1784. *February* 20. SPALDING *against* LAURIE.

No. 51.

Walter Laurie entailed his lands of Bargattan under the usual limitations and restrictions. He afterwards purchased the teinds, which were disponed to him and his successors in the lands; but on this disposition no infeftment followed. On the death of an heir under this entail, a creditor of his pursued the next heir of entail, on the ground, that these teinds having been held by the debtor unfettered by any entail, were liable to his debts. Urged in defence, That accessorial rights are subject to the same qualities and restrictions with their principals, or the subjects to which they are annexed. The Lords found the teinds were not entailed.

Fol. Dic. v. 4. *p.* 344.

*** This case is No. 55. p. 14461. *voce* SERVICE OF HEIRS.

1784. *March* 3.

PATRICK STEWART and Others, *against* ROBERT VANS-AGNEW.

No. 52.
Mutual entail, imposing its restraints on the granters, not good against creditors.

John Vans of Barnbarroch, married a daughter of Robert Agnew of Sheuchan. Afterwards a contract was executed, one part of which was, an entail by Mr. Agnew, of his estate, upon his daughter and her husband, their issue, and a series of other heirs in substitution; and the counterpart, a destination by Mr. Vans, in the same terms, respecting his lands. This mutual tailzie contained conditions prohibiting the granters as well as the heirs from alienating the lands, or affecting them with debt, which were guarded by the usual irritant and resolutive clauses. It was farther completed by infeftment.

Stewart, and other creditors of Mr. Vans, having instituted against Robert Vans-Agnew his son, and the first heir of the entail, an action of reduction of that deed,

Pleaded: The efficacy of entails, in general, might justly have been questioned before 1685. By the statute indeed which passed in that year, every doubt on this head was removed, and validity imparted to entails; but it was to those only which correspond to the description of the enactment, or in the structure of which its directions are observed. These, therefore, are now the only valid entails; the effect of them at common law, (of such, at least, as like the present, are made real by infeftment) being thus precluded. Now, an entail which imposes festers on the entailer himself, is evidently no object of the statute under consideration, the express terms of which exclusively refer to the limitations of property in the person of heirs, alone; a distinction of the most important kind, since it is obvious, what dangerous sources of fraud would otherwise be opened up.

Answered: The contract in question was an onerous deed, the one entail being made in consideration of the other; and the power of executing such a bargain seems to be inherent in the right of property.

No. 52. Observed on the Bench: In order to render entails effectual, it is necessary that the right of the contravener should be resolved; in which case the statute directs the next heir of tailzie, "to serve himself heir to him who died last infeft in the fee, and did not contravene;" a provision totally inconsistent with the predicament of an entailer imposing restraints upon himself. As to the tailzie in question being a mutual contract, the sole effect of that circumstance is to bar revocation *ad libitum;* agreeably to the decision respecting the entail of Macculloch of Barholm. See APPENDIX.

The Lord Ordinary having reported the cause to the Court,

The Lords found, "that the entail was not effectual against any of Mr. Van's creditors."

Reporter, *Lord Justice-Clerk.* Act. *Maconochie.* Alt. *Honyman.* Clerk, *Home.*

S. *Fac. Coll. No.* 150. *p.* 235.

1785. *June* 25.

JOHN MENZIES *against* ELIZABETH MACKENZIE MENZIES.

No. 53.
Powers of an heir of entail, not being the last substitute, to impose new fetters.

The estate of Culdares was limited by a deed of entail executed in the year 1697, which contained the usual prohibitory, irritant, and resolutive clauses.

The devise was, to James Menzies and his heirs-male; whom failing, to John Stewart of Cardneys and his heirs-male; whom failing, to George Stewart, the brother of the former, and his heirs-male; and these all failing, to the entailer's heirs-male. After this followed a destination in favour of the entailer's heirs whatsoever, and their assignees.

James Menzies, and the late Commissioner Menzies, his only son, who had no male-issue, agreed to execute a supplementary entail; whereby, in addition to the substitutes specified in the former deed, their own heirs, including, in the *first* place, the Commissioner's daughter, were called to the succession, before the heirs whatsoever of the original entailer.

After the death of Commissioner Menzies, who survived his father, John Stewart of Cardneys, now Menzies of Culdares, made up his titles by a service, under the original entail. He afterwards brought an action against Elizabeth Mackenzie Menzies, the daughter of Commissioner Menzies, for setting aside the additional settlement, which had been completed by charter and infeftment. In this manner the general question occurred, How far a person possessing an estate under a strict entail, himself not being the last substitute, could make a suppletory entail, to take effect when the subsisting one should come to an end.

Pleaded for the defender: An heir of entail, unless where particular limitations occur, and these too guarded by the statutory clauses requisite for creating a proper *jus crediti* in the after heirs, is as much an absolute proprietor as the entailer himself. Erskine, B. 3. Tit. 8. § 29; 8th November, 1749, Sinclair against Sinclairs, No. 22. p. 15382; January, 1744, Gardener and Creditors of Dunni-