No. 90.

The case of Gordon Cuming differs from the present in two respects. In the *first* place, there was, in that case, no actual sale; and the action was brought by the heirs in possession, of purpose to defeat the intention of the entailer. In this case, the action is brought to enable the charger to fulfil an onerous bargain, which he is bound to perform under a high penalty; and as the only question is, Whether the suspender's purchase will be secure to him? so even the judgment in the other case seems to point out, that an onerous purchaser would have been safe. In the *next* place, the prohibitory words used in that case, against squandering or putting away the estate, were justly considered as equivalent to an express prohibition to alienate or sell.

"The Lords found the letters orderly proceeded, and decerned in the declarator."

For the Charger, *Montgomery*. For the Suspender, *Lockhart*.

A. W. *Fac. Coll. No.* 121. *p.* 282.

*** This case was appealed. The House of Lords, (20th March, 1765,) ORDERED and ADJUDGED, That the appeal be dismissed this House, and the interlocutor therein complained of be, and the same is hereby affirmed.

1768. *January* 27. M'LAUCHLAN *against* M'LAUCHLAN.

No. 91.

One who had granted a trust-disposition, for the purpose of bringing a reduction of his entail, was found not thereby to have incurred an irritancy, the intention having been only to try the validity of the entail.

Fac. Coll.

*** This case is No. 45. p. 15421.

1772. *July* 14. JAMES CAMPBELL of Blythswood *against* JOHN LOVE.

No. 92.
A second tack for 19 years, to commence upon the determination of a former, of the like endurance, which had near four years to run at the date of the second,

Colin Campbell of Blythswood executed a deed of entail, December 13, 1739, by which he disponed his lands and estate of Blythswood to himself, in life-rent, and James Campbell, his only son, in fee, and the heirs-male of his body; whom failing, to the several substitutes therein mentioned.

This entail contains the usual prohibitory, irritant, and resolutive clauses, *de non alienando, et contrahendo debita;* and it also contains a *proviso*, that the heirs of entail shall not let tacks for above the space of nineteen years.

This entail was duly recorded in the register of tailzies, November 26, 1742; and the maker having died in 1745, was succeeded by his son, the foresaid James Campbell, who made up his titles to the estate upon this entail, and the

No. 92.
granted by an heir of entail, whose power of letting tacks was limited not to exceed 19 years, and who died while the first was current, sustained to give the tenant a right to possess for 19 years from the date of the tack.

whole conditions and provisions thereof were duly engrossed in the investitures of the estate.

In January, 1750, a tack was executed between the said James Campbell and John Love, letting to the latter, his heirs, secluding assignees, without consent of the said James Campbell, the lands of Dubbs, for nineteen years, commencing at Candlemas 1751, at the yearly rent of 5 bolls oat-meal, and £.43 6*s*. 8*d*. Scots of silver rent, with £.4 10*s*. Scots yearly, for the rood of land therein mentioned. This tack, therefore, was current till Candlemas 1770.

Upon the 6th March, 1766, when there were near four years of the foresaid lease still to run, the said James Campbell entered into another tack with the said John Love, by which he let the lands to him, and his heirs, secluding assignees and sub-tenants, for nineteen years, from the term of Candlemas 1770, at the rent of £.11 4*s*. 5*d*. Sterling of money, and 5 bolls of oat-meal, commencing with crop 1770.

Upon Mr. Campbell's decease, in November, 1767, without issue, his heir of entail, James Douglas, *alias* Campbell of Blythswood, on Love's failure to remove at Candlemas 1770, when the first tack had determined, brought an action of removing against him before the Sheriff of Renfrew, libelling upon the act of sederunt, and concluding, that the defender should be decerned to remove at the term of Candlemas 1771, as to the arable lands, and from the houses and yards at the term of Whitsunday thereafter.

It was pleaded in defence: That Love possessed in virtue of a tack from the deceased James Campbell of Blythswood, of which there were a number of years to run; for that, in 1766, he had obtained from Mr. Campbell a tack for nineteen years, to commence at Candlemas 1770.

It was answered for the pursuer: That the first tack was current for near four years when the second tack was granted; and as the second tack was not clothed with possession in the granter's life-time, it could not be binding upon the pursuer, who was an heir of entail, and who was not personally liable to implement the deeds of the late Blythswood, who had no more than a limited fee in the estate.

