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MARCHIONESS OF TITCHFIELD v. GORDON.

[Mor. App. Tailzie, No. 4.]

The Most Hon. HENRIETTA SCOTT, Marchioness of Titchfield, and WILLIAM HENRY CAVENDISH BENTWICK SCOTT, Marquis of Titchfield, her Husband, for his interest, } *Appellants;*

ALEXANDER PENROSE CUMMING GORDON of Altyre and Gordonston, . . } *Respondent.*

House of Lords, 20th June 1800.

ENTAIL — FETTERS — INSTITUTE — HEIRS OF TAILZIE — *RES JUDICATA.* — (1.) Sir Robert Gordon the first, executed a strict entail to himself in liferent, and to Robert Gordon, his eldest son, and the heirs male of his body, in fee, whom failing, to a series of substitutes therein named. The entail contained prohibitions against selling, contracting debt, or altering the order of succession, fenced with irritant and resolutive clauses; but these prohibitions and irritant clauses were directed only against the heirs of tailzie, and did not expressly include the institute; but it declared that the "heirs who shall happen to succeed to the said *lands and dignity*" shall not be entitled to alter. Sir Robert the second, succeeded both to the lands and the dignity or title, and by a contract of marriage, he executed a deed, by which an alteration of the succession was to take place. On his death, his son, Sir Robert the third, conceiving that, by his father's marriage-contract, he was called to succeed as fiar, served heir of provision to him under that contract, and raised action to have it declared, that he was free from the fetters of the entail 1697, and, dying during the dependence, it was carried on by his brother, Sir William, who obtained decree in this action, and executed a new entail, by which the respondent was called to succeed, in preference to the appellant. In an action of reduction and declarator, held by the Court of Session, and affirmed in the House of Lords, that, as Sir Robert the second, was institute, and called to the fee, he was not bound by the fetters of the entail directed against the heirs of entail succeeding to the estate. 2. Also, held that a former decree was not *res judicata*, so as to foreclose the present action.

Sir Robert Gordon of Gordonston was, prior to the year 1697, unlimited proprietor of the estate of Gordonston, &c., which stood devised to "*Herédibus masculis et assignatis* "*quibuscunque.*"

In 1697, he executed an entail of his estates, in the form of a procuratory, whereby he became bound to resign the 1697.

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lands for new infeftment thereof, " in favours of me, the said " Robert Gordon in liferent, during all the days of my life- " time, and to Robert Gordon, my eldest lawful son, pro- " created betwixt me and Dame Elizabeth Dunbar, *my* " *spouse*, and the heirs male lawfully to be procreated of his " body *in fee*; which failing, to any other son lawfully to " be procreate of my own body, according to their order of " succession, and the heirs male lawfully descending of the " bodies of the said sons, which failing, to and in favour of " any person or persons, and their heirs, whom I shall name, " design, and appoint, at any time in my life, *et etiam in* " *articulo mortis*, to succeed to me in my estate and dig- " nity, by any writ or nomination under my hand; and " which nomination and writ, and the provisions (if any be) " therein contained, shall be of as great strength and effect " as if the same were insert herein, and in the infeftment to " follow hereupon; and failing such nomination, so that no " such writ shall happen to be extant at the time of my " decease, or if the same being made, shall thereafter hap- " pen to be revoked or innovate by me; or if the person " or persons so to be named and designated, shall die " and fail, then, and in that case, to and in favours of " Mrs. Jean Gordon, my eldest daughter, and to the heirs " male to be procreate of her body; which failing, to Mrs. " Margaret Gordon, my second daughter, and the heirs " male to be procreate of her body; which failing, to my " third and younger daughters procreate, or to be procreate, " of my own body, respective and successive in their due " order and age, and to the heirs male to be procreate of " the bodies of the said daughters; which failing, to the " daughters or heir-female lawfully to be procreate of the " body of the said Robert Gordon, my son; and failing " thereof, of the body of any other lawful son to be pro- " create by me, and the heirs male or female lawfully " descending of the said daughters bodies; which failing, " to the daughters and heirs female lawfully to be pro- " create of the bodies of the saids Mrs. Jean and Mrs. Mar- " garet Gordons, my eldest and second daughters; and, " failing thereof, of my third and younger daughters, (of " whom the appellant's predecessor, Miss Lucy Gordon, " was one,) and the heirs whatsover, descending of such " females—the elder daughter in the respective cases above " being always preferred to the younger succeeding with- " out division," (whom failing to certain other substitutes).

