

1801. *December 15.*

STIRLINGS *against* SIR JOHN STIRLING of Glorat, Baronet.

Sir John Home of Renton died in 1788, in possession of the barony of Renton, holding of the Crown, and of certain other lands, which were held of a subject-superior. To these estates, the late Sir Alexander Stirling succeeded, as heir of line. He made up feudal titles to the barony of Renton, but he never made up titles to the lands which were held of the subject-superior; and with respect to them died in apparency, having been more than three years in possession. These estates had been burdened by Sir John Home with considerable debts, which Sir Alexander Stirling never discharged, but contracted additional debts himself, for which he granted heritable securities over the lands of Renton.

Soon after the succession opened to Sir Alexander Stirling, he executed a trust-deed, 28th June, 1788, and also a deed of entail. These deeds were of the same date, and had relation to each other. In the trust-deed, he mentioned the intention of suspending, in some measure, the operation of the entail, by creating a temporary investiture of the estate in the hands of the trustees, who were to apply the rents to the discharge of the debts, and to the payment of certain annuities, which were there specified. This trust-deed comprehended all the lands of Renton holding of the Crown, which are particularly specified and described, but it did not comprehend any other lands, either in general or in special terms. Of the same date with the trust-deed, Sir Alexander executed an entail of the lands and barony of Renton, fortified with irritant and resolute clauses, in which he specially enumerated all the lands held of the Crown, to which he had made up titles, and, without specifically mentioning any of his other lands, further obliged himself, in general terms, "also to resign and surrender all other lands and teinds which belonged to the said Sir John Home of Renton."

Sir Alexander Stirling died on the 28th February, 1791, and was succeeded by his son, Sir John Stirling of Glorat, Baronet, who made up his titles to those lands which were not held of the Crown by precepts of *clare constat*, from his subject-superior, "as nearest and lawful heir to Sir John Home." Sir John also entered heir to his father, and succeeded, in consequence of this service, to certain tenements in Edinburgh. Meanwhile, the persons named in the trust-deed refused to accept; and the Court appointed a *curator bonis* to execute the purposes of the trust. Upon examining the rental of the estate, and the amount of the debts, application was made to Parliament for authority to sell such parts of the estate as might be deemed expedient; and, by an act of the Legislature, the Court of Session were authorised to order such parts of the estate to be exposed to sale as might be necessary to disencumber the entailed succession.

Certain parts of the lands were accordingly sold; but the purchasers, being apprehensive that the sale might be challenged by the heirs of entail, suspended the payment, upon the ground that there were unentailed lands, which should have been

No. 63.

How far a general obligation, accompanying a specific description of lands in a deed of entail, is binding upon an heir, to the effect of obliging him to execute a supplementary deed of tailzie of those lands which are not specifically described.

No. 63. appropriated, in the first instance, to discharge the debts of the late proprietor, or which should be entailed in place of those which had been sold. After some procedure in this action, the Court found the letters orderly proceeded, reserving to the heirs of entail any claim competent against Sir John Stirling.

Although no steps were taken by the heirs, in consequence of this reservation, it was judged expedient that the matter should be clearly ascertained. For this purpose, a summons was raised at the instance of the heirs of entail against Sir John Stirling, concluding, that he should execute a supplementary deed of entail of the lands held of subjects-superior to the same series of heirs, and under the same limitations as that executed by his father; that he should disencumber them of his own debts; and that he should apply the price of the lands sold to the purchase of other lands, to be entailed in a similar manner. Sir John, on the other hand, raised a declarator against the heirs of entail, concluding, that as he was full proprietor of these lands, to which he had made up titles by precepts of *clare constat*, he should not be disturbed in his possession by any person whatever.

These mutual actions were conjoined, and the Lord Ordinary reported the cause. The heirs of entail

Pleaded: The general words, "all other lands and teinds belonging to the late Sir John Home," can only apply to those lands which Sir John Stirling had taken up in fee-simple, and show clearly, that the late Sir Alexander intended himself to entail, or at least to oblige his son to entail, the lands in question, as well as the barony of Renton. Sir John cannot defeat this obligation, by making up his titles as heir-at-law to his father's immediate predecessors; for his father died after being three years in possession. In a question with singular successors, these lands might be considered as unentailed property; but in a question with the heir, the obligation to entail is effectual, for Sir John cannot approbate and reprobate his father's settlement. He represents his father *passivè* by having served heir, by accepting the annuity provided for him, and being infest in the entailed estate. It is therefore out of his power to shake himself free of his father's personal obligations. If Sir Alexander had completed the entail himself, the lands would have been protected to the heirs of tailzie against the debts of the heir; and as he is liable to implement this obligation, he must put the substitutes of the tailzie on the same footing as his father intended, and must therefore disencumber the lands of his own debts, and entail them upon the same series of heirs, and under the same limitations. In the deed of tailzie, Sir Alexander resigned *nominatim* the lands and barony of Renton, to which he had complete titles; and, accordingly, that part of his estate was effectually entailed. In the same deed, he obliged himself to resign his other lands; and, in the trust-deed, he mentions his having entailed, not only the barony of Renton, but also the other heritages which belonged to Sir John Home. Thus, though the tailzie was not completed by him, there was an obligation upon his heir, which he is obliged to fulfil, as representing his father.

