1713. *February 5.*

SIR ALEXANDER DON of Newton *against* JAMES DON, second Son to Patrick Don of Ottenburn.

No. 126.
Limitations found effectual, though established only by way of reference, and not to be specifically discovered by the record.

In the competition mentioned No. 13. p. 14425. betwixt Sir Alexander Don and James Don, for the estate of Rutherford,

Alleged for the pursuer: The estate of Rutherford being provided, failing Sir Alexander Don of Rutherford, and the heirs of his body, to old Sir Alexander Don of Newton, and his heirs-male, tailzie, and provision, in his infeftments of the lands of Newton, the present Sir Alexander Don, younger, as only heir-male, tailzie, and provision to his grandfather in these lands, hath undoubted right to the lands of Rutherford.

Answered for the defender: 1*mo*, The pursuer is not heir of tailzie of the estate of Rutherford, not being heir-male, tailzie, and provision, to old Sir Alexander, nor capable to be so by the investiture of the estate of Newton; in so far as the pursuer is not within the description of heir to Sir Alexander in the first line of the tailzie of Newton; because Sir Alexander was, in that line, a simple life-renter, and the pursuer enjoys the estate as heir to Sir James his father, who was fiar; Stair, Instit. p. 449. (468.) Nor can the pursuer be heir to Sir Alexander in the second line of that tailzie of Newton, for that Sir Alexander is there called to succeed as an heir of provision to the pursuer; and no man can be heir and predecessor so much as *designativè* to one and the same person in the same tailzie. But, on the contrary, the express words of the investiture (which are the rule of succession in feudal rights, but especially in tailzies) carry the estate of Rutherford to the defender; for, taking the relative clause in the tailzie of Rutherford with the clause referred to in the tailzie of Newton, they run thus: Which failing, to the said Sir Alexander, and his heirs-male and of tailzie and provision contained in his infeftments of the barony of Newton, viz. to Patrick Don, his third son, and the heirs-male of his body, (seeing Sir Alexander Don, the second son, mentioned as immediate successor to his father in the tailzie of Newton, cannot be understood to be repeated in the tailzie of Rutherford); and the defender is heir-male of Patrick's body. 2*do*, Suppose, upon the foundation of the charter of Rutherford 1685, the pursuer were entitled to the estate, as heir to old Sir Alexander Don in the charter of Newton, yet the defender must be preferred, seeing Sir Alexander Don of Rutherford altered the tailzie 1685 by a later tailzie in favours of the defender.

Replied for the pursuer: 1*mo*, The defender, a remote substitute, can have no claim as heir of tailzie to old Sir Alexander, while the pursuer, his grandchild by his eldest son, an interjected nearer person, is alive, who is the first substitute in the tailzie of Newton, and only successor in that estate. It is frivolous to pretend, that because old Sir Alexander died a naked life-renter in the estate of Newton, the pursuer could neither be served heir-male nor heir of line to him therein; for the

No. 126. clause of return of the estate of Rutherford to Sir Alexander and his heirs must be understood *cum grano et temperamento*, not of heirs actually served; because, being a life-renter when the tailzie of Rutherford was made, he could have no such heirs, but of the heirs institute and substitute in the infeftment of Newton; that is, such as, by their blood, might have been served heirs, and are actually successors in the said lands. As to Patrick Don, old Sir Alexander's third son, and the descendants of his body, they are not called to the succession, but in the event of the return of the fortune of Newton to Sir Alexander, which never happened, nor could happen, so long as there is a male descendant of Sir James, the eldest son. 2*do*, The deceased Sir Alexander Don of Rutherford having not a simple *dominium* or absolute fee, but a fee qualified with provisions, limitations, and conditions, contained in the tailzie of Newton, that is, not to do any deed whereby the estate, or any part of it, might be evicted from Sir James Don, or any other heirs in the infeftment of Newton, consequently was not in a capacity to make the second tailzie of Rutherford founded on by the defender.

