

1742.

LESLIE
v.
LESLIE.

CHARLES CAJETAN, COUNT LESLIE, - *Appellant* ;
JAMES LESLIE, Esq. of Pitcaple, *et alii*, *Respondents*.

LEOPOLDUS, Eldest Son of the said }
COUNT LESLIE, - - - - - } *Appellant* ;
The said JAMES LESLIE, *et alii*, - *Respondents*.

ANTONIUS, Second Son of the said }
COUNT LESLIE, - - - - - } *Appellant* ;
The said JAMES LESLIE, *et alii*, - *Respondents*.

29th April, 1742.

TAILZIE.—CLAUSE.—Found that a clause providing “ that in
“ case any heir of entail should succeed to a certain other
“ estate, he and the heirs male of his body so succeeding,
“ should be obliged to denude in favour of the next heir ;” and
that the estate in that event should be redeemable “ from the
“ said heirs male who shall succeed to both the said estates,
“ and his heir male foresaid,”—has not the effect of excluding all
the heirs male of the body of the person so succeeding (so as
to make room for the next branch,) but only his eldest son,
or heir apparent ; and the succession opens to the second
son.

No. 64. ALEXANDER LESLIE of Balquhain had four sons,
James, Patrick, William, and Alexander. His
brother, Walter Leslie, acquired a large estate in
Germany, and was created a Count of the em-
pire.

Walter died without issue, and was succeeded
by James, the eldest son of Alexander ; and Patrick
succeeded to the paternal estate in Scotland. James
had no issue ; Patrick, by his first marriage, had
issue, James Ernest, by his second, George, Mar-
jory, and Anne ; James Ernest had issue, Joseph

(who died without issue) and Charles Cajetan Count Leslie ; Charles Cajetan had issue, Leopoldus, Antonius, and Carolus ; George (the son of the second marriage) had children, but they died without issue ; Marjory the eldest daughter was married to Alexander Leslie of Pitcaple, and had issue, James Leslie, the respondent. Count Patrick, upon the recital that he wished to keep the two estates distinct, and that he had already secured his eldest son James Ernest in the succession of the German estate, executed an entail of the estate in Scotland, (8th November 1692,) disponing it “ to himself in
 “ liferent, and to George Leslie, his second son, and
 “ the heirs male of his body, whom failing, to the
 “ heirs male of his own body of that or any other
 “ marriage, and to the heirs male of their bodies,
 “ (with other substitutions,) which failing, to the
 “ heirs female of the body of the entailer.”

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There were two clauses of devolution in the entail. The first provided for the case of George or the heir male of his body succeeding to both estates.

The second clause, under which the present question arose, was as follows:—“ And in case it shall hap-
 “ pen any other heir male of my body to succeed to
 “ both the said estates ; in that case, the foresaid
 “ estate of Balquhain shall fall and belong to the
 “ next heir male to be procreate of my body of this
 “ or any other marriage, which failing, to the sub-
 “ sequent heirs of tailzie aforesaid, to whom the
 “ said *heir male*, and *the heirs male of his body* who
 “ shall succeed to the German property, shall be
 “ obliged to dispoise and resign the foresaid lands
 “ of Balquhain ; and the same shall from hence-
 “ forth be redeemable by the other, and next heirs

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“ male to be procreate of my body of this or any
 “ other marriage, and the other heirs of tailzie
 “ aforesaid, from the said heirs male, who shall
 “ succeed to both the said estates, and his *heir*
 “ *male foresaid*, by payment of the said sum of
 “ ten merks.”

Count Patrick afterwards made a new entail, containing some variations, and disposing the estate,—failing the heirs male to be procreate of his own body of any other marriage, and the heirs male of their bodies,—to Charles Count Leslie, second son of James Ernest, with other substitutions, which failing, to James Leslie, the respondent, eldest son of Marjory, &c.

The heirs under this new entail are also bound to adhere to the above condition of devolution, as well as to the other provisions of the former entail.

Under these settlements the estate was possessed after Patrick's death by his son George, and then by George's sons in succession. After their death, without issue, the succession opened to Count Charles, who had already succeeded to the German property.

In virtue of the clause of devolution above referred to, three several actions of declarator were brought before the Court of Session against Count Charles,—the first by his eldest son Leopoldus, as the next heir of tailzie after him; the second by his second son Antonius, as next heir other than Leopoldus; and the third by James Leslie of Pitcaple, the son of Marjory, as next heir after all the male issue of Count Charles, who, he maintained, were all excluded. On the other hand, Count Charles contended that he was not bound to denude in favour of any of the claimants.

