natural possession of the lands themselves, or to receive from the tenants the yearly sums or prestations stipulated to be paid or performed by them in consideration of their several possessions, the pursuer must have equal right to the annual sums payable by these bonds and bills as to the other rents payable by the tacks: Nor can the defender screen himself by pretending, that these bonds and bills must be considered as given for *grassums*—" Grassumas dicimus summas pecuniæ quæ in principio assedationis aut solvuntur, aut promittuntur, supra annuam mercedem;" Craig, L. 16. 2. Dieg. 10. § 4. But here it is plainly an *annua merces* which the tenants became bound to pay. And the giving sanction to devices of this kind, to disappoint succeeding heirs of the future rents of an estate, might be attended with many bad consequences. No. 88.

Replied: It seems admitted, that no complaint could have been made against Sir Robert Denham, had he taken from the tenants bonds for a particular sum of money, payable at one term; and it can make no substantial difference, that, instead of this, he indulged them with several terms of payment. Neither could the pursuer have complained, though Sir Robert had granted to the defender a lease of the whole estate at the old rent, and allowed him to subset; though, in that case, the pursuer would have been equally deprived of what he calls the raised rents. Nay, further, Sir Robert might have discharged these bonds; and there appears to be no good reason why the pursuer's situation should be bettered by their being assigned to a lawful creditor, for payment of a debt, which, was it not for the entail, he himself would be bound to pay.

" The Lords found, That the bonds and bills in question, granted by the tenants of Westshiel to the deceased Sir Robert Denham, appeared to be securities granted by the tenants for part of their future rents; and therefore belonged to the pursuer, and the other heirs of entail on the said estate in their order."

" And upon a reclaiming petition, and answers, adhered."

Act. *Williamson et Advocatus.* Alt. *Wight et Lockhart.* Clerk, *Justice.*

J. C. *Fac. Coll. No.* 6. *p.* 10.

1761. *July* 29.

JOHN GORDON CUMING of Pitlurg *against* ROBERT GORDON of Logie.

No. 89.
Effect of certain terms of limitation and restriction.

Robert Cuming of Birnes executed an entail, in 1729, by which he provided his estate to the second son of his eldest daughter, and the heirs-male of his body; whom failing, to a number of other substitutes.

This entail contained a variety of provisions and limitations; and, amongst others, the following clause: " In case it should happen any of the said heirs of tailzie to commit or be accessory to any acts of treason against our sovereign Lord, then, and in that case, the life-rent of the committer thereof shall only be lost so far as concerns the committer; but the heritable and irredeemable right and property of the lands and others foresaid shall, after their decease, return and remain

No. 89. with their next heir of tailzie, as if the act of treason and rebellion had not been committed; and that the said heirs-male and of tailzie above-mentioned, or any of them, or their foresaids, shall never have power, by any other deed whatsoever, whether treasonable or otherwise, by contracting of debt exceeding the sum of 12,000 merks for provision of their younger children, or any other manner of way whatsoever, to squander or put away the samen, or any part thereof, *vel faciendo vel delinquendo*, any ways contrary to this present settlement."

The succession having devolved upon John Gordon Cuming, the grandson of the entailer by his youngest daughter, he brought a process of declarator for having it found and declared, that, notwithstanding the entail, he was at liberty to sell the estate, and to dispose of the price at his pleasure.

To this action opposition was made by Robert Gordon, the next substitute called by the entail, failing the pursuer and his issue-male; for whom it was contended, That the pursuer was effectually barred from selling by the clause above recited.

