1779.

GRAY
v.
DOUGLAS, &C.

The Lord Ordinary decerned against him for these sums. On representation, the Lord Ordinary pronounced an interlocutor refusing. On reclaiming petition, the Court pronounced this interlocutor:—"Adhere to the interlocutors of "the Lord Ordinary reclaimed against, and refuse the desire "of the petition: Find expenses due, and allow the pursuers "to give in an account thereof." And of this other date, the Court pronounced this interlocutor.—"The Lords modify "the within account to £8, 8s. 11d. sterling, and decern."

July 31, 1777.
Nov. 26, 1778.
Jan. 24, 1779.

Against these interlocutors the present appeal was brought.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Ja. Wallace, A. Macdonald.*

For the Respondents, *Al. Wedderburn, Henry Dundas, Ilay Campbell.*

1744.

THE EARL OF
MORAY
v.
ROSS, &C.

The Right Honourable EARL of MORAY, . *Appellant;*

CHARLES Ross of Balnagowan, Esq., and Others, ... *Respondents.*

House of Lords, 6th April 1744.*

ENTAIL.—Special circumstances in which it was held that it was competent to the maker of an entail and the institute to put an end to the entail, and to convey the estate, although there were prohibitory and irritant clauses against selling and conveying the estate, and the entail was recorded.

David Ross of Balnagowan having fallen into debt, in consequence of which, and of outlawry, the liferent escheat of the Balnagowan estate was granted to James, Lord Ross, who afterwards acquired right to other adjudications, whereby the right to Balnagowan became vested in him.

1647.

Robert, Lord Ross, having made up proper titles to the estate of Balnagowan, conveyed the estate to David Ross, the eldest son of the said David Ross, and *to the heirs male of his body;* remainder to the said Lord Ross, *his heirs and*

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* Omitted at its proper date.

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assignees. Upon this conveyance David Ross obtained a charter, which contained a *novodamus* "to David Ross, and the "heirs male of his body, remainder to Lord Ross, as "aforesaid."

1666. In 1666, David Ross the third, intermarried with Lady Anne Stewart, sister to the Earl of Moray; and it was alleged, that David Ross then brought himself into great difficulties by debt. Several wadsets to the extent of nearly one-half of the estate, and five several apprisings were led against the whole estate.

At this time David Ross was in London; and it was stated, that advantage was taken of his distressed situation, by the Earl of Moray, his brother-in-law, then Secretary of State, to get from him a conveyance of his whole estate.

The Earl stated, that the incumbrances then on the estate amounted to L.6083, 6s. 8d.; and, in consideration of his advancing the sum of L.833, 6s. 8d., David Ross had executed the deed of entail, now brought in question, in favour of

1685. his second son, Francis Stewart. This entail was in these terms, "to and in favour of himself, the said David Ross, for "life, and to the said Mr Francis Stewart, in fee, and the heirs "male of his body," with several remainders over, with a proviso that the same should "be redeemable from the said "Francis Stewart, and the heirs male of his body, and other "heirs of tailzie herein specified, by the heirs male of the "said David Ross, upon repayment of the before-mentioned "sums."

It reserved to Lady Anne Stewart such parts and portions of the estate as were secured to her by her marriage-contract; and it contained the following prohibitions, "That it shall "not be lawful to the said Francis Stewart, nor to his heirs "of entail succeeding to the said estate, to sell, or convey "the said estate, or any part thereof, nor to contract debts, "by which the said estate might be evicted." There were also irritant and resolutive clauses, to protect these prohibitions, and a clause of absolute warrandice.

This deed of entail was further granted, upon this condition, "That the said Francis Stewart, after his majority, "shall be obliged to free the said David Ross from any "demands to be made upon him for the money contained in "the mortgages."

This deed, it was stated, as against the heirs of the beforementioned Robert, Lord Ross, in case of failure of issue male, of David Ross, was void in point of law, so far as it was

not for a valuable consideration, and therefore they would have been entitled to the estate upon payment of the 15000 merks, or £833.

As against David Ross himself, this deed, the respondents contended, could only be viewed as a security for sums advanced. It, therefore, could neither be looked on as a purchase, or as a family settlement, or entail; because, though colourably and fraudulently thrown into that form, yet it was in substance not an entail. There was no family consideration; the two first takers were absolute strangers to his name and blood; it was nothing but a mere trust.

This deed was allowed to lie dormant until 1691, when it was recorded, and an infeftment taken upon it, which was done during the infancy of Francis Stewart.

Francis Stewart, at his coming of age, did not perform the condition of paying off the mortgages on the estate, amounting to £6083, 6s. 8d.

In 1686, the Earl, doubtful of his son's title by the above settlement, and looking to the clause of return in favour of Lord Ross' family, procured a bond from David Ross for 36000 merks, which, by the back bond relative thereto, was declared to be only granted for further security, and to strengthen the deed of settlement 1685.