Duplied for the defender: 1*mo*, The pursuer's allegeance, that he is heir-male to old Sir Alexander, and enjoys the estate of Newton by the tailzie 1681, is no better argument than the exploded sophism, *Est hæres, et masculus, ergo est hæres masculus*. The pursuer, for instructing that he is heir of the tailzie of Rutherford, must take the whole clause complexly, and then find it in the charter of Newton, agreeing therewith both in the stile and propriety of language. 2*do*, The general reference founded on by the pursuer is no habile way to restrain Sir Alexander Don of Rutherford from making a new tailzie; for, 1*mo*, Infeftments can be affected with nothing but what is expressly therein contained; Craig, Feud. p. 140. (Edition 1655); which is agreeable to the decision in the case of Lady Monboddo, (see APPENDIX), and to the act 22. Parl. 1685, which requires conditions in tailzies to be expressed; besides, the reference is defective, for not mentioning what charter of Newton it respects, there being two, viz. one in 1665, and another in 1681; and the clause may refer to the former, wherein the conditions and provisions are not so hard upon the proprietor as to abridge him of the free disposal of the estate; 2*do*, The relative clause doth not hinder Sir Alexander Don of Rutherford to make the tailzie in question, but concerns only those called in the second line to succeed upon the failing of heirs of his body, as the immediate antecedent to this relative. 3*tio*, The irritant clauses in the tailzie 1681 of Newton are only *de non alienando, et non contrahendo debitum*, and that the heirs-female should not marry contrary to the provisions therein; but there is no prohibitory or irritant clause as to the making of a new tailzie, or altering the order of the succession; and clauses irritant are of strict interpretation, not to be extended, by inference or implication, beyond the cases expressed. There may also be apparent reasons for prohibiting a fiar to alienate *extra familiam*, and yet to leave him at large to choose his own heir within the family; as, if the person called in order to succeed were unworthy, or ungrateful to the proprietor, or the like. The civil law doth also afford us instances of this distinction; L. 38. § 3. D.

Dé Legat. 3. 4*to*, Albeit there be a reference to provisions, limitations, and conditions, (which import only destination), there is no mention of prohibitions, irritancies, or restrictions; and only such could incapacitate Sir Alexander Don of Rutherford to alter the succession. 5*to*, *Esto* the provisions in the tailzie of Newton were understood to be repeated, that could not hinder Sir Alexander Don of Rutherford, the first fiar, from the free disposal of his estate; for however it might descend to the heirs, with qualities and conditions, that, by their acceptance, could bind them, the original constitution of the fee in the person of him who first acquired it was without any restriction, except what is made by law; as in the case of minority, furiosity, or the like, or by the diligence of creditors; and any condition that he could impose upon himself might be taken away *contraria voluntate*. Nor could these prohibitions flow from any power in the person of old Sir Alexander, who was never fiar; since no body can restrict property but the proprietor, who cannot *sibi imperare*, nor bind when he cannot loose himself, if he still retain the property. The statute 1685 provides, that clauses irritant in tailzies shall begin upon the heirs; which tacitly confirms the power of the proprietor in all other cases, leaving inhibitions and interdictions as they stood before. The decision of Leslie and Johnston of Knockhill against Dick of Grange, No. 10. p. 15358. and the case of The Creditors of Riccartoun, No. 81. p. 15494. confirm, that the maker of a tailzie cannot, by the nature of the thing, be bound to himself, and the heirs of tailzie, to make effectual the irritant and prohibitory clauses thereof; for, if he doth not incur an irritancy, his deed must be good against his heirs who take under him; if he doth incur, then he can have no heirs; and what shall become of the fee? The notion, that it may be conveyed by a declarator, is a chimera, directly against the most essential parts of our law, which require, that heirs be entered by their superiors, and that lands be bruiked by service and retours, or charters and infeftments; for, though declarators may annul rights, they can never convey them. Nor is it consistent with sense, that a precept should be directed for serving heirs upon a declarator declaring their right to which they are to be served void. The only way to make tailzies effectual, is by serving heir to the person last infeft before the contravener. But this will never agree to the case of a fiar, maker of a tailzie, altering the same, who can never be said to have a predecessor to whom, upon the irritancy of his fee, an heir of tailzie may be served. Again, Sir Alexander Don of Rutherford was no more tied up from granting gratuitous deeds than he was from doing onerous deeds; for that distinction hath been only received where there was a provision in favours of an heir of a marriage, who is, in the construction of law, a creditor, with respect to other heirs; or in the case of obligations in favours of onerous creditors. And here the question is as to the power of the maker of a tailzie, restrained by nothing else but an act of his own will, without the colour of an onerous cause; unless the giving a life-rent to his father, where none seems to have been due, can be thought such.

