

No. 45. “ The Lords found, That the entail is valid : But, in respect the sale was only intended to try the question, whether or not the entail was good, and was qualified by a back-bond to that purpose? found, That no irritancy is incurred by the said sale ; and therefore assoilzied the defender from the conclusions of the declarator ; but sustained the reasons of reduction of the trust disposition.”

Act. Blair.

Alt. G. Buchan Heffburn.

Reporter, Kennet.

G. F.

Fac. Coll. No. 63. p. 303.

1769. January 25.

PETER LESLIE GRANT of Balquhain against JAMES GORDON of Cobairdie, and Others.

No. 46.  
Import of a  
clause in a  
tailzie.

In the year 1679, Patrick Leslie of Balquhain, afterwards Count Leslie, in his marriage-contract with Mary Irvine, his second wife, provided to the heir-male of that marriage, with the burden of his life-rent, lands to the extent of 3000 merks yearly. This contract declares, that if Patrick Leslie shall secure the said heir-male in lands which he may afterwards conquest, to the aforesaid amount, he shall be holden to accept of lands so to be conquered and acquired, and to renounce any claim to the lands now provided. In the year 1692, Count Leslie settled the lands of Balquhain upon himself, in life-rent, and George Leslie, his eldest son of the second marriage, and the heirs-male of his body, in fee ; which failing, upon several substitutes, under strict prohibitory, irritant, and resolute clauses, but with full power to him to alter the destination, or burden the lands.

This tailzie contains the following clause : “ And further, in case I shall happen to conquest, acquire, or succeed unto any lands, heritages, &c. which I shall not otherwise dispose upon in my life-time, in that case, I, by these presents, sell and dispoise the said lands, &c. so to be conquered or acquired by me, or whereunto I shall happen to succeed, and not dispoise thereupon in my life-time, to and in favours of the said George Leslie, eldest lawful son of my second marriage, and the heirs-male of his body ; which failing,” &c. This tailzie was duly recorded, a charter was expedite, and infestment followed.

In the year 1699, Count Leslie having purchased the lands of Inch, took the disposition thereof to himself, in life-rent, and to George Leslie, his lawful son of the second marriage, and his heirs-male ; which failing, to several substitutes, with reserved powers to burden, sell, or dispoise. Upon this disposition, a charter was expedite, and infestment followed.

In the year 1700, Count Leslie, in virtue of his reserved powers, executed another tailzie, in some respects different from the former, with procuratory for resigning not only the lands expressed in his former tailzie, “ but also all and sundry whatever lands, baronies, &c. which I have already acquired, or may hereafter happen to conquest or acquire, to me, the said Patrick Count Leslie, in life-rent, and to the said George Leslie, my eldest lawful son by Mary Irvine, and the

heirs-male of his body ; which failing," &c. By this deed, the heirs of tailzie are bound to adhere to, and fulfil, the conditions, clauses, and limitations, &c. " specified and contained in the former bond of tailzie, except in so far as altered by that second deed."

In the year 1706, Count Leslie, in the marriage-articles of his son, George Leslie, with Margaret Elphinston, renounces, in favour of his son and promised spouse, the life-rent right of the lands of Balquhain, " and sicklike all and hail the lands of the kirk-town and barony of Inch, with the pertinents, &c. free of all sums due by the said Patrick Count Leslie, which can any way affect the same ; likeas, the said Patrick Count Leslie hereby renounces all power and faculty to burden the said lands with any sums of money in all time hereafter."

On the death of Patrick Count Leslie, George Leslie possessed the estate of Balquhain, in virtue of the titles expedite upon the deeds of entail ; but he possessed the lands of Inch on the charter and infeftment expedite in 1699. George Leslie left two sons, James and Ernest. James, the eldest, possessed the lands of Inch upon his apparency, without making up titles.

Upon the death of James, Ernest, in 1739, procured himself served and retoured heir in special in the lands of Inch to George Leslie, his father, and was thereafter infeft in virtue of a precept from the Chancery.

Ernest likewise made up titles to the estate of Balquhain in terms of the deed of entail.

In 1735, Ernest Leslie executed a settlement in favours of himself and his heirs, the eldest heir-female succeeding without division ; which failing, to James Gordon of Cobairdy, the eldest heir-female succeeding without division ; which failing, to certain other heirs.

Ernest Leslie died in 1740, without issue ; and James Gordon of Cobairdy, being served heir of provision to him, in virtue of the settlement 1735, expedite a charter, and was infeft, in 1740, and continued in possession of the lands from that time. In bar of the action to have the above mentioned deed 1735 set aside, as contrary to the restrictions to which Ernest Leslie was subject, it was pleaded for the defender, That the lands of Inch were never subject to the tailzie of the estate of Balquhain ; the lands are conveyed to Count Patrick, in life-rent, and to George, his son, and his heirs-male, in fee ; which failing, to Patrick Count Leslie's other heirs of tailzie, specified in deeds of tailzie already made, or to be made ; and are therefore vested in George, as unlimited proprietor, and subject to his free disposal.