It was provided and declared in this entail, "That it shall "be noways leisome nor lawful to the *heirs of tailzie above* "*designed, male or 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; nor yet to give, "grant, sell, annalzie, or dispone irredeemably, nor wadset, "nor dispone under reversion any of the baronies above "named." It further declared, "It being understood, that "though the forenamed persons be designed heirs of tailzie, "and be to succeed to my said estate as such, yet they shall "have no further power to affect and burden the same nor "if they were liferenters."

These prohibitions were fenced with proper irritant and resolutive clauses, directed in terms as above against the heirs of entail. This entail was duly recorded. Although the maker had reserved power to himself to alter, yet he never did this, and died in 1704, whereupon he was succeeded by his son, Sir Robert the second.

The son took possession of the estate, not by service as heir to his father, but as *fiar* and disponee under the disposition and infeftment in the entail. Under this title, he possessed for seventy years.

He married, in 1734, Mrs. Agnes Maxwell; and, in con- 1734.
templation of that marriage, bound and obliged "himself to "provide, secure, and resign the whole lands and estate "enumerated in the said bond of tailzie, which are holden "as repeated herein *brevitatis causa,* and all other lands "and estates now pertaining and belonging to him, and that "to and in favour of himself, and the heirs male of this "present marriage; which failing, the heirs male of his "own body of any other subsequent marriage; which fail-"ing, to such person or persons, as he by a writ to be sub-"scribed by him, at any time of his life, shall nominate and "appoint to succeed to him in his said lands and estate, "and if no such nomination of successors shall be made, or "if made, and afterwards revoked, then in favour of the "heirs male and of tailzie, substitutes and successors men-"tioned in the said bond of tailzie, made and granted by "the said deceased Sir Robert Gordon of Gordonston.

Sir Robert Gordon the second, never executed any other deed in terms of the above obligation altering the order of succession. On the contrary, in granting subsequently a bond of provision, he refers to his father's entail of 1697,

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and declared, "That it is my intention that the entail, dated "26th day of January 1697 years, made and granted by the "deceased, Sir Robert Gordon, my father, be, and continue "the rule of succession to the said lands and estate." He died in 1772, leaving two sons, Robert and William.

Sir Robert the third, imagining that he succeeded to the estates in fee simple, in virtue of the clause in his father's marriage contract, expede a general service as heir of provision under that contract. He raised an action, to have it declared that he was free from the fetters of the entail. By agreement with him, Mrs. Hay appeared, and gave in, as was stated, a pretended defence. He obtained
July 10, 1777. decree setting aside the entail 1697, of this date. Sir Robert the third died during the dependence of this action, without issue. It was then carried on to a conclusion by his brother, Sir William.

In 1781, Sir William Gordon executed a new entail, "to "myself, and the heirs male of my body; whom failing, "to the heirs whatsoever of the body of the heir male of my "body who shall die last infeft in, and in possession of my "said lands and estate; whom failing, to the heirs whatso-"ever of my own body; whom failing, to any person or "persons that shall be nominated and called to the succes-"sion by a writing under my hand, at any time in my life, "*et etiam in articulo mortis*; and, failing of such nomina-"tion, to and in favour of David Scott of Scotstarvet, eld-"est lawful son of the deceased David Scott of Scotstarvet, "by Mrs. Lucy Gordon, and other substitutes; whom fail-"ing, to Alexander Penrose Cumming of Altyre," &c.

The appellant was heir of line, and heir of tailzie and provision under the entail of 1697, executed by Sir Robert Gordon the first; and she brought the present action of reduction to set aside the entail executed in 1781 by Sir William Gordon, as *ultra vires* of the maker, and a contravention of the previous entail and investitures of the estate of 1697. The decree in 1777 was also sought to be set aside—the action being brought against the respondent, the substitute next entitled to succeed by the entail, executed by William last above quoted, in consequence of the failure of all the previous heirs substitute of entail. The defence stated to the action was, 1. That Sir Robert *the second*, being fiar and institute by the entail 1697, was not bound by the fetters of that entail, directed against the heirs of tailzie only; and, therefore, that he and his heirs had full power

to dispose of the estate as they thought fit. 2. That, by a previous judgment of the Court, in the same question, the matter was now *res judicata*.

