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HENRY WEDDERBURN, Esq., Second Son of CHARLES WEDDERBURN of Gosford, } *Appellant;*

SIR PETER HALKET of Pitfirran, Bart., ALEXANDER HART, his Curator *ad litem*, and JOHN WEDDERBURN of Gosford, } *Repondents.*

WEDDERBURN, &c. *v.* HALKET, &c.

House of Lords, 19*th March*, 1770.

ENTAIL—POWER TO ALTER ORDER OF SUCCESSION.—Entail taken to the makers and longest liver in liferent, and to their eldest son in fee, whom failing, his second son, &c., with a prohibition against altering the order of succession; but no restraint against selling or charging the estate with debt. The eldest son, who succeeded after the maker, finding his own eldest son an idiot, altered the order of succession, and gave the estate to his second son, and the heirs precisely marked out by the original entail. Held, that as he was fiar of the estate, he could exercise this power, more especially seeing that the deed so executed had not in view fraudulently to alter the order of succession, but merely to provide for a contingency that had not been contemplated by the maker.

Sir Peter Wedderburn of Gosford married Janet Halket, heiress of the estate of Pitfirran, which was more considerable than his own paternal estate; and having agreed to dispone each of their estates to different members of their family, his wife, by deed of this date, conveyed her estate of Pitfirran, "to the longest liver of themselves in liferent, and "to Peter Wedderburn, their eldest son, in fee, and the heirs "male of his body, whom failing, to the daughters, or heirs "female of his body, without division; which failing, to "Charles Wedderburn, their second son, and the heirs male "and female of his body; which failing, to James Wedder-"burn, their third son, and the heirs male and female of his "body as aforesaid; which failing, to Janet, Agnes, and "Christian, their three daughters." Sept. 9, 1706.

This deed was of the nature of an entail, and strictly prohibited the succeeding heirs from altering the order of succession, otherwise to forfeit their right. There was a provision also, that if the two estates of Pitfirran and Gosford became united, by one heir succeeding to both, then such heir was to make his election of either, allowing the other to go to the next succeeding heir.

In like manner, a deed was executed by his father, Sir Peter Wedderburn, of his estate of Gosford, taken to him-

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self in liferent, and Charles his second son in fee, and the heirs male of his body; whom failing, to the daughters or heirs female of his body without division; whom failing, to James Wedderburn, his third lawful son, and the heirs male of his body.

Before Sir Peter's death, he had been a party to his eldest son's contract of marriage with Lady Amelia Stewart, whereby the estate of Pitfirran was disponed to the same series of heirs as contained in the tailzie of 1706, and under all its conditions and provisions.

Of this marriage, there were three sons, Peter, Francis, and James. Peter, the eldest, was insane from infancy,

1751. whereupon his father executed a settlement, whereby the estate was left in precisely the same manner as formerly, excepting as to the order of heirs, the present deed passing over his insane eldest son entirely.

The question then came to be, whether, having reference to the original entail of 1706, which strictly prohibited the succeeding heirs from altering the order of succession, this deed of 1751 was effectual?—A reduction being brought to set it aside, the question was, whether that conveyance precluded him from altering the order of succession? The prohibiting clause on the subject stood thus "That it shall not be law-"ful to the said Peter Wedderburn, or any of the remanent "heirs of tailzie and substitution, above written, to do any "fact or deed whatsomever, directly or indirectly in any "sort, whereby to alter, infringe, or innovate this present "tailzie, in the order of succession, and under the conditions "and provisions above specified, otherwise, not only such "facts and deeds shall be *ipso facto* void and null, without "declarator for that effect, but also that the contravener, "and the heirs of the contravener's body, shall omit, lose, "and tyne the said lands and estate above written."