They are not affected by the tailzie 1692 ; for a tailzie of lands to be acquired is not a valid and effectual tailzie, since the requisites of the statute 1685 cannot be complied with, as to lands which the tailzier might afterwards acquire. Though such tailzies were valid, the lands of Inch cannot be affected by the irritant and resolute clauses in the tailzie 1692, nor by the limitations in the settlement 1700, which only extend to the lands in the tailzie 1692 ; nor will restraints upon property, even in a question with heirs, be carried further than the tailzier has thought

No. 46. proper to express; June 17, 1746, Campbell, Sect. 3. *h.t.*; Carlourie, 1749, No. 22. p. 15382.

By the tailzie 1692, such lands alone are tailzied as Count Leslie should happen to conquest, acquire, or succeed to, "and which I shall not otherwise dispose upon in my life-time;" but the lands of Inch are taken directly to George, as a fee-simple, and the powers reserved by his father are discharged in George Leslie's contract of marriage 1706, without mention of, or reference to, the tailzies 1692 or 1700: They therefore cannot fall under the clauses of the tailzie 1692.

*2do*, Supposing the lands of Inch had been subject to the same fetters and limitations with the estate of Balquhain, they are free from such fetters, and secure by prescription. In 1699, the lands of Inch were conveyed to Patrick Count Leslie, in life-rent, and his son, George, in fee, without conditions or limitations. Upon this disposition a charter was expedite, and infestment followed the same year; and upon that title the lands have been possessed from that period downwards; by which the claim competent to the several heirs of entail is cut off by the negative prescription, and the unlimited fee of the estate established by the positive; Act 1617, C. 12.; July 10, 1739, Macdowal of Makerston, No. 172. p. 10947.; Ayton, No. 174. p. 10956.; Douglas *contra* Lady Kirkness, No. 38. p. 4350.

Though Ernest Leslie made up his titles to Balquhain by a special service and infestment, as heir under the tailzie 1700, it is no interruption of the right under which he possessed the lands of Inch, as he made up a separate title to these lands by a separate service and infestment, as heir under the infestment 1699, his possession upon which entitled him to complete the prescription that was begun in the person of his father.

As Count Leslie did, in his son's marriage-contract 1706, discharge and renounce his reserved powers over the lands of Inch, from that time the right of George became indefeasible, and the prescription, running from that period, was completed, before interruption, by the action of Anthony Count Leslie.

*Answered for the pursuer*: The marriage-contract 1679 did not deprive Count Leslie of the power of laying his heir under the obligations contained in the after tailzies. When he acquired the lands of Inch, in 1699, he did not take the right of these lands to his son George in fee, in implement of his obligations to him contained in the marriage-contract; but, *esto* an obligation lay upon him in favour of George, his son, that obligation was extinguished by George's taking and possessing the estate of Balquhain, in virtue of his father's settlements.

When Count Leslie, in 1699, purchased the lands of Inch, though the right was taken to his son in fee, and only in life-rent to himself, yet that acquisition must be considered as made by himself, and, therefore, as falling under the clause of the tailzie 1692 concerning lands to be conquered or acquired by him, and under the clause of the tailzie 1700, concerning lands that had then been con-

quested or might thereafter be conquered by him : In consequence of which, the several heirs succeeding to George are subject to the limitations contained in the tailzies.

The lands of Inch being subject to the limitations in the tailzie of Balquhain, there is nothing in the marriage-articles between George Leslie and Margaret Elphinston that can import a discharge of the obligations by former deeds.

*2do*, Neither the positive nor negative prescription can avail the defender. The absolute property of the lands of Inch having been established in the person of Count Leslie, or George his son, their heirs cannot acquire such property by prescription, since, independent of, and antecedent to, any prescription, the same was fully in them.

The right claimed by the pursuer is not a right of property, but the performance of an obligation, which Ernest Leslie, being subjected to by the tailzies of the estate of Balquhain, could not, by a gratuitous deed, disappoint.

Could an immunity from such obligation be acquired by the positive prescription, the possession of the estate of Balquhain by George, upon the tailzies 1692 and 1700, and by Ernest, upon that of 1700, was an acknowledgement of the obligation upon the heirs, with regard to the lands of Inch, in virtue of that right by which they enjoyed the estate of Balquhain.

Prescription could not run till after the death of Count Leslie, in 1709, who, by his right, in 1699, to the lands of Inch, had full power over those lands ; and it was interrupted, in 1746, by the process of Anthony Count Leslie.

The negative prescription has not run, as no action could arise before the deed executed by Ernest Leslie, at least before the death of Patrick Count Leslie, who was not subject to the tailzie ; and the possession of the estate of Balquhain by the heirs in virtue of the tailzies is an effectual interruption of such prescription.

“ The Lords sustained the defence, and assoilzied.”

Act. *D. Grame.* Alt. *M<sup>c</sup>Queen.* Reporter, *Auchinleck.* Clerk, *Pringle.*  
P. C. *Fac. Coll. No. 88. p. 158.*

1771. *June 20. and 1772. February 19.*

ROBERT HAY, Second Son of ALEXANDER HAY of Drumelzier, *against* GEORGE MARQUIS of TWEEDDALE,

The Barony of Linplum, anciently a part of the estate of Yester, had been originally given off to a second son ; and in the investitures which followed, a predilection had always been shown to the family of Tweeddale.

In the year 1748, Sir Robert Hay executed a deed of settlement of his estate of Linplum “ to Mrs. Margaret Hay his sister, in life-rent, and to the second lawful son to be procreated of the body of John, present Marquis of Tweeddale, and the

No. 47.  
Effect and interpretation given to a clause of devolution in a deed of entail.