Lord Ordinary of the 7th March 1753, and the said interlocutor of the Lords of Session of the 10th July following, adhering thereto, be, and the same are hereby affirmed.

1756.

HIS MAJESTY'S ADVOCATE *v.* MACKENZIE.

For the Appellant, *W. Murray, R. Dundas.*

For the Respondent, *A. Forrester, Geo. Brown.*

NOTE.—Unreported in the Court of Session.

JOHN STEWART, Esq., . . . *Appellant;*

Sir KENNETH MACKENZIE, Bart., . . *Respondent.*

1757.

STEWART *v.* MACKENZIE.

House of Lords, 20th December 1757.

ENTAIL—DEBTS—PROVISIONS.—(1) An entailed estate having been sold under an Act of Parliament, and this Act having been obtained by the fraudulent allegation of debt, which did not exist, the sale was set aside, and the entail held to be still a binding and subsisting entail, though the maker and the institute had concurred to put an end to it, before the Act had been obtained. (2) Held that two of the debts founded on were not true debts; but that Lady Anne's bond of provision was a true debt, yet that no interest was chargeable against the estate on it, during Lord Royston's possession, as during that possession he was bound to keep down the interest of the debt on the estate.

This is the sequel of the case reported in vol. i., p. 578.

The cause having returned to the Court of Session, an account was ordered to be taken. The appellant, besides the allowances out of the money arising from the sale of the estate, for the expenses of passing the Act, and for a small part of the estate not comprised in the entail, claimed the following:—

1st, For the amount of Lady Anne and Lundine's debts, as accumulated by adjudication, and stated in the Act of Parliament at 51,350 merks Scots, with arrears of interest, and, 2d, For £800 as four years' rent of the estate with which Sir James Mackenzie had power, by the entail, to charge the same, for provisions to younger children.

To these claims the respondent objected, 1st, As to Lundine's debt, that it could be no charge on the entailed estate, the security having been granted eighteen years after the

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granter was divested of the fee; and that from a defeazance produced in Court, granted by Sir James to his father, the Earl, it appeared that bonds and other securities, to a large amount, had been assigned by the Earl to Sir James, in trust, among others, to pay the interest and a part of the principal money due to Lundine.

With respect to Lady Anne's bond of provision, the entail had expressly provided, that the interest thereof should become chargeable on the estate, only from the day of the Earl and Countess of Cromarty's death, and no interest could afterwards accrue, as Sir James then became the creditor, by the above-mentioned assignment, and was in the perception of the rents and profits, or otherwise bound by law to keep down the growing interest during his own lifetime.

2d, With respect to the £800 provision bond, as the power given to Sir James of charging the estate with provisions for younger children, had never been executed, no allowance could be made in respect thereof; and the fact was, Sir James had, in his own time, paid all his younger children's fortunes, and taken their discharges.

3d, It was, besides, contended that the maker of the entail and institute, before the Act of Parliament was obtained, had both concurred in putting an end to the entail 1688, so as to leave in Lord Cromarty the estate in fee simple.

June 25, 1756. The Court pronounced this interlocutor:—"Find that it "is competent for the defender to object that the estate of "Royston, did not remain entailed at the date of the Act of "Parliament authorizing the sale thereof, notwithstanding "of that Act; but find that the tailzie made by the disposi-"tion and charter 1688, was and is a subsisting tailzie." On reclaiming petition for the respondent, this interlocutor

Feb. 16, 1757. was pronounced:—"Find that it was not competent for the "defender to object that the estate of Royston did not re-"main entailed at the date of the Act of Parliament author-"izing the sale thereof." And also having considered the petition for the appellant, with the answer, and additional

Feb. 11, 1757. answer for the respondent, "they adhere to their former "interlocutor, and refuse the desire of the petition."

The Lord Ordinary having afterwards reported the other

Feb. 23, 1757. points in the cause, the Lords, by interlocutor of this date, "Find that neither the debt due to Humphrey Lundine, "nor the £800 sterling, said to be paid by Lord Royston, "for provisions to his daughters, are true debts affecting the "estate of Royston; but find that the principal sum of

" 20,000 merks contained in Lady Anne Mackenzie's bond, " is a debt affecting the said estate, but that the annual rents " thereof, either before Lord Cromarty's death, or after, " during Lord Royston's possession, are not a charge on the " same; and remit to the Lord Ordinary, to proceed ac- " cordingly."

The appellant reclaimed against this interlocutor, but the Court, without troubling the respondent to answer, " unani- " mously adhered to their former interlocutor, and refused " the desire of the petitioner."