The Court, upon the report of the Lord Ordinary, found, (20th February, 1741,) “ That it being provided by the deed of entail,” &c.* “ and that the estate of Balquhain shall be redeemable by the other and next heir male, and the other heirs of tailzie foresaid, from the said heir male who shall succeed to both estates, and his heirs male aforesaid, for payment of the sum of ten merks; that Charles Count Leslie, being an heir male of the said Patrick’s body, and having, in terms of the said clause, succeeded to both estates, that he, and the heirs male of his body, are obliged to denude of the estate of Balquhain in favour of the next heir of tailzie: and found that Charles Count Leslie, and the heirs male of his body, being thus excluded from the estate of Balquhain, in the event that has happened of his succeeding to both estates, the respondent, James Leslie of Pitcaple, is the next heir of tailzie to whom the estate of Balquhain now devolves; and that Charles Count Leslie is obliged to denude in his favour; and that Leopoldus and Antonius Leslies, being, by the substitution in the entail, called to the succession in their order, only as heirs male of the body of the said Count Charles, they are, in like manner, as heirs male of his body, excluded from the succession to the estate of Balquhain, in the event that hath now happened of their father succeeding to both estates; and that, therefore, Count Charles, their father, cannot denude in their favour, but ought to denude in favour of the said James Leslie, the next heir, and therefore decerned,” &c.

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* The first part of the interlocutor contains merely a recital of the clauses of devolution in the entail.

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Entered

Dec. 18, 1741.

The Lords adhered, (27th February 1741.) Three several appeals were brought from these interlocutors of the 20th, and 27th February by Count Charles, by Leopoldus his eldest son, and by Antonius his second son.

Pleaded for Count Charles :—The plain intention of the clause, “that the heirs male of Patrick’s body succeeding to both estates should resign the estate in Scotland,” could only be to oblige such heirs to divest themselves who should succeed in virtue of the destination in the same deed, “to the heirs male of Patrick’s body by that or any other marriage.”

It could not be intended that these words should be understood in a more extensive sense in the clause of devolution than in the clause of destination. Under the latter clause, the entailer did not comprehend the descendants of his eldest son James Ernest, for Count Charles is called by a distinct and posterior substitution. Therefore neither can the clause of devolution have a greater effect so as to affect these descendants. The words must have the same import in both parts of the deed.

2. The construction put upon this clause is repugnant to the terms of it; for although Count Charles is heir male to Patrick, yet he never could be an heir male who could resign in favour of any heir male of Patrick’s body, of that, or any other marriage; for he never could have succeeded while there were any other such heirs male. Now it was not the intention of the entailer to restrain all persons succeeding to both estates from retaining both; but only to keep the estates separate, while the entailer had an heir male of his body who could enjoy the Scottish estate singly.

Pleaded for Count Leopoldus :—In virtue of

the condition referred to, the heir succeeding to both estates is bound to denude in favour of the next subsequent heir of tailzie in the order of succession thereby appointed, and it is undoubted that the appellant is the next heir.

It is not denied that the heirs male of Count Charles are preferred to James Leslie, the son of Marjory. The sole intention of the proviso was, that the two estates should be kept separate; whereas, by the construction put upon it by the Court below, the respondent, and the heirs female of Count Charles, are to succeed before any of Count Charles's sons, though none have as yet succeeded; and some of them, in all probability, never will succeed to the German estate.

Although not only the heir male succeeding to both estates, but the heirs male of his body, are bound to denude—these words are not to be extended farther than the sense necessarily demands; and the plain sense is, that these heirs male shall only denude of the one when they succeed to the other, and it would be hard to exclude the apparent heir to the German estate, as he may possibly never succeed to that estate.

Pleaded for Count Antonius :—It is not all the heirs male of the body of the persons succeeding to both estates who are excluded, but only that heir male who shall succeed to the German estate. The Scottish estate is declared to be redeemable from the heirs male succeeding, and from his heir male, aforesaid; by which expression, the general description of heirs male is restricted to the apparent heir male, or the eldest son of the person succeeding, who is the only proper heir male.

The general purpose of the two entails was, that the Balquhain estate should always devolve to

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the second son of the person succeeding to both estates ; and it was never intended that the female descendants of the entailer should succeed, as long as there was any such second son capable of enjoying it.

It could not have been intended that all the male descendants of the person obliged to denude should be deprived of that right of succession which they were otherwise entitled to. The second son of this person is uniformly preferred. If George had succeeded to the German property, his second son, by the express terms of the deed, must have succeeded to Balquhain ; and yet, in another part, George, and the heirs male of his body who shall succeed, are bound to denude.

If the words do not necessarily import an exclusion of all the male descendants of the person succeeding, there can be no reason for giving it such a construction. The only intention was, that the two estates should be possessed by different persons, and this intention is as fully answered by the succession of a second son as it can be by that of the remotest relation.

*Pleaded for James Leslie :—*Count Charles must denude, as the express purpose of the settlement was, that the same person should not possess both estates.

The words, “ other heirs male of my body,” necessarily apply to all the heirs male of the entailer’s body, other than George and his male descendants, whose succession to both estates is regulated by the preceding clause.

Count Charles cannot denude in favour of Count Leopoldus, otherwise instead of establishing a separate representation of the family in the Scottish

estate, that estate would become merely an appendage to the property in Germany.

Count Charles is not bound to denude in favour of Antonius.

