" 'the action,' commenced by the appellants, and " therefore, 'sustained the defence, and decerned " 'accordingly,' be, and the same is hereby reversed. " And it is declared, that there is a sufficient title " in the appellant, George Morrison, to carry on " this action; and, therefore, it is hereby ordered, " that the said action be sustained at the instance " of the said George Morrison."

For the Appellants, *W. Hamilton, K. Evans.*
For the Respondent, *C. Maitland, W. Murray.*

Lord Elchies says, that " the Chancellor thought the objections to " the first suit well founded, and that a committee in England could " not sue in Scotland, but that yet the lunatic might sue in his own " name; and that though the first suit was brought in name of his " committee as of a lunatic, which they could not do in Scotland, " yet when the suit was afterwards brought in the lunatic's own name, " we could take no notice of his lunacy unless a brieve of furiosity " had issued, and, (I supposed, he added), that he had been found " furious; or if we did take notice of it, it could only be as a lunatic " at large, which could not bar a suit in his name; and that the " union made no difference, for that the law would be the same in " England."

JAMES DAVIDSON, - - *Appellant;*
CAPTAIN HENRY SINCLAIR, *et alii, Respondents.*

14 *February* 1750.

TAILZIE.—A prohibition, with irritant and resolutive clauses, against altering the order of succession, or contracting debts, or doing any deed by which the right of succession may be prejudged in any manner of way, is ineffectual to prevent a sale of the estate.

[Elchies, *voce* Tailzie, No. 36. Mor. Dict. 15382.]

No. 87.

THE entail of the estate of Carlourie contained prohibitory, irritant, and resolutive clauses, not

1750.

DAVIDSON
v.
SINCLAIR, &c.

" to alter, innovate, or infringe the foresaid tailzie " or order of succession therein appointed, nor yet " to contract or take on any debts or sums of mo- " ney, or grant any right of wadset, rights of an- " nualrent, heritable or moveable bonds, or other " rights or security whatsoever therefor, &c. nor " do any other fact or deed that may anywise af- " fect, burden, or evict the lands, and others above " resigned."

Sinclair, the heir in possession, sold the lands with absolute warrandice to Davidson, who, alleging that the heir was disabled from selling by the above prohibition, presented a bill of suspension of a threatened charge for the price. Sinclair, thereupon, brought an action of declarator against the heirs of entail, to have it found and declared, that he had a right to sell and dispose of the estate. A counter declarator was raised by the heirs of entail, to have it found, that by the sale in question, an irritancy had been incurred under the entail.

These actions being conjoined by the Lord Ordinary, (to whom the suspension was likewise remitted,) it was pleaded for the heirs of entail, that in all settlements, the will of the donor is the governing rule, and as it was the evident intention of the maker of the entail that the succession should go invariably to the heirs, and in the order, appointed by him, and as he had prohibited all acts and deeds which might interrupt or alter that course of succession, it must import a prohibition against sales, which would completely defeat it; that the intention of the entailer was expressed in precise words, for he prohibits the heirs of entail " to alter, innovate, or infringe " the said tailzie or order of succession," or to do " any other act or deed that may any ways affect,

"burden, or evict the lands," or "whereby the "right or benefit of succession may be prejudged "in any way;" which words did fully comprehend a prohibition to alien the estate in prejudice of the heirs of entail.

The case being reported to the Court, it was found, (9th Nov. 1749,) "That Captain Henry "Sinclair, the pursuer and charger, is not restrain- "ed from selling by the entail in question, there "being no clauses therein *de non alienando*, and "therefore, find that he may sell, and decern in "terms of the declarator at his instance," &c.

The appeal was brought from this interlocutor.

Entered, Nov. 29, 1749.

Pleaded for the Appellant:—It is inconsistent to suppose a settlement, in the form of an entail, importing a line of succession, with prohibitory clauses against contracting of debt, or altering the order of succession, and yet that any heir of entail is at the same time at liberty to sell the lands at pleasure. Besides, the prohibitory clauses are conceived in such general and comprehensive terms, as not only may, but in proper construction do include every act or deed by which the right of succession might be prejudged, which would be effectually done, contrary to the plain intention of the entailer, if a sale of the estate be allowed; so that, if these prohibitions, expressed in these general words, are to have any operation, and not to be deemed superfluous, they must surely import a prohibition to sell, and cannot be otherwise explained by any just construction.

Pleaded for the Respondents:—Although the act 1685 authorises entails with such restrictive clauses as the entailer shall think fit, yet such restraints and perpetuity of liferents, being contrary

to the rules of common law, and to the natural use of property, are never extended farther than they are fully and clearly expressed; and, therefore, if an entail contains a prohibition to alter the order of succession, under an irritancy, this will strike against all new settlements, but it will not bar a sale of the estate, nor the charging it with debts, even although such sale or incumbrance will as effectually exclude the order of succession fixed by the entail, as any new destination whatever; for the law does not allow restraints to be imposed by implication, nor those expressed in the entail to be extended further than the words strictly bear. So likewise, although it contain further a clause prohibiting the contraction of debt, whereby the estate may be evicted, this will not import a restraint upon selling, although a sale effectually alters the course of succession, and is of greater prejudice to the heirs of entail than charging the estate with debt.

By parity of reason, although an entail contains prohibitions against selling, against contracting debt, and altering the order of succession under an irritancy, yet if these be not also fortified with proper resolutive clauses, they will be ineffectual against all such deeds. Hence, although the entail in question contains prohibitions to alter the order of succession, to contract debts, or grant securities therefor, it contains no prohibition to sell; and therefore, the heir in possession is entitled to that legal consequence of his property, in the same manner as if it had been vested in him by an unlimited title. Whatever may have been the entailer's intention, if he has not imposed this restraint by express words, his will can have no effect. In

the present case the entailer has not used proper words to prohibit a sale or alienation, but on the contrary, has omitted such prohibition; and as he has not used the known technical words for such a prohibition, but has it omitted altogether, it must be held that such was his intention, and that by the entail, as well as by the disposition of law, the heirs should be at liberty to sell the estate.

Judgment, Feb. 14, 1750.

After hearing counsel: "It is ordered and adjudged, &c. that the interlocutor complained of "be, and the same is hereby affirmed."

For Appellant, *C. York.*
For Respondents, *W. Murray.*

The Honourable FRANCIS CHARTERIS of Amisfield, - - - *Appellant;*
The LORD ADVOCATE, - - *Respondent.*

22 February 1750.

IRRITANCY.—FORFEITURE.—A conveyed his estate to the second son of B, and appointed trustees, (three of whom were declared to be a quorum,) to direct his education. He at the same time left a sum of money to B's eldest son, on condition that B did not interfere with or hinder his trustees in the management of the second son. In a claim for repetition of the money on the ground of B's interference, it was found that the forfeiture was not incurred, a *quorum* of the trustees never having acted.

[Elchies *voce* Tutor, No. 22. Br. Sup. v. 772. Mor. 7283.]

No. 88.

COLONEL CHAPTERIS of Amisfield settled his estates, under the form of an entail, upon his grandson, (the