

1757.

FOBBES

v.

SKENE.

MAJOR FORBES of Pitrichie, Esq., - *Appellant.*  
 ANDREW SKENE of Dyce, and Others, *Respondents.*

House of Lords, 25th January 1757.

**ENTAIL.—HEIR FEMALE.—PASSIVE REPRESENTATION.—**1. An entail conceived to heirs male, whom failing, to the entailer's daughters by name, and the *heirs male of their body*. Held that a son of one of these daughters was not an heir female, but an heir male in virtue of the destination. 2. There being no annulling clause in the entail, held that the debts contracted by a previous heir affected the succeeding heir under the passive titles.

No.

THIS case arose out of the succession of Major Forbes to the estate of Pitrichie, as set forth in the case reported p. 570.

The entailer's son Sir Charles, after his father's death, ratified the entail, and resigning on the procuratory therein, obtained a charter, but died without issue and without being infeft, whereupon the estate descended to Mrs Jean Maitland.

During the few years Sir Charles possessed, he contracted debts amounting to 30,000 merks, (L.1666.) Jean Maitland also contracted debt to the amount of 20,000 merks, (L.1111.) When her son Charles Maitland, advocate, succeeded, the estate was further burdened with L.2000 sterling. Actions were raised by the respondents, his creditors, against the appellant, as representing Charles Maitland. In defence, the appellant maintained, That Charles Maitland was an heir female, and as heirs female are, by the express provisions of the entail, laid under an absolute prohibition "to wadset" and impignorate the aforesaid lands, or any part

“ thereof, or to burden or affect the same with any  
 “ sum of money above the sum of 50,000 merks,” and  
 if the estate became burdened by the previous heir  
 with this sum, then they were strictly prohibited  
 from burdening it with any more, under a contra-  
 vention and irritancy of their right; and as the en-  
 tail was his sole title to the estate, and the estate  
 already burdened to the full extent, *his* personal  
 creditors could have no right to attach the same,  
 nor to come against the appellant personally for the  
 debt.

1757  


---

 FORBES  
 v.  
 SKENE.

*Answered:*—By the peculiar conception of the  
 destination clause, the appellant was an heir male  
 and not an heir female. This is apparent from the  
 clause itself:—“ To Charles Maitland, his only son  
 “ in fee, and his heirs male of his body; which fail-  
 “ ing, to his younger brothers, and the heirs male of  
 “ their bodies respectively; which failing, to the heirs  
 “ female of the said Charles Maitland’s body; which  
 “ failing, to Jean Maitland, his eldest daughter, *and*  
 “ *the heirs male to be procreated of her body; which*  
 “ *failing, to Mary Maitland his second daughter, and*  
 “ *the heirs male of her body,*” &c. He was therefore  
 not bound by the above clause directed against  
 heirs female. He might contract debt, and omit in-  
 serting the prohibitive and irritant clauses in the  
 title which he made up to his mother.

Of this date the Lord Ordinary found the appel-  
 lant “ liable to make payment to the pursuers of the  
 “ sums libelled.” And on reclaiming petition the  
 Court, of this date, adhered, with this explanation:—  
 “ 1st, That Charles Maitland was not an heir female  
 “ in the sense of the tailzie made by Sir Charles, his  
 “ grandfather, in 1700. 2d, That as there is no an-  
 “ nulling clause in the said entail, the same can-  
 July 31,  
 1755.  
 February 25,  
 1756.

1757.

---

 FORBES  
 v.  
 SKENE.

“ not have any effect against the pursuers’ debts.  
 “ And, 3<sup>d</sup>, That the entail can have no effect as to  
 “ the lands of Pitrichie, and others to which Mr  
 “ Charles made up titles as heir to his mother, with-  
 “ out engrossing the prohibitive and irritant clauses  
 “ in his retour and infestment.”

Against these interlocutors the present appeal was brought.

*Pleaded for the Appellant:*—That Charles Maitland had no power to charge the estate with any debt, being bound by the prohibitive, irritant, and resolute clauses therein, as an heir female under the destination of the entail—he being the son of an heir female, (Jean Maitland.) And his mother having exercised the power reserved to burden to the full extent allowed by the entail, he could not burden it with any sum beyond the sum mentioned. The debts therefore of Charles Maitland, advocate, cannot affect the present heir in possession. Even supposing it otherwise, these debts of his being merely personal, and never having been created a burden on the estate, could not affect the same; just as it was equally clear that, if he had done any act or deed to make them a real burden, they would have in like manner been ineffectual. Nor is the question in any degree altered by Charles Maitland making up his titles as heir to his mother, without engrossing the prohibitive and irritant clauses in his retour, because this act of contravention on his part could not affect the entail. Besides, it is only an heir who serves generally to his predecessor that becomes liable universally under the passive title. But this rule ought not to apply to an heir of entail.

*Pleaded for the Respondents:*—Charles Maitland was an heir male in the sense indicated by the ex-

press destination of the entail; and as that entail only laid the restrictions against contracting debt on the heirs female and not on heirs male, it was competent for him not only to contract debt, but also to make up his title without inserting in his retour the prohibitory, irritant, and resolute clauses in the entail. It is obvious that the term, heirs female, as used in the first clause is descriptive of daughters, in contra-distinction to males descended of their body. Thus, "to Jane Maitland, my eldest daughter, *and the heirs male of her body.*" But even if it were more doubtful than it appears, it would not avail the appellant, because in the entail there is no clause annulling the debts contracted, and the resolute clause, being thus defective, leaves the estate open to the debts of the heirs of entail. He cannot pretend to maintain that he is not liable in the passive titles, because he has entered without inventory on the possession of his ancestor's estate, and this is sufficient to subject him, whether he enter as heir of line, or of provision, or of tailzie, &c., and whether by general or special service.

After hearing counsel, it was

*Ordered and adjudged that the said appeal be dismissed, and the interlocutors be affirmed.*

For Appellant, *C. York, S. Frazer.*

For Respondents, *Robert Dundas, Al. Forrester.*

*Note.*—Unreported in Court of Session.

1757.

FORBES

v.

SKENE.