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requisites cannot be dispensed with, and equipollents cannot be received.

After hearing counsel, it was

Ordered and adjudged that the said interlocutor complained of be reversed; *and it is hereby declared, that, Alexander Turnbull having been arrested and actually in custody of the messenger upon the caption at the suit of Sir Wm. Ogilvie, was imprisoned within the true intent and meaning of the act of Parliament of* 1696: *And it is therefore ordered that the objections made to the heritable bond of corroboration obtained by General Scott be sustained, and that the respondent Colonel Scott have no preference to the other creditors of the said Alexander Turnbull, by virtue of said bond.*

For Appellants, *W. Murray, R. Dundas.*
For Respondent, *Al. Forrester, Gilb. Elliot.*

Note.—Unreported in Court of Session; but the judgment in the House of Lords has been founded on, and is the leading authority upon which all the subsequent cases have been decided :—M'Adam *v.* M'Ilwraith, 23d Nov. 1771, Fac. Col.; Frazer *v.* Munro, 5th July 1774, M. 1109; M'Meath *v.* M'Kellar, 1 March 1791, Bell's Cases, p. 22.

[Mor. 15399.]

Lord CATHCART, &c., - - *Appellants.*
JOHN STEWART N. SHAW of Greenock, by his Guardian, - - } *Respondent.*

House of Lords, 19*th March* 1756.

ENTAIL—POWERS OF FEUING AND LEASING—INTEREST OF DEBT.—1. Question, whether an heir of entail in possession is bound

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to keep down the interest of the debt on the estate during his possession. 2. Where power was reserved in the entail to grant feus and long tacks. Held that the powers exercised in virtue of this reservation did not fall within the fair and rational administration of the estate, and therefore feus of the greater part of the estate, together with leases of the mansion house and grounds, and sale of growing wood, reduced.

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Sir John Shaw of Greenock, then fiar of his estate, executed an entail of the estate of Greenock to himself in liferent, and to his son John Shaw and the heirs male of his body in fee, whom failing, to a series of substitutes.

The entail contained prohibitory, irritant, and resolutive clauses, "to alter, innovate, or change the "present tailzie and order of succession, nor to sell, "alienate, dispone, nor to wadset or burden or do "any other fact or deed whereby the same might be "evicted, apprised, &c." These clauses were directed against the maker himself; but he reserved power to himself, "and after his death to the said John "Shaw his son, and the heirs of tailzie and provision "above-specified, to grant feus or long tacks for "such spaces as they shall think fit of any part or "portion of the lands. And also power to the said "John Shaw, or any of the said heirs of tailzie, to "contract the sum of 50,000 merks Scots money of "debt, and therewith to affect the said lands and "estate," for provisions to daughters and younger children.

After Sir John Shaw's death, Sir John his son, in 1718, in virtue of the powers contained in the entail to burden the estate for provisions, granted bonds of provision to his daughter Marion Shaw, afterwards Lady Cathcart, to the extent of 50,000 merks, by three several bonds, one for 30,000 merks, one for

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17,000 merks, and one for 3,000. These were made real burdens on the estate, and bore interest payable from (29th September 1718) their date.

He also feued the lands of Broadstone at a reserved rent of 40s. Scots yearly. A feu was also granted of part of the town of Greenock. These grants were not disputed.

But nineteen acres of the town of Greenock still

August 3, 1719. remaining unfeued, Sir John, of this date, feued the same to his daughter Lady Cathcart and her heirs, at a reserved rent of 20s. for every fall of dwelling-house, and 5s. for offices and gardens, with a reserved rent of L.996 Scots per annum. He also, of this

September 2, 1751. date, granted feus of the mansion house and gardens of Greenock to Lord Cathcart, which Sir John himself had built, enclosed, and laid out, since the date of the tailzie. And of the same date he also feued to him two small pieces of ground lying near the town of Greenock, intended for straightening the south boundary of the town, and for building a new church; and for the whole subjects comprehended under these grants, amounting to twelve acres, he was taken bound to pay a reserved rent or feu-duty.

November 1, 1751. He also of this date feued to Lord Cathcart the lands of Wester Greenock, Finnart, and others. He likewise, about the same time, gave him a lease of part

November 1751. of the estate for the space of nineteen years. And by contract of the same date, he sold him also all the wood growing on the estate, the greatest part of which being natural wood, was ripe for cutting, the remainder had been planted by Sir John since the date of the tailzie.

Action being brought by Lord Cathcart on the death of Sir John (the second), against the respondent as next heir of entail, for principal and bygone

interests of the bond for 50,000 merks; and a counter action of reduction being raised by the respondent to set aside and reduce the feus, leases, and sale of the wood above-mentioned, the questions were, 1st, Whether the heir of entail next succeeding was entitled to relief from the arrears of bygone interest, accumulated during the previous heirs' possession? and, 2d, Whether the several feus, the leases, and the sale of the wood were valid and effectual, and a fair exercise of the powers of administration reserved, or an infringement of the entail?