The Lord Ordinary (Swinton), of this date, pronounced this interlocutor, "Repels the reasons of reduction, assoilzies the defender, and decerns." On reclaiming petition to the whole Court, "The Lords repelled the defence of *res judicata* stated for the respondent; but sustain the other defences, adhere to the interlocutor complained against, and refuse the desire of the petition.

A second reclaiming petition was presented, but refused; and the former judgment adhered to.

Against these interlocutors the present appeal was brought by the Marchioness of Titchfield and her husband, the respondent, on his part, acquiescing in that part of the interlocutor in regard to the *res judicata*.

Pleaded for the Appellants.—1. This is not a question with creditors or purchasers, who are objects of favour, but between donees, in which case the will of the donor ought to decide, unless it is controlled by precedents. The precedents referred to by the respondent, it is submitted, do not apply to this case, as there are special circumstances which exclude them. The entail applies to the title of honour as well as to the lands. Supposing, therefore, Sir Robert the second was a mere institute or disponee under the entail, yet, as he was heir in the title, the limitations which include that title must be held to include him. This is apparent from the entail itself, because it declares, that "the heirs "who shall happen to succeed to the said lands and *dignity*," are prohibited from altering the tailzie. Sir Robert the second therefore fell, by the express terms of the entail, within the fetters thereof, which was farther evidenced by the clause, prohibiting "the forenamed persons from "having more power than simple liferenters." 2. But, assuming that Robert the second was not bound by the fetters of the entail, he not being an heir of tailzie, but institute under the entail, and had full power to alter it, the appellants do with confidence maintain, that he neither did alter, nor ever entertained any intention of doing so. On the contrary, it is clearly shown by the bond of provision above referred to, executed by him before his death, and which refers to his father's entail of 1697, that it was his intention that that entail should regulate the succession to

Leslie *v.* Findrassie, 1752. Erskine *v.* Hay Balfour, Edmonstone *v.* Edmonstone, 1769, M. p. 4409. Menzies *v.* Menzies, 1785, M. 15436. Wellwood *v.* Wellwood, 1791, M. 15463.

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the estate of Gordonstoun. He therefore never altered that order of succession. His marriage contract of 1734 cannot be held as an alteration of that entail, because it is not absolute but conditional. It proceeds on an uncertainty, and sets forth, "*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, &c., then he binds and obliges to "provide and secure the estate," &c. But this is not an actual alteration of the entail. It is only an obligation to *secure* the succession in a certain event, namely, if he had powers to alter. No declarator of this power to alter followed this, and no deed thereafter, altering in terms of that obligation, was ever executed. It is clear, he never *thought fit* to alter, and never imagined that his marriage-contract of 1734 was itself an alteration, because the bond of provision subsequently granted, which refers in express terms to his father's entail of 1697, confirms the order of succession therein, and declares that it is his intention that this entail should be the rule of succession to the estate. And the fact of his having lived forty years after executing his marriage contract, and dying without doing anything by word or by deed, to alter that entail, goes to corroborate this meaning of the contract.

Pleaded for the Respondent.—1. Sir Robert Gordon the second, being institute or disponee, and not an heir of entail, by the conception of the tailzie 1697, was not bound by the fetters and limitations thereof, and, consequently, the prohibitive, irritant, and resolutive clauses, could not affect him, or restrain his rights as fiar: And having in him an unlimited fee in the estate of Gordonstoun, he was entitled to dispose of it at pleasure. 2. Sir Robert Gordon the second, accordingly, by his marriage-contract of 1734, did effectually settle the said estate upon the heirs male of the marriage, without any restraint or limitation whatever; and Sir William Gordon, who, by the death of his elder brother, Sir Robert the third, had succeeded, became, as heir male of the marriage, creditor under the obligation in his father's marriage-contract, and was therefore entitled, and did take up the succession to the said estate, as heir of provision under his father's contract, and so was entitled to make the entail of 1781, under which the respondent is entitled to succeed to the estate.

