

June 7. 1825. thus formed was founded on right principles. My Lords, having given my best attention to this matter, I see no reason whatever, in this case, to find fault with those reasons which influenced the Court below to repel those objections on the part of Mr Gillan; and, therefore, on the cross appeal also, I should humbly move your Lordships that the judgment be affirmed;—that the interlocutors appealed shall be affirmed, and both appeals dismissed.

Appellant's Authorities.—(In chief Appeal.) Stat. 1633, c. 19.; 1690, c. 30.; 3. Connell, 107.; 1. id. 433.—(Cross Appeal.) 1. Con. 335. et seq.; Cochran, June 26. 1751, (9951.); Lanark, July 29. 1772, (9954.); House of Lords, March 2. 1753.

Respondent's Authorities.—(In chief Appeal.) Stat. 1633, c. 19.; 1707, c. 9.; Kin-noul, May 21. 1823, (Shaw's Teind Cases, No. 20.)—(Cross Appeal.) 2. Ersk. 6. 51.; Johnston, March 3. 1810, (F. C.); Campbell, March 2. 1808, (Ap. 5. Removing); 2. Ersk. 10. 25.; 2. id. 5. 20.; Thompson, Nov. 17. 1611, (3395.); Campbell, Feb. 26. 1741, (14,795.); College of Aberdeen, Jan. 10. 1679, (14,791.); Forbes's Treatise on Tithes, p. 401.; Magistrates of Kirkcudbright, Feb. 12. 1777, (15,765. & Ap. No. 1. Teinds.)

SPOTTISWOODE and ROBERTSON—CONNELL,—Solicitors.

No. 33.

MAJOR MACKAY, Appellant.

ERIC LORD REAY, Respondent.

Prescription.—A fee-simple proprietor having, in 1732, executed an entail of his estate to his son, and the heirs of the son's marriage, and other substitutes, reserving power, with consent of his son, to alter, except as to the heirs of the marriage, on which infestment was not taken; and having, in 1741, with his son's consent, executed a disposition of the estate, without fetters, on which sasine was taken; and having cancelled the entail; and one of the heirs of the marriage having afterwards, by a decree of proving the tenor, revived the entail, on which infestment was taken in 1768; and the heirs of the marriage having become extinct in 1797; and a party who was entitled to succeed, both under the entail and the unfettered disposition, having in ignorance of the latter made up titles under the entail, and there having been a possession for a period exceeding forty years from the date of the infestment in 1768;—Held, (affirming the judgment of the Court of Session), That, having two titles, he was entitled to impute his possession to the unfettered disposition, and that the entail was not rendered effectual against the estate by prescription.

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 1st DIVISION.
 Lord Alloway.

IN the earlier part of the last century, George Lord Reay held the estate of Reay in fee-simple, under a charter from John Earl of Sutherland. He had three sons, Donald, Master of Reay, Hugh, and George. In August 1732, in contemplation of the marriage of his son Donald, Master of Reay, with Marion Dalrymple, a contract of marriage was executed, by which Lord

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Reay granted procuratory for resigning all and sundry the lands, mills, &c. therein specified, ‘ in favours and for new charters and
 ‘ infestments of the same, to be made, given, and granted to the
 ‘ said George Lord Reay, in liferent, during all the days of his
 ‘ lifetime, and to the said Donald, Master of Reay, his eldest
 ‘ lawful son, in fee, and to the heirs-male to be procreated be-
 ‘ twixt him and the said Mrs Marion Dalrymple, his future
 ‘ spouse; which failing, to the heirs-male to be procreate of the
 ‘ said Donald, Master of Reay, his body, of any subsequent mar-
 ‘ riage; which failing, to Mr Hugh Mackay, second son of the
 ‘ said George Lord Reay, and the heirs-male of his body; which
 ‘ failing, to Mr George Mackay, third lawful son of the said
 ‘ George Lord Reay, and the heirs-male of his body;’ which fail-
 ing, another male substitution; ‘ which failing, to the said George
 ‘ Lord Reay, his nearest heirs-male whatsoever; which failing,
 ‘ to the said Lord Reay, his nearest heirs and assignees whatso-
 ‘ ever, the eldest heir-female and descendants of his body se-
 ‘ cluding all the other heirs-portioners, and succeeding without
 ‘ division, through the whole course of succession, in all time to
 ‘ come, after all the heirs-male shall happen to fail.’

