1742.

EDGAR
v.
MAXWELL.

THEODORE EDGAR, - - *Appellant;*
JAMES MAXWELL, *alias* JOHNSTONE, - - - } *Respondent.*

31*st May*, 1742.

FIAR ABSOLUTE AND LIMITED.—An estate being settled in a marriage contract upon the heirs male of the marriage; whom failing, upon the heirs male of the body of the husband by any other marriage; whom failing, upon the heirs female of the marriage; found that the heir male of the second marriage, who succeeded to the estate, might gratuitously dispose of it to the exclusion of the substitutes, the heirs female of the first marriage.

SERVICE OF HEIRS.—A person being entitled to succeed to lands in virtue of two conveyances, with different destinations, but neither of which imposed or inferred a prohibition to alter, as against him, may, after making up titles upon one of them, exclude, by a gratuitous disposition, the heirs under the other.

[Kilk. pp. 148—192. Fol. Dict. 1, 192—200. Elchies, *voce* Service of Heirs, No. 2; *voce* Service and Confirmation, No. 6; Mor. 3089—4325.]

No. 65. JOHN JOHNSTONE being infeft in the lands of Elshieshiels, which by the investitures stood provided to heirs male, did, upon the marriage of his son Alexander with Marion Grierson, and in terms of the marriage contract, settle the said lands upon Alexander, and the heirs male of the marriage; whom failing, upon the heirs male of the body of Alexander of any other marriage; whom failing, upon the heirs female of the marriage; and he granted procuratory of resignation in favour of the said heir, but there was no provi-

sion in the contract that Alexander should take up the estate by virtue of that title only.

By a clause in the settlement, reciting, that in case Alexander should have heirs male by any other marriage, the issue female of this marriage would be excluded from all benefit of succession to the estate, a particular provision is, in that event, made for the daughters of this marriage.

Of this marriage, the only issue were two daughters, the eldest of whom had a son, Theodore Edgar.

By a second marriage, Alexander had issue two sons, Gavin and Alexander.

Upon the death of John Johnstone, the procuratory of resignation not having been executed, Alexander his son was, in 1688, served and retoured heir male in special to his father in the lands, conformably to the standing investiture in favour of heirs male. Upon Alexander's death, Gavin, his eldest son, was in like manner served and retoured heir in special to him in the same manner, and was infeft; and Gavin having died without issue, his brother Alexander made up titles in the same way. He then executed a gratuitous disposition of the estate in favour of his half brother Maxwell, the respondent. In the mean time, the daughters of John Johnstone had received payment of their provisions under the marriage contract.

Upon the death of Alexander, Theodore Edgar took out brieves, in order to have himself served heir of provision under the marriage contract.

He was opposed by Maxwell, who claimed under the disposition executed in his favour by Alexander last mentioned.

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There were thus two questions: 1. Whether Alexander, the son of the second marriage, could, by a gratuitous settlement, dispose of the estate in prejudice of the heirs female of the first marriage, and

2. Whether this Alexander, not having made up a title as heir of provision under the marriage contract, so as to vest himself with a right to the procuratory, but having only been served and retoured as heir male under the ancient investiture, had power to dispose of the estate.

The Court of Session, upon the report of the Lords Assessors, found, (6th July, 1736,) "that the "son of the second marriage might gratuitously "alter the destination in the contract of marriage, "and 2. Repelled the objection that the right to the "provision in the contract of marriage had not been "established in the person of Alexander Johnstone; "in respect of the answer, that the real right of the "estate was established in the said Alexander's per-"son."*

Edgar reclaimed, and pleaded further, that to some parts of the lands settled by the marriage contract, Alexander, under whose deed alone Maxwell claimed, *never had been served heir, or made up any title whatsoever*; that he could not therefore dispose of these lands, but that they must necessarily belong to the petitioner, as