The Sheriff, July 24, 1770, pronounced the following interlocutor: "Finds, That the defender, in virtue of the last tack, dated 6th March, 1766, has right to possess the lands libelled for nineteen years from the date of the tack; and assoilzies him from the process of removing."

The pursuer thereupon obtained an advocation of the cause; and the defender also obtained an advocation, complaining, that the Sheriff had not sustained the second tack for the whole term of endurance.

Pleaded for Blythswood: That a tack granted by the proprietor of an entailed estate, is not good against a subsequent heir of entail, unless the tack was clothed with possession in the life-time of the granter; and, therefore, as the tack in question, at the late Blythswood's death, remained a mere personal deed, not clothed with any possession, that, however this tack might found the tacksman in an action

of damages against the granter and his general representatives, it could not be set up against the pursuer, a subsequent heir of entail. No. 92.

Answered: Although the Court were of opinion that it could not listen to the advocation, at the instance of the defender, wherein he desires the full benefit of both leases, the Court will, at any rate, see cause to refuse the advocation, at the instance of the pursuer, whereby he complains of the relief in equity, which the Sheriff has given to the defender, by sustaining the tack under challenge, for the space of nineteen years, from the date thereof, in place of nineteen years, from the expiry of the old lease.

The ground of the pursuer's challenge rests upon a want of power in the late Blythswood to grant a tack beyond the endurance of nineteen years, being prohibited from doing so by the entail under which he possessed the estate; and the pursuer himself has not pretended to controvert, that, if the late Blythswood's second tack had expressly borne its commencement to be from the year 1766, it would have been no objection thereto, that it had been granted previous to the expiry of the former lease.

The present challenge, therefore, appears in a very ungracious point of view; for there is not here any diminution of the rental; on the contrary, there is a considerable augmentation thereof; neither is there any ground for alleging, that this lease was granted in the view of injuring an after heir of entail; for it is well known, that, when the late Blythswood granted the tack in question, there was no ground to suspect his not surviving it many years; so that there can be no doubt, that the challenge brought of this tack, by the present proprietor of Blythswood, is a challenge for the purpose of reducing as fair and honest a transaction as can be conceived, and a transaction entered into by the late Blythswood in the common and ordinary administration of his estate.

2*do*, The plea is likewise repugnant to the sound principles of law and equity; for, the only method by which the pursuer can fairly support his action, is by subsuming upon a contravention of the powers competent to the late Blythswood by the entail of the estate; and, therefore, it seems incumbent on him to point out something in the Sheriff's interlocutor, sustaining any act or deed of the late Blythswood, beyond what he was empowered and warranted to do by the entail. No such thing is there to be found; for it is admitted, that Blythswood could have let a nineteen years lease, to commence from the 6th March, 1766, and this is the full extent to which the Sheriff has sustained the act and deed of Blythswood.

The pursuer says, *quod potuit non fecit;* he has not granted a tack of nineteen years, to commence from March 1766, as he might have done; but he has granted a lease for nineteen years, to commence from Candlemas 1770, a term after his own death.

This, however, is splitting hairs, in a manner which will not be approved of; for although, in fact, the manner in which Blythswood and his tenant, unsuspicious of any undue challenge, went about the execution of their transaction, might have the effect to give the defender a possession of twenty-one or twenty-two years,

No. 92. from March 1766, in place of nineteen from that period, what grounds in fair argument or equity can the pursuer have to complain, when the Sheriff has reduced the transaction to what was confessedly within the powers of the late Blythswood? The challenge instituted by the present Blythswood goes solely upon the want of powers in the late Blythswood to do the whole of what he did; and, what reasonable ground of complaint, therefore, can he have, now that the transaction is rectified, so as to bring it within his admitted powers? When the late Blythswood meant to give the defender the possession of his ground for a space of twenty-two years, from March 1766, his meaning certainly included an intention to give it for nineteen years, from March 1766; and although, perhaps, he had not power to execute the last intention; and having virtually done so, every consideration of justice and equity require that that intention should be supported to the extent of his powers.

Many similar examples will readily occur. Thus, nuncupative, or verbal legacies, exceeding £.100 Scots, are not valid by the law of Scotland; but, even when they are granted for more, they are ineffectual only as to the excess; and so has been decided, 7th July, 1726, Wallace. See APPENDIX.

