

1755. *January 31.*LORD CATHCART *against* JOHN STEWART NICHOLSON SCHAW.

In the contract of marriage betwixt John Schaw, younger, of Greenock, and Margaret Dalrymple, *anno* 1700, Sir John Schaw, the elder, and John, his son, the younger, concurred in making a settlement of the estate of Greenock on the heirs-male of the body of John, the younger; after which, the heirs-male of Sir John, and the heirs of the body of his daughter Margaret, were preferred to the heirs-female of John.

This settlement was executed in the form of an entail, which contained prohibitory, irritant, and resolute clauses, in the strictest words, against selling or charging, or altering the order of succession; and a provision, with a penalty annexed to the contravention of it, That the " heirs of tailzie should not suffer the duties of ward, marriage, or relief, nor the feu-bleuch, nor teind-duties, nor other public burdens, payable forth of the said tailzied lands, by the not-payment whereof the same may be evicted, to run on unsatisfied."

In the faculty to contract debt, a power was given the heirs to contract 50,000 merks Scots money of debt, and therewith to affect and burden the said lands, for providing of their daughters, or younger children; but it was declared, that it should not be lawful to any of the succeeding heirs of tailzie to contract any more debts, for provision of their children, until the first debts contracted by their predecessors, for provision of their children, be paid and cleared; " at least, that it should be only lawful for them to contract so much, for the end foresaid, as, with the predecessor's debt above specified unpaid, should amount to 50,000 merks in the whole;" and that the adjudications led therefor should always be redeemable upon paying the sums for which the same should be obtained, " with the annual-rents thereof."

A provision was likewise made for the daughters of the marriage, in case of failure of heirs-male of the marriage. In that event, the father and son bind " themselves, their heirs-male and of tailzie," to pay to the daughters of the marriage, if there be only one daughter, the sum of 30,000 merks for her portion; if two daughters, 40,000 merks; if more than two, the above sum of 50,000: which provisions are declared to exhaust the above faculty of contracting debt, in so far as they are exercised; and which portions shall be payable to the said daughters, at their ages of 16 years complete, or at their marriages, which of them shall first happen, together with the " annual-rents of the said portions continually during the non-payment thereof," after the several terms of payment above-mentioned. And they further bound themselves, &c. to free the daughters of all debts that may affect them as heirs of line to their father. The faculty to contract, or the provisions in exercise of it, being declared to be a burden on the entailed estate, and the heirs of tailzie being bound to relieve Sir John's heirs of line of the debts so contracted or sums so provided.

No. 33.

Where there is a power to provide to a certain extent, whether by-gone annual-rents of such provisions are a burden on the estate?

There are other particulars in this case relative to right to cut timber, grant feus, &c.

No. 33. *Proviso*, in case of the second marriage of Sir John, or any other heir of entail, he or they may provide a second wife in a jointure, not exceeding a fourth of the free rent of the estate at the time, "the annual-rents of children's portions, &c. being first discounted."

Separate *proviso*, that the present tailzie, and "irritancies thereof, are to be no-wise prejudicial to any execution competent on this contract, in so far as the same is conceived in favours of Margaret Dalrymple, and the daughters of the marriage," failing heirs-male thereof.

In March, 1718, John the younger, then become Sir John, in the contract of marriage betwixt his only daughter, Marion Schaw, and Lord Cathcart, obliged himself to grant bond to Lord Cathcart for 50,000 merks, payable by him, and his heirs succeeding to him in the estate of Greenock, within a year and day after the marriage, with annual-rent and penalty; and also to grant an heritable security for the said 50,000 merks on the lands of Greenock, obliging his heirs of tailzie to relieve his other heirs of these sums, annual-rents and penalties, which should happen to be due at the time of his death. This obligation proceeded on a recital of the reserved faculty in the entail 1700, of burdening the estate with 50,000 merks; and of the provision, by the same settlement, secured to the daughters excluded from the succession.

On the 3d of September, 1718, Sir John granted bond to Lord Cathcart for 30,000 merks, in satisfaction of this provision.

The day after he granted two other bonds to Lord Cathcart, making together the sum of 20,000 merks, in exercise of that faculty.

In both these bonds Sir John binds himself and the heirs succeeding him in the entail of Greenock; they are made payable at the next term after their date; annual-rent is made due upon them from the date of the marriage; in both of them Sir John binds his heirs of tailzie to relieve his other heirs of the sums, principal, and annual-rents, and penalties; and in both of them Sir John binds himself to infeft Lord Cathcart in an annual-rent effeiring to these sums out of the barony of Greenock; and, for that purpose, an assignation to the rents, for satisfaction of the annual-rent, is therein granted to Lord Cathcart.

From the time of Lord Cathcart's marriage till the death of Sir John, which happened *anno* 1752, Sir John paid none of the annual-rents, either of the 30,000 merks bond, or of the two bonds making together 20,000 merks granted by him to Lord Cathcart.

Margaret Dalrymple, Lady Schaw, survived Sir John.

