

1791.

[Mor. 4215.]

HENDERSON v. HENDERSON.	SIR JOHN HENDERSON, Bart., ROBERT BRUCE HENDERSON, Esq.,	Appellant ; Respondent.
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House of Lords, 11th May 1791.

FIAR OR LIFERENTER—ENTAIL—CONDITION.—1. Circumstances in which, though an estate belonged originally to the wife, and was taken to her and the husband in conjunct fee and liferent, failing whom to the wife's heirs, and failing them to the heirs and assignees whatsoever of the husband, that the fee was in the latter, and that he was entitled to make entail with the condition therein specified. 2. In this entail, the condition was, that when the estate of Earshall came into the family of Fordell, the heir of Fordell was not to hold both estates, but Earshall estate was to go to the next heir. Held, this condition good, and that the heir of Fordell was bound to denude in favour of the next heir.

Robert Bruce of Earshall held his estate of Earshall under a destination to heirs male ; but having himself no heirs male, and there being issue of his body four daughters, he executed a deed upon the narrative, that as the estate was considerably burdened with debts, he had resolved that what of the same was free, after paying these debts, should, failing heirs male of his own body, belong to the heirs female of his body, viz. to his four daughters successively, and the heirs of their bodies, whom failing, to his sisters and the heirs of their bodies ; the eldest daughter always to succeed without division, and to exclude heirs portioners.

The estate, at the date of this settlement, was loaded with debts, equal to or exceeding its value, so that Robert Bruce, the granter, had little more than the name. The substantial right in the estate was vested in a number of creditors, who had adjudications thereon, some of which were completed by charter and sasine, and the legals long expired.

Robert Bruce died in 1768 without male issue. His eldest surviving daughter, Helen Bruce, did not think it expedient to make up titles by serving herself heir of provision under the above settlement, or to enter into possession ; but a creditor, after obtaining charter and sasine, and decree of expiry of the legal, and decree of mails and duties against the tenants, entered into possession.

Helen Bruce was thrice married ; 1st, to David Baillie. Mr. Baillie, by the assistance of his father, acquired right during the subsistence of the marriage, to several of the most considerable of the debts affecting the estate, particularly to the adjudication above-mentioned. He died in 1726, leaving one son, who also died soon thereafter. His eldest brother served heir to him, and thereby acquired right to the debts and adjudications affecting the estate of Earshall ; all of which he made over to his father, James Baillie, W.S., who

Jan. 30, 1728, by virtue thereof entered into possession, and levied the rents.

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By contract between the said James Baillie and Mrs. Helen Bruce, his widowed daughter-in-law, he agreed upon the narrative that the debts contained in David Baillie's bonds, paid by the father after the son's death, with other debts due to him by his son, and what the father had paid out for him and the maintenance of his widow and family, after deducting all intromissions with the rents of Earshall, amounted to £3108; Mr. Baillie, for the love and respect he bore to his daughter-in-law, became bound and obliged, in part payment of the said sum, "to make over the said estate, and any other lands which belonged to the deceased Sir Andrew Bruce, and Andrew Bruce of Earshall, his son, with all right, title, and interest he had thereto, with the hails debts affecting the same, standing in his favour, and that in favour of the said Helen Bruce and her heirs and assignees; but reserving to him, the said James Baillie, and his foresaids, the rights and securities of the said estate, and the possession thereof, for security of, and till he should be fully paid off the foresaid mentioned sum with interest."

Mrs. Helen Bruce in 1730 married her second husband, Mr. James Henderson, granduncle to both parties in this cause; She entered into a contract of marriage, and in place of conveying her interest in the Earshall estate, she bound and obliged herself to pay him, her husband, 80,000 pound Scots, an obligation upon which it was intended that he should raise adjudication, and by this means obtain possession of the estate.

In order to fortify still further his right, another contract was entered into by him with Mr. James Baillie, in terms somewhat similar to those in Baillie's contract with Mrs. Helen Bruce.

