Case 21. James Don Esq; - - - - *Appellant*;
Forbes, Sir Alexander Don of Newton, - - *Respondent.*
28 Nov. 1712.
5 Feb. 1713.

14th *July* 1713.

Construction.—An estate is entailed by a person to himself in liferent, and to his eldest son and the heirs male of his body, whom failing to the entailer himself, whom failing to his second and third sons, and the heirs male of their bodies, &c. whom all failing to the father's nearest heirs, and assignees: another estate is entailed to the second son of the former entailer and the heirs male and female of his body, whom failing to the said former entailer and his heirs male of tailzie, and provision in the former entail: after failure of the institute in the second entail and the heirs male and female of his body, the heir male of the first entailer succeeds to the estate contained in the second entail.

Tailzie.—An heir of entail prohibited from alienating gratuitously, where the prohibitory, irritant, and resolutive clauses, were referred to as contained in another entail.

At making an entail the institute reconveys to his father an estate formerly settled upon him, and he and his wife discharge an obligation upon the father by their contract of marriage; the institute, nevertheless, cannot gratuitously alter.

SIR Alexander Don of Newton, the grandfather of the appellant and respondent, had issue three sons, James, Alexander, and Patrick. In consideration of a marriage between Alexander, his second son, and Anna, the daughter of George Pringle Esq. who brought her husband a considerable portion, Sir Alexander did, by their contract of marriage in 1677, settle and dispone his lands of Broomlands and Ravelaw to the said Alexander his second son, his heirs and assignees, in fee or property, without any restriction; and Sir Alexander did thereby also oblige himself to lay out 25,000*l.* Scots in the purchase of other lands to be settled in the same manner, and to pay the annual interest thereof until such purchase could be made to the said Alexander the son: and the lands of Broomlands and a house in Kelso were thereby settled in jointure on the said Anna, in case she should survive her said husband.

Afterwards, upon the marriage of the said James, the eldest son, Sir Alexander, on the 3d of August 1681, executed a deed of entail of his lands of Newton and others, settling the same to himself in liferent, and to James, his eldest son, and the heirs male of his body, in fee; whom failing, to Sir Alexander the entailer himself; whom failing, to Alexander his second son, and the heirs male of his body; whom failing, to Patrick his third son, and the heirs male of his body, with several other substitutions of heirs; whom all failing, to Sir Alexander (the entailer), his nearest heirs and assignees. The deed contained strict prohibitory, irritant, and resolutive clauses upon the said James and all the other heirs of entail.

Sir Alexander Don, having afterwards agreed with Sir Francis Scott for the purchase of the lands and barony of Rutherford, a transaction of the following nature took place. Alexander the second son, and his wife, reconveyed to the father and his heirs

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the foresaid lands of Broomlands and Ravelaw, and discharged the said obligation in their marriage-contract; and Sir Francis Scott, in 1682, disponed and conveyed the said lands and barony of Rutherford to Sir Alexander Don himself in liferent, and to Alexander the second son and the heirs male and female of his body, "*whom failing to the said Sir Alexander Don and his heirs* "*male of tailzie and provision contained in his infeftment of the barony* "*of Newton with and under the conditions, provisions, and limitations* "*therein contained.*" In this deed, executed by Sir Francis Scott, the purchase-money, being 5500*l.* sterling, is mentioned to be paid by "Sir Alexander Don for himself and in name and behalf of "Alexander Don his son."

After the death of Sir Alexander, in 1686, his eldest son Sir James, and his second son Alexander (afterwards Sir Alexander) entered upon and possessed the several and respective estates so provided to them by their said father.

Sir Alexander Don of Rutherford, in 1710, executed a new deed of entail of that estate, settling the same to himself and the heirs male and female of his body, whom failing to the appellant, the third (*a*) son of Patrick Don, old Sir Alexander's third son, and the heirs of his body: and afterwards died on the 15th of August 1712.

Sir James Don of Newton, being now also dead, and succeeded by the respondent, his son and heir, a competition arose between the respondent and the appellant for the estate of Rutherford. The respondent brought an action of declarator against the appellant before the Court of Session, claiming the estate of Rutherford under the deed of entail made thereof by Sir Francis Scott, whereby the same failing heirs of the body of Sir Alexander the son was settled upon Sir Alexander the grandfather and his heirs male of tailzie, and provision contained in his infeftments of Newton; and contending that the deed executed by Sir Alexander the son, under which the appellant claimed, was void, and that Sir Alexander was expressly tied up from making any alienation of his estate by the deed under which he possessed the same. The appellant appeared and made defences, and the Court, on the 20th of January 1712-13, "Found that the respondent was "next heir of entail of Rutherford by the failure of the heirs of "Sir Alexander Don of Rutherford his body; and that the "clause in the entail of Rutherford mentioning the prohibitory "and irritant clauses in the entail of Newton, hath respect to Sir "Alexander Don of Rutherford, and the heirs of his body, as "well as old Sir Alexander Don of Newton, and the heirs after "him, and that the said entail of Newton, referred to in the en- "tail of Rutherford, is the last investiture in 1681; and that the "disposition of Rutherford, bearing the price to be paid by Sir "Alexander Don the elder, and the right taken to him in life- "rent, and to his son in fee, the fee was so qualified in the "person of the son, that he could not gratuitously alter the or-

(*a*) The respondent's case says the second son.

