[*3d August* 1840.]

(No. 14.) Mrs. Catherine Munro or Ross and Husband, Appellants.[1]

[*Pemberton — James Anderson.*]

William Paul (M'Leod's Trustee), Respondent.

[*Attorney General (Campbell) — Lord Advocate (Rutherfurd) James Moncreiff.*]

Title to pursue — Practice — Process — (Amendment of the Libel.) — A party who was heiress under a certain deed of entail, and also beneficiary under a trust deed of the remainder of the entailer's estate not included in the entail (executed of the same date as the entail), containing powers of sale, and directing the undisposed-of residue to be settled on the series of heirs mentioned in the entail, brought an action of reduction of a sale of part of the trust property "as heiress of entail," and "as such and otherwise" having good right to pursue. No mention of the trust deed was made in libel of the summons, but in the second reason of reduction it was stated to be a deed in favour of such persons, uses, &c. as were declared in and by the entail, &c.: — Held (affirming the judgment of the Court of Session), (1.) that the pursuer could not insist in the action, in respect that her title under the trust was not relevantly libelled in the summons; (2.) that in the circumstances an amendment of the summons was incompetent.

1st Division. Lord Ordinary Cockburn.

In 1785 the late George Ross of Cromarty made a strict entail of a portion of his lands in favour of a certain series of heirs, and, of the same date, he executed a

[1] Fac. Coll., 9th March 1837, 15 D., B., & M., 780.

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conveyance of the remainder in favour of trustees, with power to sell and pay off debt, and with the residue to purchase lands, to be entailed on the same series of heirs. In 1795 the trustees, by virtue of the powers in the trust deed, entered into a contract of sale of the lands of Pitkerrie, part of the trust estate, to Donald M'Leod of Geanies, now deceased, one of their own number. A disposition was granted to M'Leod, dated 19th and 20th May 1796, on which infeftment was taken in September 1796.

In May 1836 Mrs. Ross, the appellant, a substitute heir of entail, and consequently beneficially entitled under the trust deed, brought a reduction of this sale against the trustee for the creditors of the purchaser (Mr. Paul the respondent), on the ground of incompetency and irregularity.

The summons libelled the pursuer's character as heiress of entail, and that as such and otherwise she had good right to pursue.

The second reason of reduction set forth the trust and its purposes, and amongst others the application of the residue of the trust estates, after paying debt, to the purchase of lands, to be entailed "to and upon such "persons, uses, intents, and purposes," &c., "as were "declared in and by the entail of the estate of Cro-"marty, which was executed by the said George Ross, "of even date with the said trust deed."

The summons concluded, that the lands of Pitkerrie should be found still to remain a part of the trust estate, and for payment of the rents since the sale.

Preliminary defences were given in by the respondent, admitting that the right of succession to the entailed estate had opened to the pursuer (appellant), as a

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substitute heir of tailzie; but objecting, (1.) that she had not set forth in her libel a sufficient title to pursue; (2.) or at least that she was not vested with such title, in respect she had not expede a service as heiress of entail; and, besides, (3.) that the action was barred by prescription and acquiescence.

The Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having considered the "summons and dilatory defences, and heard counsel "for the parties, and made avisandum, and considered "the debate and whole process, repels the first dilatory "defence of want of title, reserves the two remaining "defences to be discussed along with the merits, and "decerns; and in respect that the defender intimates "his intention to reclaim, finds him liable in expenses, "appoints an account thereof to be given in, and, "when lodged, remits the same to the auditor to tax "and report." To this interlocutor his Lordship added the annexed note.[1]

Judgment of Court, 9th Mar. 1837.

