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any consideration; and it is not in the donor's power, much less in that of his executors, to retract it. It is impossible to doubt the nature of the evidence that has been adduced to support the delivery of the gift, because that evidence clearly shows, not only that Charles Stewart formed the resolution of sending a sum of money to his father by Captain Dundas, but that resolution was in fact carried into execution by the actual delivery of the box of rupees to Mr. Dorin for the use of his father the donee. Every thing therefore which law requires to make a complete gift, has been shown to have taken place, and, consequently, the respondent James Stewart is entitled to recover the money.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellants, *E. Bearcroft, Wm. Alexander.*

For Respondents, *J. Anstruther, Jas. Allan Park.*

JAMES ROCHEID of Inverleith, Esq., . *Appellant;*
SIR DAVID KINLOCK of Gilmerton, Bart., *Respondent.*

House of Lords, 22d March 1790.

ENTAIL—CLAUSE.—A lady made an entail of her estate in favour of a certain series of heirs, under this condition, that her sister Elizabeth "shall execute a tailzie of her half of the estate, according to the same order of succession." She executed an entail, but not to the same series of heirs. A declarator being brought: Held, by the Court of Session, that the condition was virtually complied with. Reversed in the House of Lords; and held, that the entail executed by Elizabeth Rocheid, did not sufficiently comply with the condition, and that the fourth part, held by Mrs Kinlock, must therefore be free from the fetters of her entail.

Sir James Rocheid of Inverleith and Darnchester, died in 1737, leaving his estates, held by him in fee simple, to descend to his four daughters as heirs portioners.

One of these daughters was married to Sir Francis Kinlock of Gilmerton. She was entitled to one fourth; her sister, Mrs Elizabeth Rocheid, had two fourths, or *one half* of these estates, (from having acquired the fourth of a sister deceased, and the other fourth descending to her in her own

right); the remaining fourth belonged to the children of the other deceased sister.

Lady Kinlock and Mrs. Elizabeth Rocheid had expressed a desire to put their three-fourths together, and, by entail, make it descend to Lady Kinlock's second son, as a distinct representation of the Rocheid family.

Accordingly, Lady Kinlock executed a settlement, under the strict fetters of an entail, with this express quality and condition, that the fetters she thereby imposed, should not be binding, unless her sister, Mrs. Elizabeth Rocheid, should entail her two fourths upon the same series of heirs. Feb. 25, 1744.

Mrs. Elizabeth Rocheid did execute an entail of her two-fourths in favour of Lady Kinlock's younger son, but not exactly to the same series of heirs appointed to succeed on his failure by Lady Kinlock's settlement; and the question was, Whether this fourth, which belonged to Lady Kinlock, was subject to the strict fetters of an entail, or free therefrom, and the absolute property of the appellant, to whom both, in the meantime, had descended. Reduction and declarator being raised, to have it so found, the Court adhered to the interlocutor of the Lord Ordinary, sustained the defences pleaded for Sir David Kinlock and others, and decerned. Jan. 14, 1749. Aug. 2, 1788. Jan. 13, 1789.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The clause in Lady Kinlock's settlement is decisive of the question. The condition expressed in the first part of it is, that Elizabeth Rocheid "shall execute a tailzie of her half of the estate, according "to the same order and course of succession;" and if she fails to do so "then, and in such case, &c." her heirs are declared to be free from the fetters of the entail thereby made by her. The words "according to the same order "and course of succession," are enunciatory of her will. These words cannot be thrown aside, or rendered of no effect or signification; they pervade and control its true sense and meaning. The meaning of the words "accord-"ing to the same order and course of succession," is clear, and so also is the purpose for which it was so inserted. The object obviously was, that unless her sister's two fourths of the estate, went along with her fourth, there was no use and no propriety in making an entail in regard to her fourth; accordingly, she did not intend to impose fetters on that fourth in *all* events, but only in the event of her sister conveying by tailzie, her two fourths to the same

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series of heirs, which not being done, leaves Lady Kinlock's portion of the estate unfettered.

