

affirmed; and it is further ORDERED and ADJUDGED, that the interlocutors of 21st January, and 28th February; and 24th July, 1771, and the interlocutor 26th June 1776, be also affirmed; but without prejudice to any satisfaction in money that the appellant may be entitled to, in respect of any claim he may have in virtue of the agreement in 1733, and it is further ordered, that the appeal be dismissed. (See No. 143. p. 15617.)

No. 1.

1777. July 8.

SIR WILLIAM GORDON of GORDONSTON, Baronet, *against* MRS. LINDSAY, HAY, and Others, Defenders.

IN 1697, Sir Robert Gordon, the pursuer's grandfather, executed a bond of tailzie, whereby he obliged himself to make resignation of his title and dignity of baronet; and also of the barony of Gordonston, and other lands therein mentioned, in favour of himself in liferent, and Robert Gordon (the pursuer's father,) his eldest lawful son, and the heirs male of his body in fee, whom failing, to a long destination of heirs of tailzie, as mentioned in the deed.

Among other provisions, usual in entails, is the following: 'And in like manner it is hereby expressly provided and declared, and shall be contained in all the subsequent infeftments, and rights of the said estate and lands, in all time coming, that it shall be nowise leisome or lawful to the heirs of tailzie above designed male nor female, nor the heirs who shall happen to succeed to the said lands and dignity, to alter, infringe, or break the said tailzie and destination, nor the order and course of succession above written,' &c. And the tailzie contains the usual prohibitory, irritant, and resolute clause, *de non alienando et contrahendo debita*. But these restraints are laid only upon the heirs of tailzie.

Upon the procuratory of resignation contained in this bond of tailzie, a charter was expedie in the year 1698, by the entailer, in favour of himself in liferent, and his said eldest son, the pursuer's father, in fee, and they were thereupon infeft accordingly. But the sasine does not recite the conditions, and irritances of the tailzie, but only bears a general reference to them. The tailzie itself was afterward recorded in the register of tailzies, in the year 1700.

Upon the death of Sir Robert Gordon the entailer, he was succeeded by his son the late Sir Robert, the pursuer's father, and who possessed the estate as fiar under the deed. Besides the estate of Gordonstone, contained in the tailzie, the tailzier died possessed of the lands of Garbettie, &c. Sir Robert the pursuer's father married, in 1734, Mrs. Agnes Maxwell, eldest daughter of Sir William Maxwell of Calderwood, by whom he had issue, his eldest son and

No. 2.

*The institute or dispoonee ought not, by implication from other parts of the deed of entail, to be construed within the prohibitory, irritant, and resolute clauses, laid upon the heir of tailzie.*

*What sufficient alteration of an entail by the institute.*

See No. 69. p. 15462.

No. 2. successor the late Sir Robert, and the present pursuer, Sir William Gordon his second son.

By the contract of marriage betwixt Sir Robert and Agnes Maxwell, ‘In contemplation of the said marriage, the said Sir Robert Gordon hereby declares, that at present by the rights 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 the heirs male of this 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 rights and investitures of his estate, and the order of succession thereby settled and condescended upon, and particularly the bond of tailzie thereof made and granted by the deceased Sir Robert Gordon of Gordonston, his father, dated the 26th January 1697, and registered in the particular register of tailzies upon the 2d day of January 1700, and the charter under the great Seal, passed thereupon, dated the 27th of June 1698, and infestment following upon the same, dated 18th November 1699; then, and in either of these cases, the said Sir Robert Gordon hereby binds and obliges himself to provide, secure, and resign the whole lands and estate enumerated in the said bond of tailzie, which are holden as repeated herein *brevitis causa*, and all other lands and estate now pertaining and belonging to him, and that to and in favours of himself and the heirs male of his body, of this or of any other subsequent marriage, which failing, to such person or persons, as he by a writ to be subscribed by him at any time of his life, shall nominate and appoint to succeed him in his said lands and estate. And if no such nomination of successors shall be made, or if made and afterward revoked, then to and in favours of the heirs male and of tailzie substitute, and successors mentioned in the said bond of tailzie, made and granted by the said deceased Sir Robert Gordon of Gordonston.’