The defender reclaimed, when the Court pronounced the following judgment:—"Alter and recal the inter-"locutor submitted to review; and in respect the sum-"mons libels only on the pursuer's character as heir of "entail of Cromarty, sustain the first dilatory defence,

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[1] "*Note.*—The Lord Ordinary repels the first defence, because he "thinks that it is sufficiently met by the fact, that the possession of the "character in which the pursuer sues is not only set forth in the sum-"mons, but is admitted in the defences to belong to her; and after this "the defender cannot urge an objection which in substance amounts to a "denial, or at least a doubt of what they themselves admit; and he re-"serves the other two defences, because, although it be possible that they "may ultimately supersede the necessity of considering the merits, it is "possible they may not, and on the whole the case will be put into the "most convenient and an equally safe shape by being kept all together."

" and dismiss the action, and find the pursuer liable in " defender's expenses." The opinions delivered by the judges are annexed.[1]

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The pursuers appealed.

Appellants Argument.

Appellants.—It being admitted in the defences that the appellant, Mrs. Ross, is heiress of entail of Cromarty, and that the trust deed is in favour of the same persons as are called by the entail executed on the same day, it must be held to be clearly established, on the face of the record of this process, that the appellant is the party beneficially interested under that trust, and is consequently entitled to sue out a reduction of any deed granted to her prejudice. Accordingly, the title and interest set forth on the summons is sufficiently distinct and specific, inasmuch as the appellant sues as the

[1] *Lord Gillies.*—" This is a question as to the form of proceeding; and " the point to be determined is, whether the title on which the pursuer " insists,—that of beneficiary under the trust, is competently set forth in " her summons. On looking to the summons, I find the only title " libelled in the part of the summons appropriate for that purpose is the " entail. But it is now said by the pursuer, that she insists as beneficiary " under the trust deed, and that it will be seen from the second reason " of reduction, that she has in her that character. Now, I doubt very " much if the omission of the title to pursue in the proper place of the " summons can be cured by any subsequent allegations in another part, " such as the reasons of reduction; I do not think we can allow so " important a matter to be gathered from other parts of the summons, " and pass over its omission in the proper place. I see nothing for it, " therefore, but to dismiss the action, because we can never admit of an " amendment of a summons to the effect of inserting the title to pur- " sue. A defect in so essential a part of the libel is a fatal vice, which " cannot be cured.

Lord Mackenzie.—" I feel the same difficulty as Lord Gillies, and I " am inclined to concur with him in thinking the objection to the sum- " mons a fatal one. The title libelled is that of 'heiress of entail,' 'and " 'as such and otherwise' having right to prosecute the reduction. " Now, if we throw out of view the words 'and otherwise,' the only " title specified is that of heiress of entail. But that is not the character

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heiress of entail, "entitled to succeed to the lands of "Cromarty and others, and as such and otherwise "having good and undoubted right," &c. The character of heiress of entail comprehended in græmio all the rights and interests to which such heiress was by the trust deed, executed unico contextu and in furtherance of the purposes of the entailer, entitled. The trust deed is set forth in the summons, and is thus directly founded on by the appellant as a ground on which she sued, in addition to that of heiress of entail. A service by the appellant was wholly unnecessary, that being only requisite either to take up something that remains in an ancestor, or to prove some disputed fact; and as in Rutherford v. Nesbit, 12th Nov. 1830[1], a party, whose apparency was admitted, was allowed without a service to bring a reduction, so here the appellant did not require to have vested in her any other title than that which, by the admission of the respondent, she possesses. [*Lord Chancellor.*—The judges do not say that the title as heiress of entail is not sufficiently set out, but that no other title is set out.] It is in her

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"in which she now insists, because she now adopts that of beneficiary "under the trust deed, which is not libelled on as a title to pursue; for I "cannot think we can hold that the words 'and otherwise' are to have "any effect whatever in remedying so important an omission as that of "passing over, wholly unnoticed in the proper place, the deed under "which the pursuer intends to insist.

"The action must therefore be dismissed.

Lord President.—"I concur. The only title relevantly libelled is that "of heiress of tailzie. The words 'and otherwise' cannot have the effect of "allowing the pursuer to insist in any character she may have narrated "in the subsequent part of the libel.

