

1736.

NAIRN  
v.  
NAIRN, &c.

JOHN NAIRN of Greenyards, Esq. - *Appellant* ;  
MARGARET, LADY DOWAGER NAIRN, }  
*et alii*, her creditors and heirs of }  
entail. The Lord Advocate, on } *Respondents.*  
behalf of his Majesty. - - - }

14th May 1736.

TAILZIE.—CLAUSE.—In an entail in favour of a daughter, *nominatim*, a clause ‘prohibiting the heirs female of the ‘said Margaret, her body, or any other of the heirs male and ‘of tailzie above written, (except the heirs male of the said ‘Margaret’s body,) to sell,’ &c. found to debar the daughter from selling.

[Elchies, *voce* Tailzie, No. 5.]

No. 39.

SIR ROBERT NAIRN of Strathord, (senator of the College of Justice,) having entered into a contract with John, Marquis of Athol, for the marriage of his daughter, Margaret, with one or other of the younger sons of the Marquis, bound himself to settle his estate, failing heirs male of his own body, on his said daughter and the heirs of the marriage. The contract contained a procuratory for resigning the estate in favour of himself, and the other substitutions, under the limitations of the intended entail, which contained the following clause: ‘And ‘that it should nowise be lawful to the heirs ‘female to be procreate of the said Margaret ‘Nairn, her body, nor any other of the heirs male ‘and of tailzie, before mentioned, succeeding in ‘the said lands and estate, by virtue of the fore- ‘said tailzie and substitution, (except. the heirs

‘ male of the said Margaret, her body, in the then  
 ‘ intended or other subsequent marriage, according  
 ‘ to the provision and destination therein specified,)  
 ‘ or any of them, to sell, annailziè, dispone, dilapi-  
 ‘ date, or put away the foresaid lands and estate,  
 ‘ or any part or portion thereof, nor to innovate or  
 ‘ infringe the said tailzie, nor to contract debt,’ &c.  
 under the sanction of strictly irritant and resolute  
 provisions. ‘ Declaring, nevertheless, that the  
 ‘ said restriction of innovating the said tailzie, con-  
 ‘ tracting debts, or disposing upon the said estate,  
 ‘ should be nowise extended to the heirs male of  
 ‘ the said then intended marriage to be procreate  
 ‘ between the said Margaret, and the said Lord  
 ‘ George Murray, and failing of him, any other of  
 ‘ his brothers whom she should happen to marry,  
 ‘ and failing of the heirs male of the said marriage  
 ‘ between them, to the heirs male of the said  
 ‘ Margaret, her body, of any other subsequent mar-  
 ‘ riage, who, and the heirs male lineally descending  
 ‘ of their bodies, should have power to use and dis-  
 ‘ pone upon the said estate at their pleasure, pro-  
 ‘ viding the said immunity and freedom were no-  
 ‘ wise extended to the heirs female of the said  
 ‘ Margaret, her body, nor remanent heirs of tailzie  
 ‘ and provision before mentioned.’

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Upon the above procuratory Sir Robert obtained  
 a crown charter, in which all the conditions and  
 clauses of the entail were inserted; and upon his  
 death his daughter Margaret was served and re-  
 toured heir of tailzie and provision to him; and  
 afterwards married Lord William Murray, fourth  
 son of the Marquis of Athol.

1681.

1683.

Having contracted considerable debts, she en-  
 tered into minutes of sale with the appellant re-

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garding a portion of the lands; but he declining to complete the bargain, on the ground that she was incapacitated for selling by the entail, the question came before the Court of Session upon a suspension of a charge of horning at her instance. She likewise raised a process of declarator, to have it found that she had a right to burden or alienate the estate.

The case was reported by the Lord Ordinary, when the Lords (January 2, 1736,) found ‘That by the contract dated 12th April, 1676, and by the procuratory of resignation contained in the contract, dated 15th July, 1676, granted in implement of the said first contract, and pursuant to the powers therein reserved; and the infestment following on the said procuratory, Margaret, Lady Nairn, the charger and pursuer of the declarator, is not subjected to the prohibitory clauses *de non alienando et non contrahendo*; but that the said Margaret, Lady Nairn, has power to charge the estate with debts, and to alienate the same; and, therefore, decerned and declared in the declarator, at the instance of the said lady and her creditors against the defender, heirs of tailzie, and the officers of state, and found the letters orderly proceeded, and decerned.’ This interlocutor was adhered to.

Entered Feb.  
18, 1736.  
Amended  
March 11, —

The appeal was brought from these interlocutors of the 2d and 31st January, 1736.

