

1803. *May 19.*SIR WILLIAM ELLIOTT *against* The HEIRS of ENTAIL of STOBS.

No. 101.

The irritant and resolute clauses under mentioned found to prevent a sale of the estate.

Sir Gilbert Elliott of Stobs, by contract of marriage (14th April, 1702,) with Eleanor Elliot, settled his estate of Stobs upon himself, and the heirs-male of the marriage.

He afterwards executed a deed of entail, (17th September, 1718,) in favour of himself in life-rent, and John Elliott, his eldest lawful son, and the heirs of his body; whom failing, to his other sons, in their order, and the heirs of their bodies; whom failing, to other substitutes.

The general prohibitory, irritant, and resolute clauses, in the entail, follow one another in these words: " That it shall not be leisom nor lawful to me the said Sir Gilbert Elliott, nor any of my heirs and successors foresaid, to sell, and I hereby bind and oblige me and them not to sell, annailzie, wadset, dispone, dilapidate, and put away the said lands, baronies, and estate, or any part or portion thereof, heritably, and irredeemably, or under reversion, (except in so far as the faculties above written do extend), nor contract or on-take debts thereupon, or grant bonds or other securities therefor, nor do or commit any other facts, deeds, or delicts, civil or criminal, whereby the said lands and estate may be anywise apprised, adjudged, forfeaulted, evicted, or affected, nor to infringe, alter, or innovate, this present substitution, and course of succession, in defraud and prejudice of the subsequent heirs of provision above mentioned, conform to the order and substitution above specified; neither shall it be lawful to me, nor to any of my heirs of provision foresaid, whether male or female, to suffer the said lands, baronies, and estate, or any part thereof, to be adjudged or apprised for debts to be contracted, but shall be obliged to redeem the same within the space of eight years, after deducing and leading any such diligence: And if I, or any of the said heirs, whether male or female, *successive*, shall contravene the premises, or do any fact or deed in prejudice hereof, by the said heirs-female not using the surname of Elliott, and my arms and title, or by the said unmarried heirs-female not marrying a gentleman, who and their heirs shall not use the same, and my arms and title, as above; or by the said heirs-female, and they and their husbands and children not using the said surname, arms and title as aforesaid; or who whether male or female, and I shall dispone the said lands and estate, or any part thereof, or contract debts, or commit any other fact or deed, during their respective marriages, or in favours of their respective husbands, wives and children, (except in so far as is above provided), whereby the said lands and estate may be evicted or affected in manner foresaid; or shall permit the same, or any part thereof, to be adjudged or apprised for any such debts and deeds, and not redeem the same within the limited time foresaid, after leading thereof; and if I or any of the persons and heirs foresaid, whether male or female, shall infringe or alter the succession and substitution foresaid, then, in any of these cases, not only shall all such deeds and contra-

ventions to be done by me, and the said heirs male and female, or any of them, during their respective marriages, so far as the samen may burden and affect the said estate, and infringe or alter the succession, be *ipso facto* null and of no effect, by way of exception or reply, without any sentence and declarator to follow thereupon; but also, I shall lose my right of liferent, and the other persons, doers of said deeds, and committers of said contraventions, or any of them, shall amit their right of succession, and be debarred from said lands and estate; and all the infeftments, and other rights thereof, shall from thenceforth expire and become void, as if they had never been granted; and the same shall accresce to the next immediate person appointed to succeed to the said estate, and so forth *successivè*, in case of divers contraventions, and that free of all debts, deeds, and delicts, done, contracted, or committed by the contraveners; and it shall be leisom to the next succeeding heirs, to use and prosecute any legal way or method competent for establishing the right thereof in their persons, or in the persons of the remanent heirs of provision foresaid, to succeed to them in manner above expressed, always with and under the provisions, conditions, reservations, faculties, burdens, and declarations and irritancies above mentioned."

Sir Gilbert made up new titles to his estate on the footing of this entail in 1719 and 1720, upon which he and his eldest son were infeft. The entail was recorded in 1724, and Sir Gilbert possessed the lands upon these titles till his death in 1764.

He was then succeeded by his eldest son Sir John, who possessed the estate upon the titles made up in his father's lifetime, and died in 1767, being succeeded by his eldest son Sir Francis, who also made up titles in terms of the entail; and, upon his death in 1791, Sir William succeeded, and made up his titles under the entail, as his predecessors had done; on which titles he has ever since possessed the estate.