This deed was fortified by the usual clauses of a strict entail, and bore a variety of provisions, all directed against Donald the Master, and ‘ the heirs-male of his body, and the other heirs of
 ‘ taillie and substitutes before-mentioned;’ and it was declared, that ‘ the said Donald, Master of Reay, and the heirs-male of his
 ‘ body, and the other heirs and substitutes aforesaid, shall enjoy,
 ‘ bruick, and possess the said estate, by virtue of the present con-
 ‘ tract and infestment to follow hereupon, and by no other right
 ‘ or title whatsoever;’ but Lord Reay reserved power to burden the lands with provisions to a certain extent to the younger children of the marriage, and power to him and his son, the Master, ‘ during their joint lifetimes, in their liege poustie, and
 ‘ with mutual consent, to alter the course of succession and taillie
 ‘ above-mentioned, except in so far as concerns the provisions to
 ‘ the said Mrs Marion Dalrymple, and the heirs and daughters
 ‘ of this marriage.’

Donald had two sons, also named George and Hugh.

In 1741, while the contract remained personal and unrecorded, Lord Reay, with consent of his son and the Dalrymple family, cancelled the marriage-contract; and, ‘ for certain good
 ‘ causes and considerations moving’ him thereto, executed a dis-
 position of the estate in favour of Donald, Master of Reay, in life-
 rent, and George Mackay, eldest son of his marriage with Ma-

June 7. 1825. rion Dalrymple, Mistress of Reay, and the heirs-male of his body, in fee; which failing, to Hugh Mackay, second son of Donald, and the heirs-male of his body; which failing, the heir-male thereafter to be procreated of the body of Donald; which failing, the male substitution called in the marriage-contract of 1732; but, after his own nearest heir-male whatever, calling 'the nearest heir-female of the last heir-male,' according 'to the above destination, who was last in possession of the lands, baronies, and others.' This disposition did not contain the fetters of an entail. Of the same date, Lord Reay and the Master conveyed the rents of the estates to certain trustees, for the payment of debt and other purposes; and a few days afterwards, on the narrative of the reserved power in the marriage-contract to alter, and that it was meet and convenient, for their mutual advantage, and the advantage of their family, to alter the deed of 1732, they executed a deed of consent and ratification, declaring their consent 'to the alteration of the destination of succession in the foresaid contract, in so far as the same is innovate or altered in any respect' by the disposition; and 'declare, that the foresaid disposition was granted with mutual consent of us both, in virtue of the reserved powers above-mentioned.

Lord Reay died in 1748, and was succeeded by his son Donald, (now Lord Reay), who in 1750 took infestment to himself, in liferent, on the disposition 1741; and, in 1760, to his son George, (now Master of Reay), in fee, and the sasines were recorded.

In 1757 his son George married Miss Marion Mackay, and on that occasion, with consent of his father, executed marriage articles, by which he disposed in fee-simple the estate of Reay to himself and the heirs-male of the marriage, on whose failure, to a series of substitutes, one of whom was George, the third son of George Lord Reay, (called by the contract of 1732), and the heirs-male of his body. Infestment followed and was recorded. In 1761 George entered into a second marriage with a Miss Fairlie, and executed a similar deed.

Donald died in 1761, and was succeeded by his son George, who soon afterwards, for the purpose of defeating the trust-conveyance of the rents, revived, by an action of proving the tenor, the contract and entail of 1732. He recorded the decree in the Record of Taillies, and in 1768 expedite a general service as heir-male and of provision to Donald, his father, under the contract of marriage and entail of 1732. He died in the same year, and

having no issue was succeeded by his brother Hugh, who being June 7. 1825: cognosced as a lunatic, his tutors and curators, in August of that year, expedite a general service in his favour as heir-male and of provision of his brother George under the marriage-contract 1732, and infeftment followed. This was the first sasine which had been taken on the marriage-contract 1732. Of this infeftment and relative titles, and inter alia the marriage-contract 1732, a charter of confirmation was obtained from the superior in 1778. Hugh died in 1797 without issue, and thus the heirs of the marriage between Donald and Marion Dalrymple became extinct.