Upon the 11th of May 1767, Sir Robert Gordon executed a deed of entail proceeding upon the narrative, ‘That for the weil and standing of his family, he had resolved to settle the said lands of Garbettie, &c. upon the same plan with that of the entail of the estate of Gordonston, executed by his said deceased father, that thereby the succession on both might run in the same channel.’

This last mentioned deed of entail, in favour of the heirs male of his own body, whom failing, the other heirs specified in the former entail of the estate of Gordonston contains the usual clauses, *de non alienando et contrahendo debita*, and is registered in the particular register of sasines for that year.

But of the very same date with this deed of entail, Sir Robert executed another deed, which after reciting the deed of entail and his reserved power of altering, proceeds as follows: ‘And I being resolved so far to alter the same, as to liberate William Gordon my second lawful son from the whole clauses

‘ of the said entail, do therefore hereby declare, that in case the said William Gordon shall at any time succeed to the said lands and estate by virtue of the said entail, that then, and in that case, the said William Gordon shall be wholly liberated and freed from the whole clauses prohibitory, irritant, and resolute, of the said entail, in the same manner as it never had been made, &c.’

So matters stood from 1767 to 1771, when Sir Robert having altered his mind with regard to the settlements, he in virtue of the power reserved to him by the deeds themselves, executed a revocation, which, among the rest, particularly revoked the foresaid tailzie of Garbettie, &c. in the following words, (18th February 1771 :) ‘ And likewise a disposition and assignation of the town and lands of Garbettie, &c.’ Which disposition and assignation contains irritant and resolute clauses, and is dated the            day of            . ‘ But which I hereby revoke and recall.’ Sir Robert also, on the 25th of the same month (February 1771,) executed a disposition of his moveables in favour of Robert his eldest son, in which he expressly declares all former testaments and deeds of settlements made by him anterior to the date thereof to be revoked and altered.

Sir Robert Gordon, the pursuer’s father, died in 1772, and was succeeded by his eldest son Sir Robert, who was advised that neither the tailzie of Gordonston made in 1697, nor the tailzie of Garbettie made in 1767, were binding upon him ; but that he as heir male of the marriage was entitled to take both estates as a fee-simple, in virtue of the settlement and provision contained in his father and mother’s contract.

Sir Robert accordingly expedite a general service as heir of provision to his father under the said marriage-contract, and upon that title he brought an action of reduction and declarator before the Court, in which he called as defenders, the whole heirs in life named by both the foresaid deeds of tailzie.

Appearance was made for Mr. Lindsay Hay, an heir under both the deeds of entail ; and Sir Robert Gordon last mentioned having died unmarried, his brother Sir William was served heir in general of provision to him under the said marriage-contract between their father and mother, and upon that title insisted in the action, that in the entail of Gordonston executed by his grandfather in 1697, the whole prohibitions and limitations of that deed were only laid upon the ‘ heirs of tailzie ;’ and as Sir Robert Gordon, Sir William’s father, was not an heir of tailzie, but the fiar and institute under that deed, so he could not be comprehended under the general description of an heir of tailzie, and consequently, the estate stood vested in his person as a fee-simple : That even supposing, (what was denied) that it evidently appeared to be the entailer’s intention to include his son Robert under the terms ‘ heirs of tailzie ;’ yet as tailzies were *stricti juris*, that intention could be of no avail when it was not *habile modo* carried into execution : And that this point was expressly so adjudged by the House of Lords, in the case of Edmondstone of Duntreath,

No. 2. 24th Nov. 1769, No. 68. p. 15461; which judgment was afterward followed in the Court of Session, in the case of Sinclair of Mey.

