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DOUGLAS
v.
STRATHNAVER.

ARCHIBALD, DUKE OF DOUGLAS, *Appellant*; WILLIAM, LORD STRATHNAVER, *Respondent.*

25th February, 1730.

TAILZIE.—REPARATION.—An heir of entail having made up titles in fee-simple to the entailed estate, and burdened it with debts, contrary to the provisions of the entail, which had not been recorded,—his representatives were found liable, at the instance of the next substitute, for reparation and damages, to the effect of disburdening the estate of those debts.

COSTS—L.50, given to Respondent.

[Fol. Dict. II. p. 435. Rem. Dec. I. No. 104, p. 198. Mor. Dict. p. 15373.]

No. 8. Feb. 4, 1729.

JEAN, Countess of Sutherland, executed a disposition and entail of her lands of Rosebank in favour of Archibald Earl of Forfar, her eldest son, and the heirs male of his body; whom failing to William Lord Strathnaver (her grandson by a second marriage) and the heirs male of his body; whom failing to certain other substitutes. By this deed, the granter obliged "herself, her heirs and successors, under the conditions therein expressed, "to infeft the said Archibald Earl of Forfar, and "the other heirs of provision," and to grant procuratories and other writings necessary for that effect. It is expressly provided and declared, "that

" it should not be in the power of the said Earl " of Forfar, or of the heirs of provision before " mentioned, to contract debts upon the foresaid " lands, or to affect the same with any sum ex- " ceeding two years rent for the time :" And further, " that it should not be in the power of the " said Earl of Forfar and his heirs of provision, " to give away, dilapidate, sell, or wadset the said " lands, or to allocate or bestow them in fee or " jointure to their ladies ;" and in the event of their contravening, " then and in that case these " presents shall be void and null, in so far as con- " ceived in favour of the person so acting, and " the next heir of provision above mentioned shall " thereby succeed in his right and place."

The deed contained a clause dispensing with delivery, but it was not recorded in the register of entails, and was found in the repositories of the Countess at her death in 1714.

Archibald, Earl of Forfar, the institute, predeceased his mother, and upon her death, Archibald, his son, (Earl of Forfar,) passing by the above entail, made up titles to the estate by a service as heir of line to her. Having affected the estate with debts to a large amount contracted by himself or his father, he died in 1715, whereupon his other family estates devolved upon the Duke of Douglas in terms of the investitures.

Lord Strathnaver, having then served himself heir of provision to the first Earl of Forfar in the lands of Rosebank, brought an action against the Duke of Douglas, as representing the Earl of Forfar, concluding that he should be ordained to dis-

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incumber the estate of the debt with which it had been charged in violation of the terms of the entail.

He argued that the Countess of Sutherland, being absolute proprietor of the lands, had power to settle them under whatever conditions she thought proper; and that having by her settlement bound and obliged herself and her heirs to resign the lands, for new infeftment in terms and under the conditions thereof, and prohibited the persons in whose favour they were conveyed, from charging them with debt under the pain of forfeiture, there was a good claim competent to the next substitute to whom the succession had opened, against the representative of her heir who had neglected so to resign the estate, and by whom debts had been laid upon it, contrary to the prohibition of the entail.

It was answered, that the entail, not having been recorded in terms of the act 1685, was not obligatory, and besides that the Earl of Forfar was the heir at law of the Countess, and therefore at liberty to make up his title to the lands in that character, there being no clause in the deed by which (as is usual and necessary in such cases) the heirs of entail are prohibited from claiming under any other title.

The Court found "that the heirs of tailzie in "the Countess of Sutherland's disposition, could "not alter the order of succession therein ex-"pressed, and that the last Earl of Forfar, who "was infeft as the Countess's heir of line, was "obliged to have resigned in the terms of the pro-"curatory contained in the tailzie, and that the "appellant who was heir of provision to the said

" Earl of Forfar, was bound and obliged to dis-
" burden the said Countess her tailzied estate,
" and to relieve her heirs of tailzie of the debts of
" the family of Forfar; and repelled the whole
" other defences and decerned." This judgment was adhered to; and some other proceedings ensued which it is not necessary to detail.

