

1800. *February 27.*

WILLIAM CHISHOLM, *against* ELSPETH MACDONALD, and Others.

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Leases followed with possession, granted by a landlord who had only a personal right to the lands, qualified by an entail, on which infestment had not followed, reduced, because they were longer than the entail permitted.

THE estate of Chisholm was forfeited, in consequence of the accession of Roderick Chisholm to the rebellion in 1715.

The greater part of it was held of the Crown, but a branch, called Comarkirkton, was held of Lord Lovat.

The Commissioners of Inquiry disposed the whole to James Baillie, with procuratory of resignation; and he soon after conveyed it to George Mackenzie, his heirs and assignees, assigning the former disposition and procuratory.

Mackenzie took a charter of the whole from the Crown, with the same destination, and conveyed it to Chisholm of Mackerach, by disposition, containing assignation to the unexecuted precept in the Crown-charter, upon which he was infest in the whole lands.

In 1742, he disposed the whole to Alexander Chisholm, (son of Roderick,) and the heirs-male of his body, &c. and he immediately obtained a Crown-charter for the whole, and took infestment.

Lord Lovat afterwards brought a reduction of these titles, so far as they related to the superiority of Comarkirkton, and in 1744, he obtained judgment in his favour.

Owing to his forfeiture, on account of the rebellion in 1745, the process fell asleep; but it was revived first by the Commissioners of Annexed Estates, and afterward by the representatives of the family when the estate was restored; but the decree was never extracted.

Alexander Chisholm, without noticing the process, in 1777 executed a strict entail of the whole estate of Chisholm, containing a prohibition against granting leases longer than nine years, or the life of the granter, with procuratory of resignation in favour of himself and his sons, and the heirs-male of their bodies *seriatim*.

He recorded the entail, but did not take infestment on it.

He was succeeded by his son Alexander, who obtained a brieve from Chancery, which directed the jury to inquire, ‘ si dict. Alexander Chisholm sit legitimus et propinquior hæres masculus talliæ et provisionis dict. quond. Alexandri Chisholm sui patris,’ &c.

He accordingly expedite a general service.

The retour, in terms of the claim made by him before the jury, bore, that he was ‘ legitimus et propinquior hæres masculus, ac etiam hæres talliæ et provisionis, dict. quond. Alexandri Chisholm, sui patris, et literarum talliæ,’ &c.

He immediately applied for a Crown charter of the whole estate of Chisholm; but in consequence of opposition from the family of Lovat, Comarkirkton was not included in the charter obtained by him.

He was infest on the charter, but no further steps were taken by him for completing his title to Comarkirkton. While in this situation, he granted leases of Comarkirkton for eighteen years. They bore to be granted in virtue of 10th Geo. III. C. 51. for improving entailed estates, but it appeared *ex facie* that grassums had been paid by the tenants, which excluded the benefit of the statute.

Alexander having died without male-issue, was succeeded by his younger brother William, who made up titles to the Crown lands, by special service to his brother, and was infest. He resigned Comarkirkton into the hands of Lovat's representatives upon the procuratory in his father's entail, and obtained a charter, on which likewise he took infestment.

He then brought a reduction of the leases of Comarkirkton, so far as they were longer than the entail permitted.

The defenders *objected* to the title of the pursuer, that his charter and infestment were inept, as proceeding upon a procuratory by a person holding under a wrong superior, and upon titles which had been set aside in Lord Lovat's process. But it was *answered*, That an infestment is of itself a sufficient title to prosecute a removing, without production of its warrants, and that even an infestment is unnecessary as a title to insist in a declarator and reduction.

On the merits, the defenders

Pleaded: As the titles made up by Chisholm of Mackerach and the entailer stand reduced, the late Mr. Chisholm might have taken up the lands in fee-simple, by connecting himself with the disposition to James Baillie, and various transmissions of it, without noticing the entail, which at best created only a personal obligation against him, in which case singular successors would not have been affected by the restrictions of it. Now, it appears from the retour, that he assumed alternatively the character of heir-male in general, and of heir of entail; and the defenders are entitled to ascribe his possession to any character in his person which can support the onerous rights obtained by them. This being the case, and the entail being a separate latent deed, it would have been defeated by any posterior right granted by him completed by infestment before it; 22d June 1737, Bell against Garthshore, No. 80. p. 2848; Bankt. B. 4. Tit. 43. § 16.; Ersk. B. 2. Tit 7. § 26.; 13th February 1781, Mitchells against Fergusson, No. 105. p. 10296; 1765, Douglas of Kelhead, (not reported); 31st January 1792, Creditors of Ross of Kerse, No. 108. p. 10300. And possession in leases is equivalent to infestment in rights which require it.

Besides, by act 1685, C. 22. fixing the requisites of entails, none can affect third parties upon which infestment has not followed.