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" der of ſucceſſion; and therefore decerned in favour of the re-
" ſpondent."

The appellant having reclaimed, after a rehearing of the cauſe on the 5th of February 1712-13, the Court " adhered to their for-
" mer interlocutor, and found that the clauſes irritant in the en-
" tail of Newton, not being verbatim expreſſed, but related to
" in the entail of Rutherford, does affect the entail of Rutherford
" ſo as Sir Alexander Don of Rutherford could not gratuitouſly
" alter the ſucceſſion, and that the entail of Rutherford relating to
" the conditions, limitations, and proviſions in the entail of New-
" ton does alſo comprehend the irritancies in the entail of Newton."

Entered, 28 May, 1713.

The appeal was brought from " certain interlocutory ſen-
" tences, or decrees, of the Lords of Council and Seſſion of the
" 20th of January and 5th of February 1712-13."

Heads of the Appellant's Argument.

By the reconveyance and diſcharge made by Sir Alexander the ſon and his wife of the ſaid eſtates of Broomlands and Ravelaw, &c. ſettled, or agreed to be ſettled, by their marriage-contract, Sir Alexander the ſon was and ought to have been adjudged the real purchaſer of the ſaid barony of Rutherford; and therefore, according to the laws of Scotland, he had power to ſettle and diſpone the ſame as he thought fit, as he might the ſaid eſtates of Broomlands and Ravelaw, if they had not been reconveyed.

Though Sir Alexander the ſon had not been ſuch real purchaſer, yet the clauſe in the entail of Rutherford, referring to the entail of Newton, could not properly be underſtood otherwiſe, than for limiting the eſtate of Rutherford, in caſe of Sir Alexander the ſon's death without iſſue to Patrick the appellant's father, who in the entail of Newton, is mentioned next ſubſtitute, or in remainder after the ſaid Sir Alexander the ſon and his heirs male.

And, however this might be, though Sir Alexander the ſon might by the irritant or prohibitory clauſes in the ſaid deed referred to, be reſtrained from ſelling, contracting debts, or doing any acts whereby the eſtate might be evicted from the family by a ſtranger, yet he could not by any thing therein contained be debarred from altering or interrupting the couſe of ſucceſſion thereto in his own family.

Heads of the Reſpondent's Argument.

Whatever tranſactions were betwixt the father and ſon, it is certain that old Sir Alexander Don, was the purchaſer of the eſtate of Rutherford; he paid the price, he took the eſtate to himſelf for life, to him the deeds relating to that eſtate were to be delviered, and to him the warrandice was granted. And ſince the ſaid eſtate was ſold conditionally, and Sir Alexander the ſon accepted of, and poſſeſſed by that deed, the appellant who claims under him, can be in no better circumſtances. Sir Alexander the grandfather, then, being the purchaſer, might diſpoſe of and ſettle his eſtate in what way and manner he pleaſed; and he having expreſsly

expreſsly granted it under the conditions, limitations, and reſtrictions, contained in the infeftment of Newton, whereof this was one, that neither he who was inſtitute, nor any of the ſubſtitutes, ſhould be capable to do any deed to the prejudice of any of the ſubſtitutes, Sir Alexander the ſon, was no doubt tied up from doing any deed to alter the order of ſucceſſion, and conſequently the deed under which the appellant claims is void.

Though, as the appellant contended, the reſpondent could not be ſerved heir to old Sir Alexander, who became merely a life-renter, yet he is in the true genuine ſignification of the word his heir, that is univerſal ſucceſſor to him: to the reſpondent alone ought the lands of Rutherford by the ſaid deed to deſcend: he alone is Sir Alexander the grandfather's heir male, being his grandſon by his eldeſt ſon: he alone is heir of entail, and proviſion of the eſtate of Newton, the ſame being limited to him in the firſt place, and as ſuch he has ſucceeded to, and now is in poſſeſſion of theſe lands. And the deſcription in the deed of ſettlement of the Lands of Rutherford, whereby the ſame are limited upon the failure of the iſſue of Sir Alexander the ſon, to Sir Alexander the grandfather's heirs male and of entail and proviſion in the lands of Newton can poſſibly agree to nobody elſe but the reſpondent.