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1st, As to the settlement 1688. This deed was manifestly calculated for a temporary purpose, and was never intended as a permanent settlement of the estate of Royston. There could be no views of establishing a family in the person of a third son, then an infant, as the value of the estate allotted to him as a patrimony, did not at that time exceed £3000 sterling, subject to his father's liferent, and a provision to his sister, equal to a third of the value. Accordingly, this settlement was never made effectual or recorded in the register of tailzies, in terms of the Act 1685. The maker of the entail continued in possession of the estate, and as soon as his son came of age, they jointly concurred in every deed which could render this entail of no effect.

2d, By the established law of Scotland, if the institute or first heir repudiate the entail, the substitutes (who can have no title but by service, as heir to him), of course cannot take the estate, and the entail is at an end; and even where the institute has taken the estate under the entail, it is still in the power of the maker of the settlement and the institute, by their joint concurrence to a deed, to vacate the entail, or to relax the prohibitory, irritant, and resolutive clauses thereof. In the present case, Sir James Mackenzie, the institute, far from accepting or approving of the settlement 1688, did, twelve years after, formally and legally renounce all right and title to the estate. On the faith of this renunciation, Lord Cromarty exercised all the powers of an absolute proprietor. He granted an heritable bond over the estate, to Humphrey Lundine, and soon after, by marriage articles, he provided the estate to his wife in liferent, and to the heirs-male of the marriage, in fee. These deeds afford incontestable proof that the entail was deemed legally vacated; and in

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confidence of this, Sir James Mackenzie did thereafter give up his right to an estate of equal value, and did take the estate of Royston, upon a new unlimited grant from his father, after which, they both concurred, in 1714, in a formal deed of revocation of the entail, 1688, and upon the unlimited title, Sir James Mackenzie possessed the estate till the year 1739.

3d, By the law and usage of Scotland, heirs of entail may lawfully take rights to the incumbrances affecting the estate tail, and keep these as separate estate, to be disposed of at pleasure, and to continue equally effectual against the estate tail, as if they had remained in the persons of the original creditors. In the present case, the debts for which the appellant claims allowance, out of the price of the estate of Royston, were such as, by the settlement, 1688, were made charges on the estate, or were really *bona fide* paid by Sir James Mackenzie. The whole does not exceed a very moderate provision, intended for the appellant's grandfather. Equity will, therefore, not suffer the words of a settlement to be rigorously strained to disappoint the appellant of his provision.

Pleaded for the Respondent.—1st, Sir James Mackenzie having, by repeated acts, testified his acceptance of the entail 1688, and in his petition to Parliament and otherwise, judicially admitted himself bound thereby, and the legislature, on his own information, having enacted that the residue of the price, after payment of debts, should be laid out to the uses of the entail; these circumstances are, in respect of him and all coming under him, conclusive, and must bar the appellant, his heir general, from disputing the validity of the entail. And as the question is not open, neither is it material, since, whether Sir James accepted or refused the entail, he could not prejudice the remainder men who claimed not through him. Their right was out of the reach of his refusal. His father, the Earl of Cromarty, was confined to a bare life estate; his own was, after the particular power of charging for younger children, limited by the strongest prohibitive, irritant, and resolutive clauses; it was therefore, no longer in his or his father's power, by any joint or separate act of theirs, to affect the remainder men.

2d, Lundine's debt is no charge upon the entailed estate; the infeftment was granted by a bare tenant for life, and determined with his liferent interest. If the debt remained still in Lundine's person, the question would not bear dispute;

and it is clearer, if possible, against an heir of tailzie, who would set up that debt to defeat the settlement under which he himself possessed.

3d, No interest on Lady Anne's bond is chargeable on the estate, but from the time it was made so by the entail, which makes it to commence at the Earl's death only.

4th, The power to charge for younger children given to Sir James, was optional and discretionary, whether he would or would not execute it. He did not execute it; nay, he does not appear to have ever taken one step towards executing it, unless it was by getting the whole purchase money into his own hands, and covenanting to lay out only £1000 to the old uses, which he never did. Here are no younger children unprovided for, nor any other ground of equity for the Court to interpose.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *C. Yorke, Alex. Wedderburn.*

For the Respondent, *Al. Forrester, Fred. Campbell.*

[Elchies, vol. ii., p. 159.]

Colonel JAMES ROSS of Balnagowan, . *Appellant;*

ALEXANDER ROSS of Pitcalny, and Others, *Respondents.*

House of Lords, 19th January 1758.

REDUCTION OF DEED—TITLE TO SUE—FRAUD AND INCAPACITY—PROOF—A reduction was brought of settlements on the head of fraud and incapacity. The appellant objected, that the respondent had no title to raise such action, and, therefore, that he ought not to be let into proof of the reasons of reduction. Held him entitled to a proof; proof allowed to both parties.

This was an action of reduction and improbation, brought by the respondent's father, a colateral relation of Ross of Balnagowan, and who, 123 years before, had, by settlement, the estate of Balnagowan limited to him under that settlement, on the ground that the subsequent settlements of 1685,