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E. OF RUGLEN v. KENNEDY.

[M. 15,412, et Kames' Dec. p. 222.]

WILLIAM EARL OF RUGLEN and MARCH, - *Appellant;*
Sir THOMAS KENNEDY (claiming the title and dignity of EARL OF CASSILS,) - } *Respondent.*

House of Lords, 19*th May* 1760.

ENTAIL.—When an estate entailed is possessed by the last substitute, it becomes in him a fee-simple estate; when failing him, it devolves upon heirs whatsoever.

JOHN EARL OF CASSILS, by marriage articles, of this date, June 15, 1697. entered into, in contemplation of his son, Lord John Kennedy's marriage with Mrs Elizabeth Hutchison, the said Earl and Lord Kennedy became bound to settle lands to the yearly value of £1500 per annum in favour of the said John Earl of Cassils in liferent, and the said Lord John Kennedy, and the heirs-male of the said intended marriage in fee; which failing, to the heirs and substitutes therein named, declaring that the said lands, to the extent of £1000 of yearly rent, should be conveyed in the form of a strict entail, with the usual prohibitory, irritant, and resolutive clauses.

In conformity with the obligation contained in the above marriage articles, a settlement by entail was executed by John Lord Kennedy, with consent of John Earl of Cassils his father, of the lands in question, in the following terms: —" To and in favour of the said John Earl of Cassils in life- Sep. 5, 1698.
" rent, during all the days of his lifetime; and the said Lord
" John Kennedy his son, in fee, and the heirs-male lawfully
" procreated, or to be procreated, of his body, on the body
" of the said Elizabeth Lady Kennedy; which failing, the
" heirs-male lawfully to be procreated of his body on any
" other wife to be by him hereafter taken; which failing,
" the heirs-male lawfully to be procreated of the body of
" the said John Earl of Cassils, on any wife taken, or to be
" hereafter taken by him; which failing, to the eldest
" daughter of the said Lord John Kennedy, begotten, or to
" be begotten by the body of the said Elizabeth Lady Ken-
" nedy, and the heirs-male lawfully to be procreated of the
" body of such eldest daughter; which failing, the second
" and every other daughter and daughters of the said Lord
" John Kennedy to be begotten on the body of the said
" Elizabeth Lady Kennedy, and the respective heirs-male
" lawfully to be procreated of the body of every such daugh-

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" ter or daughters; which failing, to other substitutes " named; and which all failing, to the heirs and assignees " whatsoever of the said Lord John Kennedy."

John Lord Kennedy had issue of the foresaid marriage only one son, John, who became the last or late Earl of Cassils. He intermarried with Lady Susan Hamilton, daughter of the late Earl of Ruglen or March (his cousin), and entered into a contract of marriage with her, by which the lands in the above entail, to the extent of £1000 per annum, and other lands, were provided " to himself and the " heirs-male of the said marriage; which failing, to the " heirs-male to be procreated of the body of the said John " Earl of Cassils in any subsequent marriage, and other " substitutes; including the heir-male of the bodies of Lady " Anne Kennedy, married to Earl of Ruglen and March." It was also provided, " That it shall not be leising or lawful " to, nor in the power of the said John Earl of Cassils, nor " any of the substitutes succeeding to the said lands and " estate, to alter, change, or innovate the destination or or- " der of succession appointed to the said estate, by the " destination above written."

Of this marriage there was no issue; and, having no prospect of issue, and the heirs of entail who could claim under the marriage settlement of 1698 being all extinct, he, before

Mar. 29, 1759. his death, executed, of this date, a new settlement in favour of the respondent, the nearest heir-male and representative

Aug. —— of the family. He died, of this date, upon which the appellant, William Earl of Ruglen and March, claimed to succeed, in virtue of the entailed settlement of 1698, as heir whatsoever of John Lord Kennedy; and the question was: Whether an entailed estate becomes a fee simple estate when it descends to the last substitute or heir called, previous to going to heirs whatsoever?

The appellant insisted, in a reduction of the latter deed, that as the entail 1698 prohibited the whole heirs of entail " to alter, innovate, or change the order of succession there- " by established," and as the late John Earl of Cassils was an heir of entail, he could not alter. He was further prohibited, by his own marriage settlement 1739, from so altering.