The appeal was brought from several interlocutors of the 2d and 24th February, and the 9th and 25th July, 1728. Entered Feb. 4, 1729.

Pleaded for the Appellant:—1. By the act 1685, it is provided that such entails only shall be binding as are recorded agreeably to the directions of the act; which not having been done here, the entail can only be regarded as a destination which was alterable at pleasure by any of the heirs.

The mere nomination of heirs without prohibitory clauses, is not effectual against the heir, and as the prohibitory clauses have no force or effect unless recorded, it follows that in the present case, the prohibitory clauses not having been recorded, the destination to the particular line of heirs can have no effect to debar any of the substitutes from altering it.

2. But supposing that the entail had been recorded, it could only have been obligatory upon the Earl of Forfar in case he had chosen to possess the estate by that title; but as he had another title, as heir to his grandmother, he was at liberty to claim upon it, and thereby create in himself an absolute fee, especially as there was no clause in the entail restraining him from doing so.

For the deed was an actual conveyance of the

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estate, and not merely an obligation to convey; the obligation to grant procuratories, &c. was only accessary to the conveyance, and the conveyance not having been accepted, but repudiated; the accessary obligation necessarily fell to the ground. But even on the supposition of its being still binding, it was in favour of the Earl of Forfar, who consequently became both creditor and debtor in respect of the same obligation, and since he did not accept of the credit, no subsequent heir could take it up under his right as heir to him.

3. Wherever, in an entail, effectual care is taken in terms of the act, that no deed or debt of the heir in possession can affect the estate, the entail must subsist and be obligatory according to the intention of the maker. But where no such effectual provision is made, but on the contrary, the deeds and debts of the heir are, notwithstanding the entail, an effectual charge upon the estate itself, the law has provided no remedy to make good to the next substitute the damage that he may suffer through the defect and lameness of the settlement.

Pleaded for the Respondent:—1. Although by the act 1685, it was declared lawful for persons to entail their estates with clauses, prohibitory and resolutive, and that such entails, being duly registered, should be effectual against creditors; yet by that law the power which every person previously had of limiting and restraining his heirs with regard to one another, was not impaired. The intention of the law was only to ascertain how creditors might with safety contract with a person having

an entailed estate, for which end it was declared that they were not to be affected by the conditions of the entail, unless it was properly recorded; but in questions between the heirs, entails, although not registered, as they are the deeds of the ancestor, must be still as binding upon the heir as they would have been before the passing of the act.

2. The Countess of Sutherland, by this entail, in express words obliged her heirs to resign the lands in favour of the persons, and under the conditions mentioned in the deed; and as resignation made in terms of the obligation would effectually bar any claim as heir at law, there was no occasion to add a proviso "that the heirs should not possess "by any other title." Their doing so was effectually prohibited by the condition whereby they were bound to resign under the conditions of the entail. The Earl of Forfar being himself served heir at law to his grandmother, became thereby obliged to the performance of all obligations entered into by her, and consequently to resign in terms of the deed.

Every substitute is a creditor under this obligation, as well as the institute, whose renunciation therefore of the right of credit competent to himself, can have no effect to bar the claim of the other heirs of entail.

3. The Earl of Forfar's estate, to which the appellant has succeeded, must clearly be liable for the present claim; otherwise, it is evident that both the act of parliament, and entails made in terms of it would avail nothing; for the heir in possession, by merely omitting to insert in the subsequent con-

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veyances and infeftments, the prohibitory and resolutive clauses, would be at perfect liberty to charge the estate with debts to the full value of it, and to apply the money in what manner he might think fit.

After hearing counsel, it is ordered and adjudged, &c. "that the appeal be dismissed, and "the interlocutors therein complained of be af-"firmed; and it is further ordered that the appel-"lant do pay to the respondent the sum of L.50 "for his costs in respect of the said appeal."

For Appellant, *P. Yorke, Dun. Forbes, and Rob. Dundas.*

For Respondent, *C. Talbot, and Will. Hamilton.*