Answered: Sir Alexander Stirling did not entail the lands in question, nor is there any reason to think, unless he meant to reduce his heir to absolute poverty, he ever intended to entail them; for, at the time the deed was executed, the interest of the debts already contracted, with the amount of the annuities which were granted, were more than sufficient to exhaust the rents of the estate. But, whatever may have been his intention, it is clear, that entails are *strictissimi juris*, and are never, by any construction of intention, to be extended beyond the express meaning of the words; nay often, when the intention is perfectly evident, the omission of a word in the prohibition has been found sufficient to render it nugatory.

If these general expressions were to be interpreted in their utmost latitude, the pursuer's plea must go the length of obliging Sir John Stirling to entail upon them all the lands that Sir John Home had ever possessed at any period of his life. But the general words, "all other lands," &c. can only apply to those lands which are specially described in that part of the deed immediately preceding, and to comprehend any parts of them that might accidentally have been omitted. This is the legal sense in which general words are to be interpreted, when subjoined to a specific enumeration; as, for instance, in a general discharge, after a special one in an assignation. The trust-deed, and the deed of tailzie, must be viewed as co-relative writs; and as there is no mention at all of these lands in the trust-deed, the general enumeration in the tailzie cannot apply to them. As to the argument of approbate and reprobate, this general service, which was expedited before the pursuer knew any thing of his father's affairs, cannot be reasonably construed to subject him to such a hardship as would be the consequence of this implied obligation. At all events, such a service may be set aside; and accordingly, in many cases, the Court have reponed the heir against general services, even in questions with onerous creditors; Gordon against Maitland, No. 359. p. 11164. But supposing that there were a legal obligation imposed upon Sir John to entail these lands, it does not follow that he must previously disencumber them of debts; for they were left in such a situation as to make it impossible to prevent the debts from affecting them. The original entail of Renton was under the burden of debt; and if this entail be found effectual, by implication, it must be under the same conditions.

The Lords found, (21st November, 1800,) "That, in terms of the deed of entail executed by the late Sir Alexander Stirling, upon the 28th June, 1788, the defender, his son, as representing him, is bound and obliged to entail the whole lands and teinds belonging to the deceased Sir John Home to which the defender made up titles in fee-simple, after the death of his father, and to resign and surrender the same to and in favour of himself, and the other heirs and substitutes in the said deed of entail executed by his father, and with and under the burdens, conditions, provisions, declarations, restrictions, limitations, and irritant and resolutive clauses, therein contained: That he is bound to disencumber the said lands and others, in so far as they remain unsold, of all his debts and deeds.

No. 63. already contracted, or to be contracted, done or granted by him; and in so far as any part thereof has been sold, to lay out and employ the price and proceeds thereof in payment and extinction of the debts still remaining due by the said deceased Sir John Home and Sir Alexander Stirling, in so far as the same do or can affect the lands, teinds, and others, which belonged to the said Sir John Home, or to purchase therewith other lands, and to entail the same in manner foresaid."

But upon advising a reclaiming petition, with answers, they, by the narrowest majority, altered their former interlocutor, and found, "That, under the circumstances of the case, the lands to which the petitioner succeeded as heir to Sir John Home of Renton, and which are not specifically described in the deed of entail, are not included under the tailzie; and that the petitioner is not bound to execute any supplementary entail thereof, nor to relieve them of his debts and deeds;" and remitted the other conclusions of the libel to be discussed by the Lord Ordinary. See APPENDIX.

Lord Ordinary, *Cullen.* Act. *Erskine, Morehead.* Alt. *Ross, Campbell.*  
Agent for Pursuers, *A. Grant, W. S.* Defender, *R. Ayton, W. S.* Clerk, *Gordon.*

J.

*Fac. Coll. No. 12. p. 23.*

## SECT. II.

### Institute.

1726. February 26. WILLISON against WILLISON.

No. 64.

An institute in an entail having contravened, by contracting debt, &c. a substitute pursued a declarator of irritancy. Objected for the institute, The irritancies were only annexed to the contravention of the heirs; under which he, as being institute and fiar, was not comprehended. The Lords repelled the objection, and decerned in the declarator.

*Fol. Dic. v. 4. p. 332. Edgar. D. Falconer.*

\*• This case is No. 14. p. 15369.