No. 61. favourable), were not materially different from what will be found in the case, 24th November, 1795, and 1st March, 1796, Gibson against Kerr Reid, No. 108. p. 5891. and *voce* TERCE.

The Court, on advising memorials, considered that case to be decisive of the present. In the former case, it was observed, the entail, though recorded, was ineffectual against creditors, from wanting an irritant clause: But irritant and resolutive clauses, and consequently registration, are unnecessary to make entails effectual *intra familiam* of the substitutes.

"The Lords found, That Mrs. Agnes Law, otherwise Makgill, has no right to a terce out of the entailed estate, or any part thereof; also found, That the life-rent annuity of £.200 Sterling, contained in the heritable bond in her favour, must be restricted to a yearly sum or annuity equal to one fourth of the free rent of the said entailed estate for the year current at her husband's death; but valuing the victual-rent upon an average of the prices thereof for the three preceding years, and deducting public burdens and interest of the entailer's debts chargeable thereon; and further found, That the provision of £.2400 Sterling, contained in the bond of provision to the younger children, must be restricted to a sum equal to three years free rent of the said entailed lands and estate, converting the victual, and deducting public burdens, as aforesaid."

A reclaiming petition was (5th February, 1798,) refused, without answers.

Lord Reporter, *Glenlee.* Act. *Rolland.* Alt. *Monypenny.* Clerk, *Menzies.*

D. D. *Fac. Coll. No. 6. p. 10.*

1799. *February* 1.

SIR BENJAMIN DUNBAR *against* GEORGE, LOUISA, HENRIETTA, and ELIZABETH DUNBARS, and their TUTOR AD LITEM.

No. 62.
A Knight-Baronet executed an entail, settling his title and estate on a series of heirs different from those to whom his patent of Baronet was limited; and the clause prohibiting the heirs of entail from selling or contracting debt having been directed against

Prior to 1707, Sir William Dunbar of Hempriggs obtained the dignity of baronet, to himself and his heirs-male.

In 1707, Sir William had an only daughter, Elizabeth, then married to Sir James Dunbar, advocate. She had children by a former marriage.

In that year, Sir William executed an entail, by which, on the narrative that he had resolved "to tailzie his *dignity* and estate," he obliged himself "to make due and lawful resignation of his title and *dignity* of baronet, and also of all and sundry his lands, &c. in favour of the said Sir James Dunbar, in life-rent, during all the days of his life-time, and to Dame Elizabeth Dunbar, his only lawful daughter and child now in life, now spouse to the said Sir James Dunbar, in fee; and, after their decease, to the heirs whatsoever, male or female, procreate or to be procreated betwixt the said Sir James and Dame Elizabeth Dunbars, likewise in fee, and the heirs whatsoever, male or female, descending of their bodies;" whom failing, to Elizabeth's children by her former marriage, and a series of other substitutes.

In the procuratory of resignation, power was granted for resigning " his said title and dignity of Baronet," as well as his lands. The deed also contained clauses prohibitory and irritant, declaring, " That it should nowise be leisom nor lawful to the heirs of tailzie, who shall happen to succeed to the said lands and dignity, to alter, infringe, or break the said tailzie, nor yet to give, grant, sell, wadset," &c.

No. 62. those " who should happen to succeed to the said lands and *dignity*," a substitute who succeeded to the former only, brought an action against the other heirs of entail for having it declared, that he held the estate free from these restrictions; but the defenders were assoilzied.

When Sir William executed this deed, his plan probably was to resign his title into the hands of the Crown, for a new grant of it to himself and the heirs mentioned in the tailzie; a thing which was not uncommon at that period. In this, however, he did not succeed; for in the Crown charter, proceeding on the above mentioned procuratory, there is no *novodamus*, nor grant of any sort of the title; but the limitations in the entail are engrossed in it exactly in terms of the deed. The charter, in particular, declares, " Quod nullo modo licitum erit præfat. Dominæ Elizabeth Dunbar, vel hæredibus talliæ supra designat. nec eorum hæredibus qui ad prædict. terras et *dignitatem* succedere contingerint, dictam talliam infringere nec alienare, nec debita contrahere," &c.