In the year 1801, Sir William entered into a minute of sale with Mr. Joseph Gillon, writer in Edinburgh, of a part of the estate. Mr. Gillon suspended the payment of the price, on this ground, that Sir William had no power to implement the minute of sale on his part, being restricted from selling by the entail of Stobs. The bill of suspension was passed of consent.

With a view to ascertain the nature of his right in the estate, Sir William expeded a general service as nearest and lawful heir of provision to Sir Gilbert, his great grandfather, under the contract of marriage 1702; and upon that title he brought actions of reduction and declarator of the tailzie and subsequent investitures, calling as defenders all the heirs of entail in existence.

These actions were conjoined by the Lord Ordinary, and by his Lordship reported to the Court.

In the process of reduction, Sir William maintained, that the entailier had no right to make the entail, contrary to the provision in his marriage-contract, in favour of the heirs of the marriage, who were entitled to receive the estate from him no otherwise fettered than had been done by the marriage-contract. He therefore insisted for a total reduction of the entail.

No. 101. But the Court (May 19, 1803,) were unanimous in thinking that this plea was ill founded ; that the destination in the contract of marriage, though generally in favour of the heirs of the marriage, was exhausted in the person of the eldest son ; that supposing he could have challenged the entail, yet as he took the estate under the entail, he homologated it. The *jus crediti* in favour of the heirs by the contract of marriage was then exhausted, and the right of challenge in future barred.

Against this judgment Sir William Elliott did not reclaim.

In the process of suspension and declarator, Sir William maintained this separate plea, that the entail was ineffectual to prevent a sale, being defective in its various clauses ; in support of which, he

Pleaded : The limitations of an entail are not be extended by inference or implication beyond what is expressed in the entail itself ; and wherever these limitations are directed against third parties, as in the case of a prohibition to sell, or contract debt, in order to render these effectual against purchasers or creditors, it is necessary that the prohibitory and irritant clauses should be accompanied by a resolute clause making void the right of the contravener ; 11th March 1707, Heiress of Redheugh against Forsyth, No. 80. p. 15489 ; 22d July 1712, Creditors of Ricarton, No. 81. p. 15494 ; 8th February 1758, Creditors of Humbie, No. 86. p. 15507. On the other hand, though there be prohibitory and resolute clauses, if there be no irritant, the case is the same ; Ersk. B. 3. Tit. 8. § 29, 11th July 1734, Bailie against Carmichael, No. 82. p. 15500 ; 28th January 1779, Kempt against Watt, No. 95. p. 15528. The irritant and resolute clauses, besides, must be precisely applicable to the act of contravention, in order to be effectual against third parties ; 15th January 1799, Bruce against Bruce, *supra*.

In the present case, the irritant and resolute clauses, instead of bearing in general that all the acts of contravention contained in the prohibitory clause shall be void and null, or shall subject the heir to a forfeiture, specially enumerate the various cases to which they are meant to apply ; with this farther limitation, That in order to render void an act of contravention, it must be done by Sir Gilbert and the heirs ; it must be done by the heirs during their respective marriages ; and it must be such as to burden or affect the estate, and infringe or alter the succession. But to enter into a minute of sale, does not fall under any of the cases enumerated, as qualified and explained by the irritant clause, in which cases alone contravention of the entail can be effectual against third parties. The prohibition “ to sell, anailzie, wadset, dispone, dilapidate, and put away the said lands,” is most ample ; but in the irritant and resolute clauses, there is not one word about selling, nor any thing which in sound legal construction can be held to be equivalent to it. The only words having the least reference to this prohibition are these in the irritant and resolute clauses, “ or who, whether male or female, and I shall dispone the said lands, and estate, or any parts thereof.” Now, the relative “ who” refers to the nearest antecedent clause, “ heirs-female, their husbands and children,” none of which Sir William is ; at least if it does not,

this clause is so uncertain as to be insufficient for imposing fetters, which can only be done clearly and expressly, to affect the rights of purchasers and creditors. Again, the disposition must be granted in concurrence with Sir Gilbert himself, "who, whether male or female, and I;" and it can only take place in case they concur to dispoise the estate, but does not take place in any of the other ways by which the estate may be alienated, *e. g.* by a minute of sale. The statute 1685 distinguishes between selling, anailzieing, and dispoising, as being different modes of affecting property. Selling or anailzieing, therefore, by a minute of sale, is different from dispoising; and the minute of sale may be completed by the purchaser adjudging in implement.

