordonston, and others contained in the said deed of entail, executed by his grandfather, as a fee simple, free of any fetters, limitations or conditions contained in said entail."

Sir William, in 1781, executed an entail of Gordonston, by which, at his death, Colonel Alexander Penrose Cuming, in consequence of the failure of prior substitutes, was called to the succession, and he made up titles accordingly.

But a reduction of the decree in 1777, of the entail 1781, and the titles made up by him on it, was brought by the Marchioness of Titchfield, heiress of entail under the deed 1697, and the Marquis for his interest, who contended that that deed must regulate the succession.

Beside an argument, whether the decree 1777 barred the present action, on the ground of *res judicata*, the points at issue came to be,

1mo, Whether Sir Robert II. as institute, was bound by the restrictions of the entail 1697?

2do, Whether, supposing him not bound by them, he altered that entail by the contract in 1734?

On the *first* point,

The pursuers, without expressly admitting the authority of the cases of Edmonstone and Wellwood, Nos. 68. 70. and 72. rested their plea on some specialties, which, they alleged, distinguished them from the present, and either made the restrictions apply directly to Sir Robert II., or at least showed, that his father

understood them to apply to him under the description of an heir of entail, and consequently made him personally liable to fulfil them. As the dispositive clause (it was said) conveyed the lands and dignity to Sir Robert II. as well as the other substitutes, under the conditions contained in the deed, these conditions must apply to him as well as to the rest, unless he be liberated from them by other parts of the deed. So far, however, from this being the case, the prohibitions are directed, not only against "the heirs of tailzie," but against the heirs who shall happen to succeed to the said lands and dignity ;" under which description, as well as that of "forenamed persons," Sir Robert II. was certainly included. Indeed, whatever may be said as to the character in which he took the lands, he was, in the strictest sense, an heir of entail to the dignity, which could not be held by one person in life-rent, and another in fee. As heir of tailzie to the dignity, therefore, the restrictions expressly apply to him.

As to the intention of Sir Robert I. the object of the deed did not admit of his son holding the estate in fee-simple ; and from the whole tenor of it, as well as from a settlement made by him on his wife in the year 1699, and a bond of provision to his children in the year 1701, it is clear, that he considered his son to be included in the designation of an heir of entail.

Answered : What are called specialties by the pursuer, (except that with regard to the title,) and even much stronger expressions occurred, and were argued upon without success in those former cases, by which it is completely established, that the restrictions of an entail do not apply to the institute who succeeds not as heir, but as disponee, unless they be expressly directed against him ; and that, where they are not, the mere intention of the tailzier appearing in the deed itself, and still less in collateral ones, cannot supply the defect ; 14th February, 1758, Balfour against Erskine, No. 58. p. 4406 ; House of Lords, 24th November, 1769, Edmonstone, No. 59. p. 4409. ; 25th June, 1785, Menzies, No. 53. p. 15436. ; 23d February, 1791, and 31st May, 1797, Wellwood, No. 72. p. 15466.

Sir Robert II. was fiar to the dignity as well as to the lands ; and, according to the custom at that period, it is believed, he might have even assumed the dignity during the life-time of his father.

On the *second* point, the pursuers

Pleaded : Although it were admitted, that Sir Robert II. was not bound by the entail 1697, it would not avail the defender, because Sir Robert neither altered it, nor bound himself to alter it by his marriage-contract in the year 1734. The contracting parties were satisfied with the entail 1697, but it being doubtful at the time, whether Sir Robert was bound by it, he did not wish to preclude himself from the right of afterwards challenging it ; and accordingly, the wife's relations stipulated, that, if any actual alteration should be made by him, the heirs-male of the marriage should be secured in the *first* place. On the other hand, it is very improbable, that Sir Robert would come under a positive obligation, to set aside the entail executed by his father, or that the other party would propose it ; and the words of the contract do not warrant the supposition. For although the clause,

No. 73. taken by itself, in which Sir Robert "obliged himself to alter the entail, in case he shall at any time hereafter think fit, *or* that it shall be in his power," to do so, might bear the meaning, that the existence of the obligation was to rest solely on the power to fulfil it, this would be considered as a mere inaccuracy of the writer, in using "*or*," instead of "*and*," which would not be allowed to defeat the intention of parties. Besides, with us, as in the Roman law, it depends on the context, whether *conjuncta pro disjunctis, et disjuncta pro conjunctis, accipiuntur*; D. L. 53. De Verb. sign. Voet, D. L. 28. T. 7. § 29.; Bothwells against The Earl of Home, 3d December, 1747, No. 41. p. 2989; 16th December, 1757, Campbell against Campbell, No. 42. p. 2991; 1600, C. 7. Now, the contract declares, that the present investitures, if not altered, "secure" the heirs-male of the marriage in the succession, and, if parties were satisfied with the present investitures, the only event to be guarded against by them, was the possibility of their being afterwards altered.

The subsequent part of the clause has accordingly that event in view, where it is added, "But in case" the said Sir Robert Gordon shall, at any time hereafter, think fit, or that it shall be in his power, to alter the present investiture. If it had been intended to impose a positive obligation on Sir Robert to alter the entail, very different expressions would have been employed. Indeed, if "*or*" is to be taken in a disjunctive sense, Sir Robert's inclination and his power to alter, must be held as two distinct alternatives, the existence of either of which, without the other, must be sufficient to purify the obligation. But it would have been singular to have imposed an obligation upon a person to do, what it was foreseen was not within his power, and superfluous to have mentioned his inclination to do it, if his power was to be the only limit of his obligation. This construction is confirmed by the use of the word "*hereafter*." Sir Robert certainly would not come under a positive obligation to do in future what he did not then approve of. And his subsequent conduct also shows, that he did not consider the entail to be altered by the contract.

Answered: By the contract of marriage, it was declared, that in case Sir Robert should thereafter think fit, or should have power to alter the entail of Gordonston, "then, and in either of these cases," he should be obliged to provide his whole landed property, of which Gordonston formed only a part, to the heirs-male of the marriage, and others therein mentioned. Here there are two conditions, the occurrence of either of which, according to the plain and obvious meaning of the disjunctive particle "*or*," and legal construction of the passage, is sufficient to purify the obligation, and the pursuers cannot be allowed to substitute one word for another, or change the usual meaning of terms, in order to make way for their conjectures as to the meaning of parties.

The object of the contract, was to provide the lands in fee-simple to the heirs-male of the marriage; and for this purpose, all that was necessary, was, that the distinction contained in the contract should not be clogged by restrictions. But as Sir Robert's powers over the estate were doubted, a qualified obligation only

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.

No. 73.

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.

No. 74.

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