It was contended on behalf of the lunatic, that this clause was binding on the whole heirs of entail. That the deed executed in 1751, by which his father disinherited him, the eldest son, was in contravention of the deed 1706; and the above prohibition therein, against altering the order of succession being binding, the deed of 1751 was inept. On the other hand, it was stated in defence, that Peter Wedderburn the father, was fiar,—that the estate was conveyed to him in fee; and as fiar he could exercise every act of proprietor. He could sell,—charge the estate with debt, and the only particular wherein his full powers of proprietory were re-

strained, was in regard to the order of succession. In regard to these, much must be drawn from the intention of the makers. They evidently did not contemplate the contingency which has happened,—namely, of the eldest son being a lunatic, so as to incapacitate him from bearing the arms, and assuming the name, or of making his election which estate to take, in the event of succeeding to both. All these acts supposed a will and capacity of judging in the several heirs called to the succession. That the object by this mutual deed between spouses, was not so much to secure the estate to a *particular heir*, as to secure it to the family, and general line of representation chalked out.—That the lunatic's father was fiar, only under this single limitation, that he should not fraudulently disappoint the succession, and as the deed 1751 cannot be construed to be so, but a rational deed, made to suit emerging circumstances, it was valid beyond all question.

The Lords, of this date, "sustain the reasons of reduc- Nov. 27, 1761.
"tion of the procuratory of resignation and tailzie made by
"the late Colonel Sir Peter Halket, dated 14th Oct. 1751,
"with the charter and infeftment following thereon, and re-
"duce, decern, and declare accordingly."

And, on advising reclaiming petition, "They adhered to Feb. 16, 1762.
"their former interlocutor, and refused the desire of the
"petition."

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—By the law of Scotland, every proprietor in tail has power, by the nature of his right, to exercise every act of ownership; and is under no restraint but what arises from the prohibitions contained in the deed of entail. In the present case, the granter had the whole fee in him. He was expressly allowed to charge the estate. He might have sold it, or forfeited it; and, in short, was under no restraint but that of altering the order of succession, of design and *intention* to frustrate the said order of succession set forth therein. It is clear that what has given rise to this deed of 1751, was the eldest son's incapacity to take. His insanity was not a foreseen event by the makers of the deed of 1706, and consequently do not provide against it.—The present deed only does what they would have done, in the circumstances, in order to secure what was evidently their intention by the deed; namely, the estate to go to the line of succession chalked out by them. The deed 1751, therefore, cannot in any view be deemed beyond the luna-

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tic's father's powers, or in fraud, or in contravention of the deed of 1706.

Pleaded by the Respondents.—The deed of entail 1706, under which the appellant, Sir Peter's father, made up his titles, and possessed the estate, disabled him from altering the order of succession thereby settled, and declared any such act was null and void: he was farther bound by his own contract of marriage 1738 to preserve that order, and as the deed of 1751 alters the order chalked out by the deeds of 1706 and 1738 the same is inept, in consequence of the granter being disabled from granting any deed of that nature.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be reversed, and that the defender be assoilzied.

For Appellants, *Ja. Montgomery.*

For Respondents, *Al. Forrester.*

Note.—Not reported in Court of Session Reports.

EARL OF LAUDERDALE, - - *Appellant;*

GEORGE MACKAY of Skibo, - *Respondent.*

House of Lords, 21*st March* 1770.

CASUS AMISSIONIS—EXTRACT.—Where a bond was challenged as false and forged, and on production being called for in the improbation, and an extract produced to satisfy production: On its being urged that the original bond ought to be produced, it was stated that it was lost in the hands of the Keeper of the Records; a proving of the tenor being made necessary: Held, that a special *casus amissionis* was unnecessary where, in these circumstances, the proof that the original existed was established—both by the extract, and by the decreets in other processes, and where the Keeper of the Record deponed that such bonds had gone amissing in the Register Office on former occasions.

Action of mails and duties was raised by the respondent, founded on a bond granted by the appellant's ancestor about 70 years before; and a counter action of reduction improbation of the said bond raised by the Earl.