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'Found that the bonds of provision were in lieu of the provisions in the contract of marriage ; but found that the substitution in the bond of provision to Mary Gibson did not restrain her after her father's death from disposing of her provision ; and as she did dispose thereof to her sister Anne, that therefore the present Durie has no right to retain the half in virtue of the substitution.'

Act. *A. Lockhart.*Alt. *R. Craigie.*Clerk, *Kirkpatrick.*

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Eol. Dic. v. 3. p. 216. Fac. Col. No 51. p. 75.

S E C T. X.

The first Member of an Entail being Disponee, is not bound by the Restrictions laid on the Heirs of Entail.

1758. *February 14.*KATHARINE and RACHEL ERSKINES *against* Mrs MARY BALFOUR-HAY.

No 58.

A party disposed his estate in favour of his son and the heirs whatsoever of his body ; whom failing, to a series of heirs, with strict prohibitions, and irritant and resolute clauses. The son was found unlimited fiar.

IN 1677, Michael Balfour of Randastoun executed a settlement of his estate by way of entail, in favour of James Balfour, second lawful son to Sir David Balfour of Forret, one of the Senators of the College of Justice, and the heirs whatsoever of his body, without division ; whom failing, to the other heirs therein named.

This entail contains the strictest prohibitions *de non contrabendo et non alienando*, which are fenced with the usual irritant and resolute clauses, and by virtue of this settlement, the said James Balfour succeeded to, and enjoyed the said estate, and after him his sons, Michael and Robert, and his daughter, the defender.

In 1756, the pursuers brought an action against the defender for payment of a bond for 1000 merks granted to their father in November 1717, by the said James Balfour.

The defence was, That she was only an heir of entail, under strict prohibitive, irritant, and resolute clauses ; and therefore not liable for any of her predecessors debts, who had no power to charge the entailed estate therewith.

The dispositive clause in the tailzie runs thus : ' Me, Michael Balfour of Randastoun, for certain onerous causes, &c. to have given, granted, and disposed, &c. from me, my heirs, and all others my successors, &c. to and in favour of the said James Balfour, and the heirs whatsoever of his body, &c. ; which failing,' and so forth, substituting several other persons, and their heirs-male alienarly, ' under the provisions, conditions, reservations, and restrictions under

‘ written, conceived in favour of the heirs of tailzie above named, or in favour of me, and Mary Hay my spouse, in manner after mentioned allenary.’

In the obligation to infeft, the tailzier ‘ binds and obliges himself, his heirs and successors, duly, well, and sufficiently, to infeft and seise the said James Balfour, and remanent persons above named, heirs of tailzie and provision, &c.’ And the procuratory of resignation is exactly in the same terms with the dispositive clause.

The obligation to carry the arms is upon the heirs of tailzie who shall any manner of way succeed to the estate ; and the prohibition to alter, &c. is in these words: ‘ And further, it is hereby specially provided and declared, that it shall not be lawful for the said heirs of tailzie and provision, in any case, to alter, innovate, &c. or to contract debt.’ &c.

The clause containing reserved powers to the tailzier is in these terms: ‘ That it should be lawful to the maker of the tailzie, without the consent of the foresaid persons, heirs of tailzie and provision above named; or any of them, and their foresaids, to sell,’ &c. and the obligation to pay the tailzier’s debts is in the same terms, being laid upon ‘ the above-named persons, heirs of tailzie and provision, succeeding to me in the said lands,’ &c. And the same clause further provides, that an extract of the tailzie should be a sufficient title to the maker’s other heirs for pursuing ‘ the foresaid persons, heirs of tailzie and provision above named, and their foresaids,’ for relief of these debts.

And in the clause dispensing with the not delivery it is declared, ‘ That the tailzie found unaltered at the maker’s death, with all that followed thereon, should be obligatory evidents in favour of the above named heirs of tailzie, although not delivered to the said James Balfour, as first person of the said tailzie, or to any others of the said heirs of tailzie above named.’

From the above recited terms of the different clauses in the tailzie, the pursuer *contended*, That James Balfour, the debtor in the bond pursued on, and institute of this tailzie, was a simple disponee ; and therefore not bound by the same limitations and restrictions with the heirs of tailzie.

And in support of this, *pleaded, imo*, That where one disposes his estate directly in favour of a person *nominatim*, and the heirs of his body, whom failing, to certain substitutes, reserving a liferent and powers to himself; in that case, none of the substitutes can take up the succession as heir to the disponent; but must of necessity succeed to the disponee; and the restrictions imposed upon the heirs of tailzie will not affect the disponee, who does not take as heir, but as singular successor to the granter. And there are no two things better distinguished in the law of Scotland, than a disponee, and an heir-substitute. The first of these takes an immediate fee, by expeding infeftment upon the procuratory contained in the disposition, and it is impossible he can succeed as heir to the tailzier in this same subject; whereas, on the other hand, the substitute has but a hope of succession, and, so soon as the succession opens, must

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take it by a service. And so this point was expressly decided in 1752, in the case of the entail made by Lesly of Findrassie, (*See* TAILZIE.)

2do, Supposing it appeared evident from the clauses of the entail, that the maker had truly not considered James Balfour, the institute, as a simple donee, but had intended to comprehend him under the description of his 'heirs of tailzie;' and, as such, had intended or supposed that he would be liable to the same limitations with the other heirs of tailzie; yet as entails are *strictissimi juris*, and the favour of law is against all restrictions, this intention of the tailzier can have no effect, as he has not expressed it in plain and explicit words; nor will the law allow of an extension of such restraints upon property from implication or artificial arguments; as has been again and again decided by the Court.

Answered for the defender; To the *first*, The law defines an heir to be, *qui succedit in jus defuncti*. 'Heirs of tailzie and provision,' considered as technical terms of the law of Scotland, include every person who succeeds by deed to another, whether mediately or immediately, whether as donee or institute, or as a substitute nearer or more remote; and therefore, James Balfour, though the donee, is, in a proper legal sense, an heir of tailzie and provision to Michael Balfour, the maker of the entail, and certainly took this estate by succession to him in virtue of a deed which is plainly of a testamentary nature, to take place only upon the death of the disponent, who reserved to himself, not barely a life interest, but such powers of property as the law construes to be equal to a fee; and although he is the heir first named, he does not appear to be a donee in any other or higher sense than all the other heirs of tailzie are in their own order, whom it is not disputed the restrictions do affect. From comparing the whole clauses of this entail, it is apparent, that the maker of it has used the words 'heirs of tailzie' as descriptive of all that were to succeed to him, whether the institute or last substitute; and, as his express and anxious intention was, to limit those heirs whom he was creating, by certain provisions and conditions, it seems impossible to maintain, that the very first of these heirs should be free of all these conditions, and left at liberty at once to defeat the declared purpose of the testator.

To the *second*, There appears no good reason why a person should not be understood according to his intention, when speaking in an entail, as well as in any other deed. It is true, entails are held to be strictly, but at the same time they ought to be fairly interpreted; and, while they are supported by the sanction of law, they ought to receive their full effect, when there are plain words to support the clear meaning of the tailzier.

"THE LORDS found, That James Balfour, the granter of the bond pursued on, was not restricted from contracting debts, he being donee, and the restriction only laid on the heirs of tailzie; and therefore found the defender, who admits she is heir of tailzie to the said James, liable in payment of the sums libelled." *See* TAILZIE.

Act. Alex. Hay.

Alt. Mackintosh.

G. C.

Fol. Dic. v. 3. p. 215. Fac. Col. No 100. p. 177.