No. 126.

No. 126. Triplied for the pursuer: By our law and form, relative clauses, especially such as refer to writs in public records, where no ambiguity can be pretended, are sustained as effectual; which ought far more to be sustained in this case, where both conveyances make but one settlement of a fathers's estate by division among his younger sons, and, in that view, to be considered as parts of one another, with relation to the different branches of the same family. Whatever might be pretended, were the pursuer competing with creditors who had contracted *bona fide* for an onerous cause, and were not, perhaps, obliged to search other people's charter-chests, or notice any rights not standing upon record, it is quite another case here, where the debate is with a gratuitous assignee, who, by the very acceptance of his disposition, effectually represents Sir Alexander Don of Rutherford: And this obviates what may be pleaded from the practick betwixt The Lady Monboddo and Newmains, (see APPENDIX). The act of Parliament 1685 meets not the present case, being long posterior to both tailzies, and relative only to the original settlement; and yet there is no insinuation therein, that one writ may not effectually relate to another, as effectually as if the writ referred to were *verbatim* inserted. Again, the reference cannot be thought uncertain, though there be two charters of the estate of Newton; because, wherever a person hath different rights to one subject, the last not only alters but absorbs, and on the matter extinguisheth all former securities; especially when the last is sovereign and universal, with the addition of a tailzie: Therefore, the charter of Newton referred to must be the last charter. *2do*, If the heirs of Newton's being called immediately before the relative clause were a good reason to find Sir Alexander Don of Rutherford, and the descendants of his body not affected with the irritancies, then, in every tailzie, the whole heirs would be free, except the branch substituted in the last place; whereas it is evident, that such restrictive clauses affect the whole chain of succession, from the first institute to the last called by the nomination. *3tio*, It is of no weight to suggest, that the tailzie of Rutherford mentions not irritancies, but only conditions, restrictions, and limitations, seeing it must be allowed, that though all conditions are not irritancies, yet all irritancies are conditions, and comprehended under that more general word; albeit, by the anxious exuberance of style, the *modi* and conditions of tailzied fees be ordinarily branched out into limitations, restrictions, and irritancies. *4to*, It is a new position, unknown in law, that the first fiar in tailzied settlements is free of limitations. Is not the original and main design of all tailzies, especially in contracts of marriage, to bind up the first institutes, whom the maker of the tailzie hath ground to suspect as inclinable to do deeds prejudicial to the standing of his family or estate? and not so much calculated to restrict those substitutes who, being commonly *nascituri*, and presumed, in law, to prove frugal and provident, till the contrary appear, cannot, with so much ground, be suspected of mismanagement. It hath indeed been sometimes disputed, (though on no solid ground), whether a person, once stated in the absolute right of fee, could by resigning in his own favours, and, failing of

him, to his heirs, under irritancies, tie up his own hands, so as he should not have a power to dispone. But that is not the present case; for Sir Alexander Don of Rutherford never was in the absolute fee of that estate, but had it disponed to him by another, under conditions and limitations. And it was never questioned but a man could burden another with irritancies, whatever he could do as to the tying up himself. The statute 1685 declares it lawful for men to convey their estates, in what manner, and under what conditions they think fit, without distinction of institutes or substitutes. Every one is more capable to bind and oblige himself than any other person. It is not easy to conceive how it can enter in thought, that a person can have greater power over another than he hath over himself. Nature and experience dictate, that every man hath, or ought to have, more power at home than abroad.—*Qui potest majus potest minus:* Whoever can absolutely give away his estate, or denude himself entirely, can do it in part, or restrict himself. As to the question, What becomes of the fee, if the fiar incur an irritancy? it is answered, the fee devolves immediately upon the next called to the succession, as if the contravener were naturally dead; so that, upon a declarator of contravention, the next successor serves heir to the contravener, in the same way as if he were dead, without danger of a passive title, seeing the heir represents him only in deeds compatible with the investiture; the warrant of which service is the will of the maker of the tailzie. But though James Don's right be null, the granter's right could not be irritated thereby in his own time, but stood valid *ad ultimum spiritum;* consequently, the next heir of the tailzie of Rutherford may be duly served heir to Sir Alexander Don of Rutherford of late deceased; for deeds of contravention do not irritate the contravener's right till they come to affect the tailzied estate; seeing, otherwise, the tailzied fiar were not at liberty to buy a suit of clothes, or any other necessaries for himself, in trust. Farther, *esto* the last Rutherford had irritated his right, in his life-time, the pursuer, being served heir in general, might have declared, that he had right to the fortune, as if Sir Francis Scot's disposition had been originally granted to himself; and might thereafter infeft thereon, as if the last Rutherford had died uninfeft; seeing the declarator would *funditus* remove his infeftment. No. 126.