Upon Sir John's death, John Stewart Nicolson, the descendant of Margaret Schaw, and heir of entail to Sir John, pursued Lord Cathcart, son of the marriage 1718, and heir of line of Sir John, to be relieved of the by-gone annual-rents of the 50,000 merks for which Lord Cathcart was creditor upon the entailed estate.

Pleaded for the pursuer: An heir of entail has only a life-rent right to the estate. He is under a fiduciary obligation to transmit the estate to his successor

in as good condition as it was at the time when he came to it. If he counteracts this obligation, the next heir has an action of relief for damages against his representatives.

This was the intention of parties in the present entail; for that faculty to contract debt, in limiting the sum, declares that no heir shall contract more debt than, added to his predecessor's debt, shall amount to 50,000 merks in whole.

In case of Sir John's second marriage, or of that of any heir of entail, the extent of the wife's jointure is to be a fourth of the free estate; but the estate is to be computed only free after deduction of the annual-rents of the younger children's portions, which supposes that these annual-rents were every year to be paid out of the estate.

In Lord Cathcart's contract of marriage, the bonds are payable at next term, Sir John binds himself personally; annual-rent is due from the date; Lord Cathcart was infeft in an annual-rent effeiring to his debts, and had an assignation to the rents for payment of his annual-rents: All these things show the meaning of parties, that the annual-rents were to be regularly paid.

Separatim, With regard to the 30,000 merks.—By the entail 1700, the sum allotted to an only daughter is not to be paid in all events, but merely on the contingency of Sir John Schaw's dying without issue-male. Whether that event would or would not happen, was uncertain in the year 1718, and continued so till his death, his Lady having survived him; and therefore the estate could not be charged with this debt, and the annual-rents on it from 1718, the date of Lord Cathcart's marriage.

Answered for Lord Cathcart: An heir of entail is not a tenant for life, but an absolute proprietor, except in so far as he is restrained by express limitations: where he infringes not these, although he hurts the next heir, no action of damage is competent;—as if he commits waste by cutting the woods, not cultivating the ground, or spoiling the mines.

Where it is the intention of parties to oblige the heirs to keep down the debts, by paying the interest, it is usual in tailzies to insert anxious clauses for that special purpose.

It was not the intention of parties here, that the annual-rents should be regularly paid; for though it is provided that no heir of tailzie should suffer the duties of ward, non-entry, nor any public burdens, to run on unsatisfied, yet it does not provide, that no heir of tailzie should allow the annual-rents of the debts to run on unsatisfied.

The faculty to contract empowers the heir to contract 50,000 merks of debt, and therewith to affect and burden the lands; that is, he was to borrow 50,000 merks, and lay it as a burden on the estate; which implied, that both principal and annual-rent should be a burden thereon.

In providing for the redemption of adjudications led for that debt, it makes mention of the annual-rents thereof.

No. 33.

In the provision to the daughters of the marriage, the portions are payable at a certain period, with the annual-rents of the said portions continually during the non-payment thereof.

In Sir John Schaw's contract of marriage 1700, the father and son bind themselves, and their heirs of tailzie, to liberate the daughters of the marriage of all debts which might affect them as heirs of line: In consequence of this, in Lord Cathcart's contract of marriage 1718, Sir John binds his heirs of tailzie to relieve his other heirs of the said sum of 50,000 merks, with the annual-rents due at his death;—in all the bonds he does the same. All which supposes, that the heirs of tailzie were to be liable for the whole principal and annual-rents, without relief of the daughters as heirs of line.

Separatim, With regard to the 30,000 merks.—As it is declared, that the tailzie and irritancies thereof are not to be prejudicial to the execution competent to the daughters for their provisions, the estate was so far unentailed and free of irritancies. Now, if there had been no tailzie, there can be no doubt the estate would have been subject to the annual-rents as well as to the principal sums.

“ The Lords found the pursuer is not entitled to any relief against the defender as heir of line of Sir John Schaw of the annual-rents of the 30,000 merks contained in the heritable bond produced, granted by Sir John Schaw to the late Lord Cathcart, in implement of the obligation in the contract of marriage to pay that sum to the only daughter in the marriage; but found the pursuer is entitled to relief against the defender, as heir of line, of the annual-rents of the 20,000 merks contained in the two bonds produced, granted by Sir John Schaw to the defender, in exercise of the faculty contained in the entail, and incurred during the life of Sir John Schaw.”

* * * By the entail 1700, Sir John Schaw having reserved power to the heirs of entail to grant feus, the feu-duty not being under a certain extent for each fall of dwelling-houses, nor under another certain extent for each fall of office-houses; Sir John had granted a feu of the town of Greenock to Lord Cathcart. In this feu there were several clauses, which produced the following objections:

Objected: By this feu, the defender is freed from thirlage, though the entail conveys, along with the barony, the mills and multures thereof, and though the heir of entail supports the mill; from paying duties at the harbour, though the harbour is entailed, and the heir of entail supports it; from ministers' stipends, cesses, and all public burdens whatever, which are natural burdens upon feus. He is freed from the legal irritancy *ob non solutum canonem*, and the duplication of the feu-duty upon the entry of heirs. The composition due by a singular successor is taxed to a trifle.

