

16th March 1858.

SECOND DIVISION.

Lieut.-Col. JOHN AUGUSTUS UDNY, *Pursuer*, v. JOHN HENRY UDNY, *Defender*.

Entail—Fetters—Clause—Statute 11 and 12 Viet., c. 36, sect. 43—Construction—Held that an entail was defective, in respect that the irritant clause did not apply to alienations or to the alteration of the order of succession.

By disposition and deed of entail, dated 25th January 1729, and duly recorded, John Fullertone of Dudwick disposed to himself in liferent, and to John Fullertone, his eldest son, and the heirs-male of his body, in fee, whom failing, to his other heirs of tailzie and provision therein mentioned, heritably and irredeemably, all and sundry the lands of Dudwick and others in the county of Aberdeen, and granted procuratory for resigning in the hands of his superiors, in favour of, and for new infeftment of the same, in the terms following, viz. :—

“To me in liferent during all the days of my lifetime, I allwise retaining and carrying the said Collonell John Fullertone his name and armes of Fullertone in all time coming, and no otherwise, and to John Fullertone, my eldest son, and the heirs-male lawfully procreat, or to be procreat, of his body, in fee, he and they allwise assumeing and carrying the said name and armes ; whilks failzieing to Fullertone, my second lawfull son, and the heirs-male of his body, he and they allwise assumeing and carrying as aforesaid ; whilks failzieing, to the third, fourth, or other son lawfully procreat, or to be procreat, of my own body, and the heirs-male of their bodys, they allwise succeeding conform to the priority of their birth, and the son succeeding, and the heirs-male of his body, allwise assumeing and carrying the name and armes of Fullertone, as aforesaid ; whilks failzieing, to Mr James Udny, advocat in Aberdeen, my brother-german, and second son procreat betwixt the said Elizabeth Fullertone and Robert Udny of Auchterellen, her husband, and the heirs-male of the said James Udny his body, he and they allwise assumeing and carrying as aforesaid, and so furth, failzieing one son of the said Elizabeth and her said husband to their next immediat younger son successive, and his heirs-male, who shall be holden to assume and carrie the said name and armes ; whom failzieing, to the second son lawfully procreat, or to be procreat, betwixt Susanna Fullertone, second lawfull daughter to the said Collonell and William Fullertone of that ilk, her husband, and the heirs-male of his body, he and they allwise assumeing and carrying as aforesaid, and no otherways ; whilks failzieing to the next lawfull son procreat, or to be procreat, betwixt the said Susanna Fullertone and her said husband, and the heirs-male of his body, he and they allwise assumeing and carrying as aforesaid, and swafurth, failzieing one son of the said Susanna and her said husband, to their next immediat younger son successive, and his heirs - male, who shall be holden to assume and carrie the said name and armes ; and if there shall be no sons procreat betwixt the said Susanna Fullertone and her said husband to succeed to the said Collonell, his lands and estate, or being, shall failzie to assume his said sirname and armes, as aforesaid, then to the second son lawfully procreat, or to be procreat, betwixt Jean Fullertone, third lawfull daughter to the said Collonell and

her husband, and the heirs-male of his body, he and they allwise assumeing and carrying as aforesaid, and no otherways, whilks failzieing, to the next lawfull son procreat, or to be procreat, betwixt the said Jean Fullertone and her said husband, and the heirs-male of his body, he and they allwise assumeing and carrying as aforesaid, and so furth, failzieing one son of the said Jean and her said husband, to the next immediat younger son successive.

his surname and armes, as aforesaid, then to the second son lawfull procreat, or to be procreat, betwixt Agnes Fullertone, the Collonell's youngest lawfull daughter and her husband, and the heirs-male of his body, he and they allwise assuming and carrying as aforesaid, and no otherways; whilks failsieng, to the next lawfull son procreat, or to be procreat, betwixt the said Agnes Fullertone and her said husband, and the heirs-male of his body, he and they allwise assuming and carrying as aforesaid, and so furth, failsieng one son of the said Agnes and her said husband, to their next immediat younger son successive, and his heirs-male, who shall be holden to assume and carrie the said name and armes; and if there shall be no sons procreat betwixt the said Agnes Fullertone and her said husband to succeed to the said Collonell his lands and estate, or being, shall failsie to assume and carrie the Collonell his surname and armes as aforesaid, then to the said Collonell John Fullertone, his nearest and lawfull heirs and assigneyes, heritably," &c.

