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As to the other point, the Court was divided in opinion; but it carried upon a question put, Whether the late Blythswood had power to grant a tack to the extent of the Sheriff's interlocutor? that he had.

"The Lords advocated the cause, and found, that the defender, in virtue of the tack, dated the 6th March 1766, has right to possess the lands libelled for nineteen years, from the date of the said tack."

Act. *M'Queen.* Alt *Sol. Dundas.* Reporter, *Coalston.* Clerk, *Ross.*

Fac. Coll. No. 18. *p.* 46.

1774. *February* 22.

JOHN CARRE of Cavers, *against* ALISON CAIRNS, and Others, Daughters of the Deceased WILLIAM CAIRNS.

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Import of a clause in a tailzie, that it shall be lawful for the heirs of entail to set tacks, the same being only for the life-time of the setter, or for fifteen years, without an evident diminution of the rental, and, if made otherwise, to be void, and deemed a deed of contravention,—and of a lease granted by one of those heirs for nineteen years, containing a clause of warrandice in common form, with an exception, that, in case the granter shall happen to die before the expiration of this tack, the

In the year 1678, Sir Thomas Carre of Cavers executed an entail of his estate, which was recently recorded in the books of Session, but never inserted in the register appointed by the statute 1685.

This entail is guarded with the following prohibitory clause: "That it shall not be lawful to the heirs of tailzie and provision therein mentioned, to sell, annailzie, wadset, or dispone, redeemably or irredeemably, said lands, or any part thereof, or to grant infeftments of annual-rents, or life-rent, forth thereof, or to contract debts, or do any other facts or deeds, civil or criminal, whereupon said lands may be anywise evicted, adjudged, apprised, become caduciary, or escheat." And this prohibition is attended with the usual irritant and resolutive clauses, declaring all such facts and deeds to be in themselves null and void *ipso facto*, by way of exception or reply, without the necessity of any declarator; and that the person, and the heirs-male to be procreated of his body, who shall happen to contravene, by doing any of the facts and deeds above mentioned, directly or indirectly, shall, from thenceforth, and immediately upon the doing and committing thereof, forfeit their right.

The above entail contains the following clause, respecting leases to be granted by the heirs of entail; "That notwithstanding the irritant clause above written, it shall be lawful to the heirs of tailzie to set tacks of the lands and others above-mentioned, the same being only for the life-time of the setter, or for fifteen years, without an evident diminution of the rental, as the lands may be set for at the time, otherwise all such tacks to be null and void, and to be a deed of contravention of the irritant clause above written."

In 1743, John Carre of Cavers granted a lease of the farm of Softlaw to William Cairns, father to the suspenders, for fifteen years; and, in the year 1754, (four years before the expiration of this lease), a new one was entered into between the charger's father, who had then succeeded to the estate, and the said William Cairns, for nineteen years, to commence at the term of Whitsunday 1758: "Which tack the said John Carre binds and obliges him, his heirs and succes-

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obligation of warrandice shall not be extended any farther than what is consistent with the powers he hath by the entail, with respect to granting tacks.

sors, to warrant to be good, valid, and sufficient, free, safe, and sure, to the said William Cairns, and his foresaids, at all hands, and against all deadly, as law will; declaring always, as it is hereby expressly provided and declared, that, in case the said John Carre shall happen to depart this life before the expiring of this tack, then the obligation of warrandice above written shall not be extended any farther than what is consistent with the powers he hath, by the entail of said lands, with respect to the granting tacks thereof."

Cairns the lessee died in the year 1764; the said John Carre of Cavers, the lessor, died in the year 1766; and John Carre, his successor, as heir of entail, as well as universal representative, towards the end of the year 1772, brought an action of removing before the Judge Ordinary, against the daughters of William Cairns, concluding, that they should be decerned to remove from the farm of Softlaw at the term of Whitsunday 1773, upon the ground of their father's tack being determined at the end of fifteen years; and having obtained a decree of removing against the daughters, they brought the cause under the review of the Court, by a suspension.

The principal points agitated between the parties were, 1*mo*, Whether, by a just construction of the deed of entail, the heirs of entail are restrained from granting leases for a longer space than fifteen years, or the lifetime of the granter? and, 2*do*, What is the real and just import and construction of the lease, and clause of warrandice, entered into in the year 1754, between the charger's father and William Cairns deceased?

Upon the part of Carre it was insisted: That the words of the entail, respecting the granting of leases, were express, clear, and unambiguous, declaring that it should not be lawful to the heirs of entail to grant leases for a longer term than the life of the granter, or for fifteen years, without any material diminution of the rental; and, if made otherwise, the leases themselves are declared void, and the person granting them forfeits the estate, not only for himself, but for the heirs-male of his body: That the law had required no precise form of words in making a deed of entail; it is sufficient that the deed be conceived in language sufficiently expressive of the will of the maker, as to the limitation he intends to impose upon his representatives, and the penalties or forfeitures annexed to the transgression of such limitations; all which is done in the present case; and the plain import of the clause is, that the power of leasing shall be only for the life-time of the granter, or for fifteen years. If it is limited to the life-time of the granter, he is laid under no restriction as to the *quantum* of rent; but, if it is granted for the definite term of fifteen years, the land must be set without any material diminution of the rent at the time, as that term may endure after the life-time of the lessor.