Pleaded for the pursuer: 1*mo*, As in this clause there are no words expressly prohibiting the heirs of entail from selling the lands, so neither can any such prohibition be thence inferred. The maker of the entail had it only in view to restrain the heirs from squandering and putting away the estate in two ways, by committing treason, or contracting debts. The first words of the prohibition, "That it shall not be in their power by any deed whatsoever, whether treasonable or otherways," are indeed general; but that generality is immediately limited by the following words: "By contracting debts exceeding 12,000, merks for provision to their younger children, or any other manner of way whatsoever, to sqaunder or put away," &c. These words, "or any other manner of way whatsoever," plainly refer to the preceeding words, "contracting debts," and not to the subsequent words, "to squander or put away." And the repetition, *vel faciendo vel delinquendo*, must necessarily be explained by the words of the preceeding prohibition, not to squander or put away the lands by their delict, or by contracting debts; but can never be understood to imply a quite distinct prohibition, that they should not have power to sell. If the entailer had truly intended to lay his heirs under such prohibition, it would be difficult to account for his omission of the common prohibitory words, not to sell, alienate, or dispone; and the words used by him, "not to squander or put away," are very proper for restraining the heirs from dilapidating the estate by their debts or delicts, but are very ill adapted to express a prohibition to sell.

2*do*, Supposing that, from the general words supported by the probable intention of the entailer, the clause could be so construed as to imply a prohibition to sell, such constructive or implied prohibition cannot be sustained. For the words of the prohibiting clause against selling and alienating are so fixed by the statute 1685, and by common use and practice, that they ought not to be departed from, or left to be supplied by the conjectural sense or meaning of other words. The statute has said, That it shall be lawful to his Majesty's subjects to tailzie, and to

affect the said tailzies with irritant and resolutive clauses, whereby it shall not be lawful to the heirs of tailzie to sell, annailzie, or dispone, &c. There are proper words by which a restraint of this kind may be legally created. The maker of the entail must declare, in express terms, that it shall not be lawful to sell, annailzie, or dispone. These are the words used in practice, wherever any such restraint is intended; and whatever may appear to have been the probable intention of the entailer from other clauses of the deed, it ought to have no effect, when neglected to be expressed by the legal and common words. No. 89.

3tio, It is a clear rule in law, that restraints upon property created by entails are not to be extended *de casu in casum;* and, upon this principle, the Court has uniformly proceeded in their later judgments, and particularly in the case of Campbell *contra* Wightman, No. 85. p. 15505. and in the case of Carlourie, No. 22. p. 15382.

Answered for the defender: 1*mo*, By the clause in question, taking it in the plain sense and meaning of the words, the heirs of entail are expressly discharged to sell. Nothing can be more clearly conceived. It is said, that it shall not be lawful to squander or put away the estate, or any part thereof, *vel faciendo vel delinquendo*, any ways contrary to the present settlement: But he who sells, unquestionably puts away the estate; therefore, he counteracts the express will and prohibition of the entailer.

2*do*, The statute does by no means tie down proprietors to use certain words in framing conditions, provisions, and limitations in their entails. Many new provisions, which did not occur to the Legislature, have been introduced by the vanity and invention of mankind, in order to perpetuate their families; and all of these must be effectual, as long as entails are tolerated, if the will of the granter be clearly expressed, whatever stile or words he shall think proper to make use of.

3tio, Although, in questions with creditors and purchasers, prohibitions or irritancies in entails do, with great justice and reason, meet with the strictest interpretation, yet, in questions among the heirs of entail themselves, the maxim of the common law must take place, *Uti quisque legassit*, &c. The will of the testator, whether express or plainly implied, must be supported. But in the present case there is no occasion to resort to this plea; the defender does not contend for an extension of words by implication, but for a just construction of express words, which plainly import a prohibition to sell or alienate.

" The Lords found, That, by the conception of the tailzie, and particularly by these words, " or any other way whatsoever to squander or put away the same, or any part thereof, *vel faciendo vel delinquendo*, any ways contrary to this present settlement," the pursuer is laid under a prohibition of selling or alienating the estate, to the prejudice of the substitute heirs of tailzie: And therefore, that however safe an onerous purchaser might be, the pursuer, by a voluntary sale of the lands, would contravene the tailzie, and be subjected to an action of reparation and damages, at the instance of the substitute heirs of tailzie; and therefore dismissed the process."

Act. *Advocatus.* Alt. *Solicitor Garden.*

A. W. *Fac. Coll. No. 52. p.* 127.