Lord Corehouse.—"I am of opinion that the title on which the pursuer now insists is not relevantly libelled, because it is not mentioned "in the proper part of the summons. I do not think the omission "can be remedied, and, therefore, on that ground the action must be "dismissed."

[1] 9 S., D., & B., 8.

character of heiress of entail of the estate of Cromarty, in which character the residue of the trust estate is destined to her, that the appellant is entitled to complain of any act of malversation. As heiress of entail she has a legal title to enforce the obligation on the trustees to complete the investment of the residue, or to bring back the funds within the operation of the trust. She necessarily unites both titles in her person, and having the first she of course has the second, which cannot by possibility be vested in another. The particular interest she is seeking to enforce is specially described in the second reason of reduction.

But even if the summons had been defective in the specification of title, the Court ought to have allowed an amendment of the libel, instead of de plano dismissing the action. The Court allowed a new title to be libelled, in Sheriff of Teviotdale v. Lord Cranstoun[1], and in the Laird of Meldrum, 28th July 1716[2], which was the case of a reduction; and in more modern practice, in Kerr v. Kerr, 16th Dec. 1830[3], Millar, 21st May 1831[4], Campbell v. Mitchell[5], and Hutton v. Gibson[6], both which last were cases of reduction. There is nothing in the acts of sederunt which authorizes the Court to deal more stringently with reductions than with other summonses requiring amendment. [*Lord Chancellor*.—Did the appellant ask leave to amend?] It may be collected from both reports[7] that such an application was before the Court.

Lord Advocate.—A minute ought to have been given in.

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[1] 1 Bro. Supp. 179.
[2] Mor. 12152.
[3] 9 S., D., & B., 204.
[4] Ibid. 625.
[5] Ibid. 875.
[6] 2 Sh. App. 110.
[7] D., B., & M., and Fac. Coll.

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Mr. Anderson.—The usual practice is to ask leave by motion, not by a minute.

Attorney General.—I cannot doubt that such an application was adjudicated upon, and refused.

Respondent's Argument.

Respondent.—The title libelled by the appellant was not sufficient to entitle her to insist in the action of reduction. By her title as heiress of entail and provision to the lands of Cromarty, she had no right to challenge any act done under the trust, or to interfere at all as to the lands the title to which is challenged in the reduction. She could not sue a reduction of land rights without a service[1], and the respondent was not bound to plead to the action, in respect that without a service no judgment would have been res judicata in regard to the documents sought to be reduced. A pursuer in such circumstances, before requiring a defender to produce a title, is bound to show that she has a title which is likely to be affected by the deeds which she craves may be set aside; she ought to produce the titles by which she has that interest. Stair[2] and Erskine[3] state the nature of the action of reduction, and hold that production of the title is requisite. In England production cannot be enforced under the subpœna duces tecum until the plaintiff shows his title to maintain that he is injured. The characters of heiress of entail and beneficiary under the trust are separate and distinguishable; they are created under distinct deeds, and apply to different subjects.

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[1] Edmonston, 16th March 1637, Mor. 16089, and cases in Mor., p. 15,409, 16,088, 16,091, 16,096, 16,117; M'Allum, 16,135; Anderson, 22d June 1832, 10 S., D., & B, 696; Graham v. Hunter, 14th Nov. 1828; 7 S. & D. 13.

[2] 4. 20. 3., App., p. 833.

[3] 4. 1. 19.

An amendment of the libel in circumstances such as the present would have been altogether incompetent under the forms of process in Scotland. No provision is made in the late judicature act (6 Geo. 4. c. 120.), or in the relative act of sederunt of 1828, as to amendment of the libel in reductions, although a party may add reasons of reduction, that being, as is clear from the 50th section of the act of sederunt, the only amendment contemplated in reductions. The act of parliament (6 Geo. 4. c. 120. s. 27.) makes certain provisions as to summonses of reduction among others, but expressly "without prejudice to the present form of reductions "in other respects." The practice so reserved will be found explained in the act of sederunt, 1st January 1726. In section 3. of that act it is required that "in "reductions the pursuer do set forth specially in his "libel the writs upon which he founds his title;" and section 4. of the same act of sederunt provides for new reasons of reduction being libelled, without providing for any amendment as to the title of the pursuer.

