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lators, are strictly complied with, viz., ‘ That the laws of both ‘ parts of Great Britain should (as to forfeitures for treason) ‘ agree as near as may be.’ And the world must allow that the favourable side for Scotland was chosen.”

“ But though by this decision the like force is given to such substitutions in your tailzies as to English remainders, yet they are by no means turned into remainders to any other purpose, but are to be governed by the rules of the law of Scotland to every other effect ; and therefore you express yourself with strict propriety when you say, that *by this judgment a remainder is introduced into our law with respect to forfeiture only.*”—Letter dated 12th July 1757. Kames, El. p. 381.

[M. 14431.]

MRS KATHERINE MAITLAND, - *Appellant.*
 MAJOR FORBES, (*et e. contra,*) - *Respondent.*

House of Lords, 12th February 1754.

ENTAIL—HEIR-FEMALE—SERVICE.—1. Held restrictions of entail only to apply to the heirs-female. 2. Also held, that a retour of service bearing that the party was served nearest heir of tailzie in general was good, though it did not mention to what estate, or by virtue of what deed of tailzie, and carried right to every subject in that character.

No. 105. SIR CHARLES MAITLAND of Pitrichie being seized of the lands of Pitrichie in fee-simple, descendable to heirs-general, executed an entail of this estate. By this deed of entail he resigned his lands in favour of himself in liferent, and to Charles Maitland, his only son, in fee, and the heirs-male to be lawfully procreated of his body, and the heirs-male of their bodies; which failing, to any other heir-male to be procreated of his own body; which failing, to the heirs-female to be lawfully procreate of the said Charles Maitland’s body, and the heirs-male of

20th Jan.
1700.

their bodies, (the eldest daughter or heir-female always succeeding without any division); which failing, to Jane Maitland, his eldest daughter, and the heirs male to be lawfully procreate of her body; which failing, to Mary Maitland his second daughter and the heirs male to be lawfully procreate of her body; which failing, to Margaret Maitland his third daughter, and so on through the other daughters in same terms.

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He reserved full powers to alter or to burden; and in the event of the estate coming to his daughters, he imposed this condition, “that they should be obliged to marry a gentleman of the Reformed Protestant religion, who is not cousin-german to her, nor within the forbidden degree, of the surname of *Maitland*, and bearing the arms and family of *Pitrichie*.” And if they marry a gentleman of any other name, they shall assume the name and arms of *Maitland*; and their not doing so, and not marrying a person of the Reformed Protestant religion, is thereby declared a contravention, and forfeiture, of all title to the estate. It had also this proviso:—That it should not be lawful “to any of my daughters or heirs female,” who happen to succeed, “to sell, annailzie, or dispone the same, nor to wadset or impignorate the lands, nor to burden the same with any sum of money above 20,000 merks.” And if the estate became burdened by the previous heir with this sum, then they were strictly prohibited from burdening it with any further sum.

The entail was recorded during Sir Charles’ lifetime; and he soon thereafter died, without altering the tailzie.

His son Charles, now Sir Charles Maitland, succeeded him, and by deed of this date he ratified and April 1, 1703.

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confirmed this tailzie. He then obtained a charter under the Great Seal, proceeding upon his father's procuratory of resignation and tailzie, but died soon thereafter *without being infeft*, and without issue male or female.

May 5, 1704. The estate then devolved upon Jane Maitland, the appellant's mother, as the entailer's eldest daughter and heir-female under the entail. She was served and retoured heir of tailzie *in general* to her brother, whereby she had right to her brother's charter, and to the unexecuted precept of sasine therein contained, and of this date took infeftment on it. It is the regularity of this service that forms the question in the cross appeal.

May 24,
1704.

June 8, 1733. Jean Maitland married a son of Lord Arbuthnot, who complied with the conditions of the entail, in so far as taking the name and wearing the arms of Maitland were concerned. She survived her husband, having issue with him, a son, Charles Maitland, advocate. Of this date she disposed to him and the heirs of his body; whom failing, to return to herself, and to any other heirs-male to be procreate of her body; which failing, to the heirs-male of the body of her sister Mary, second daughter of the deceased Charles Maitland of Pitrichie, elder, &c., the lands of Auchincrieve and Skillmannell, being parts of the tailzied estate; and upon this deed Charles Maitland was infeft. She died in 1746, leaving this son and two daughters, Katherine the present appellant, and Ann Maitland.

1746.

In making up his title to the estate, it occurred to Mr Maitland that the limitations in the entail of his grandfather, Sir Charles, were only imposed upon daughters and heirs-female, and as he was not an heir-female but an heir-male, the two restrictions against

marrying a gentleman of the name of Maitland, and not to sell or charge the estate with debt, did not apply to him, he, in taking out a retour for service, did not insert these limitations in the same; and upon this retour, so taken by a precept from the Chancery, he was duly infest.