Replied: There is no sort of similarity between the two cases. If the late Blythswood had granted a tack, to commence immediately, but for a longer space than the term allowed of by the tailzie, the two cases would have some sort of resemblance; and the defender might have pleaded, from the analogy of the case of a verbal legacy above £.100 Scots, that, when the tack was in every other respect a proper tack, it was not a good reason for annulling it, that, in point of endurance, the granter had exceeded his powers, and that, therefore, it ought only to be set aside, in so far as he had gone beyond them; although, in that case, it is observable, that an heir of entail's granting a tack for a term of years that was prohibited by the entail, would have been a ground not only for annulling the tack, as granted contrary to the prohibitions of the entail, but likewise for declaring an irritancy against the granter.

But the foresaid case is very different from the present. The pursuer's plea is, that the new tack could not, in this case, be sustained for one moment; that it was not at all a binding and an effectual deed against the pursuer, as *collata in tempus indebitum*, it not being in the power of an heir of entail to grant a lease for any endurance, to commence only after the determination of his own right. It might have been in his power, upon the then current tack's being renounced, to grant a new tack, to commence for the space of nineteen years; but it will not from thence follow, that a tack, for any term of endurance, which did not commence till after the death of the granter, when his own right is at an end, and when he had no power by the entail to impose burdens upon the subsequent heirs, ought to be sustained. The rule of law strikes against it, quod potuit non fecit, et quod voluit non potuit.

2do, The defender likewise alleged acts of homologation on the part of the pursuer himself. But little stress was laid on this defence.

As to the other point, the Court was divided in opinion; but it carried upon a question put, Whether the late Blythswood had power to grant a tack to the extent of the Sheriff's interlocutor? that he had. No. 92.

"The Lords advocated the cause, and found, that the defender, in virtue of the tack, dated the 6th March 1766, has right to possess the lands libelled for nineteen years, from the date of the said tack."

Act. *M'Queen.* Alt *Sol. Dundas.* Reporter, *Coalston.* Clerk, *Ross.*

Fac. Coll. No. 18. *p.* 46.

1774. *February* 22.

JOHN CARRE of Cavers, *against* ALISON CAIRNS, and Others, Daughters of the Deceased WILLIAM CAIRNS.

No. 93.
Import of a clause in a tailzie, that it shall be lawful for the heirs of entail to set tacks, the same being only for the life-time of the setter, or for fifteen years, without an evident diminution of the rental, and, if made otherwise, to be void, and deemed a deed of contravention,—and of a lease granted by one of those heirs for nineteen years, containing a clause of warrandice in common form, with an exception, that, in case the granter shall happen to die before the expiration of this tack, the

In the year 1678, Sir Thomas Carre of Cavers executed an entail of his estate, which was recently recorded in the books of Session, but never inserted in the register appointed by the statute 1685.

This entail is guarded with the following prohibitory clause: "That it shall not be lawful to the heirs of tailzie and provision therein mentioned, to sell, annailzie, wadset, or dispone, redeemably or irredeemably, said lands, or any part thereof, or to grant infeftments of annual-rents, or life-rent, forth thereof, or to contract debts, or do any other facts or deeds, civil or criminal, whereupon said lands may be anywise evicted, adjudged, apprised, become caduciary, or escheat." And this prohibition is attended with the usual irritant and resolutive clauses, declaring all such facts and deeds to be in themselves null and void *ipso facto*, by way of exception or reply, without the necessity of any declarator; and that the person, and the heirs-male to be procreated of his body, who shall happen to contravene, by doing any of the facts and deeds above mentioned, directly or indirectly, shall, from thenceforth, and immediately upon the doing and committing thereof, forfeit their right.

The above entail contains the following clause, respecting leases to be granted by the heirs of entail; "That notwithstanding the irritant clause above written, it shall be lawful to the heirs of tailzie to set tacks of the lands and others above-mentioned, the same being only for the life-time of the setter, or for fifteen years, without an evident diminution of the rental, as the lands may be set for at the time, otherwise all such tacks to be null and void, and to be a deed of contravention of the irritant clause above written."

In 1743, John Carre of Cavers granted a lease of the farm of Softlaw to William Cairns, father to the suspenders, for fifteen years; and, in the year 1754, (four years before the expiration of this lease), a new one was entered into between the charger's father, who had then succeeded to the estate, and the said William Cairns, for nineteen years, to commence at the term of Whitsunday 1758: "Which tack the said John Carre binds and obliges him, his heirs and succes-