Soon after Mr. Henderson executed a settlement, bearing,—“For Feb. 1733.
 “the love and favour which I have and bear to Mrs. Helen Bruce,
 “my spouse, do hereby assign and dispoise to myself and her, in
 “conjunct fee and liferent, for her liferent use allenary, in case she
 “survive me, and if there happen to be an heir or heirs existing
 “of the marriage betwixt us, and to the heirs of the marriage be-
 “tween us in fee; and in default of issue of the marriage betwixt
 “us two, to such of us as shall survive the other, and to such surviv-
 “or's heirs or assignees whatsoever, all right, title, and diligence, that
 “I have already acquired, and shall happen to acquire, either in my
 “own name, or in the name of any other person or persons to my
 “use and behoof, of or concerning the lands and estate of Earshall.”

In order to complete the above plan, which had been settled at the time of the marriage, of vesting in Mr. Henderson the right to the estate of Earshall, or at least to the reversion thereof, it was afterwards concerted, in consequence of the advice of counsel, that his spouse and her two sisters, under the character of heirs-portioners to their father, should concur in granting a bond to the amount of 100,000 pounds Scots in favour of George Lock, as trustee for Mr. Henderson, the bond to contain *in græmio* a declaration that it had

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been granted for the sole purpose of enabling Mr. Lock to lead an adjudication of the estate, which would be an effectual title of property, and to convey the same to Mr. Henderson. A trust-bond was accordingly granted, qualified by stating the purpose for which it was so granted, namely,—“that by adjudication, or such other method as is competent by law; and that the said George Lock, or his heirs, who shall have established such titles, shall denude thereof, to and in favour of me, the said Mr. James Henderson, and me the said Mrs. Helen Bruce, in conjunct fee and liferent, and to the *heirs of his body* to be procreate betwixt him and me, the said Helen Bruce; which failing, to and in favour of me, the said Helen Bruce, and the heirs to be procreated of my body of any subsequent marriage: which failing, to and in favour of me, the said Elizabeth Bruce the sister; which all failing, to the said Mr. James Henderson, his heirs and assignees whomsoever.”

Upon this bond George Lock obtained an adjudication of the estate of Earshall for payment of the sum in the bond, amounting with penalty to 712,500 pounds Scots.

Thereafter Mr. Lock executed a deed divesting and denuding himself, and stating, that seeing the said trust bond was only granted to me on trust “*for behoof of the said James Henderson.*” “Therefore, wit ye to have sold, alienated, and disposed, to and in favour of the said Mr. James Henderson, and Helen Bruce his spouse, and the longest liver of them, in conjunct fee and liferent, and failing either of them by decease, to the heirs and assignees of the survivors heritably under reversion, according to act of parliament, all and whole the said lands.”

Sept. 30, 1737. Before obtaining this conveyance from Mr. Lock, another settlement had been executed, by which Mr. Henderson assigned to Mrs. Helen Bruce, his spouse, the contract and agreement entered into by him with Mr. James Baillie, with full power to her, “immediately after my decease, not only to enter into possession, but to intromit with, uplift, and receive the rents, &c.” This settlement, like the former one, reserved *full power to revoke* or alter at any time during the granter’s life. It has been asserted that both were delivered to Helen Bruce during the granter’s life, and the respondent has no occasion to dispute the fact.

In 1738 Mr. Henderson having implemented his part of the contract above mentioned with Mr. Baillie, by finding security for the balance of the 36,000 merks which he was bound to pay by that contract, he (Mr. Baillie) with consent of his son, executed a formal disposition, which, after reciting the various debts and diligences affecting the estate, with the progress thereof into Mr. Baillie’s person, proceeds in these terms:—“And seeing Mr. James Henderson of Earshall has made payment and satisfaction to me of a certain sum of money, for my granting these presents, whereof I grant the receipt; therefore, wit ye me with consent foresaid, to have sold,

“ &c. ; likeas, I hereby sell, &c. to and in favour of the said Mr. James Henderson, his heirs and assignees whatsoever, all and hail the foresaid lands.” It conveyed also the debt and diligence.

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Upon these titles thus acquired, Mr. Henderson obtained charter of adjudication and resignation of the lands under the great seal, in these terms,—“ Dilecto nostro Jacobo Henderson de Earshall, fratri germano demortui Domini Joannis Henderson de Fordel Baroneti, ejusque hæredibus et assignatis quibuscunque.” And he was infest.

April 1739.