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In 1747 he then made a new settlement in favour of himself and the *heirs whatsoever*; whom failing, to the appellant, Catherine Maitland, his eldest sister, and the heirs of her body; whom failing, to Ann Maitland, his youngest sister, and the heirs of her body; whom failing, to the respondent Captain Arthur Forbes, the eldest son of *Mary Maitland his mother's* immediate younger sister, and the heirs-male of his body, &c. 1747.

Charles Maitland, the maker of this last settlement, died in 1751, without issue, whereupon the appellant, his eldest sister, entered into possession of the estate; but her possession was contested by Major Forbes, as heir-male of *Mary*, the entailer's second eldest daughter, who claimed to succeed preferably to the heir-female of *Jean*, the entailer's eldest daughter.

Mutual declarators being brought, Major Forbes maintained, 1st, That Mr Charles Maitland was affected by the limitations of the entail, and could not alter it, or introduce a new destination into the succession. 2d, That Jean Maitland's retour of service as heir of tailzie in general to her brother was inept, as it did not mention what particular tailzie, the date thereof, or describe the lands entailed; and her brother might have had other entails; and no parole evidence was competent to supply this defect in the retour.

The appellant maintained in answer, 1st, That the limitations of the entail were only laid on *daugh-*

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ters or *heirs female*, and not on *heirs male*, which Charles Maitland undoubtedly was; and the prohibitions against altering the succession or contracting debt did not affect him. 2d, That it was not necessary the retour of service of Jean Maitland should set forth in virtue of what deed of tailzie she claimed to be served, to specify the date thereof, or the particular estate to which she claimed to be served heir of tailzie. That it was sufficient the excerpts produced from the Bailie Court established, that the entail in question was produced before the inquest in the service, and shown to the jury. Besides, this title was fortified by the vicennial prescription of retours, and the positive prescription with forty years' possession.

July 13,
 1753.

On report of the Lord Ordinary, the Court, of this date, pronounced this interlocutor:—"The
 " Lords having heard the report of Lord Shew-
 " alton, of the procedure before the macers and
 " their assessors, in the service of Major Arthur
 " Forbes, as heir of tailzie to Sir Charles Mait-
 " land his uncle, and in the other service as heir
 " of tailzie to Mr Charles Maitland his cousin, writs
 " produced, excerpts of retours taken from the re-
 " cords of chancery, and parties' procurators there-
 " on, they (by the opinion of ten judges against two)
 " repel the objections to the general retour of the
 " service of Mrs Jean Maitland, as heir of tailzie to
 " the deceased Sir Charles Maitland, her brother,
 " and find, that the said general retour did carry
 " the procuratory in the tailzie 1700, and ratifica-
 " tion and settlement 1703, and charter following
 " thereon: And that therefore the said Major Ar-
 " thur Forbes cannot be served heir of tailzie to his
 " uncle Sir Charles: But find, that Mr Charles
 " Maitland, advocate, could not gratuitously alter

“ the destination of the succession to the estate to
 “ Pittrichie, settled by Sir Charles Maitland, his
 “ grandfather, by the said tailzie 1700, and by his
 “ uncle Sir Charles’ ratification and settlement 1703,
 “ and charter following thereupon, in prejudice of
 “ Major Arthur Forbes the purchaser of the brieve;
 “ and that the deed granted by the said Charles
 “ Maitland, advocate, to himself and his sisters, can-
 “ not bar the said Major Arthur Forbes from prose-
 “ cuting his brieves, and being served heir of tailzie
 “ to the said Mr Charles Maitland, his cousin. And
 “ decern and declare accordingly.”

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On reclaiming petition the Lords adhered.

Aug. 9, 1753.

Against these interlocutors the present appeal was brought by the appellant, in so far as they decide against her right to the estate, in preference to Major Forbes.

*Pleaded by the Appellant:—*By the law of Scotland, every proprietor or fiar of an estate tailzie is at liberty to alien and charge the tailzied estate, unless he be expressly prohibited from so doing by the entail itself. By the deed in question it is manifest that the maker intended to favour male-heirs over female, and the whole scope of the deed is directed to this object. It is equally clear to have been a part of his intention, not to make a perpetual or unalterable line of succession, in so far as these male heirs were concerned; and the favour he shows them is precisely this, by leaving them free and unlimited possessors, while the real limitations are only imposed on the heirs-female. The terms, heirs-female, are here descriptive of daughters, and in contradistinction to males descended of daughters. It is not denied that this is the meaning in which the maker understood the word daughters. Thus

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then the restriction from selling or burdening is imposed upon them alone, just as the restriction of marrying a Protestant gentleman of the name Maitland, and also the prohibition against burdening the estate beyond 20,000 merks, is alone directed against them. Nor does there lie any objection to the general retour by which the appellant's mother was served heir of tailzie to her brother, as it was quite in accordance with practice, to serve heir of tailzie in general, without mentioning therein the particular deed of entail, or the lands claimed, and consequently the procuratories 1700 and 1703, were sufficiently carried by such service. Besides, when regard is had to the fact that by the extract produced, it is proved, that the tailzie itself was produced before the inquest; and when it is considered that the act regarding the prescription of retours bars all exceptions after twenty years; and also the possession had upon the title for more than forty years, this ought to be conclusive of her right.

