1786. *June* 20.

JANET GIBSON and OTHERS, *against* JOHN CLEARIHUE MACBAIN.

No 11.
A perſon having accepted of a legacy deviſed to him, cannot refuſe effect to a bequeſt contained in the ſame ſettlement, in favour of another.

AMONG the effects belonging to John Clearihue, there was an heritable bond, which devolved at his death to his ſon, who was then in India.

The ſon, however, though informed of his father's death, and though he had given authority to his agents in this country to adopt ſuch meaſures as they thought moſt for his advantage, made up no titles as heir to his father; it being doubted by thoſe who had the management of his concerns, whether he ought to betake himſelf to the heritage, or, after collating it with his father's younger children, to draw a rateable proportion of the whole effects.

In the mean time he executed a latter-will, whereby he bequeathed *his eſtate in India* to John Clearihue Macbain, one of his nephews, and *his eſtate in Scotland* to Janet Gibſon, his mother, and his other relations; expreſsly excluding thoſe who ſucceeded to him in the former, from partaking in any manner of the latter.

A diſpute enſued after his death with regard to the heritable bond. As the ſums thereby ſecured were ſtill *in hæreditate jacente* of the teſtator's father, John Clearihue Macbain, who had taken poſſeſſion of his uncle's India eſtate, *contended*, That theſe did not fall within the words of the deviſe, which were limited to the eſtate belonging to the teſtator; thus endeavouring to diſtinguiſh his caſe from thoſe formerly decided, in which a legacy of a right of lands belonging to a teſtator, was found effectual againſt his heir, who had taken a benefit from the teſtament in which the legacy was given; 17th January 1758, Mary Gainer *contra* Cunningham, No 10. p. 617.

THE LORDS found, 'That John Clearihue Macbain having taken the eſtate or effects acquired by his deceaſed uncle in India, under a ſettlement executed at Calcutta, whereby he ſtood excluded from any dividend of the effects or eſtate, which was, or might become the property of his ſaid uncle in Scotland, is thereby debarred from competing for any part of the ſums in queſtion.'

Lord Ordinary, *Elliock.* Act. *Maclaurin.* Alt. *C. Hay.* Clerk, *Sinclair.*

Fol. Dic. v. 3. *p.* 34. *Fac. Col. No* 273. *p.* 421.

Craigie.

1792. *July* 4.

The VISCOUNT of ARBUTHNOT, *against* The Honourable JOHN, &c. ARBUTHNOTS, and their TUTOR *ad litem.*

No 12.
Whether one ſucceeding to a large perſonal eſtate, be obliged to fulfil his pre-

IN 1733, John, Viſcount of Arbuthnot, executed a deed of entail, in the form of a diſpoſition, reſpecting the lands of Arbuthnot. Failing the heirs-male of his own body, his uncle, and neareſt male relation, John Arbuthnot of Fordoun, and his heirs-male, were called to the ſucceſſion.

No 12.
deceſſor's will, ſo as to expoſe him to forfeiture of a valuable landed property?

After theſe, were called the entailer's other heirs-male, and laſtly his heirs-female; the eldeſt always ſucceeding without diviſion.

The deed contained the uſual prohibitory, irritant, and reſolutive clauſes; and, in particular, it directed, under an irritancy, that the limitations, conditions, and proviſions, ſhould be inſerted in all the ſubſequent inveſtitures. But it had neither a procuratory of reſignation, nor a precept of ſaſine. Being put into the hands of a friend of the family, it remained with him till 1757, when the entailer died.

Mr Arbuthnot of Fordoun, the inſtitute in the entail, having died ſome years before, the ſucceſſion opened to his eldeſt ſon, the late Viſcount of Arbuthnot, who, in 1759, neglecting the entail, made up titles, as heir to his couſin, under the ſtanding inveſtitures, which were ſubject to no limitation. Before his ſucceſſion to the eſtate and honours of Arbuthnot, he had become bound, by his marriage-contract, to ſettle his paternal eſtate of Fordoun upon the heirs-male of the marriage.

In 1777 the late Viſcount executed a new entail of all his lands, including thoſe of Arbuthnot and Fordoun. The prohibitory, irritant, and reſolutive clauſes were the ſame with thoſe in the deed 1733; and the order of ſucceſſion differed only in this, that upon the failure of heirs-male, his Lordſhip called 'his 'own neareſt heirs and aſſignees whatſoever;' ſo that the eldeſt heirs-female, inſtead of having, in their order, a tailzied ſucceſſion, had nothing but a *ſpes ſucceſſionis* along with the other heirs portioners. The heirs of entail were alſo ſpecially required, under an irritancy, to hold the eſtates under this entail, and no other title.