Sir William Dunbar, the only son of the marriage between Elizabeth and Sir James Dunbar, acquired right to the whole lands contained in the deed, partly by a disposition from his mother, and partly in virtue of a special service expede by him as heir of tailzie and provision under his grandfather's entail.

In 1789, Sir William passed a new charter, precisely in terms of the entail; which he assigned to his son, now Sir Benjamin Dunbar; on which title he is infeft in the estate.

On Sir William the entailer's death, his title went to a distant heir-male, Sir Benjamin, being neither heir-male nor of line. He conceiving that the principal limitations of the entail were confined to those who should succeed both to the lands and dignity, brought a declarator against his children and the other substitutes, for having it found, that his father formerly, and that he now, held the estate free from these restrictions.

The substitutes in the entail, in defence,

Pleaded: When the entailer disponed his estate and title to the same series of heirs, he either believed that he possessed the power to do so, or, by means of a new grant, would soon obtain it. Be that, however, as it may, it is impossible to doubt but that it was his intention that all the heirs of entail possessing the estate should be bound by it, although they should not inherit the dignity. His own daughter, who stood in this predicament, was clearly fettered by it; and that being the case, it cannot be supposed he meant to emancipate any of the succeeding heirs. A superfluous addition to their description, although erroneous, ought not therefore to be attended with an effect so opposite to the will of the granter.

Besides, as it is unlawful and impossible to entail a title on a series of heirs different from those in the patent, the words in the entail by which this is attempted,

No. 62. must be held *pro non scriptis*; June, 1750, Stewart against King's Advocate, Sect. 4. *h. t.*

Answered: It cannot be shown, that it was not the intention of the entailer to liberate the pursuer, and the other substitutes in his situation, from the fetters in the entail. On the contrary, it may reasonably be supposed, that the entailer's motive in making it was to support the title, which he expected was to descend with the estate; and that, therefore, in the event of their separation, he did not mean to fetter those heirs succeeding only to the estate. But, at all events, the clear import of the words of an entail cannot be departed from, on account of the strongest evidence of a contrary intention; House of Lords, 15th April, 1771, Edmonstone, No. 68. p. 15461. Nay, intention expressed in common language is not sufficient to support an entail, unless the words used be technical; November, 1763, Scott Nibet against Young, Sect 3. *h. t.*; 22d May, 1798, Marchioness of Titchfield against Cuming, No. 73. p. 15467. But the persons who, in this case, are prohibited from selling and contracting debt, are the heirs of entail who shall happen to "succeed to the said lands and dignity." Now, the pursuer, not having succeeded to the dignity, is not within the description of persons prohibited, and therefore cannot be affected by its prohibitions.

The Lord Ordinary took the question to report on informations.

Two of the Judges thought the pursuer should prevail in the action, on the principle adopted by the House of Lords in the case of Edmonstone. The rest of the Court were, however, of an opposite opinion. The words, "who shall happen to succeed to the said lands and dignity," (it was observed), are not taxative, but descriptive. Their object was not to make the entail obligatory on the heirs, only on condition that they should succeed both to the estate and title; but merely to point out those who should be bound by it; and although the latter part of the description is, with regard to the pursuer, superfluous, still he is clearly in the former part of it as one of the heirs of entail, subject to its restrictions. Besides, if a person were to entail two estates, over one of which it should afterwards be discovered he had no power, the entail would be good with respect to the other. But this is precisely the case here, for Sir William had no power to entail the dignity.

The Lords "sustained the defence."

A reclaiming petition for the pursuer was refused, (19th February), without answers.

Lord Reporter, *Glenlee.* Act. *M. Ross.* Alt. *Monypenny.* Clerk, *Home.*

R. D. *Fac. Coll. No.* 109. *p.* 248.