1763. *November.*

JOHN SCOTT NISBET of Craigentinny *against* JOHN YOUNG of Newhall.

No. 90.
A general clause in an entail, restraining the heirs from doing any facts or deeds in prejudice of the right of succession, and declaring such deeds null, and the contravener's right forfeited, no bar to the heir in possession to sell.

William Nisbet of Dirleton became bound, in the marriage-contract with his second wife, Jean Bennet, to provide of his own proper means and estate, separate and distinct from the estate of Dirleton, £.100,000 Scots, to be bestowed upon land, the rights to be taken to himself in life-rent, and to the heirs-male of the marriage in fee.

In implement of this obligation, William Nisbet granted a procuratory for resigning eight ox-gates of land of Restalrig for new infeftment to himself in life-rent, and, after his decease, to David Nisbet, his eldest son of the aforesaid marriage, and the heirs-male of his body; whom failing, to the other heirs-male to be procreated of the said marriage, and the heirs of their bodies; whom failing, to Walter Nisbet, his second son by his first wife, and the heirs-male of his body; whom failing, to the heirs-male of his own body in any subsequent marriage, and the heirs-male of their bodies; whom failing, to certain other heirs-female, and their issue; whom failing, to the second son to be procreated of the body of his eldest daughter, Mrs. Christian Nisbet, and John Scot of Ancrum, her husband, and the heirs-male of the second son of his body; whom failing, to certain other heirs, the issue of his daughters, the eldest heir-female always succeeding without division.

This deed of settlement, after imposing an irritancy upon the heirs-female, in the event of their not marrying a gentleman of the sirname of Nisbet, and carrying the proper arms of Nisbet of Craigentinny, or who should use the said sirname and arms, contained the following clause: "That it shall be noways leisome or lawful to any of the said heirs-male or female to do any facts or deeds in prejudice of the other heirs their right of succession; and which facts or deeds, all and each of them, shall not only be void and null, in so far as concerns the said lands, so as the same shall not be therewith affected or burthened, but likewise the contraveners shall forfeit and amit their right and interest in the aforesaid lands, and the same shall devolve, pertain, and belong, to the next heir, in the order of the above destination."

In consequence of this deed of settlement, which was duly recorded in the register of entails, the succession opened to John Scot Nisbet, the second son of Sir John Scot of Ancrum; who, finding the estate greatly burdened with debt, resolved to dispose of it to the best advantage.

With this view, he entered into a minute of sale with John Young of Newhall, upon the 19th of August, 1762, obliging himself to grant a valid disposition of the lands, and to deliver a sufficient progress to Mr. Young betwixt and Martinmas then next; for which, on the other hand, Mr. Young became bound to pay a price of £.10,000 Sterling.

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Mr. Scott Nisbet, in implement of his part of the minute, made offer of a disposition, and of the title-deeds of the lands, to Mr. Young, under form of instrument, and required payment, or security for the price. But Mr. Young having entertained a doubt whether the sale might not be challenged, at the instance of the subsequent heirs of entail, preferred a bill of suspension, founded upon the clause of the entail above recited; and, in order that the question might be properly tried, Mr. Scott Nisbet brought an action of declarator against Mr. Young, and all the heirs of entail then alive, in which he concluded to have it found and declared, that he was not disabled from selling, and that he was entitled to do so without incurring an irritancy.

No appearance was made for the heirs of entail.

Pleaded for Mr. Young, the suspender: Entails are allowed by statute; and every limitation which the makers of entails think proper to impose upon succeeding heirs must be binding, provided they are properly expressed. No particular form of words is necessary: If the intendment of the entailer is apparent, and if the expression he uses is sufficient to denote the intention, the law does not require, nor will justice permit it to be frustrated by, critical and new construction.

That the maker of the entail in question intended to restrain, not only the power of selling, but every act and deed whereby the estate might be diverted from the line of heirs to which it was destined, is apparent. The long line of succession established by the entail shows how anxious he was to preserve a separate representation; and the clause respecting the heirs-female indicates that he understood the estate was to come to those heirs-female in their order. It is, however, unnecessary to resort to collateral clauses.—The words of the prohibition, declaring, that it shall not be lawful to any of the heirs "to do any facts or deeds in prejudice of the other heirs their right of succession," are most comprehensive; and unless the charger can maintain, that his selling the estate, and pocketing up the price, does not prejudice the right of the other heirs, he must be restrained from doing so.

In the late case of Gordon Cuming of Pitlurg, No. 89. p. 15513. a general clause of this kind, declaring, "That the heirs of entail should never have power, by any deed whatsoever, whether treasonable or otherwise, by contracting of debt exceeding the sum of 12,000 merks for the provision of their other children, or any other manner of way whatsoever to squander or put away the same, or any part thereof, *vel faciendo vel delinquendo*, any ways contrary to this present settlement," was found to restrain the heirs from selling, although there was no special prohibition to that effect, and although it was strongly pleaded, that a constructive prohibition was not sufficient to supply the want of express words.