1. Because in terms of the settlement, the person who loses or irritates his right, irritates for himself, and the heirs male of his body, *i. e.* his whole male descendants.

2. If Antonius is not considered as an heir male of the body of Count Charles, he is not called to the succession ; if he is considered as such, he is excluded by the devolving clause.

3. By the law of Scotland, irritant clauses in entails either exclude the person only who irritates, so as to make the estate descend to his next heir, or they exclude the whole descendants of his body, and make way for the next branch. The law knows no other alternative ; and as none other is provided by the entail, the succession now opens to the next branch.

But Count Charles is to denude in favour of the respondent, because he is manifestly the next person in the line of succession after Count Charles, and the heirs male of his body.

After hearing counsel, “ it is ordered and adjudg-
 “ ed, &c. that the said appeals of Charles Cajetan
 “ Count Leslie, and Leopoldus Count Leslie, be,
 “ and the same are hereby dismissed; and upon the
 “ said appeal of Antonius Count Leslie, it is or-
 “ dered and adjudged, that the said interlocutor
 “ of the 27th February 1741, be, and the same is
 “ hereby reversed, and that at the latter end of the
 “ recital in the said interlocutor of the 20th Feb-
 “ ruary, 1741, after the words, (‘ from the said’)
 “ the following words, (‘ heir male who shall suc-

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Judgment,
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“ceed to both estates, and his heirs male,”) be
 “left out, and these words, (‘ heirs male who shall
 ‘ succeed to both the said estates, and his heir
 ‘ male,’) be inserted instead thereof, and that after
 “the words, (‘ that he and,’) the following words,
 “(‘ the heirs male of his body,’) be left out, and
 “these words, (‘ his eldest son as his heir male,’)
 “be inserted instead thereof; and it is further or-
 “dered and adjudged, that so much of the inter-
 “locutor of the 20th February, 1741, whereby
 “the Lords of Session found, ‘ That Charles Count
 ‘ Leslie, and the heirs male of his body, being thus
 ‘ excluded from the estate of Balquhain, in the
 ‘ event that hath happened of his succeeding to
 ‘ both estates, the respondent, James Leslie of
 ‘ Pitcaple, is the next heir of tailzie to whom the
 ‘ estate of Balquhain now devolves; and that Char-
 ‘ les Count Leslie is obliged to denude in his
 ‘ favour; and that Leopoldus and Antonius Leslies,
 ‘ being, by the substitution in the entail, called to
 ‘ the succession in their order, only as heirs male
 ‘ of the body of the said Count Charles; they are,
 ‘ in like manner, as heirs male of his body, exclud-
 ‘ ed from the succession to the estate of Balquhain
 ‘ in the event that hath now happened of their
 ‘ father’s succeeding to both estates; and that,
 ‘ therefore, Count Charles, their father, cannot de-
 ‘ nude in their favour, but ought to denude in
 ‘ favour of the said James Leslie, the next heir;
 ‘ and, therefore, they decerned the said Charles
 ‘ Count Leslie to denude himself of the estate of
 ‘ Balquhain in favour of the said James Leslie of
 ‘ Pitcaple, and declared the same redeemable by
 ‘ the said James Leslie of Pitcaple from the said
 ‘ Charles Count Leslie, and the heirs male of his

‘ body, for payment of the sum of ten merks Scots
 ‘ money, in terms of the said entail,’ be, and the
 “ same is hereby reversed, and it is hereby declar-
 “ ed that the appellant, Antonius Count Leslie,
 “ second son of the said Charles Cajetan Count
 “ Leslie, is the next heir of tailzie to whom the said
 “ estate of Balquhain, in the event which hath
 “ happened, devolves, according to the true intent
 “ and meaning of the deed of entail in the said
 “ appeals mentioned ; and it is further ordered and
 “ adjudged, that the said Charles Cajetan Count
 “ Leslie do denude himself of the estate of Bal-
 “ quhain in favour of the said Antonius Count
 “ Leslie ; and it is hereby declared, that the same
 “ be redeemable by the said Count Antonius from
 “ the said Charles Cajetan Count Leslie, and his
 “ eldest son, as his heir male, for payment of the
 “ sum of ten merks Scots money in terms of the
 “ said entail ; and it is further ordered, that the
 “ residue of the said interlocutor of the 20th
 “ February, 1741, not before reversed or varied,
 “ be, and the same is hereby affirmed ; and that
 “ the said Lords of Session do give the necessary
 “ directions for carrying this judgment into exe-
 “ cution.”

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For Count Charles,	-	{	<i>Alex. Lockhart.</i>
		{	<i>Ch. Erskine.</i>
For Count Leopoldus,	-	{	<i>James Erskine.</i>
		{	<i>Alex. Forrester.</i>
For Count Antonius,	-	{	<i>William Grant.</i>
		{	<i>Wm. Murray.</i>
			<i>Ro. Craigie,</i>
For Leslie of Pitcaple,	-	{	<i>Wm. Noel,</i>
		{	<i>A. H. Campbell.</i>
		{	<i>Jas. Graham.</i>