As, therefore, the late Sir Robert Gordon was not laid under any of the fetters of the entail 1697, and as he, therefore, held the estate as unlimited fiar, it followed that the marriage settlement must regulate both the nature and the course of the succession. And as Sir Robert by that settlement, in case it should be in his power, obliged himself to provide, secure, and resign the whole lands enumerated in the said tailzie, &c. to the heirs of the marriage, without any fetters whatever, so Sir William must be entitled, as heir of that marriage, to take the whole lands as a fee-simple under the marriage contract.

With regard to the lands of Garbettie, &c. the subject of the tailzie 1767, it was said, that as they belonged to Sir Robert at the time of the marriage, so they must have been included under the general provision contained in the marriage contract to the heir of the marriage, 'Of all other lands and estate which then belonged to him.' It was therefore contended, that the heir of the marriage was creditor to the father to the full amount of the provision. That the father was even obliged to transmit all he was possessed of at the time of the marriage-contract, *tanquam optimum maximum*, and to purge the lands of the most trifling incumbrance with which he might afterward have affected them. In such a situation, then, he was not entitled to fetter the heir of the marriage with an entail containing strict prohibitory, irritant, and resolutive clauses. But it was even needless to enter into this general question, as there were two other distinct grounds in favour of the pursuer. For first, there was an express reservation in his favour, as being entirely free from this tailzie; and secondly, it was very evidently put an end to by the deeds of revocation already recited.

To this it was answered, that the case of Edmonstone of Duntreath did not apply to the present question. Because every question upon an entail must stand upon its own merits, as it is merely a *quæstio voluntatis*, and from the nature of the present entail it was evident, that the intention was to extend the fetters over the institute under the words '*heirs of tailzie*.' But even supposing that the institute had a power of altering, it was denied that the marriage contract had done so; for the clause 'in case the said Sir Robert shall at any time hereafter think fit, or that it shall be in his power, or alter, innovate and change, or to reduce and set aside the present rights and investitures of his estate,' seems to import no more, than that if the father thought fit he might alter that tailzie, but not that it was actually altered by that deed. But at any rate, Sir Robert was under no obligation of conveying the estate in fee simple to the heirs of the marriage; as the contrary was decided in the case of Craik, 1728, No. 111. p. 12984. It was also pleaded, that this entail 1767 was not revoked by the pursuer's father, because the deed of entail exists uncanceled; and as the particular revocation founded on only recalls a disposition and assignation, it clearly cannot apply to the bond of tailzie. The other revocation

founded on, conveying the moveables to the late Sir Robert, indeed recalls all former settlements, but the revoation contained in that deed can extend no farther than to settlements *ejusdem generis*, viz. of moveables. With regard to the other deed founded on, which exempts Sir William, the present pursuer, from the burdens imposed on the heirs of tailzie, it is only a personal deed of liberation, and can only be used when he has made up his titles to these lands upon his father's deed of entail.

No. 2.

The Court, upon the report of Lord Justice Clerk, and upon advising informations *hinc inde*, decerned in the declarator and reduction in favour of the pursuer.

Lord Reporter, *Justice-Clerk.*Act. *David Rae.*Alt. *Alexander Murray.*

D. C.

1797. *January 31.*

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

This case (No. 59. p. 15444.) was appealed. The House of Lords (29th May 1802,) ORDERED and ADJUDGED, That the several interlocutors complained of in the appeal, so far as the same concern the estate of Logie, which belonged to the last Walter Bowman, be reversed; and find, that the succession to the said estate falls to be governed by the deed of entail executed by Walter Bowman, in the year 1757; and it is therefore ordered, That the appellant be assoilzied from the action brought against him by the respondent Robert Henderson, and decern; and decern also in the declarator brought by the appellant, according to the prayer of his declarator.

No. 3.

1798. *May 22.* MARCHIONESS OF TITCHFIELD *against* CUMING.

THIS case (No. 73. p. 15467.) was appealed. The House of Lords, (20th January 1800,) ORDERED and ADJUDGED, That the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

No. 4.

1799. *February 27.* SYME *against* RONALDSON DICKSON.

THIS case (No. 75. p. 15473.) was appealed. The House of Lords, (26th April 1803,) ORDERED and ADJUDGED, That the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

No. 5.