Pleaded for the charger: Although the statute 1685 allows entails to be made under limitations, restraining the heirs from alienating, contracting debts, or altering the course of succession, yet every limitation must be strictly interpreted, as being a restraint upon the free exercise of property, which is disagreeable to law;

No. 90. and, on that account, no limitation can be inferred by implication, nor extended *de casu in casum.*

Agreeably to this principle, an entail, which only prohibits the altering the course of succession, and the contracting debts, whereby the estate may be adjudged or evicted, will not restrain the heirs of entail from selling or alienating; though a sale does certainly more effectually alter the course of succession, and creates a greater prejudice to the heirs of entail than the contracting debts. So it was expressly determined in the well known case of Hepburn of Keith, (see APPENDIX). In like manner, an entail prohibiting not only the altering the succession and contracting of debts, but also the power of alienation, will have no effect against creditors or purchasers, unless it contain a clause voiding the deeds of contravention; 11th July, 1735, James Baillie *contra* Mauldsly, No. 82. p. 15500. 27th January, 1744, Creditors of Dunipace, No. 84. p. 15501. Again, an entail prohibiting the altering the course of succession, under the strictest irritancy of the contravener's right, will not prevent the heir from selling or contracting debts, nor bar diligence for such debts from burdening or carrying off the estate by adjudication; and so it was adjudged in the case, Campbell *contra* Wightman, 17th June, 1746, No. 85. p. 15505. where the prohibitory words in the entail were: "That it shall not be lawful nor in the power of the heirs of tailzie to alter, innovate, or infringe the aforesaid tailzie, or the order of succession therein appointed, or the nature or quality thereof, any manner of way, and the deeds so done shall be void."

The case of Carlourie, No. 22. p. 15382. is still more apposite. The prohibitory words of that entail were: "That it should not be lawful nor in the power of the heirs of tailzie to alter, innovate, or infringe the foresaid tailzie, or order of succession therein expressed, nor to contract or take on any debts or sums of money, or grant any right of wadset, rights of annual-rent, heritable or moveable bonds, or other rights or securities whatsoever therefor; or grant any life-rent rights, annual-rents, or annuities, upliftable forth thereof, to any person or persons whatsoever; nor do any other such deed that may anywise affect, burden, and evict the lands and others above designed, or whereby the right and benefit of succession of the aforesaid tailzie may be prejudged any manner of way, or whereby the said lands may be evicted, adjudged, or apprised," &c. But the Court found, in an action of declarator brought by the heir of entail in possession, that he was not restrained from selling, there being no clause in the deed *de non alienando.* Indeed, it is altogether improper, in a case of this kind, to talk of the *presumed* will of the maker of an entail. The will of a testator, or maker of a deed of settlement, is the governing rule for determining who are the persons he intends to succeed him, and what he intended them to succeed to. In such cases, presumption may be resorted to with propriety; but where the question respects a restraint upon property, the reverse obtains. Nothing is to be presumed against liberty, but every thing for it; and no restraint can be imposed, but in direct and express terms.

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The case of Gordon Cuming differs from the present in two respects. In the *first* place, there was, in that case, no actual sale; and the action was brought by the heirs in possession, of purpose to defeat the intention of the entailer. In this case, the action is brought to enable the charger to fulfil an onerous bargain, which he is bound to perform under a high penalty; and as the only question is, Whether the suspender's purchase will be secure to him? so even the judgment in the other case seems to point out, that an onerous purchaser would have been safe. In the *next* place, the prohibitory words used in that case, against squandering or putting away the estate, were justly considered as equivalent to an express prohibition to alienate or sell.

"The Lords found the letters orderly proceeded, and decerned in the declarator."

For the Charger, *Montgomery*. For the Suspender, *Lockhart*.

A. W. *Fac. Coll. No.* 121. *p.* 282.

*** This case was appealed. The House of Lords, (20th March, 1765,) ORDERED and ADJUDGED, That the appeal be dismissed this House, and the interlocutor therein complained of be, and the same is hereby affirmed.

1768. *January* 27. M'LAUCHLAN *against* M'LAUCHLAN.

No. 91.

One who had granted a trust-disposition, for the purpose of bringing a reduction of his entail, was found not thereby to have incurred an irritancy, the intention having been only to try the validity of the entail.

Fac. Coll.

*** This case is No. 45. p. 15421.

1772. *July* 14. JAMES CAMPBELL of Blythswood *against* JOHN LOVE.

No. 92.
A second tack for 19 years, to commence upon the determination of a former, of the like endurance, which had near four years to run at the date of the second,

Colin Campbell of Blythswood executed a deed of entail, December 13, 1739, by which he disponed his lands and estate of Blythswood to himself, in life-rent, and James Campbell, his only son, in fee, and the heirs-male of his body; whom failing, to the several substitutes therein mentioned.

This entail contains the usual prohibitory, irritant, and resolutive clauses, *de non alienando, et contrahendo debita;* and it also contains a *proviso*, that the heirs of entail shall not let tacks for above the space of nineteen years.

This entail was duly recorded in the register of tailzies, November 26, 1742; and the maker having died in 1745, was succeeded by his son, the foresaid James Campbell, who made up his titles to the estate upon this entail, and the