He then executed a deed in the form of a strict entail, whereby he bound himself to resign the said lands in favour of “ myself and Helen Bruce, my spouse, in conjunct fee and liferent, and the heirs of my body in fee ; which failing, to the heirs of her body of any future marriage ; which failing, to Elizabeth Bruce, his wife’s sister, and heirs of her body ; which failing, to Margaret Bruce, (also her sister) and the heirs of her body ; which failing, to her husband, Captain William Henderson, my brother german, and the heirs of his body ; whom failing, Sir Robert Henderson of Fordell, Bart., and the heirs of his body ; which failing, any other heirs I shall hereafter nominate and appoint by a writing under my hand ; and failing such appointment, to my own nearest heirs and assignees whatsoever.” This entail provided, that when the estate came to the Hendersons of Fordell family, that the estate of Earshall and Fordell should be held by separate heirs, and in that event Earshall should devolve on the next heir. It also contained the usual prohibition against selling or contracting debt, protected by irritant and resolute clauses ; and the entail was recorded.

June 1740.

Mr. James Henderson died in 1741 ; and thereupon his widow entered into the possession of the estate. She afterwards married Walter Wemyss of Lathacker.

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But Helen Bruce having died in 1774, Sir Robert Henderson, the nephew of Mr. James, being then the nearest heir under the above entail, made up titles to the estate, as heir of tailzie and provision to his uncle ; and upon the general service which carried to him the unexecuted procuratory in the deed of entail, he expedite a charter from the crown, and entered into possession of the estate.

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The said Sir Robert Henderson had two sons, Sir John the appellant, and Robert the respondent. In terms of the condition of the above entail, the respondent behoved to succeed to Earshall, his elder brother taking Fordell. But this obligation was not implemented, and accordingly Sir John, when he succeeded, entered into both estates of Earshall and Fordell.

Action was then brought by the respondent to have him to make up titles, and to denude in favour of the respondent.

The appellant’s defence was twofold :—1st, That Mr James Henderson had no power to make an entail of Earshall, the property or right of fee thereof not having been vested in his person, but in the

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person of Helen Bruce, his spouse, or at least held in trust for her behoof; 2d, That supposing James Henderson's right were unexceptionable, still there was no obligation upon Sir Robert Henderson, or upon the appellant, as representing him, to give up the estate to the respondent in the event which has happened; for that the clause in the entail, obliging the heir in possession of the estate of Earshall to denude in favour of the second son, was only applicable to the case of an heir holding the estate of Earshall under the entail, and who should afterwards succeed to the estate of Fordell, whereas Sir Robert was proprietor of the estate of Fordell long before he succeeded to the estate of Earshall, and is so described in Mr. Henderson's entail.

The Lord Ordinary ordered memorials, and reported to the Court. Upon the report of Lord Rockville, the Court pronounced
 Jan. 21, 1790. this interlocutor:—"The Lords repel the defences stated for the
 "defender, and decern and declare in terms of the libel with respect
 "to the pursuer's right to the lands and estate libelled, and the de-
 "fender's making up legal titles thereto, and denuding thereof in
 "favour of the pursuer, in terms of the entail libelled on; and with
 "respect to the other conclusions of the libel, remit the cause to the
 "Lord Ordinary to proceed therein as to his Lordship may seem
 "just."

June 1, 1790. Upon reclaiming petition this judgment was adhered to.
 Against these interlocutors the present appeal was brought.
 After hearing counsel, it was
 Ordered that the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

NOTE.—It is noticed in the House of Lords Journals, that no appellant's case was printed.

For the Respondent, *Sir John Scott, Robert Blair, Wm. Tait.*

NOTE.—On going back to the Court of Session, Sir John having refused to make up a legal title, Mr. Bruce Henderson was obliged to take decree of adjudication, and completed title thereon. Thereafter being advised, that as he had taken the Earshall estate, not as an heir of tailzie nor by a service in that character, but as a disponee under the injunction of Mr. Henderson's deed; and as the prohibitory and irritant and other clauses in that deed were imposed singly upon the heirs of tailzie, and not upon a disponee taking the estate under the clause of devolution, that he was entitled to hold the estate in fee-simple. But the Court sustained the entail.—*Vide Sess. Papers, 12th Nov. 1796.*