The entail 1777 was duly recorded. In 1789 the late Viſcount died; and his eldeſt ſon, the preſent Viſcount, having expede a general ſervice under the entail 1733, brought an action for ſetting aſide the ſubſequent one.

So far as it related to the lands of Arbuthnot, the action was founded on the prior entail; which, though merely perſonal, and unaccompanied with procuratory and precept, was binding on the late Viſcount, as repreſenting the entailer. With regard to the lands of Fordoun, it was contended, that the late Viſcount, by his marriage-contract, was barred from laying his eldeſt ſon, and the heir of the marriage, under any limitations.

The defenders, who were the preſent Viſcount's children, inſiſted that the entail of 1733 was cut off by the negative prescription. That, however, was evidently founded on a miſtake, as the preſcription could not run till the entailer's death in 1757. They farther contended, that, notwithſtanding the marriage-contract, their grandfather was at liberty to lay his eldeſt ſon, and the other heirs of the marriage, under any reaſonable limitations; and that the entail which he had executed, and which was merely intended to perpetuate the repreſentation of his family, was of that ſort.

Beſides, and what ſeemed to ſuperſede all farther argument, it was ſtated, that the purſuer had taken up his father's moveable ſucceſſion to the amount of L. 30,000; ſo that he was barred from challenging the deeds in queſtion.

No 10.

THE LORDS 'Repelled the objection to the deed 1733; but found, that the 'purſuer, as repreſenting his father, is barred from challenging the deed of en-'tail executed by him.'

In a reclaiming petition, the purſuer

Pleaded: Where a perſon executes a ſettlement, which cannot be immediately effectual, from his want of powers, the grantee, if not liable to the ſame inability, is in general bound to fulfil the teſtator's purpoſe, upon his availing himſelf of thoſe parts of the ſettlement which are favourable to him. But where the ſettlement is not merely impracticable from a defect of power in the teſtator, but the heir is required to do an illegal act, or one which would expoſe him to a forfeiture, this, like a condition which is naturally or morally impoſſible, ought to be diſregarded, and the heir permitted to take under the will, without any obligation to perform what has been required from him. The preſent caſe is to be viewed nearly in the ſame light, as if the teſtator, along with his own lands, had entailed thoſe which belonged to a third party, where the heir of entail, though obliged to fulfil the teſtator's injunctions as to the former, might warrantably omit taking any ſteps as to the latter; Erſkine, 3. 3. 85.

Answered: If the purſuer had made up his titles under the entail executed by his father, a very few years would have invalidated the former one; and therefore, if he is under any embarraſſment, it is one imputable to himſelf only. But the ſubſiſtence of that deed, though it may endanger the purſuer's right, does not preclude the other, which is effectual, till it is brought under challenge, and may, by the force of preſcription, be rendered unchangeable. Beſides, the purſuer muſt be barred from challenging the latter deed, ſo far as it lays him perſonally under farther limitations, the idea of ſetting aſide a deed *in toto*, becauſe in one reſpect it cannot be effectual, being inadmiſſible; and, at any rate, if the purſuer were to be indulged in voiding the entail 1777, ſo far as it is inconſiſtent with the former one, he ought to be compelled, by employing the moveable funds which belonged to the late Viſcount, in the purchaſe of lands, ſubject to the ſame reſtraints which are preſcribed in the deed executed by him, to fulfil, ſo far as it is poſſible, his father's intentions.

After adviſing the reclaiming petition, with anſwers,

THE LORDS 'Suſtained the reaſons of reduction of the diſpoſition and deed of 'tailzie executed by the deceaſed John, late Viſcount of Arbuthnot, *quoad* the 'eſtate of Arbuthnot; but aſſoilzied as to the eſtate of Fordoun and others.' (*See* TAILZIE.)

Ordinary, *Lord Eskgrove.* Act. *Dean of Faculty, Dickson.* Alt. *Wight.* Clerk, *Gordon.*

Craigie. *Fac. Col. No* 220. *p.* 462.

A caſe, Miln againſt Gourlies, 21ſt December 1727, not collected, was decided in direct oppoſition to Anderſon againſt Bruce, No 3. p. 607. *Fol. Dic. v.* 1. *p.* 49.