The Lords, of this date, "Found the pursuer (respondent) is not entitled to any relief against the defender (appellant), as heir of line to Sir John Shaw, of the annual rents of 30,000 merks contained in the heritable bond produced, granted by Sir John Shaw in implement of the obligation in the contract of marriage, to pay that sum to the only daughter of the marriage; but found the pursuer is entitled to relief against the defender, as heir of line aforesaid, of the annual rents of the 20,000 merks contained in the two bonds produced, whereof the one for 17,000 merks, and the other for 3000, granted by Sir John Shaw to the defender's father, in exercise of the faculty contained in the entail, and incurred during the life of Sir John Shaw; and therefore found the said John Stewart Nicholson Shaw, and his said tutor, administrator of law for his interest, liable on the passive titles, in payment to Hew Dalrymple and other trustees of the late Lord Cathcart, of the said principal sum of 50,000 merks, contained in the bonds pursued for, and annual rent of 30,000 merks from 29th March 1718, and annual rent of the other 20,000 merks from Sir John Shaw's

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" death (9th April 1752); and likewise of the sum " of 3000 merks of penalty contained in the bond of " 30,000 merks. Sustain the reason of reduction of " the feu-right of the several farms of the wester " barony of Greenock, dated 1st Nov. 1751, and of " the four feu-rights dated 2d Sept. 1751 of the " mansion-house, office houses, gardens, and court. " And found, none of the planting could be cut by " the defender, in virtue of the contract of sale pro- " duced after the death of Sir John Shaw. And " in respect it was alleged by the pursuer, and not " denied by the defender, that the natural wood sold " by the said contract was not fit for cutting at Sir " John Shaw's death: Therefore sustain the reasons " of reduction of the said contract of sale, and repel " the reasons of reduction of the feu-right of the town " of Greenock, and feu-right of that part of the brae " adjacent to some of the yards on the south side of the " town of Greenock, and piece of flat ground on the top " of the said brae, containing in whole three acres, one " rood, three falls, and eighteen ells, dated Sept. " 1751, and sustain the reasons of reduction of the " tack of several farms and parts of the estate, dated " 30th October 1751, so far as it comprehends the " avenues about the house; but repel the reasons of " reduction thereof, so far as it comprehends any " other subjects."

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On reclaiming petition, the Lords also sustained " the reasons of reduction of the feu-rights of that " part of the brae adjacent to some of the yards on " the south side of the town of Greenock, and piece " of flat ground on the top of the brae, containing " in whole three acres, one rood, thirty-three falls, " and eighteen ells, and decern: And find the 3000

" merks of penalty due if incurred; but adhered to " their former interlocutor, and refused the desire " of both said petitions as to the other points."

Against these interlocutors Lord Cathcart &c. brought the present appeal to the House of Lords, in so far as concerns the interest on the 20,000 merks' bond: And also in so far as they sustain the reduction of the feu-right dated 1st Nov. 1751, of the several farms of the wester barony of Greenock—of the four feu-rights dated 2d Sept. 1751—of the mansion-house, office-houses, gardens, and court of Greenock, and of the two tacks of the same—of the contract of sale of the woods—of the tack of several farms and parts of the estate, 30th Oct., so far as these comprehend the avenues about the house; and against the interlocutor of 31st Jan., in so far as it reduces the feu-right of that part of the brae adjacent to some of the yards on the south side of the town of Greenock, and the piece of the ground at the top of the brae, feus, sales, and lease; and a cross appeal was brought as regards the interest on the heritable bond for 30,000 merks and penalties thereof.

Pleaded for the Appellants:—Entails generally are to be strictly interpreted, and no limitation is extended by implication. The late Sir John Shaw, absolute fiar of the estate of Greenock, having by gratuitous settlement confined himself to an estate tail, *reserving to himself certain powers and faculties*, the question was, whether he had exceeded the true measure of these powers. In considering which, the powers reserved to him in the entail must, in law, be construed in the most liberal sense, more especially in a question with a gratuitous donee. He had reserved power to burden to the extent of 50,000 merks for provisions, and to charge the estate accord-

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ingly. He had power to feu and to grant long leases, for such space as they shall think fit. 1*st*, As to the 50,000 merks of provision, and interest, and penalty thereon, no objection is stated against the principal sum, but interest and penalty are demanded; and what the heir of entail now states, is, that an heir of entail in possession is bound to keep down the interest of debts charged upon the estate during his possession, in the same manner as if he had only a liferent interest in the estate, and was bound to transmit it to the next heir of tailzie, in the same good condition that he found it; but this has no foundation in law, and it proceeds upon an erroneous supposition, namely, that an heir of entail is a mere liferenter, whereas he is not so, but an absolute fiar, except in so far as he is restrained by the limitations of the entail. In this character he can cut woods and do many other things implied in a proprietory right; and unless there be a clause compelling the heir in possession to keep down the interest of debt during his possession, he will be under no obligation to do so. 2*d*, In regard to the granting of the feus in question, it was quite clear that by the powers reserved, he had power to grant those now excepted to. As to the feu of the farms, the reserved power does not confine Sir John to the feuing of mere stances for building tenements, and therefore that it empowered him to feu farms at a fair rent, as the clause "to grant feus or long tacks of *any* part or "portion of the estate," at once indicates. 3*d*, Then in regard to the feus of the mansion-house, office-houses, and garden, as it is admitted by the respondent, that Sir John had power to grant feus of dwelling houses, yards, and offices, there was no reason for making a distinction of Sir John's own house.