The Lords found, That Sir Alexander Don of Newton is next heir of the tailzie of Rutherford by the failure of heirs of Sir Alexander Don of Rutherford's body: And found the clauses in the tailzie of Rutherford mentioning the prohibitory and irritant clauses in the tailzie of Newton, have 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 tailzie of Newton referred to in the tailzie of Rutherford is the last investiture in the year 1681: And found, That the disposition of Rutherford bearing the price to be paid by Sir Alexander Don, elder, and the right being 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 order of succession: And further found, That the tailzie of Rutherford relating to the conditions, limitations, and provisions in the tailzie of Newton,

No. 126. doth also comprehend the irritancies; and that these clauses irritant, though not expressed, but only related to in the tailzie of Rutherford, do affect that tailzie, so as Sir Alexander Don of Rutherford could not gratuitously alter the order of succession.

Fol. Dic. v. 2. p. 433: Forbes, p. 654.

1725. *July* 28.

The VISCOUNT of GARNOCK, *against* the MASTER of GARNOCK, and The other HEIRS of ENTAIL of SIR JOHN CRAWFORD of Kilbirny.

No. 127.

The act 1685 relates to all posterior conveyances, whether the tailzies were made before or after it.

Irritancies must be recorded *verbatim.*

Sir John Crawford, *anno* 1662, made an entail of his estate of Kilbirny and others, in favours of his daughter Margaret, and the heirs therein substituted to her, with prohibitory and irritant clauses against contracting of debt; upon which followed a sasine to Margaret, containing verbatim the limitations and provisions in the entail. After the death of Margaret, the first institute, John, afterwards Viscount of Garnock, her son, was infeft as heir to her; but neither his service or sasine contained verbatim the limitations and clauses irritant, only a general reference "with and under the reservations, provisions, and conditions specified in the former charter and infeftment." The late Viscount having contracted a great burden of debts which were corroborated by the present Viscount, it was thought advisable to raise a process of sale of part of the entailed estate, that the Lords might interpose their authority thereto. Compearance was made for the creditors, and at the same time for the master of Garnock and the heirs of entail; who being called as defenders, did object, "That the estate could not be sold for the payment of any debts contracted by the pursuer, or by the deceased Viscount, his father, in regard that by the settlement and entail of the estate, made by Sir John Crawford of Kilbirny 1662, both the pursuer and his father were so limited and restrained, that they could not charge the estate with debts; and of consequence, could not sell the estate for payment of those debts that were illegally contracted." The creditors on the other hand alleged, "That the entail could not be effectual against them, because the irritancies were not repeated in the retours, precepts and sasines, according to the direction of the act of Parliament 1685."

In answer to which, it was pleaded for the master and other heirs of entail, that the act 1685, does not at all concern deeds of settlement, or entails made prior to its date; it does not declare what was law before, or what was the import of deeds made before: Nor does it once, in any clause, mention deeds of a prior date; but every clause is introduced by words relative to what is statuted by the act itself, and to nothing else. Nor is it absurd, that at this rate, tailzies made before the act, are stronger than those made after: The Legislature thought fit by the act 1685, that creditors might not be ensnared, to regulate the form of entails thereafter to be made, and to enjoin some solemnities that were not necessary before the act: But does not this happen every day with relation to correctory laws?