Pleaded for the Respondent.—The construction put upon the condition in Lady Kinlock's entail is unwarranted by the expressions in, and by the whole entail itself. The words being, that in case the shares belonging to Elizabeth Rocheid, "shall not, by settlement made, or to be made by her, descend to the said David Kinlock, my son and my heirs of "tailzie" &c. then her heirs were not to be fettered by prohibitive, irritant and resolutive clauses therein. These words are clear and obvious, and mean, that if her sister's two fourths were to descend to her younger son and her heirs of tailzie, that then and in that event, they should be subject to the fetters imposed. But as it cannot be denied that the two fourths of Mrs. Elizabeth Rocheid did actually descend, and were in point of fact conveyed to her younger son and her heirs of tailzie, and both have descended through him to the appellant by virtue of these very settlements, it is of consequence, that by Lady Kinlock's settlement, her share is made to descend on her second son David as institute, and by her sister's entail, Alexander her third son is institute, because the reason of that change in the destination was made necessary by the second son David succeeding in the interval to his father's family estate of Gilmerton, whereby he was disabled by the express conception of Lady Kinlock's settlement from succeeding, and by the very intention of the whole arrangement. But it is not only David Kinlock, the second son, that is bound, it is also "my heirs of tailzie;" and accordingly the question is, whether the appellant has succeeded as an heir of tailzie or not. By Lady Kinlock's settlement, the persons who alone are declared to be free in the event of her sister not conveying to the same series of heirs, are, "The "said David Kinlock, or any of my heirs of tailzie, who "shall happen to be in possession of my said lands and estate, "and shall happen *not* to succeed as heir of tailzie to my "said sister in her share of the lands and other heritages "before specified, and all my other heirs of tailzie, *after-*"*wards* succeeding in my said lands and estate." It is clear that he has succeeded as heir of tailzie to Lady Kinlock's share, and that he has also succeeded to Mrs. Elizabeth Rocheid's two fourths in the same character, and therefore, in order to be free from the fetters, he would require to show that he has *not* succeeded to Mrs. Elizabeth's two fourths as heir of tailzie. When, therefore, the whole deed

is considered, and not one part of a clause merely, it is clear that the appellant can only enjoy under the fetters.

After hearing counsel, it was

Ordered that the interlocutors complained of be *reversed*, and it is declared and adjudged that the settlement of the half of the estate of Inverleith and Darnchester, belonging to Elizabeth Rocheid, does not contain a sufficient tailzie to fulfil the condition imposed by the settlement of Dame Mary Kinlock of her own fourth of the said estate, and consequently the pursuer is entitled to hold, possess, and enjoy the said one fourth part of the lands and barony of Inverleith and Darnchester, teinds, and others contained in the said deed of settlement, and that in fee simple, as heir male of the deceased Alexander Rocheid his father, and heir of provision of the said deceased Dame Mary Kinlock his grandmother, without being subject or liable to any of the conditions, provisions, restrictions, and clauses prohibitive, irritant and resolutive clauses in the said deed of settlement, executed by the said Dame Mary Kinlock.

For Appellant, *Ilay Campbell, J. Scott, J. Anstruther, Wm. Dundas.*

For Respondent. *F. Bower, Alex. Wight.*

[Mor. 2418.]

MAGISTRATES OF EDINBURGH, . . *Appellants;*
COLLEGE OF JUSTICE, . . . *Respondents.*

House of Lords, 23d March 1790.

COLLEGE OF JUSTICE—PRIVILEGES.—Held, that the members of the College of Justice were not liable in assessments for the support of the poor, within the city of Edinburgh.

This was a question, Whether the Members of the College of Justice had any exemption from being taxed for city poor rates. The Court of Session had decided they had a clear exemption, in virtue of privileges granted by the Parliament when the College was first instituted, viz. 1. The privileges granted to the College of Justice prior to the establishment of the poor law in Scotland, which was in