Upon the *second* point, Carre argued: That mutual contracts must be explained not only by the express words, but agreeable to what shall appear to have been the meaning or intention of the parties: That, upon a sound construction of the present lease, (the granter being now dead) it cannot be sustained as effectual against the present heir of entail for a longer term than fifteen years, which is now

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elapsed: That, although the lease is granted for nineteen years from Whitsunday 1758, it is qualified with this declaration, "That, in case the said John Carre shall happen to depart this life, before the expiry of the tack, then the obligation of warrandice shall not be extended any farther than what is consistent with the power he hath by the entail of said lands, with respect to the granting tacks thereof."

This express reference to the deed of entail, with respect to the power of granting leases, is as conclusive and binding as if the clause itself had been engrossed in the lease, and the consequences thereof inserted in the same. It is clear that Cairns, as well as Carre, knew what powers the entail gave in this matter. The lease provides, That, in case Carre shall die before the expiry of the tack, (*i. e.* the term of nineteen years) then the warrandice of the lease, for that term of nineteen years, shall not extend further than what is consistent with the powers Mr. Carre had by the entail of his estate, "with respect to the granting leases thereof;" which is the same thing as if he had said, That, in case of the granter's death, the warrandice of the lease, for that term of nineteen years, shall not extend further than fifteen years, as directed and limited by the entail of the estate. The first lease made by Cairns was for the express term of fifteen years. This second lease, besides the certain term of fifteen years, takes the chance of four years more, if the granter should so long live; but, as he died within the fifteen years, the lease must determine at that period, pursuant to the express agreement between the parties and the terms of the lease itself.

Upon the *first* of these points, it was contended for the suspenders:

In the prohibitory clause, above recited, there is no restriction upon granting leases. The single clause, respecting leases in the deed of entail, did not amount to a prohibition against granting a lease for the space of nineteen years, where there was no diminution of the rental.

The only meaning of that clause seems to have been, to restrain the heir of entail from granting leases beyond a limited time, or his own life, for a lower rent than what the land formerly paid. But, supposing the clause to amount to a prohibition, it could have no effect to prevent the heir of entail from the ordinary exercise of property, by granting leases for nineteen years, since there was no clause in the deed which irritated or voided his right to the estate for acting in this manner. That there was indeed a reference in said clause to a supposed irritant clause; but, as no such irritant clause existed, respecting the granting of leases, the prohibition could operate nothing.

Upon the *second* point, the suspenders observed, That, in all questions of this kind, the leasing clause, which ascertains both the estate let, and the term of endurance, is, and must be the governing rule, as all the other clauses are but relative thereto; and that, in the present case, Mr. Carre let to William Cairns the farm of Softlaw for a term of nineteen years certain, without restriction or limitation. The term of fifteen years was no where mentioned in the lease; and as to the exception from the warrandice referring to the powers in the entail, it

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could not regulate the endurance of the lease, but only the extent of the recourse in case of eviction. The only event provided for by the exception from the warrandice, was the recourse competent in case of eviction. It was, therefore, to be held the only one in view of the parties at the time; and, as to remote consequences, they either were not in view, or, if in view, had not been provided against; and, not having happened, could at no rate enter into the question.

"The Lords sustained the reasons of suspension."

Act. *L. Advocate, M'Queen.* Alt. *D. of Faculty.* Clerk, *Ross.*

Fac. Coll. No. 107. *p.* 286.

*** This case was appealed. The House of Lord, 6th May, 1774, ORDERED and ADJUDGED, That the appeal be dismissed, and that the interlocutors therein complained of be affirmed with £.100 Sterling costs.

1778. *August* 5.

SIR WALTER MONTGOMERY-CUNINGHAME *against* JOHN MONTGOMERY-BEAUMONT.

No. 94.
Provision by a wife to her husband, out of lands settled under a prohibition to alter the succession, sustained, although the annuity exceeded the free annual produce of the estate.

James Montgomery of Lainshaw executed a deed settling his estate, failing heirs of his own body, upon his sister Elizabeth, then married to Captain Montgomery-Cuninghame, and a series of heirs in succession. The deed contained a prohibition on the heirs to alter the order of succession, "or to do any other act or deed, directly or indirectly, whereby the same may be any ways altered.

On the death of Mr. Montgomery without issue, the succession to his estate was taken up by his sister Mrs. Cuninghame, under this deed. Her husband died, and she entered into a second marriage with John Beaumont; during the subsistence of which, she executed a bond for an annuity of £.300 in his favour during his life, payable out of the estate of Lainshaw.

Upon her death, Sir Walter Montgomery-Cuninghame, her eldest son of the first marriage, succeeded to this estate. Finding it deeply burdened with debts, he brought a reduction of this bond of annuity, as falling within the prohibition to alter in the settlement of the estate.

Pleaded for the pursuer: The prohibition to alter in the settlement, is a good title for voiding every gratuitous deed in contravention of it; Stair, Inst. B. 3. T. 3. § 39.; Ersk. B. 3. T. 8. C. 23.

The bond of annuity under challenge is a deed of this kind; for, 1*mo*, it is gratuitous. There is no kind of obligation on a wife to make a provision to her husband; L. 33. D. De Don, inter Vir et Ux. But although this annuity to the husband should be considered in the same light as a post-nuptial settlement on the wife by a husband, it must be held as purely gratuitous, in so far as it is immoderate, and unsuitable to the situation of the estate. In this case, the estate is so