"I do not recollect in this country a single instance where interest is charged on some sums the moment they are received, and others at twelve months thereafter. It is obvious, that trustees are not to lay out immediately; but still, in a question of interest, they are liable from the moment they are received.

"The Court here have adopted a different rule. It seems difficult to say that your Lordships should reverse the interlocutors on this head; for where five per cent. is given on sums when uplifted, it might be asked, why your Lordships do not charge on other sums according to the same rate and principle. There is no cross appeal on this point.

"The appellant said, that three per cent., which is got from bankers, was sufficient. It is dangerous to lay down a rule of this kind, so that executors and trustees may be at liberty to speculate, and, notwithstanding, shall only be held liable at three per cent. Nothing, I hope, which has fallen from me will be understood that this House is of opinion that a trustee is to be so charged. It is not proper to alter, but I have said so much as to show the special grounds on which your Lordships concur."

It was ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellant, *C. Hope, Wm. Alexander.*

For Respondents, *W. Adam, D. Monypenny.*

NOTE.—Vide App. to Mor. Dict., "Annual Rent," No. 2.

[Mor. p. 15473 et App. Mor. Dict. "Tailzie," No. 5.]

JOHN SYME, W.S., Trustee for the Creditors of Mrs. Ann Ranaldson Dickson of Blairhall, } *Appellant;*

Mrs. ANN RANALDSON DICKSON of Blairhall, and JAMES RANALDSON DICKSON, Esq., her Husband, for his interest, . . } *Respondents.*

House of Lords, 25th April 1803.

ENTAIL—CONTRACTION OF DEBT—RESOLUTIVE CLAUSE—DISPONEE.—The entail executed in this case, contained clauses prohibitory, irritant, and resolutive, against selling or contracting of debt; and the question was, whether these clauses respectively were directed against the institute, so as to include him as an heir of entail? The prohibitory and irritant clauses included him expressly by name, but the resolutive clause, which, in this instance, formed a part of the same clause or sentence with the irritant, only made reference to "the person or persons, heirs of tailzie *foresaid*." In

1803.

SYME
v.
DICKSON, &c.

an action at the instance of a creditor of the institute against the next heir of tailzie, Held, that as she did not represent the deceased as heir portioner, but succeeded as heir of tailzie, she was not liable in payment of this debt, against which the entail protected.

Andrew Ranaldson, the father of John Ranaldson, execut-

1771. ed an entail of his lands of Blairhall, to and in favour of himself in liferent, and *to John Ranaldson his eldest son*, and the heirs male lawfully to be procreated of his body, in fee; whom failing, to a series of heirs named in the entail. The deed contained proper and apt prohibitory, irritant, and resolutive clauses, directed against selling, alienating, wadsetting, disponing, or contracting debts, and granting bonds or other securities, heritable or moveable.

The prohibitory clause set forth, "That it shall not be law-
"ful to, or in the power of the said *John Ranaldson, my*
"*son, or any other of the heirs of tailzie* above mentioned,
"to sell, alienate, wadset, dispone, or grant in feu, either
"redeemably or irredeemably, the lands herein after convey-
"ed, or to contract debts, or grant bonds or other securities
"of whatever nature, whether heritable or moveable; nor shall
"any debts the heirs of entail may be owing, &c., anywise af-
"fect or burden the lands, or any part thereof, or the heirs of
"tailzie succeeding therein. Nor shall the heirs of tailzie suf-
"fer or permit any decreet of certification to pass, whereby
"any part of the said tailzied estate may be affected or
"evicted in any manner of way."

The irritant clause declared "That in case *my said son*,
"*or any of the heirs of tailzie* appointed to succeed to him in
"manner before mentioned, shall" contravene the said prohibitions, &c.

The resolutive clause did not allude to the son, but was so connected with the preceding irritant clause (which did specially mention the son) as to form one continued part of the same clause or sentence thus: *But also the person or persons, heirs of tailzie* FORESAID, "so contravening these con-
"ditions, shall forfeit," &c.

The entail was recorded; and, on his father's death, John Ranaldson, the son, made up titles under the entail, and possessed until within a year of his death. Having found himself greatly encumbered with debt, he executed a trust disposition, whereby he conveyed all his means and estate, and particularly the lands in the above entail, for the purpose of paying his

June 22, 1796. debts, in favour of the appellant and another. He died in a

year thereafter, without issue, being succeeded by the respondent, Ann Ranaldson, his eldest surviving sister.