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Respondent's Argument.

Lord Eldon, in the case of Lord Kinnoul v. Gray (21st March 1805), said, that in matters of form like the present "this House will give the Court below "credit that in points which regard their own practice "they are right, unless it can be shown beyond the "shadow of a doubt that they are wrong;"[1] and that dictum may fairly be acted on in the present instance.

Judgment deferred.

Lord Chancellor.—My Lords, this case has given me great anxiety, because it would appear at first sight

Ld. Chancellor's Speech.

[1] See also Lord Brougham, in Magistrates of Annan v. Farish, 14th July 1837, 2 Sh. & M'Le. 930.

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Ld. Chancellor's Speech.

that, from the length of time which has elapsed since the period of the transaction now sought to be set aside, the party might find it impossible, failing this suit, to institute another. At the same time, however, when we observe that the transaction alluded to is now of more than forty years standing, we appear safe to infer that a suit of that sort is not very likely to succeed, and therefore it is not probable that the appellant will sustain any loss if your Lordships should see reason to adopt the judgment which has been pronounced by the Court below.

My Lords, this is an action of reduction, seeking to set aside a transaction which took place in the year 1796, the pursuer (appellant), who was interested in the trusts of a deed, alleging that the trustees under that trust deed in 1796 improperly dealt with the estate, in selling part of it to one of themselves. The objection disposed of by the Court below is, that the pursuer (appellant) has not set out her title. Now it appears that in actions of reduction the whole form of pleading is very strict, and is subject to rules which are not applicable to other actions. In the first place it is enacted by the judicature act (6 Geo. 4. c. 120.), under the 2d section, "that "from and after the 11th day of November next in all "ordinary actions in the Court of Session the pursuer "or pursuers shall in the summons set forth in explicit "terms the nature, extent, and grounds of complaint "or cause of action." That is applicable to ordinary actions. Then a subsequent part of the statute, namely, the 27th section, applies to actions of reduction, and it recites, "whereas according to the forms now observed "in the Court of Session, there are certain classes of "actions in which the forms of process, and the mode

" of preparing and discussing the cause, are different " from those observed in the class of causes called ordi- " nary causes; but it is expedient that all classes of " causes should, as nearly as may be, consistently with " the nature and object of the action, be prepared for " decision and discussed according to the method and " on the principles above laid down;" and then it enacts, " that all rescissory actions, except reductions of the " Court of Admiralty in maritime causes, shall from and " after the 11th of November next be enrolled and con- " tinued before the junior Lord Ordinary, and the said " actions shall, with such exceptions as the judges under " the powers herein-after delegated to them shall think " necessary, be prepared and discussed according to " form and method already directed with regard to " ordinary actions, but without prejudice to the present " forms of actions of reduction in other respects."

My Lords, by an act of sederunt of an early date, 1st January 1726, it was provided, " That in reductions " and improbations the pursuer do set forth specially " in his libel the writs upon which he founds his title;" And by another act of sederunt (11th July 1828), subsequent to the late judicature act, it was provided, that " in reductions to be enrolled before the junior Lord " Ordinary, if the defender is to object to the title of " the pursuer, or to plead an exclusive title, or to state " any other objection against satisfying the production, " he shall return defences confined to these points."

It appears, therefore, that where a party seeks to reduce instruments, the first question is, whether he has shown sufficient title to justify him in calling for the reduction of the instruments which he seeks to have reduced? It is thought desirable that the defender

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should, in the first place, have an opportunity of challenging the pursuer's title to reduce the instruments, for which purpose it is provided that the pursuer shall state the writs on which he supports his title to reduce.