Pleaded for the Respondent:—It is admitted by the respondent that the restrictions of the deed of entail of 1700 are not imposed on the heirs-male, but only on the heirs-female. Mr Charles Maitland, advocate, was in law an heir-female, and *not* an heir-male; because he was descended of a daughter, or heir-female. Being, therefore, one of the heirs-female, he was one on whom the restrictions of the entail were imposed, and consequently debarred from altering the succession arranged by the entail. And in regard to the general service of Jean Maitland, it is quite a settled rule in our law, that there is no *ipso jure* transmission of rights from the dead to the living. Until, therefore, the estate is taken out of that person, by an infetment following upon

titles regularly made up, the estate must remain *in hæreditate jacente* of that person who died last vest and seized. The service by her to her brother Sir Charles was therefore inept from uncertainty, because it does not specify to what estate, or by virtue of what deed, he claimed to be served; and therefore the service of Major Forbes, as heir of tailzie to his uncle the said Sir Charles, was competent, and ought to be sustained, as well as the service to his cousin Charles Maitland.

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After hearing counsel, it was

Ordered and adjudged, that the said original appeal and the said cross appeal be, and the same are hereby dismissed this House; and that the said interlocutors therein complained of, be, and the same are hereby affirmed.

For Appellant, *Wm. Murray, A. Hume Campbell.*
 For Respondent, *Wm. Grant, C. Yorke.*

Note.—Lord Elchies has an elaborate note on this case, *vide* “Retour,” Elchies’ Notes, vol. ii. No. 3. On the objection to the retour he says, “Some were of that opinion because of the forty years’ prescription; others because of the excerpts, which I thought signified nothing in this question.”—See also Kames’ Dec. p. 53. See *Cathcart, v. E. of Cassils*, 16th Nov. 1802 (M. 14447) as affirmed in part and remitted with instructions from the House of Lords (1805) and finally held in the Court of Session when considering this remit (1807), that a general service, as “heir of line, and heir-male,” not being equivalent to a service as heir of provision, could not connect with a particular deed, which destined the estate in favour of a certain series of heirs. There seems, after it was so adjudged by the Court, to have been a second appeal in this case, where the judgment of the Court of Session was in part struck at, as unwarranted by the former remit:—viz.

9th May 1810. “The Lords find, that it was not the intention of this House, in its order of 24th May 1805, either specially or generally to remit to the Court of Session to review their

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“ interlocutors with regard to the lands of M’Gowanston, Mill of
 “ Drumgairlock, Denny-muck, Whitestone, Pennyglen, barony of
 “ Greenan, and lands of Balvaird, and that the Court of Session
 “ were not authorised to review their interlocutors with relation
 “ thereto, by the said order of this House, and that such parts,
 “ therefore, of the said interlocutors of the Court of Session of the
 “ 10th of February and 24th November 1807, as have relation
 “ thereto, being unauthorised by the remit of this House, are null
 “ and void (being the parts of the interlocutors which are unfavourable to the appellant Blane) (Cathcart’s trustee), and as
 “ such complained of in his appeal, and with this declaration, It
 “ is ordered and adjudged that the appeal be dismissed.”—*Vide*
case infra.

[M. 15459.]

SIR KENNETH MACKENZIE, Bart., - *Appellant.*
 JOHN STEWART, Esq., and OTHERS, *Respondents.*

House of Lords, 14th March 1754.

ENTAIL—ACT OF PARLIAMENT—FRAUD.—An entailed estate was sold for payment of debts by Act of Parliament applied for and obtained with the concurrence of the appellant and others, substitute heirs of entail. Held (reversing the judgment of the Court of Session), that the appellant was not barred by such concurrence and agreement, nor by the Act of Parliament, from opening up the whole proceedings, and showing that the debts fraudulently represented as due, were fictitious and not chargeable against the estate.

No. 106. THE Earl of Cromartie, then Viscount of Tarbat,
 November 28, of this date executed an entail of the lands and
 1688. barony of Roystoun, in favour of himself and his
 lady for life; whom failing, to his third son, Sir
 James Mackenzie, and the heirs male of his body;
 whom failing, to his second son, Sir Kenneth Mac-
 kenzie, and the heirs male of his body, with several
 other substitutions over.