Answered: The act 1685, permitting proprietors to entail their property, has prescribed no form of words which shall be essential for carrying the entailor's intention into effect; nor have the decisions of the Court as yet supplied the deficiency. It is only necessary that the clauses should be clearly and distinctly expressed, so that the meaning of the entailor may be carried into effect, without resorting to any constrained or violent construction of the words. In Bruce against Bruce, *supra*, the entail of Tillycoultry, among other prohibitions, contained one directed against "selling, anailzieing, dilapidating, or putting away the foresaid lands or estate." The resolute clause did not contain a general reference merely to the various prohibitions, as the irritant clause did, but proceeded to a special enumeration of the acts of contravention, which would forfeit the contravener's right; thus limiting and circumscribing the effects of the general reference. Among those acts of contravention, the whole clause *de non alienando* was omitted, and no words which could apply to it were inserted. The strict interpretation of entails will probably not be carried farther than it was there: the present question, however, is one very different.

On examining the enumeration of cases to which the irritant and resolute clauses of the estate of Stobs are meant to apply, the first part of them refers to the prohibitions with regard to the entailor's surname, title, and arms, and with regard to the heirs-female, and their husbands and children using the same surname, title and arms. Then, as the heirs of entail, as well as the entailor, were prohibited from alienating, contracting debt, or altering the succession, the next part of the clause, quite distinct and independent of the former, and beginning, "or who, whether male or female, and I shall dispoise the said lands," relates to these last prohibitions. The irritant clause begins with the words, "and if I, or any of the said heirs, whether male or female *successive*, shall contravene the premises," and the remainder is merely a continuation of that sentence. The pronoun "who," therefore applies to "any of the said heirs;" and particularly, when connected with the words, "whether male or female, and I shall dispoise," it can relate to no others than the heirs of entail; as the heirs of entail, male and female, and the entailor himself, had been prohibited from alienation. Nor is the irritancy confined to a deed of an heir in concurrence with the entailor. The entailor, by the construction of the tailzie, became a liferenter, and no prohibition against him

No. 101. was necessary; and if he had not, he could not have irritated his deed, or deprived his creditors of the means of attaching his estate, so long as he continued proprietor of it; so that the addition "and I" to the various clauses is unnecessary, and should be held *pro non scripto*; the intention of the entailer is obvious. Even the clause itself begins thus, "If I, or any of the said heirs;" afterwards when "and" is used as being synonymous with "or," which in common language it frequently is. Again, the irritancy is applicable to a sale of the estate, as disposing is one of the acts specially enumerated, making this case thus far different from the case of Tillycoultry. Selling, however, it is said, is not included under the general term, to dispone. But these words are synonymous; they are different modes of expressing the same act, and, together with annailzie, are so used by the statute 1685. Perhaps, of all the terms, "sell, annailzie, wadset, dispone, dilapidate, and put away," used in the prohibitory clause, "dispone" is the most general; and it is therefore used as equivalent to them; Creditors of Humbie, 8th February, 1758, No. 86. p. 15506.; Creditors of Dunipace, 27th July, 1744, No. 84. p. 15501. The irritant clause continues—"Then, and in any of these cases, not only shall all such deeds and contraventions to be done by me, and the said heirs-male or female;" this first part applying to such prohibitions as are directed against the entailer or the heirs of entail; and then proceeds, "or any of them, during their respective marriages;" comprehending the other class of contraventions, as to the name, arms, and title, which are to be borne by the heirs-female, and their husbands, and which prohibitions are contradistinguished throughout every clause in the entail. All these are irritated, so far as they burden and "affect" the estate; which last term is sufficient to include the sale in question.

The Lords (19th May, 1803,) sustained the defences; and adhered, (14th June, 1803,) by refusing a reclaiming petition, without answers.

Lord Ordinary, *Craig*.
Agent, *W. Riddell, W. S.*
Agent, *Dav. Christie*.

Act. *Solicitor-General Blair, Jo. Clerk, Walter Scott*.
Alt. *M. Ross, Cathcart, Forbes*.
Clerk, *Home*.

F.

Fac. Coll. No. 102. p. 224.