Answered: Alexander Chisholm could not have taken up Comarkirkton in fee-simple, without forfeiting his right to the whole estate of Chisholm, in

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Even if his service had been as heir-male general, as he was not infert, and the entail constituted a valid personal obligation against him, it must be effectual against those who contracted with him, it being only in the case of feudal rights, that personal obligations are not good against third parties; House of Lords, Denham of Westshiels, mentioned in Creditors of Carleton against Gordon, No. 33. p. 15384. and No. 75. p. 10258. Leases followed with possession, are made real by statute in questions with the successors of the landlord; but this will not prevent the qualifications of his own title, when it is personal, from affecting the tenants. It is a mistake to suppose, that the act 1685 applies to parties connecting themselves with a personal right to lands.

The result would have been different, if Alexander had afterward taken a charter and infertment as in fee-simple, or their place had been supplied by a charge to complete his titles in this manner; and to cases of this description only, the decisions quoted by the defenders relate:

The Lord Ordinary 'sustained the pursuer's title to pursue, but found, that 'the right to the lands in question in Alexander Chisholm the entailer was 'personal, and by the disposition thereof in his favour, by Alexander Chisholm of Mackerach, stood destined in the first place, to the heirs-male of his 'body: Found, That as the entail 1777 was not perfected by an apt infertment from the true superior, the destination in the disposition 1742 by 'Mackerach, was not thereby effectually altered or put an end to, and that 'therefore it remained optional to the late Alexander Chisholm, who was both 'heir-male and heir of entail of his father the entailer, to make up titles to 'Mackerach's disposition, whereby, in the first instance, he would be free of 'the fetters of the entail; Found, That by the service of the said late Alexander Chisholm as *hæres masculus*, expressed distinctly as a separate character 'from that of *hæres tailiæ et provisionis*, he carried the unfettered personal right 'in the disposition 1742, and that his right was sufficient to support the leases 'granted by him to the defenders, though upon terms inconsistent with the 'conditions in that deed of entail; therefore sustained the defences,' &c,

Upon advising a petition for the pursuer, with answers, and a counterpetition for the defenders,

The Lords (22d June 1800) adhered, in so far as the interlocutor sustained the pursuer's title, but ordered memorials *quoad ultra*.

And, on considering them, the Court were nearly unanimous in thinking that Alexander's service could, in all the circumstances of the case, be ascribed only to the entail, and that though his service had been in fee-simple, as his right to the lands remained personal, the entail which qualified it was, in terms of the decisions of Westshiels and Carleton, effectual against the defenders.

The leases were reduced.

Lord Ordinary, *Meadowbank*.
Clerk, *Home*.

Act. *H. Erskine, Rae*.

Alt. *J. W. Murray*.

D. D.

Fac. Coll. No. 168. p. 382.

1801. February 24.

MRS. ANN RONALDSON DICKSON, against JOHN SYME.

ANDREW RONALDSON executed a strict entail of the lands of Blairhall, Longleys, and Wester Broom, which was duly recorded.

His eldest son John Ronaldson, the institute, who possessed the whole lands for many years, made up titles to Blairhall in terms of the entail. He afterwards got involved in debt, and wished to take up Longleys and Wester Broom, so as to enable his creditors to attach them. With this view, he obtained from Sir William Erskine, as superior, a precept of *clare constat* to himself as heir-at-law to his father, without referring to the entail, and on this precept he was infest.

At granting this precept, it was not attended to that Sir William Erskine had previously sold the superiority to Mr. Muter, and that he was infest.

The doquet of the instrument of sasine in favour of Mr. Muter, bore, that it was written *manu aliena*, though it appeared *ex facie* of it, that the date, with the names of the procurator, bailie, and witnesses, were written by the notary himself.

Ann Ronaldson Dickson, the eldest sister and next heir of entail to John, after his death, brought against John Syme, to whom John had conveyed Longleys and Wester Broom, as trustee for his creditors, a reduction of the precept of *clare constat*, and infestment obtained by the deceased as being void, from having been granted by Sir William Erskine after he was denuded, so that John Ronaldson having died in apparenacy with regard to these lands, his debts could not be effectual against them.

Against this action, Mr. Syme, besides stating a personal exception against the pursuer from her alleged accession to the trust,

Pleaded: *1mo*, The pursuer is liable for her brother's debts in terms of the act 1695, C. 24. from her having made up titles passing him by. As no infestment was taken on the entail as to Longleys and Wester Broom, and as

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When the institute in an entail, who is likewise heir of line, dies in apparenacy, after the entail has been recorded, and before infestment has been taken on it, the next heir of entail, by making up titles passing him by, does not become liable for his debts, in terms of the act 1695, C. 24.

Objection to an instrument of sasine, that the doquet of the notary bore the instrument to have been written by the hand of another, altho' the date, and names of the procurator, bailie, and