Now it appears, by the summons, that the pursuer alleges that she is the heiress of tailzie and provision entitled to succeed to the lands and barony of Cromarty under the deed of entail made and executed by the deceased George Ross, dated the 9th of December 1783, " and as such and otherwise" she has " good and un- " doubted right along with her husband to prosecute " and follow forth the action of reduction under- " written;" and then comes a specification of the instruments which she seeks to reduce.

Nothing can be more distinctly stated than that her title is as heiress of tailzie and provision under that entail, because, although the words " and otherwise" are introduced, and have been made the subject of argument at the bar, it is quite clear that if the rule be that the party must set forth the right under which she claims, she cannot improve the statement by the words " or otherwise," there being no statement of any other title under which she claims. The sole title, therefore, under which the party seeks to have these instruments reduced is as the heiress of tailzie and provision under the entail of 9th of December 1783.

But, my Lords, when matters come to be investigated, it turns out that that was not the title she meant to found on at all. It appears that she was and is admitted to be heiress of tailzie and provision under the deed mentioned; but the suit, it further appears, does not relate to the estate settled by that deed, but to another estate conveyed by a separate deed of trust, by

which the property thereby conveyed was vested in trustees, who were empowered to sell the same after paying certain charges, and to lay out the surplus in the purchase of an estate, which, when so purchased, was to be held for the party who should be heir of tailzie under that deed; and that the real object of the suit is to set aside a sale by these trustees, as contrary to the terms of the trust. But that is quite a different title from that which the pursuer has stated in her summons. Her title is under the trust deed, and not under the deed of entail; but she says in the summons that her title is as heiress of tailzie and provision under that entail. The only way in which her title is to be found out at all is, not by reference to the part of the summons where she sets out her title, but in that part which enumerates the grounds of reduction. When she comes into Court to ask for reduction, under an enumeration of her reasons for asking reduction the purport and substance of that trust deed is stated; so that it is perfectly true that, looking to the whole of the summons, and calling in aid the statement which I find among the reasons of reduction, — putting the two parts of the statement together, there would be enough to show what was the title of the pursuer; that is, you may guess at, rather than find stated, the title on which she comes into Court to seek a reduction of those deeds. But that is not what the rule requires; for the rule requires her to set forth her title, and where she professes to set forth her title, she sets forth that which is not her title at all.

The question then is, whether that was not such a departure from the rules of practice as to justify the Court of Session in saying that the suit was not in a

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state in which the pursuer could proceed, the defender contending, as a preliminary defence, that there was no title set forth. The question strictly is not one of Scotch law, but of Scotch pleading, and this should of itself make one very careful in overturning that which has been decided by the unanimous decision of the Judges of the Inner House. The Lord Ordinary thought that under the circumstances the other part of the summons might be resorted to; but when I look at the provisions made by the Court of Session by these acts of sederunt, and consider that such rules have been thought essential to the administration of justice in cases of this sort, I cannot concur in this view, because I cannot help thinking that if such latitude of pleading were permitted, there would be no security for the observance of those rules which have been made, in order to compel parties, coming into Court to seek to reduce an instrument, to put themselves into such a situation, that their opponents may, in the first instance challenge their title to come into Court at all.

One other point was raised, — whether the pursuer should be permitted to amend. The Court of Session thought she ought not to be permitted to amend. That is a question so purely of Scotch practice, that I should be very unwilling to lay down a rule inconsistent with that acted on by the Judges; and when we look at what this suit is, and see that the object is to open up a transaction of the year 1796, which for forty years had been permitted to remain without challenge, and that there is very little probability that after that great length of time there could be such a case made as would enable the party to obtain that relief which she seeks, I cannot but think that the Court of Session exercised a very sound dis-

cretion in excluding the party from amending. Under these circumstances I would recommend to your Lordships to affirm the interlocutor of the Court of Session, with costs.

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Judgment.

The House of Lords ordered and adjudged, That the said petition of appeal be and is hereby dismissed this house, and that the said interlocutor therein complained of be and the same is hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the respondent the costs incurred in respect of the appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

RICHARDSON and CONNELL—ARCHIBALD GRAHAME, Solicitors.