

[HEARD 10th, JUDGMENT 13th July, 1846.]

WILLIAM MAXWELL, of Cape Town, Cape of Good Hope, and
WILLIAM MERCER, his Mandatory, *Appellants*.

JAMES MAXWELL, Esq., of Brediland and Merksworth,
Respondent.

Tailzie.—Contravention of an Entail cannot be declared by an action,
not brought until after the death of the Contravener.

IN this case, the appellant brought an action against the respondent, heir of entail in possession of the lands of Merksworth, alleging that William Maxwell, the father of the respondent, now deceased, had, while possessing the lands under the entail, entered into contracts for excambion of parts of the entailed estate for other lands of inferior value, the excambion having been made as a device to cover long leases upon grassums which had previously been made of the parts of the entailed lands so given in exchange; and concluding to have it declared, that the lease and excambions were made in contravention of the entail, and that William Maxwell thereby lost all right to the lands for himself and the descendants of his body, and that the right of the respondent, as his descendant, was thereby likewise forfeited. The summons did not contain any conclusion for reduction of the leases or excambions.

The Court of Session, (15 December, 1843,) after advising minutes of debate, and hearing an argument at the bar, found, “that a declarator of irritancy to the final effect of resolving the rights of the descendants of an alleged contravener, cannot competently be raised and insisted in after the death of the contravener,” and therefore dismissed the action.

This interlocutor, the subject of the appeal, was founded upon the opinion entertained by the Judges in the Court below,

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that the question raised by the action had already been decided in the Bargany case, 1 *Wil. & Sh.* 410, and 2 *Wil. & Sh.* App.; and in Gordon *v.* King's Advocate, *Mor.* 4728, and *Cra. & Stew.* 508. The argument at the bar dealt with the question raised, as if it were still an open one; at the same time that it discussed fully the precedents upon which the interlocutor was founded; but as the House rested its judgment upon the precedents as established, it will not be necessary to notice either of the arguments upon which the appellant asked for a judgment in his favour, as the grounds upon which a judgment for the respondent was given, appear sufficiently from what fell from the Lords who spoke at delivering it.

The *Hon. Mr. S. Wortley* and *Mr. A. McNeill* appeared for the Appellant, and cited *Stewart v. Denham*, *Mor.* 7275; *Creditors of Gordon v. Gordon*, *Mor.* 15384; *Gilmour v. Hunter*, *Mor.* App. Tailzie, No. 9; *Carnegie v. Cranbourn*, *Mor.* 10339.

Mr. Bethel and *Mr. Anderson* for the Respondent, cited *Gordon v. King's Advocate*, *Mor.* 4728, and 5 *Bro. Supp.* 782; *Fullerton v. Dalrymple*, 1 *Wil. & Sh.* 410, and App. 2, 1 *Sh. App. Cases*, 265; *Turner v. Turner*, 1 *Dow.* 423; *Dick v. Drysdale*, 16, *F. C.*; *Mordaunt v. Innes*, 460, 1 *Sh.* 169.

LORD CHANCELLOR.—My Lords, the first question the House have to consider in this case is, how far the former decision of this House in the Bargany case, does or does not include the question which has been argued at the bar; and certainly, one would have wished to have found that point more distinctly referred to in the ultimate decision of the House. But again looking through the whole of the proceedings in that cause, it does appear to me that, substantially, the question was not only raised and decided below, but the opinion of the Judges of the Court of Session was affirmed by the judgment

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of this House. I find that, of necessity, the relative situation of the parties was stated in the summons; I find that this particular point was raised by the defender; I find that a considerable majority of the Judges, in delivering their opinions, alluded to this particular point, and expressed their opinion, that the contravention could not be enforced against the heir of the contravener. And then, looking to what passed in this House, I find that at one period *Lord Thurlow*, and that upon a subsequent discussion, *Lord Eldon*, in terms alluded to this question: *Lord Thurlow* saying, “it is a question whether it “be possible to qualify a forfeiture against Sir Hew for himself “and his children, after his own death;” and I find *Lord Eldon* saying, “the question is whether those persons who are “innocent parties, the heirs of taillie, can be excluded from a title “with reference to which they have done nothing to exclude “themselves, unless there be not only an act, but a judgment “of law to that effect.” It is quite clear, therefore, that the question was raised; it is quite clear that the Judges of the Court of Session decided upon that point; and it is quite clear that the noble Lords who advised the House upon those two occasions on which it was discussed in this House, had that point distinctly in their minds. And then I find *Lord Eldon* saying, “every question arising on this point has been searched “to the bottom, and deliberately decided.” *Lord Eldon*, therefore, who points to this as one of the questions, states that every question had been searched to the bottom and deliberately decided; and he advises the House to affirm the interlocutor in the way I am now about to state, which was ultimately done—“that the matters in the pursuers’ summonses are not “sufficient to sustain the conclusions of those summonses.”