The succession, both to the honours and the lands, now opened to Eric, eldest son of George Mackay, third son of George Lord Reay, the entailer. He made up titles by clare constat as heir of entail to his cousin-german Hugh, the lunatic,—was infeft on the precept,—recorded the infeftment,—and on these titles possessed for a number of years. He then raised an action of declarator against Major Mackay and the other heirs of entail, alleging that he had been in ignorance of the deed 1741, which had removed the fetters from all the substitutes called in the entail 1732, excepting the heir of the marriage, (now extinct); and concluding that it should be found and declared, that he was entitled, without making up any new titles, to hold the estate of Reay in fee-simple; or that, by making up titles to Donald, or his son George, as standing last feudally invested in the estate in fee-simple, he would hold the estate in fee-simple, and be entitled to exercise without challenge all the rights of an unlimited proprietor. Major Mackay stated in defence, that the pursuer, not having connected himself with the deed of 1741, had no interest or title to insist in the action; that even if he had, the contract of marriage was an effectual deed of entail, and the titles made up on it by the pursuer and his predecessors formed the sole subsisting investiture of the estate; that the deed of 1741 was not effectual, and the infeftments following on it were inept, and had been repudiated by George the son of Donald, who restored the marriage-contract, and served himself heir in general to his father; and that the investiture under the entail had endured for upwards of forty years, and thus secured the estate to the heirs of entail called by the marriage-contract. The Lord Ordinary found, 1mo, That the pursuer has a sufficient interest and title to insist in this action, in order to ascertain the precise situation in which he stands with regard to this estate: 2do, Finds, that by the contract of marriage 1732, entered into betwixt Donald, Master of

June 7. 1825. ‘ Reay, and Marion Dalrymple, an effectual entail was intro-
 ‘ duced in favour of the heirs-male to be procreated of that mar-
 ‘ riage, and the series of heirs called upon their failure, provided
 ‘ the same had been completed by infestment and by registration
 ‘ in the Register of Tailles; but finds, that George Lord Reay,
 ‘ then in the fee-simple of the estate, and Donald, Master of
 ‘ Reay, the parties to that contract, expressly reserved the
 ‘ power and faculty of altering that entail, except in so far as
 ‘ related to the heirs-male of that marriage, by any deed to be
 ‘ executed by them in liege poustie: 3tio, Finds, that in 1741 a
 ‘ disposition was executed by George Lord Reay, to Donald,
 ‘ Master of Reay, and others, by which the estate is conveyed to
 ‘ Donald, Master of Reay, and the heirs-male of the marriage
 ‘ between him and Marion Dalrymple, and to the other heirs-
 ‘ male there mentioned, and inter alia to the pursuer’s father,
 ‘ and the heirs-male of his body, without any clauses prohibi-
 ‘ tory, irritant, and resolute; and that infestment was taken up-
 ‘ on this disposition in favour of Donald Lord Reay, in liferent,
 ‘ and George Mackay, his eldest son, in fee, in December 1750,
 ‘ and duly recorded in January 1751; and that this alteration of
 ‘ the entail contained in the contract 1732, in so far as authoriz-
 ‘ ed by that deed, was confirmed by a deed of mutual consent
 ‘ executed by George Lord Reay, and Donald, Master of Reay,
 ‘ the parties in that contract of marriage; and which deed of
 ‘ contract, executed fourteen days after the date of the disposi-
 ‘ tion 1741, proceeds upon the narrative, that “the foresaid dis-
 ‘ position was granted with the mutual consent of us both, in
 ‘ virtue of the reserved powers above-mentioned, dispensing with
 ‘ the generality of these presents, and holding the same to be as
 ‘ valid and sufficient as if all the alterations made in the foresaid
 ‘ disposition of the foresaid contract of marriage had been herein
 ‘ and specially inserted:” And finds, that this deed 1741, upon
 ‘ which infestment followed, was a complete and effectual altera-
 ‘ tion of the entail contained in the contract of marriage 1732,
 ‘ in terms of the reserved power of revocation and alteration
 ‘ therein contained, in so far as related to all the heirs called in
 ‘ that tailie who were not heirs-male procreated of that marriage:
 ‘ Finds also, that in 1757 and 1761, in the two contracts betwixt
 ‘ George, Master of Reay, with consent of his father, Donald
 ‘ Lord Reay, with Miss Marion Mackay, and afterwards with
 ‘ Miss Fairlie, the estates contained in the contract 1732 were
 ‘ settled upon the heirs-male procreated of these marriages, and
 ‘ those heirs-male substituted to them, in fee-simple, without any