In 1706, David Ross applied to Lord Ross' family, and by an agreement between them and Francis Stewart, it was agreed, that Lord Ross should pay Francis Stewart 63,000 merks, and that Francis Stewart should join with David Ross in making a new conveyance or settlement of the estate. This new settlement was executed accordingly; it being the joint act of David Ross and Francis Stewart, and this settlement bore "to and in favour of David Ross during his life; "remainder to the Lord Ross and the heirs male of his body, "with several remainders to others of the name and kindred "of David Ross, and with right of redemption to the *heirs* "*all of* David Ross' body, reserving power to both jointly to "make a new settlement." 1706.

In 1711 they accordingly made a new settlement of the estate in favour of Lieutenant-General Charles Ross, upon payment made by him of £5500 to Lord Ross, being the sum advanced by Lord Ross to Mr Stewart, and to Balnagowan's creditors, with the interest from the time of the respective payments. Upon this the General was infeft and attained possession after the death of David Ross and his widow.

In 1727 General Ross made a settlement of the estate upon

THE EARL OF MORAY *v.* ROSS, &c.

Charles Ross, the respondent, second son to George, now Lord Ross, who was, upon the General's death, in 1733, infeft in the estate.

Fourteen years after the appellant came of age, and thirty-two after his right accrued, and thirty-seven after the date of the deed 1706, he purchased brieves for serving himself heir to his father on the estate of Balnagowan, and afterwards brought a reduction of that settlement, as being contrary to the clause *de non alienando*, contained in the entail, 1685. And the respondent brought a declarator.

In these conjoined actions it was argued for the appellant, that the entail, 1685, contained strict prohibitions against selling or disponing the estate, which were fenced with proper irritant and resolutive clauses, and the entail was duly recorded, and, such being the case, it was not in the power of the maker of the entail, and the institute, by their joint act, to put an end to the entail, and therefore that David Ross and Francis Stewart could not convey away the estate by the deed 1706.

It was answered that the deed of entail 1685, was not absolute but redeemable. It was in its nature merely a security for the sum, £833, advanced by the Earl of Moray: That it was, besides, conditional, and the condition was the payment of David Ross' debts, which burdened the estate, amounting to £6082, 6s. 8d., which condition was never complied with: That, therefore, there was strong evidence for believing, that the deed was never accepted by Francis Stewart, the appellant's father. The Lords pronounced this interlocutor:—"Upon

Nov. 17, 1743.

"consideration of the disposition 1685, in favour of David "Ross of Balnagowan, in liferent, and of Mr Francis Stewart, "father to the Earl of Moray, pursuer, in fee, with the infeft-"ment thereon, with the whole circumstances of the case: "Finds, that it was in the power of Mr Francis Stewart and "David Ross of Balnagowan, jointly to make the settlement "in the year 1706, in favour of the said David Ross, in life-"rent, and William Lord Ross in fee, and of the heirs of "tailzie therein mentioned; and that the said settlement "made in the year 1706, is not liable to challenge at the in-"stance of Mr Francis Stewart, or his heirs male, and there-"fore find that the Earl of Moray cannot be served heir in "special to his father in the estate of Balnagowan, and "assoilze the defender from the reduction of the tailzie made "in the year 1706, and remit to the Lord Ordinary in the "mutual processes, to proceed accordingly."

On reclaiming petition, the Court adhered.

The Lord Ordinary thereafter "found and declared that "Charles Ross of Balnagowan, had the only good and undoubted right to the lands and estate of Balnagowan, and "that the Earl of Moray and other defenders called, in Balnagowan's declarator, had no right thereto, and ordained "the defenders to desist from troubling and molesting the "said Charles Ross, in the possession of the said estate, and "decern accordingly."*

1782.

THE EARL OF MORAY v. ROSS, &c. Jan. 25, 1744.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Al. Lockhart, C. Erskine.*

For the Respondents, *R. Craigie, W. Murray.*

[Fac. Coll., Vol. viii., p. 46, et Mor. 8822.]

WILLIAM, DUKE OF MONTROSE; JAMES, MARQUIS OF GRAHAM; JOHN GRAHAM of Duchray; GEORGE GRAHAM of Kinross, and Others, . . . } *Appellants;*

Sir JAMES COLQUHOUN, Bart. of Luss, *Respondent.*

1764.

THE DUKE OF MONTROSE, &c. v. COLQUHOUN.

House of Lords, 19th February 1782.

SUPERIOR AND VASSAL—MULTIPLICATION OF SUPERIORS.—Held that the superior was not entitled to grant certain liferent conveyances of the superiority of the vassal's lands, so as to multiply superiors over him, and the dispositions reduced.

The family of Colquhoun had at different times, by grants directly to themselves, or by purchase from other grantees, accumulated a very considerable estate, holding under the dukedom of Lennox, each of these parcels of land originally

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* For opinions of the Judges, *vide* Elchies, vol. ii., p. 451.