Now, though the House might have been of opinion with the Judges of the Court below upon the other points, and though those other points might have been sufficient to lead them to sustain the judgment of the Court below, when we find

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that the point had been raised, and deliberately discussed, and that the noble lords who presided in this House alluded to the point, and then came to the conclusion to affirm the interlocutor of the Court below, stating, “that the summonses did not contain sufficient matter to sustain the conclusion of those summonses,” it is impossible to suppose that they thought the Court of Session wrong in the opinions they had expressed upon this particular point. Though the decision pronounced in that case does not therefore in express terms point to the question, yet, when we find the question argued and decided upon in the Court below, and all the grounds of the decision of the Court below sanctioned and affirmed by this House, it appears to me that that case must be considered as having decided the point; that we must adhere to that decision; and being of that opinion, it would be not only unnecessary, but improper, to consider the grounds upon which that decision was come to. I will, therefore, without entering into the details of those grounds, merely state, that if this point were now for the first time mooted, and the Bargany case had not been decided at all, and this House were called upon in the first instance, to pronounce an opinion upon the question which was discussed at the bar, I should be of opinion that the conclusion should be the same as the conclusion of this House in the Bargany case.

LORD CAMPBELL.—My Lords, I am likewise of opinion that in this case the interlocutor appealed from should be affirmed. I confess that I doubt whether the decision of this House in the Bargany case, is so completely a decision of the question upon which this appeal turns, as absolutely to bind us, and to shut out the discussion of the question. The point was undoubtedly raised in the first Bargany case, and the majority of the Judges in the Court below, expressed the opinion that the action could not be brought against the heir of the contravener; and that opinion is not at all dissented from by Lord

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Eldon in the House of Lords, but it is not introduced as a *ratio decidendi*; and I do not find that Lord Eldon takes any express and specific notice of it—he uses language which would embrace the point—but I think he does not give any express opinion whether, if there be a contravention, an action may be brought against the heir of the contravener.

But, my Lords, as a mere authority, that case is entitled to the greatest weight, because you have a large majority of the Judges of the Court below, who express an opinion that the action must be brought against the contravener, and you have Lord Eldon countenancing that doctrine—although I cannot say that, according to my recollection of the case, he specifically adjudges it.

The great difficulty is, in understanding how, if this point had been decided specifically by the Court below, and by the House of Lords in the first Bargany case, the second Bargany case arose; and why that decision was not at once considered as an entire bar to any subsequent proceeding? But, my Lords, as Lord Thurlow and Lord Eldon have said, there seems to have been a fatality about that Bargany case, from its commencement to its termination; and there is much obscurity hanging over the views of the several judges by whom it was decided.

But, my Lords, I entertain no doubt at all that, independently of the Bargany case, this interlocutor ought to be affirmed. My Lords, I will not consider whether this is a penal action or not a penal action; this is really a matter *positivi juris*, and you must look to see how it has been treated by the law of Scotland. Now it seems to me that, independently of the Bargany case, it has been considered that an action of declarator, so as to take advantage of the forfeiture, must be brought against the contravener. For that purpose, the case of Gordon of Park seems to me to be an express authority, for there the contravention having been in the time

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of Sir William Gordon, and the Crown being placed in the situation of his heir, as if he had died naturally, and had been succeeded by his heir, it was held by the Court below, and it was held by this House, that the action could not be maintained to take advantage of that contravention, because the action had not been commenced against the contravener before the forfeiture. That seems to me, my Lords, to be an express authority, and upon that authority I rely; and I have no doubt at all that an action to take advantage of the forfeiture, must be brought against the contravener.

Then, my Lords, I find no authority on the other side; we were told,—I do not say that it was expressly asserted, but I understand both from the statement in the case, and from the manner in which that case was first cited at the bar,—that in the case of Denham, the action had been brought against the heir of the contravener; but when you examine that case, you find that the action was commenced against the contravener, and by a well-known process in the law of Scotland, it was continued against his heir—the same action being continued by what they call the process of wakening and transference.

Therefore, my Lords, the case of Gordon of Park stands on one side, (setting aside the Bargany case, which has been alluded to so much,) and in my humble opinion it is not met by any authority on the other side; and on that ground I have no doubt that in this case the Court came to a right decision, that the action could not be maintained.

It must be understood that this only settles the point that an action for a contravention, so as to work a forfeiture and to transfer the estate to the next substitute upon the *quibus deficientibus*, must be brought against the contravener. We say nothing whatsoever respecting an action of reduction, whereby the entail may be restored, and the intention of the settlor carried into effect. It has been said that this might give a facility to the docking of estates in tail in Scotland. To gain

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this object effectually, the legislature must interfere, and we cannot resort to a devise as was done in England, in Taltarum's case; but if a decision resting on former authorities, and on the recognized principles of the law of Scotland, has such a tendency, I shall not regret the result.

It is ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the said interlocutors therein complained of, be and the same are hereby affirmed. And it is further ordered, That the appellants do pay, or cause to be paid to the said respondent, the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant. And it is also further ordered, That unless the costs certified as aforesaid shall be paid to the party entitled to the same, within one calendar month from the date of the certificate thereof, the cause shall be, and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

LAW and ANTON—GRAHAME and WEEMS, Agents.
