

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

material in the present question. It is in the following words: "*Item*, It is hereby expressly provided and declared, that whensoever the said Charles Gilmour, or his heirs above-mentioned, succeeding to and possessing my estate, shall also succeed to the estate now belonging to the said Sir Alexander Gilmour, then, and from thenceforth, the right of my estate in their favours shall cease and be extinct, void and null; and the same shall fall and pertain to the next heirs of tailzie appointed to succeed, to whom it shall be lawful to procure themselves served, retoured, infest, and seised in my estate, as heirs of tailzie to the person who was last infest before the person thus succeeding to Sir Alexander Gilmour's estate, or to obtain adjudication, declarator, or any other method of the law, as aforesaid."

The General having died without issue, the succession opened to Charles Ross, second son of Lord Ross; and, during his possession of the estate, Charles Gilmour having succeeded to the estate of Craigmiller, he died, leaving the estate to his son and heir, Sir Alexander. The whole persons of the family of Ross having afterward failed, a competition arose betwixt Sir Alexander Gilmour, who was called to the succession immediately after the family of Ross, and James Lockhart, afterward Colonel James, the next substitute. It was contended for Sir Alexander, That the provision under which he was debarred from the estate of Balnagown has not happened; that he was barred in case only he should succeed to the estate of Craigmiller "after succeeding to and possessing the estate of Balnagown." The event which has happened is the reverse—he is claiming the estate of Balnagown after succeeding to and possessing the estate of Craigmiller; and therefore that Colonel Lockhart can have no claim. Colonel Lockhart contended, That the words ought to be extended so as to reach what is clearly the will and intention of the maker of the entail. The General's great object was, to preserve his estate separate and independent. In that view, Charles Gilmour's right to the estate of Balnagown is voided, in case he shall afterward succeed to the estate of Craigmiller. The words, indeed, are limited to the only event the General had in view at the time; but his intention obviously was to exclude the union of the two estates; and therefore, by all sound interpretation, the clause under consideration must be suspensive as well as resolute.

Upon this case there was a hearing in presence; and, after that hearing, very long informations, in which every argument, as usual, was urged that seemed to have any sort of relation to the point in question. As such arguments, for the most part, serve but to darken a cause, I shall state shortly what appeared to be the sense of the Court, and their motive for preferring General Lockhart. Sir Alexander, it is true, goes before Lockhart in the order of succession. Nor are there any words varying that order that can be applied to the case which has happened. But then, as it was evidently the entailer's will that Sir Alexander should not enjoy both estates, Sir Alexander's claim of preference, which is sup.

No. 94. ported by words merely contrary to intention, ought not to be sustained in a Court of equity.

“ The Court accordingly decreed.”

*Sel. Dec. No. 93. p. 125.*

1756. *January 28.* HOUSTON *against* STEWART NICOLSON.

No. 35.

A clause of entail empowering the heir of tailzie to provide wives or husbands in life-rent to the extent of a third, found sufficient to empower the first institute and next apparent heir jointly to settle a third upon the wife of the said next apparent heir.

*Fac. Coll.*

\* \* This case is No. 68. p. 2338. *voce* CLAUSE.

1757. *January 19.*

THE EARL OF BUCHAN *against* HIS FATHER'S CREDITORS.

No. 36.

Personal creditors of an heir of entail, purchasing the real debts affecting the estate, if entitled to apply the rents to pay the personal debts, to the prejudice of the next heir of entail ?

In 1664, Sir James Stuart of Strathbrock executed an entail of his estates of Strathbrock and Kirkhill, containing the usual prohibitory and irritant clauses.

Upon the death of Sir James and his male-issue, the succession devolved upon Katharine Stuart, Sir James' youngest daughter, who had intermarried with Henry Lord Cardross.

At the time this succession opened, the estates stood charged with debts to a considerable extent, which had been contracted by the maker of the entail, and his son the first institute, who was not bound by the prohibitions in the entail ; and these debts were soon after made real against the estate by adjudications, and charter following thereon.

David, late Earl of Buchan, succeeded to the entailed estate after the death of the said Henry Lord Cardross, and Katharine Stuart, his father and mother ; and he having also contracted considerable debts, which could not affect the entailed estate, his creditors proceeded to diligence against him, by adjudging his life-rent of the estate, and arresting the rents. This brought on a competition, in 1733, among the several creditors, and produced a sequestration, which continued till the Earl's death in October 1745. The creditors were classed, and afterwards preferred as follows.

1<sup>st</sup>, The real creditors of Sir James Stuart, the maker of the entail, and of his son, the first institute.

2<sup>dly</sup>, The son of the late Earl of Buchan, for an annuity of £.300 Sterling, which had been assigned to him out of the rents, under the designation of Lord Cardross, by his father the late Earl, for an onerous cause ; in virtue of which he