ses, were directed against himself, in the same manner as against the substitutes. —Having afterwards contracted considerable debts, he was obliged to sell to Cuninghame a part of the lands comprehended under the entail. He then brought, against the substitutes, an action for trying the validity of the sale; while the purchaser at the same time presented a bill of suspension, on the ground of the seller's want of power.

No. 97. be directed against the maker, so as to hinder his debts, though contracted after its date, from being effectual against the lands.

The Lords considered the entail to be altogether ineffectual in a question with the creditors of the entailer. The statute 1685, authorising settlements of that sort, related, it was observed, to the case of heirs alone, whose interest might, according to the forms therein prescribed, be limited or modified by the deed of the ancestor, from whose gift they derived the estate. But the case of the proprietor himself was left to the regulation of the common law. The maker of the entail in question might have restricted his right to a mere life-rent, or, by executing a bond of interdiction, he might have precluded his burdening the lands, unless for onerous or rational causes. These, however, were the only methods by which the order of succession marked out by him could be secured against his future contractions; the general rule being undoubted, That no man can, by any device, withdraw his estate from being liable for his debts.

The Lords decerned in the action of declarator; and at the same time refused the bill of suspension presented by the purchaser.

Lord Reporter, *Stonefield.* Act. *Honyman.* Alt. *Dean of Faculty.* Clerk, *Orme.*

C. *Fac. Coll. No.* 268. *p.* 415.

1789. *July* 8. CHARLES STEWART *against* MISS SOPHIA HOOME.

No. 98. A prohibition to sell does not hinder an alteration of the course of succession.

Mr. Hoome of Argaty made a settlement of his estate in favour of George Stewart his brother, and of a series of heirs in substitution, containing a prohibition, "during the space of thirty years next after the granter's decease, to sell and dispone, feu or wadset those lands, or to contract debts or grant any deeds whatsoever, whereby the lands, or any part of them, may, or can be evicted by adjudication or otherwise, without procuring the special consent, to the making of such sales or contracting such debts, of certain persons named trustees for judging and determining the expediency and reasonableness thereof." This prohibition was accompanied with irritant and resolutive clauses.

The eldest son of George Stewart having succeeded in his order, he, in his marriage-contract, without requiring any consent of the trustees, formed a new line of succession, by virtue of which, upon his decease, though long prior to the lapse of thirty years, the right of the estate was claimed on behalf of Sophia Hoome his daughter. In opposition to this claim, Charles Stewart, the heir under the entail,

Pleaded: The restraints or fetters of an entail are not, it is admitted, the subject of a *quæstio voluntatis*, but of strict legal interpretation. Thus, if to a desti-

No. 98.

nation of succession, a prohibition to alter has not been subjoined, the law, however apparent the maker's intention may be, will not supply the defect. Nay, a mere prohibition against altering the order of succession will not effectually hinder the contracting of debt, or even selling, notwithstanding that thus the entailer's purpose may be totally frustrated.

The present case however is very different. A prohibition against "selling and disponing, or doing any deed by which the lands may be evicted," not only in obvious consistency with its object, but in strict technical language, extends to every species of alienation as well as to a sale for a price. That general prohibition comprehends the particular one relative to an alteration of the course of succession, in the same manner as a whole does any of its parts. Otherwise indeed sale could never be effectually prohibited, as it might always be accomplished through the medium of a change of the destination. Accordingly a prohibition "to give away, dilapidate, or impignorate lands, or to allocate or to bestow them in fee or jointure to wives," was found an effectual bar to any alteration in the destined course of succession. Lord Strathnaver against Duke of Douglas, 2d February, 1728, No. 17. p. 15373. See likewise, 17th July, 1756, Ure against Earl of Craufurd, No. 10. p. 4315.

Answered: If it could be maintained, that the prohibition to sell included that against the altering of the order of succession, because this last might eventually produce a sale; it would hold at least equally true, that wherever such alteration was prohibited, selling, which would still more directly violate the purpose of the settlement, must be also debarred. It is therefore a mistake to suppose, that the former prohibition comprehends the latter.

In the case of Strathnaver, as the expressions of the entail, "give away, bestow in fee," &c. indicated gratuitous deeds, or those of settlement, these might be properly understood to have been debarred; but were that judgment more conformable to the opposite plea, it might be truly said, that at the period when it occurred, the law on this point was not so well fixed as it has been since rendered by an uninterrupted series of decisions; such as, Heirs of Campbell against Wightman's Representatives, 17th June, 1746, No. 85. p. 15505; Sinclair against Sinclair, 8th November, 1749, No. 22. p. 15382; Scot Nisbet against Young, November 1763, No. 90. p. 15516; Judgment of the House of Lords in the case of Edmonstone of Duntreath, 24th November, 1769, No. 68. p. 15461; determinations which, as in effect admitted on the other side, ought to regulate the present case, the distinction which was attempted having evidently failed.

Besides, the circumstance of the prohibitions being limited to a short period, is inconsistent with the intention of making a strict or proper entail.

The cause was reported, when

The Court unanimously found, that the prohibition in the deed was no bar to the settlement in favour of Miss Hoome.

Reporter, *Lord Monboddo.* For Mr. Stewart, *Dean of Faculty.* Alt. *Wight, Rolland.*
Clerk, *Gordon.*

S. *Fac. Coll. No.* 17. *p.* 139.