1734.

RICHART
v.
HOPETOUN.

JAMES HEPBURN RICHART of Keith, *Appellant*; CHARLES, EARL of HOPETOUN, *Respondent*.

5th April 1734.

TAILZIE.—A prohibition, with irritant and resolutive clauses against charging the estate with debt, found not to disable from selling.

SIR ROBERT HEPBURN of Keith settled, under the burden of all his debts, the lands of Keith and Paistoun, by an entail containing strict prohibitory, irritant, and resolutive clauses against contracting debts, and charging the estate therewith, but no express prohibition against alienating the lands or any part of them. No. 29.

Robert Congaltoun, possessing under this deed, sold to the Earl of Hopetoun the lands of Paistoun, (the price of which appears to have been in part applied in payment of the entailer's debts.) On Robert's death, the appellant, having made up titles as heir of entail, raised an action of reduction for setting aside this disposition, as being in defraud of the entail, and granted by a person disabled from alienating by clauses inserted in his own title.

The cause being reported by the Lord Ordinary, the following interlocutor was pronounced: "The "Lords having considered the entail libelled, and "that it contains no clause disabling the heirs of "entail to dispone the lands therein contained; "find that they might lawfully dispone or sell the

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"lands for onerous causes, and assoilzie the de-
"fender from the reduction, and decern accord-
"ingly." A reclaiming petition was refused.

The appeal was brought from these interlocutors of the 15th and 17th February 1732.

Pleaded for the Appellant:—The scope and intention of a settlement ought to be observed by heirs claiming under it. The entailer disabled the heirs of entail from charging the estate with debt for no other reason than that the several heirs might take the lands without being diminished in their value; and therefore it is quite unreasonable to suppose that he should have left them at liberty to alienate the subject.

Had Robert granted a wadset of the estate for debts contracted by him, he would, according to the scope of the settlement, have forfeited his right, and the security so granted by him could have been set aside by the appellant. If, however, he could not grant a right, with an equity of redemption in favour of the heir of entail, it would seem absurd to hold that he could alienate, absolutely and without redemption.

Pleaded for the Respondent:—Restraints upon property, being contrary to the nature of a fee, and to the common law of the land, and a great incumbrance upon commerce, are never to be presumed, where there are no express words by which they are plainly, and without implication, imposed. Such a construction would only prove a snare to purchasers, who transact on the faith of there being no other limitations of the heir's right than what are expressly set forth in the title.

The estate, notwithstanding the entail, remained

subject to the payment of the entailer's debts; and therefore it is reasonable to suppose that he forbore to restrain his heirs from alienating, with an intention that they might, by sale of part of the lands, be enabled to discharge the burden of debts put upon them.

The heirs of entail are only disabled to charge the lands with their own proper debts, but not to burden it for the debts of the entailer; and probably he was of opinion that heirs might be more easily prevailed upon to incumber than to alienate their estate; and therefore restrained them only in that respect; at all events, by the deed, the heirs are not restricted from selling for valuable considerations; and therefore the respondent having purchased *bona fide*, and paid the price, he holds and enjoys the estate even by the will of the maker of the entail. It was his will to put on one restraint and not another; and what he has actually expressed, is the only rule by which the power of the heir over the estate can be measured, who, in virtue of the fee conveyed, has the full exercise of the property in so far as he is not expressly restrained.

After hearing counsel, "it is ordered and adjudged, &c. that the appeal be dismissed, and "that the said interlocutory sentences or decrees "therein complained of be affirmed." Judgment April 5, 1734.

For Appellant, *Dun. Forbes, Al. Hume Campbell.*

For Respondents, *Ch. Areskine, Ro. Dundas.*