If the word heir was taken in ſo reſtricted a ſenſe as the appellant contends it could be of no import to him, ſince Sir Alexander the father having died, when he was but life-renter, the appellant no more than the reſpondent could be *heir* to him. For the only caſe in which Sir Alexander the grandfather could have an heir ſerved to him, was upon the event of the reverſion of the eſtate of Newton to him, upon failure of iſſue male by his eldeſt ſon, but even in that caſe the reſpondent has a good claim, being Sir Alexander the grandfather's right heir, and as ſuch the laſt in ſubſtitution mentioned in the ſaid deeds of ſettlement.

The reſpondent's claim is not only founded upon the expreſs words of the deed, but upon the preſumed will of the donor, who having acquired a conſiderable eſtate, did mutually entail the eſtates that he granted to his eldeſt and ſecond ſons, expreſsly tying them both up from doing any thing in prejudice thereof, deſigning (as he expreſſes it in the recital of thoſe deeds) *the continuation of his memory and family*: and were there any doubt, as there is not, the preſumed will of the donor is of great weight, and the rule in ſuch caſes.

The appellant objected that the irritant clauſes, &c. were not expreſſed, but only referred to in the entail of Rutherford, and ſo not binding, but this is contrary to all the known rules and principles of the law of Scotland, by which ſettlements are very often made to have relation not only to deeds already executed, but to ſuch as may be executed; and in this caſe, Sir Alexander the grandfather having made that ſettlement of the lands of Newton, and a very few months after this of Rutherford, he could not have better expreſſed his intention, that the ſeveral heirs of entail ſhould be tied up from alienating the eſtate, than by making it under all the conditions, limitations and reſtrictions, mentioned

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in the firſt deed, which had been duly publiſhed and inſerted in the publick records of the kingdom.

Judgment, 14 July, 1713. After hearing counſel, *the queſtion was put "whether the ſaid "interlocutory ſentences, or decrees ſhall be reverſed," it was reſolved in the negative :* (*a*)

Ordered and adjudged that the petition and appeal be diſmiſſed, and that the interlocutory ſentences or decrees, therein complained of, be affirmed.

(*a*) Nothwithſtanding the form of this judgment, it is not therefrom to be underſtood (as I believe,) that the judgment had been oppoſed; this is the common form of putting the *queſtion* on every judgment on appeal.

Caſe 22. George Lockhart Eſq; - - - *Appellant;*
John Cheiſly of Kerſewell, Writer in Edinburgh, Margaret Pow, William Montgomery, Walter Cheiſly, and William Bertram, - - - - - *Reſpondents.*

7th *May* 1714.

Non-entry.—A Superior having obtained a general declarator of non-entry, his agent in a ſubſequent ranking reſtricts the ſuperior's intereſt ſo as to be ranked poſterior to annual renters. On a reduction by the ſuperior on the head of leſion and as being *abſens reipublicæ cauſa*, the ranking is ſuſtained.

Ranking and Sale.—It is not relevant to reduce a decreet of ranking, that poſterior to the date of the decreet the intereſts of certain creditors were produced, and ranked, and yet no new decreet put up in the minute-book.

JOHN CHEISLY deceaſed, late huſband of the reſpondent Mrs. Pow, was vaſſal in the lands of Kerſewell, of which the appellant was ſuperior; and he was alſo indebted to the appellant.

Theſe lands being much incumbered, Mr. Cheiſly's ſon and heir, the reſpondent John, did not enter as heir to him and there being ſeveral creditors upon the ſaid eſtate who claimed by different titles, an action of ranking and ſale for determining the preferences of the creditors, and for ſelling the lands for their ſatisfaction, was brought before the Court of Seſſion.

Pending this action, the appellant brought a declarator of non-entry againſt the reſpondent, the heir, before the Court of Seſſion, but he did not call the creditors as parties. The court in that action pronounced an interlocutor declaring that the ſaid lands had been in non-entry, and in the hands of the appellant ſince the death of the laſt poſſeſſor, and were to continue in the appellant's hands till the entry of the heir, and that thereby the rents, duties, and profits of the ſaid eſtate, from the 18th of January 1702-3, did belong to the appellant. But afterwards the appellant, having ſundry ſums due to him and thoſe under whom he claimed, by adjudication upon the ſaid eſtate, agreed and conſented in his action of declarator to reſtrict his claim ſo far as only to remain a ſecurity for payment of the ſeveral ſums due to him, he being firſt paid; and after making this reſtriction the Court gave judg-