* Upon the second point it was held, that "where one has it in his "power to make up his right to an estate by either of two titles, *ex. gr.* "either upon the destination in his marriage contract, or upon the an-"cient investiture of the estate, and is under no restraint which of the "two he shall chuse; if he chuse to make up his title on the one, *ex.* "*gr.* upon the ancient investitures, and convey away the estate as in "the present case, no subsequent heir can take up the estate by virtue "of the provision in the contract of marriage, and thereupon quarrel "that conveyance."—(Kilkerran.)

heir of provision. The Court, upon advising this petition, with answers, (29th July,) adhered,—but remitted to Lord Elchies, Ordinary, to hear parties on the point with relation to the lands in which Gavin and Alexander Johnston had not been infeft.

Upon this point it was maintained by Maxwell, that the service of Alexander, as heir male to his father, implied that he was heir male of the marriage, and of consequence entitled him to the procuratory of resignation in the settlement, as heir of provision.

The Court, however, upon the report of the Lord Ordinary, (21st July, 1738,) found "that "Gavin Johnston's service as heir male in general to "his father, did not carry right to the procuratory of "resignation contained in the contract of marriage, "which was destined to heirs male of the marriage "with Marion Grierson; and that, therefore, Theo-"dore Edgar, the heir female of the marriage, may "be served heir of provision to the procuratory of "resignation."* Edgar was served accordingly, and thereafter,

An appeal was brought by him from the interlocutors of the 6th and 29th July, 1736. Entered Dec. 22, 1738.

Pleaded for the Appellant:—The heirs male of John, to whom the estate was by the old investiture to descend, were bound by the marriage contract to perform the engagements then entered into in behalf of the heirs appointed by the contract. The only right which Alexander the younger transferred by his disposition, was the right which

* Kilk. p. 508; Fol. Dict. II. 345; Mor. 14015.

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he had as heir to his father, under the old investitures; and Alexander's assignee, who could only stand in his place, must be liable to perform the contract, which Alexander himself was bound to make good to the heirs of provision.

2. By the law of Scotland, no deed by a person pretending to be heir can be effectual, unless his titles shall have undergone the examination of an inquest, and been approved of by them on oath. Unless that sanction is obtained, he has no power over the estate, and his title is incomplete. Alexander's title, however, as heir of provision under the marriage contract, never was completed, nor could he consequently make an effectual conveyance.

That he never did establish a right to the procuratory of resignation, is clear from the interlocutor of the 31st July 1738, (not appealed from,) authorizing the appellant to serve as heir of provision to the procuratory.

Pleaded for the Respondent:—1. Marriage settlements, without restrictive and irritant clauses, are not of the nature of entails, and are binding only on the contracting parties, and that merely in favour of the *personæ prædilectæ*, who in the present case were the sons of the marriage: but as soon as the first heir takes the estate, or any substitute takes it upon his failure, the person so taking holds it *tanquam optimum maximum*, and can dispose of it gratuitously; the substitution in favour of the next heirs being of the nature of a simple destination, and therefore alterable at pleasure.

In the event that has happened, the only obligation upon the heir male either of the first or of the second marriage, in favour of the daughters of

the first marriage, was as to the payment of the portions provided to them, which they have received.

2. Where any person has two or more unlimited titles to the same estate, he may use and establish the rights in his own person by any of those titles he pleases, and no succeeding heir can quarrel his predecessors having made up his title in that manner, especially in such a case as the present, where there was no proviso by the marriage contract, that the heir of the marriage should possess the estate under that title only; and therefore, though neither of the sons were served and retoured heir of provision under the contract, yet as they were served heirs male in special to their father, and infeft in the estate, they acquired as absolute a property by that form of title, as if they had made up their titles as heirs of provision.

After hearing counsel, "it is ordered and ad- "judged, &c. that the several interlocutors com- "plained of be affirmed." Judgment, May 31, 1742.

For Appellant, *R. Craigie, W. Murray, Ch. Erskine.*

For Respondent, *Jas. Erskine, Al. Forrester.*