Mar. 29, 1760. The Judges, when they came to give judgment in this case (14 in number), were almost equally divided. They found " that the said deceased John Earl of Cassils could legally " execute the settlement under reduction; and therefore

" repelled the reasons of reduction, and assoilzied the de-
" fender (*i. e.* respondent) therefrom, and decerned and stopt
" all further procedure in the said service."

Against this interlocutor the present appeal was brought to the House of Lords.

Pleaded for the Appellant:—By the law of Scotland, every man has the power of entailing his estate to any series of heirs he thinks proper. The most simple form of entail known in the law is, when a man devises his estate to a series of heirs in tail, under a prohibition laid upon these heirs not to alter the order of succession; such entails are the most favoured in the law; they require no irritancies to render them effectual; for the simple prohibition has the undoubted effect, by common law, of securing every substitute, or heir in remainder, against every gratuitous alteration of the succession to their prejudice. But the entail in question, and under which the appellant claims, contains, besides prohibitions to alter the order of succession, also prohibitions against contracting debt, or alienating the estate for the most onerous cause; and, under proper irritant clauses, declares the contravention thereof to be a forfeiture of the right. The late Earl of Cassils therefore, having possessed the estate as heir of entail, under such prohibitions and irritant clauses, directed against altering the order of succession, could not in law make a new settlement of the estate, altering said order of succession, so long as there was an heir of entail alive, and ready to take the estate under the entail; and the appellant, being such an heir of entail, is entitled to succeed accordingly.

Pleaded for the Respondent:—The appellant is not an heir of entail, who in law is entitled to enforce the limitations of the entail. The appellant's title is in the character of one of the heirs-portioners, or heirs whatsomever, of John Lord Kennedy. Such heirs-portioners are considered as heirs of simple destination. An heir of entail is such an heir as can only take under all the qualities and provisions of the entail; but it is admitted that the appellant is not such an heir as could be bound by the limitations of that entail, and therefore, in the eye of law, he cannot be an heir of entail. As, therefore, he cannot avail himself of the limitations, to which he confessedly is not subject, he cannot be heard to plead any objections to the alteration of the succession, which is a privilege only allowed to heirs of entail. The late Earl of Cassils was the right heir of Lord Kennedy

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his father, and would have taken the estate independently of the settlement of 1698. When he executed the settlement sought to be reduced, both characters were in him. He was heir of entail and heir whatsoever. The heirs of entail were all extinct except himself. There were no issue of his own body, and the moment that the heirs of entail were exhausted, the fetters of the entail flew off, and he, the last substitute of entail, possessed the estate in fee simple. He was then in a condition by law, to alter the order of succession, and entitled to make a new settlement.

After hearing counsel, it was

Ordered and adjudged that the said interlocutor be, and the same is, hereby affirmed.

For Appellant, *Tho. Miller*, *Al. Forrester*.
For Respondent, *C. Yorke*, *Alex. Lockhart*.

Note.—Lord Hardwicke has written this note on his papers in deciding this case. "*Vide* the case of Gordon of Park, decided in the House of Lords May 21, 1751; and question, What influence this judgment will have as to the forfeiture of such substitutions, to *heirs whatsoever*, for high treason?"

[Brown's Supp. to Mor. p. 869, et M. 15,609.]

The Right Honourable JOHN EARL of ROTHES, the Right Honourable WILLIAM LORD VISCOUNT BARRINGTON, of the Kingdom of Ireland, and others, - - } *Appellants;*

JOHN PHILIP, Esq., Auditor of the Revenue in Scotland, - - - } *Respondent.*

House of Lords, 16*th January*, 1761.

ENTAIL—RECORDING.—Held that the Act 1685, authorizing the recording of entails, applied to entails executed before that Act was passed, and that such entails were not good against creditors unless recorded.

Margaret, Countess of Rothes, daughter and heiress to John, Duke of Rothes, executed a procuratory in the form of a strict entail of her estates of Rothes in 1684.—Upon
Jan. 1, 1684. which charter passed under the great seal in 1687; and in March 1689 infeftment was taken thereon.

In the year 1685, the statute passed concerning entails