*Pleaded for the Appellant*:—1. The estate being limited to Sir Robert, and the heirs-male of his body, whom failing, to the respondent, Lady Nairn, and the heirs-male of her body, with several other substitutions, and *all* the heirs of entail, except the heirs-male of Lady Nairn’s body, be-

ing expressly prohibited from burdening or alienating the lands, this prohibition must be so construed as to prevent her who is an heir of entail, from selling the lands, in prejudice of the other heirs.

2. As the respondent, Lady Nairn, is not expressly excepted out of the said prohibitive clause, the exception extending only to the heirs-male of her body, she must be prohibited from selling equally with the other heirs of entail. As it plainly appears to have been the intention of Sir Robert to preserve his estate in his name and blood, it cannot be presumed that he intended to vest an absolute power in Lady Nairn to defeat the entail. When he intended to give a power of selling, (as he did to the heirs-male of her body,) he gave an *express* power; but his having given no such power to his daughter shows plainly his intention that she should be bound by the prohibitory clauses, and excluded from any power of alienation, as well as all the other heirs-female.

*Pleaded for the Respondents*:—1. The prohibitory clause *de non alienando et non contrahendo*, is not directed against the whole heirs of entail; it commences only from the heirs-female of the Lady Nairn's body, and therefore she and the preceding heirs are thereby put under no limitation, which undoubtedly they would have been by express words, if it had been so intended.

The subsequent words in the same clause, “nor any others of the heirs-male of tailzie succeeding in the said lands and estate,” can refer to no others than the heirs succeeding after the heirs-female of the lady. This is likewise clear from the last part of the same clause, where it is declared, that the heirs-male of the lady's body may dispose

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of the estate, but with a proviso, that such power shall not be extended to the heirs-female of her body, “nor remanent heirs of tailzie above mentioned;” plainly importing that the prohibition in this clause was imposed only upon the heirs-female of the lady’s body, and the subsequent heirs of entail who were to succeed after them.

Every other clause of the deed, the provisions of which apply to the heirs of entail, is expressly directed against the *hail heirs*, and not conceived in such limited words as “other heirs,” or “remanent heirs” which occur in this clause.

2. The reason for excepting the heirs-male of the lady’s body in this place was, because the whole heirs succeeding after her are comprehended in the preceding clause, with which this clause is connected; and as both these clauses prohibitory are joined in the resolute clause which follows them, therefore the issue-male of her body are excepted from the clause *de non alienando*, that they might be excepted from the effect of that resolute clause, in case of contravention. And this appears to have been the purview of Sir Robert; for, by the subsequent clause, the better to distinguish who were the heirs subject to this prohibition, he declares that the heirs-female of the lady’s body, and “the remanent heirs of tailzie,” *i. e.* subsequent to her heirs-female, were comprehended under that clause.

Judgment,  
May 14, 1736.

After hearing counsel, “it is ordered and adjudged, &c. That the said interlocutors complained of in the said appeal be, and are hereby reversed; and it is hereby declared, that, by the contract of marriage of Margaret Lady Nairn, and by the procuratory of resignation contained

“ in the contract, and the infeftment following on  
 “ the said procuratory, the said Lady Nairn is sub-  
 “ ject to the prohibitory clauses *de non alienando et*  
 “ *non contrahendo.*”

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For Appellant, *Ch. Areskine, Ja. Erskine.*

For Respondents, *Ro. Dundas, Will. Hamilton,*  
*W. Murray.*

It would appear, that in this case, the entail, which had been made prior to the act 1685, was not recorded in terms thereof. Elchies, (*voce Tailzie*, No. 5.) says, that the case of *Borthwick v. Borthwick* was quoted, as decided in the House of Peers, (*supra* page 53,) in which it was found that an entail, although made before the act, was not effectual against creditors without being recorded. This point, however, is not founded upon at all in the appeal papers.

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JOHN WALKINSHAW, *Appellant*;  
 His MAJESTY'S ADVOCATE, *et alii*, *Respondents.*

9th June 1737.

FALSA DEMONSTRATIO.—Found that an attainder was not vi-  
 tiated, although in the act the person was described by the  
 name of Wakinshaw, instead of Walkinshaw, and as being “ of  
 “ Scotstoun,” (the estate of his father,) although, at the time,  
 he was not infeft in any lands.

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[Elchies, *voce Falsa Demonstratio*, No. 1.—C. Home, No. 30,  
 p. 56.—Mor. Dict. p. 4723.]

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JOHN WALKINSHAW, son of William Walkinshaw of No. 40.  
 Scotstoun, was partner in a mercantile house in  
 Glasgow. Having been engaged in the rebellion,  
 he was, by virtue of an act of Parliament of the 1st