The deed was granted under the following conditions:—

"It is hereby provided and declared, that it shall nowise be leisum or lawfull to me or to my saids heirs of tailzie or any of them to alter or infringe this present tailzie, nor to sell, annalsie, dispoen, putt away, wadsett nor grant long tacks above the space of the setter's lifetime of the saids lands and estate hereby tailzied nor any part or portion thereof, nor contract debt nor doe any other deed or deeds whereby the samen may be comprised, adjudged, evicted from me or them in any sort, And if it shall hapen me or my saids heirs of tailzie to failsie and doe in the contrair, then and in that case all and every such debts and deeds to be done by me or them contrary hereunto shall not only be null and of no avail, force, strength nor effect in so far as the same can affect or burden the forsaid lands or estate hereby tailzied in prejudice of this present tailzie and right of succession, But also the person or persons successive failsieng to observe the forsaid provisions and doing contrary thereunto and the heirs of their bodys shall be secluded in all time coming from the saids lands and estate, and the same shall ipso facto pertain and belong to the next person and heir of tailzie to succeed for the time in whose favours the person or persons failsier shall be holden in all time coming to denude themselves and the heirs of their bodys omni habili modo of the saids lands and estate, or otherways it shall be leisum and lawfull to the said heir of tailzie so succeeding by any such contravention to obtain himself served, retoured and infest in the said estate as heir to the person who was infest therein immediatly before the contraveener free of any debts or burdens contracted by the said contraveener: Declaring nevertheless, Likeas it is provided and declared, that for sick debts and burdens as were owing or left in legacie by the said Collonell Fullertone at any time in his lifetime attovr the debts and legacies satisfied and paid as aforesaid, it shall be lawfull to me and my said heirs of tailzie to wadsett, impignorat or dispoen irredeemably one proportionall part of the saids lands and estate hereby tailzied for relief thereof, notwithstanding of the clauses irritant above writen, the said proportion being allwise correspondent and not exceeding in value the quantity of the said debt and burden; And with this provision also that it shall nowise be lawfull to me or them to suffer the said lands or estate or any part thereof to be evicted or taken away from us by comprising or adjudication for the saids debts or burdens or any other debts whatsoever, nor the legal reversions to be expyred, and if we failsie the failsier and the heirs of his body shall amitt and lose the samen lands and estate, and it shall be lawfull to the next person and heir of tailzie then appearand to succeed to interrupt the course of the saids appraisings and adjudications and to redeem the same debito tempore for their own use and behoof, in case the person or persons against whom the saids appraisings or adjudications are deduced shall be negligent, but prejudice of the former clause, whereby it is provided that all debts or debts to be done or contracted by me or the saids heirs of tailzie whereby the said estate may be evicted, comprised or adjudged or the forsaid tailzie altered or infringed are declared to be void and null; with and under the which

provisions, restrictions, conditions and declarations thir presents are made and granted by me alienarly and no otherwise, all which are hereby appointed to be contained in the instrument of resignation, charter and infestment to follow hereupon, and in the services, retours, precepts and sasins of the succeeding heirs of tailzie perpetually in all time coming in the terms of the Act of Parliament King James the Seventh, parliament first, cap. twenty-second anent tailzies; providing and declaring hereby, that the contraveener and the heirs of his body shall amitt and lose all right of succession to the saids lands and estate, and the same shall belong to the next immediat heir of tailzie who would succeed after the contraveener and the descendants of his body free from all deeds, debts or crimes done, contracted or committed by him, and it shall be lawfull to the said next immediat heir of tailzie to procure the rights of the saids lands and estate established in his person in manner as is particularly above provided in the case of the other contraveener above mentioned, acts, instruments and documents upon the said resignation to ask, lift and raise, and generally to doe all other things necessary and requisit thereunto accolyke and also freely in all respects as I might doe therein if I were personally present."

The pursuer, to whom the fee had been propelled by his father in 1842, raised this action in 1856 against the heirs of tailzie in existence, concluding to have it found that the tailzie was defective in so far as the irritant and resolute clauses did not apply to the prohibition against alterations of the order of succession, or to the prohibition against alienation; and that, in consequence and in respect of the Act 11 and 12 Vict., c. 36, sect. 43, it should be declared that the tailzie was ineffectual, and that he was entitled to deal with the estate as held by him in fee-simple.

Besides alleging that the fetters were defective, the pursuer further founded, on the record, upon alleged defects in the investiture and way in which the titles had been made up in the persons of his predecessors; but, as these matters were not taken into account by the Court, it is unnecessary to refer to them.

In defence it was pleaded, that—(1.) the entail was a valid and effectual tailzie, in terms of the Act 1685, c. 22, in respect that it contained all clauses required by that Act. (2.) The entail had not been rendered invalid and ineffectual by any defect in the feudal investiture following thereon, and any objection on that ground was obviated or excluded by the prescriptive progress of titles prior to the date of this action.

The Lord Ordinary, on 20th December 1856, pronounced the following interlocutor:—

"Finds that the prohibitory clause of the entail libelled on against selling, alienating, and disponing, is not duly fenced by a valid and sufficient irritant clause, and that the deed of entail is thereby rendered invalid and ineffectual as regards all the prohibitions.—Therefore, finds, decerns, and declares, in terms of the conclusions of the summons: Finds no expenses due; and decerns.

"Note.—This entail is challenged both on the irritant and resolute clauses. The objection to the irritant clause is, that the expression 'all and every such debts and deeds' contains a limitation to the last members of the prohibitory clause, and does not extend to and annul what is previously prohibited. The objection to the resolute clause is, that under the words 'foresaid provision,' in the singular number, it cannot be extended to the whole of the prohibitions of the entail.

"The more important objection is upon the irritant clause, and its application to the members of the prohibitory clause. It prohibits the maker and his heirs of tailzie—1st, To alter or infringe the tailzie; 2d, To sell, annalsie, dispoen, put away, wadset, or grant long tacks of the lands and estate tailzied; 3d, To contract debt; and following it, 4th, 'Nor do any other deed or deeds whereby the same may be com-