The appellant having further acquired right to sundry debts, due by John Ranaldson, he thereupon raised an action against the respondents for payment of one third part of these debts, as charged, to enter heir portioner to him. In defence, it was pleaded, that the respondent did not represent her brother as an heir portioner, or in any other respect, but as heir of entail; and, therefore, that she was not liable for any of his debts, against which the entail sufficiently protected.

The Court pronounced this interlocutor: "Upon the re- Feb. 27, 1799.
"port of Lord Eskgrove, and having advised the mutual
"memorials for both parties, sustain the defence, assoilzie
"the defenders, find no expenses due, and decern." A bill of suspension was presented, but its prayer was refused. Feb. 25, 1801.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—To subject any person who takes *in* virtue of any interest, to the restrictions and limitations contained in it, all and each of the prohibitory, irritant, and resolutive clauses, must clearly and distinctly apply to him, either by name or by legal description. If *any one* of them does not do so, he is entirely free from such restrictions and limitations. Here John Ranaldson was not an heir of tailzie, but fiar and disponee. He took directly in virtue of the entail, and not by service as heir. If, therefore, an entailer intends to impose the restrictions on him, this cannot be effectually done by restricting him in the one clause, without also restricting him in the other. By the entail in question, the resolutive clause is alone directed against *heirs of entail;* and although the prohibitory and irritant set out by including the son by name, yet even with reference to these clauses, there is a doubt whether he was intended to be included. In the other parts of these clauses, all allusion to him is dropped, and "heirs of tailzie" alone are named. And, as fetters are not to be extended beyond what is clearly expressed; especially against the institute or disponee in particular, *in dubio*, it is to be presumed that he is free from the restraints. As fiar and disponee, therefore, he is free, although even from the deed a contrary intention may appear though ineffectually expressed, as was decided in the Duntreath case, Edmonstone *v.* Edmonstone, House of Lords, 15th April 1771. The irritant and resolu- Vide ante Vol. ii. p. 255.

1803.

SYME
v.
DICKSON, &c.

tive clauses are separate and distinct clauses, having separate functions and effects; and therefore it will not avail the respondents, in order to shield the defects in the resolutive clause, to contend, as they do, that the irritant and resolutive clauses, in this instance; are one and the same clause, and parts only of the same sentence, upon which erroneous ground alone the Court below proceeded.

Pleaded for the Respondents.—The question in the present case is not, as in the case of Edmonstone, whether the institute, or disponee, in the deed of entail, who was supposed by the entailer to be an heir of entail, shall be bound by clauses which applied only to the heirs of entail; neither is it, as in some late cases, whether the irritant and resolutive clauses are so conceived as to embrace each and all of the prohibitory clauses; but it is merely whether the institute, who is included in every one of the prohibitory clauses, and also in the irritant clause, is comprehended in the resolutive clause. It cannot be denied, in this case, that the entailer's intention is clear to impose the fetters on the disponee. Also that the prohibitory and irritant clauses are pointed expressly against him; but the appellant, in violation of all grammar, would separate the resolutive clause from the irritant clause, to which it stands annexed as part of the same sentence, and concludes that as one clause is defective, the whole must fall. But the slightest inspection will show that the irritant and resolutive clauses form but one sentence. By the words, "my said son, or "any of the heirs of tailzie appointed to succeed to him," in the former part of that article, John Ranaldson, besides his being aptly and with certainty described as the *entailer's son*, is also plainly and correctly distinguished from the heirs of tailzie; and the words the appellant relies on, *i. e.* "the person or persons, heirs of tailzie foresaid," made use of in the latter part of the same article or sentence (which the appellant calls the separate and distinct resolutive clause), refer directly to what precedes; "*the person*" clearly applying to the words, "my said son," John Ranaldson.

Menzies *v.* Menzies. Ante vol. iv. p. 242.

Bruce *v.* Bruce. Ante vol. iv. p. 231.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellant, *Wm. Adam, Chas. Hay, John Clerk.*
For Respondents, *Wm. Alexander, M. Nolan.*