The defender is obliged to pay only £.1 Scots for all ground he may hereafter gain of the sea.

Answered for Lord Cathcart: Before the entail, Sir John was absolute fiar of his estate; he had a power to feu as he pleased.—In the entail, he reserved a power to feu under a limitation, That the feu-duty should be of a certain extent. He has

observed that limitation, and his original power in other respects, was the same as before the entail.

The *littus maris* is *juris publici*; it belongs to nobody; and therefore cannot be deemed a part of the entailed estate.

“ The Lords repelled the reasons of reduction of the feu-right of the town of Greenock.”

* * In the entail 1700, Sir John Schaw having reserved a power to the heirs of entail to set tacks for 19 years, without diminution of the rental, Sir John had set a tack to Lord Cathcart of the western barony of Greenock, at the real rent.

Against this tack it was objected by the pursuer: At the commencement of the tack, many of the tenants had tacks for terms then current; whereas, the intention of the entail was to empower the heirs only to set the farms that were unset.

2do, By the tack, the defender is not obliged to uphold the houses, but only, at his removal, to leave such as shall be then standing in as good a condition as they were at his entry.

Answered to the *first*: The tailzie allows the setting tacks for a certain space, without diminution of the rental. The present is no more than a tack of the tack-duties; such a tack is good in law; and whatever was the intention of the entail is within the terms of it.

To the *second*: By the entail, the heir was bound to nothing except not to set under a certain rent; and there is no law which binds an heir of entail to uphold the houses on the estate.

“ The Lords repelled the reasons of reduction as to this tack.”

* * Sir John had likewise given to Lord Cathcart a tack of the mansion-house, gardens, and pleasure-ground round the house.

Objected by the pursuer: These could not be set to preclude the heir of entail from the possession of his family-seat.

Answered: The greatest part of the house had been built, and the greatest part of the pleasure-ground laid out, by Sir John himself.

Replied: These follow the ground, by whoever built or planted, and cannot be taken out of the possession of the next heir of entail.

“ The Lords sustained the reasons of reduction as to these.”

* * Sir John had, by contract of sale, sold to Lord Cathcart all the growing timber, both planted and natural, on the estate, with liberty to him to cut it at any time before the year 1763.

The planted timber was fit for cutting, the natural wood was not.

This contract was not produced till Sir John's death.

Objected by the pursuer: Sir John's right to the estate was ended with his life. With the estate, the trees must descend to the heirs of tailzie; for, as they could not have been cut by Sir John's executors, so neither could they be cut by the purchaser.

No. 33.

Whatever may be the power of an heir of entail over such natural woods as are ripe for cutting, that power will not apply to such part of the natural woods in question as are not ready for cutting.

Answered : In questions betwixt heirs and creditors, trees, being fixed to the ground, are considered as *pars soli*, and of consequence heritable. By a sale, the property is transferred ; of consequence, the trees remain no longer part of the entailed estate ; the seller's death happening afterwards cannot annul the right of the purchaser.

Sir John's power is the more favourable, that the planted wood had all been planted by himself since the date of the tailzie.

“ The Lords found none of the planting (*i. e.* planted trees) could be cut by the defender, in virtue of the contract of sale produced after the death of Sir John Schaw ; and, in respect it is alleged by the pursuer, and not denied by the defender, that the natural woods sold by said contract were not fit for cutting at Sir John Schaw's death, therefore sustain the reasons of reduction of said contract.”

Act. *R. Dundas, W. Stuart, et alii.*

Alt. *Ferguson, Brown, et alii.*

J. D.

Fac. Coll. No. 132. p. 195.

* * This case was appealed. The House of Lords ORDERED and ADJUDGED,
That the interlocutors complained of be affirmed.

1755. November 25.

COLONEL LOCKHART *against* SIR ALEXANDER GILMOUR.

No. 34.

Words beyond intention in an entail held not to be effectual in law.

General Ross, *anno* 1727, executed a strict entail of his estate of Balnagown, in which one of his great objects was to preserve a perpetual succession of the family of Balnagown, and to prevent his estate from being sunk in another family. In this view, failing heirs of his own body, he calls to the succession the younger sons of Lord Ross, of Sir Alexander Gilmour of Craigmiller, of Sir James Lockhart of Carstairs, of the Earl of Dalhousie, of the Earl of Kilmarnock, &c. More particularly, failing the family of Ross, he calls “ Charles Gilmour, second lawful son to Sir Alexander Gilmour of Craigmiller, procreated betwixt him and Dame Grizel Ross, his spouse, (the General's sister), and the heirs-male to be procreated of the said Charles Gilmour, and the heirs-male of their bodies, (with and under the provision after expressed, in relation to the said Charles Gilmour and his said heirs their succession to my estate, when it shall happen that they also succeed to the estate of the said Sir Alexander Gilmour) ; whom failing, James Lockhart, second son to Sir James Lockhart of Carstairs, and the heirs-male to be procreated of his body ; whom failing, the other younger sons of the said Sir James Lockhart, in their order, and the heirs-male of their bodies,” &c.

The provision above referred to, under which Charles Gilmour and the heirs-male of his body are called to the succession, must be particularly attended to, as