The greatest part of the house had been built since the date of the entail by him, as well as the greater part of the pleasure grounds laid out and planted. 4*th*, And in regard to the sale of the growing wood, as Sir John's interest therein was unquestionable during his life, there was nothing to prevent him then to sell the wood to a purchaser, nor for the purchaser after his death to be entitled to cut the same in virtue of that sale. 5*th*, And lastly, As to the feu of the town of Greenock, the power reserved of feuing is unlimited in its nature; and therefore there was no reason in the objection to this feu on the ground stated, namely, that instead of a part, it is of the whole town of Greenock to one person.

Pleaded for the Respondent:—The powers reserved in this entail must be construed with reference to the prohibitory, irritant, and resolutive clauses which are binding on the maker of the entail himself, and being so construed, it is obvious the powers exercised in the manner here done go to subvert, and are in fraud of the entail. The whole estate is diverted from the heirs of entail, under the colour of feuing. And leases are granted not only of the lands but also of the mansion-house and pleasure grounds, including a sale of the growing woods, such as obviously pointed at an alteration of the order of succession, and a complete disposal of the *dominium utile* of the estate. These cannot be sustained. 1. The arrears of interest, amounting to L.4722, can form no burden or debt against the next heir of entail succeeding to the estate, because the heir of entail in possession has a mere liferent after paying all annual burdens and the interest of debt, and was bound in law to keep down the interest of the 50,000 merks debt on the estate during his possession. Be-

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sides, by the express terms of the heritable bonds, Sir John Shaw bound himself personally, as well as his heirs of tailzie, to pay the annual interest; and over and above this, made over and assigned a proportional part of the annual rents of the estate in question to Lord Cathcart, as a further security, and in payment thereof half-yearly. If the latter therefore allowed Sir John Shaw to receive and uplift these rents for his own use, for a period of thirty-four years, instead of uplifting them himself, this was a wrong application, for which Lady Cathcart's heir must suffer, and not the heir of entail. 2. Then, as to the feus granted by Sir John, he has far exceeded the powers reserved to him by the entail. To grant feus of nearly the whole estate, inclusive of the mansion-house, offices, and gardens, and a feigned sale even of the growing wood, and all this for mere illusory duties or rents, was very like an entire transference of the estate to Lord Cathcart, in defraud of other heirs of entail. By the reserved power Sir John was only empowered to feu out urban tenements or lands for purposes of building, but had no power to feu the farms of the estate. 3. Neither had he power to feu the mansion-house, garden, and offices. 4. As to the wood, as Sir John Shaw's interest in the estate ceased at his death, he had no right to sell the growing wood, to be cut by a purchaser at some remote period of years after his death; and consequently the trees standing at his death as *pars soli*, descend to the next heir of entail. 5. Nor to feu the whole town of Greenock to one person, instead of feuing a portion merely to several individuals for the purpose of building.

After hearing counsel, it was

Ordered and adjudged, that the interlocutors be af-

firmed, with the following variation; viz., *in the first-mentioned interlocutor of the* 10*th August* 1754, *after the words (so far as it comprehends the avenue about the house) to insert these words,* "*and also the power of holding courts and naming Baron Bailies.*"

For Appellants, *W. Murray, G. Brown.*
For Respondent, *R. Dundas, C. Yorke.*

Note.—This case was much relied on in the Roxburgh entail (feu cause,) 17th December 1813, *Dow*, vol ii. p. 149. At page 227, Lord Eldon, in giving judgment, after referring to the words of power in the above entail, says,—"The chief question there was as to the feu of the Western Barony; and it was held that it could not be feued, as the nature of the reservation showed that only such parts were to be feued as were fitting for dwelling houses and other buildings, and as it was not probable that the town of Greenock should extend to that length. But it had been said in that House, that if ever the time came when the town of Greenock should extend to the Western Barony, then the heirs of entail might grant feus of it."

In the Queensberry cases, 17th Nov. 1807, House of Lords, 11th Dec. 1813, 2 *Dow*, p. 90, Lord Alloway said,—"It is said without any express prohibition in the entail, it was found, in the case of Greenock, that the heir of entail could not let the mansion-house, or the ground connected with it, and that this is now settled law. I admit this; and even although it were an anomaly, I should never think of disturbing any point that has been decided either by the understanding of the country, or by the judgments of the Court."

Lord President Blair, in Gordon *v.* Gordon, January 1811, *Fac. Col.*, says,—"The case of growing trees is a case of diffi-
"culty. Even there, however, the Court, in the case of Green-
"ock, restricted the heir in possession from destroying *silva*
"*cedua,* which was not mature for cutting,"