After hearing counsel,

The Lord Chancellor Loughborough said,

" My Lords,

" Though I do not rise to move your Lordships to reverse the interlocutors complained of by this appeal, yet, as the cause has been argued with much anxiety, I think it my duty to state the reasons which influence the judgment which I have formed upon it.

" The question takes its rise on a contract of marriage, which is not conceived in the most accurate and precise terms. There is no clear or marked difference, between what is matter of recital, and what is matter of settlement. The rule of every Court, in such a case, is to view the situation of the parties who enter into the contract.

" In this contract, it is impossible not to be convinced, that the friends of the lady wished to give the most ample provision for the support and dignity of an ancient family, to the heir of the marriage. It is stated that the fortune of the lady was small; but that is of little importance; it was not an unequal match. The lady was of a family as respectable as her husband's, and it was the duty of her friends to attend to this, that the children should be duly provided for.

" Taking it then for granted, that it was the object of them, as well as of Sir Robert, to provide his estates to the children. We may enquire into the situation of his property. The largest part of his estate was held under an entail made by his father. By that deed, Sir Robert was provided to the fee of the estate, and he never made up titles as representing his father in it. The entail was very strict and binding on all the parties who might be bound by it; they were prevented from contracting debts to bind the estate, and from making conveyances of it, under an irritancy which carried it to the next heir of entail.

" This was the conception of the entail, but, by giving Sir Robert the fee, these prohibitions only affected the subsequent heirs, and did not attach upon Sir Robert. Under this entail, all the debts contracted by him would have been effectual against this estate,—he might have sold every acre of it, and a pursuit after the price, was all the remedy that was competent to his children.

" In these circumstances, it was incumbent on those treating, to secure the estate for the children. I should have observed, that Sir Robert also possessed an unentailed estate of smaller value; and it was the object of Sir Robert, that all his estates, both entailed and unentailed, should go to the heir male of the marriage,—as it was of all the parties, that such heir should have as ample an estate as possible. The mode of settling such estates upon children in Scotland, is not by reducing the father to a liferent, but by giving the children what is termed a *jus crediti* in the estate. By this settlement, it is clear, (as is stated in the decree of 1777,) the heir of the marriage was entitled to take the unentailed estate in fee simple·

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" As to the entailed estate, (and whether the entail was binding at all or not, is, I think, doubtful, historically speaking), if the entail was binding upon Sir Robert, nothing more could be done; the children would be entitled to take the estate under it. But, if not binding, the right of the heir might be affected in two ways. He might make an alteration of the settlement, and this, whether he had the power to do it or not; but, 2dly. If he was not bound by the fetters of the entail, all his debts were charges upon the estate, or he might have sold it; and though he had allowed the estate to go by the entail, it might have been so burdened as to disappoint the provision of the heir.

" It was therefore necessary to make a settlement to provide for both these cases. If Sir Robert makes any alteration, the heir male shall have right, or, if to his prejudice, he shall have right to set aside upon that contract. For this purpose, there was a covenant for an action in implement to be brought by a trustee in Sir Robert's lifetime, or by the son after the father's death. Therefore it was provided that if there was to be any alteration at all, it should be to leave the heir the fee of the estate.

" In the other case, the estate might be unentailed as to Sir Robert, as in fact it was, yet if he had a right to charge it with debts, the succession might prove very barren. He covenants, therefore, in that event, that the estate shall be provided to the heirs male of the marriage. This supposes that the entail should stand, but that Sir Robert was free from its fetters.

" I am therefore of opinion, that the clause is correctly drawn in the disjunctive, as referring to two different cases, which were perfectly distinct. This struck me so forcibly from the beginning, that if it had been put in the conjunctive, it would have been more reasonable to change the *and* into *or*, than to adopt the appellants' construction.

" The appellants' argument supposes, that if Sir Robert had not chosen to alter, that the settlement should remain upon the entail. But a court of law would be more apt to suppose that there was a mistake in the terms of such a covenant, than that it should strain other words, to adopt a conclusion which was to make the whole contract necessary. There was but one settlement of both estates, and if Sir Robert was to settle his estates upon his children, only if he should choose so to settle them, the children were left without any security whatever.

" I therefore concur with the judgment of the Court below, and move your Lordships that the decree be affirmed."

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

For Appellants, *W. Grant, Wm. Adam.*

For Respondent, *Robert Blair, Chas. Hope, Wm. Alexander.*