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‘ of the fetters of the entail in the contract 1732, which had not
 ‘ then been either registered in the Register of Tailies or com-
 ‘ pleted by infestment; and that, both in the deed 1741 and
 ‘ under these two contracts of marriage in 1757 and 1761, the
 ‘ present pursuer is called as an heir without any of the fetters
 ‘ of the entail 1732: 4to, Finds, that George Lord Reay, and
 ‘ Donald, Master of Reay, conceiving that the interest of the heirs-
 ‘ male of the marriage with Marion Dalrymple had been suffi-
 ‘ ciently secured without the entail contained in the contract of
 ‘ marriage 1732, with the consent of the Dalrymple family cancelled
 ‘ the contract of marriage 1732, and the rents of the estate were
 ‘ conveyed to the heirs-male of the marriage, under the burden
 ‘ of a trust-deed for payment of the debts: 5to, Finds, that the
 ‘ second George Lord Reay, being displeased with the trust-
 ‘ deed as limiting his powers too much, brought an action for
 ‘ proving the tenor of the contract 1732, and succeeded in ob-
 ‘ taining a decree of proving the tenor thereof; and having
 ‘ served himself heir under the contract of marriage 1732, he
 ‘ registered the decree of proving the tenor of this contract in
 ‘ the Register of Tailies 1768: Finds, that the titles of Hugh
 ‘ Lord Reay, who was fatuous, the successor to the second Lord
 ‘ George, were completed by a general service by him as heir-
 ‘ male and of provision of George Lord Reay, in August 1768,
 ‘ and by an instrument of sasine upon the decree proving the
 ‘ tenor of the contract of marriage in 1732, and which was after-
 ‘ wards confirmed by a charter of confirmation by the Countess
 ‘ of Sutherland, the superior, in September 1778: Finds, that the
 ‘ present Lord Reay completed a title by precept of clare constat
 ‘ from the superior as heir of entail to Hugh Lord Reay, dated
 ‘ 21st July 1797: Finds, that George Lord Reay, and Hugh
 ‘ Lord Reay, were both of them heirs-male of the contract of
 ‘ marriage with Marion Dalrymple in 1732, and that they were
 ‘ of course bound by the express terms of that contract, which
 ‘ had been reintegrated; but that the reintegration of that
 ‘ contract of marriage could not affect the deed 1741, and the
 ‘ infestments following thereon, which had not been reduced,
 ‘ except with regard to the heirs-male of the marriage with
 ‘ Marion Dalrymple: 6to, Finds, that the present pursuer, being
 ‘ an heir called both under the contract of marriage 1732 as
 ‘ reintegrated, and also under the deed 1741, made up his titles
 ‘ in 1797, by connecting himself with the contract of marriage
 ‘ 1732, in ignorance, it is said, of the deed 1741: And finds, that
 ‘ having all the right in his person as heir under the contract

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 ' marriage in 1757 and 1761, his making up his titles under the
 ' one deed did not exclude him from making up his titles under
 ' the other deeds, if he thought fit; and that having all these titles
 ' in his person by the repeated decisions of this Court, he can
 ' not be barred, either by the positive or negative prescription,
 ' from founding upon them: Finds, therefore, that as the pursuer
 ' is not an heir of the marriage with Marion Dalrymple, he is
 ' not prevented from making up his titles under the deed 1741,
 ' or any of the other deeds to which he has right; and repels the
 ' defences, and decerns in terms of the second alternative con-
 ' clusion of the libel.' To this judgment the Court, on the 25th
 November 1823, adhered.*

Major Mackay appealed.

Appellant. (Title.)—The respondent has qualified neither title nor interest. He has not connected himself with the deed of 1741; and this is not a declarator merely for the purpose of ascertaining the effect of his own titles, but to have it found that, in respect of the deed 1741, he is entitled to hold in fee-simple.

(Merits.)—An effectual entail was created by the marriage-contract 1732; and by it George, the first Lord Reay, and Donald, Master of Reay, were unquestionably bound. No doubt that entail contained a clause reserving power to alter the order of succession, (so far as the heirs and daughters of the marriage were not concerned), not, however, to abrogate the conditions of the entail. If the latter had been intended, the clause would have been very differently expressed. This construction is made evident, from the motives actuating parties inserting such clauses, from the terms of the deed itself, and from the meaning given to such clauses in other entails: Particularly it is manifest, from the substitution in favour of heirs-female of the marriage. It is undeniable that the heirs of the marriage could not be disappointed; yet the reading contended for, by the respondent has the effect of defeating their claims, which never could have entered into the contemplation of the entailer. The answer, that the last substitute called before the heirs-male would hold the estate in fee-simple, and therefore the destination to the heirs-female is not protected by the tailie, is not sound; for

* See 2. Shaw and Dunlop, No. 509.

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that destination is distinctly protected by the entail; and the destination in favour of the preceding heirs is necessarily burdened with the destination in favour of the heirs-female. But if the deed 1741,—which followed, as if in execution of the reserved faculty,—was not sanctioned by the clause of reservation, then it must be inefficacious, and the sasines following thereon be inept. This is evident, from the construction of the deed itself; and all doubt is removed, when it is recollected, that the respondent admits that no deed altering the order of succession could operate, while the heirs of the marriage were existing. The deed 1741 was therefore ultra vires of the maker, and must fall, as having resulted from an excess of power; and this vitiation must prove fatal in toto; for the deed, looking to its construction, cannot be sustained in part, and be held void in part. Indeed, the party who executed the deed had no power to do so; for by the entail he was merely a liferenter. The appellant's interests are protected in another view: The decree of proving the tenor bore, that the taillie was a sufficient and valid right, title, and security to, &c., and to the other heirs-substitutes by the contract of marriage; and on this title the estate has been held for more than forty years, and thus the positive prescription established, securing an unchallengeable right of succession to the substitutes called by the contract of marriage.

Respondent. (Title.)—The respondent has clearly both title and interest to sue; at all events, he has now made up titles in fee-simple under the deed 1741.

(Merits.)—The entail 1732 never having been feudalized, the reserved power could be exercised by the simple execution of the deed 1741. George first Lord Reay had been, previous to 1732, feudally vested in the estate, and had, therefore, unquestionably power to grant the deed of 1741, and to authorize infestment to be taken on it. The heirs of the marriage certainly were protected from any change of succession; and accordingly they succeeded to, and took up the estate, as long as they existed. In 1797 they failed, and then the succession opened to the respondent, who clearly had a right to hold either by the entail or by the deed 1741; and he chuses the latter. The deed of 1741 was intra vires of the maker, and authorized by the clause of reservation. It was not intended to affect the heirs of the marriage; and accordingly, the marriage-contract 1732 was restored by the decree of proving the tenor. If there were any irregularity in any of the heirs of the marriage making up their titles under the deed 1741, that could have been corrected by reduc-

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The House of Lords ordered and adjudged, 'that the appeal be dismissed, and the interlocutors complained of affirmed.'

Appellant's Authorities.—Roxburghe case, June 23. 1807, (13. Ap. voce Taillie); Heirs of Campbell, June 17. 1746, (15,505.); Sinclair, Nov. 8. 1749, (15,382.); Bruce, Jan. 15. 1799, (15,539.); Porterfield, May 15. 1821, (1. Shaw & Bal. No. 6. : remitted for reconsideration, 2. Wilson and Shaw's Appeal Cases, No. 30.); Smith, June 30. 1752, (10,803.); Durham, Nov. 24. 1802, (11,220.); Welsh Maxwell, June 21. 1808, (F. C.); Lumsden, June 13. 1811, (F. C.); Buchanan's Trust-Assignee, March 4. 1813, (F. C.)

Respondent's Authorities.—Porterfield, May 15. 1821, (1. Shaw & Bal. No. 6. : remitted for reconsideration, 2. Wilson and Shaw's Appeal Cases, No. 30.); 3. Ersk. 8. 32. ; Leslie, Dec. 15. 1710, (15,358.); Earl of March, Feb. 27. 1760, (15,412.); 2. Ersk. 1. 30.

J. RICHARDSON—SPOTTISWOODE and ROBERTSON,—Solicitors.