1760. *January* 22.

JOHN BRYSON of Hartfield, *against* ROBERT CHAPMAN, Writer in Glasgow, and ROBERT BARRIE, Weaver in Hamilton.

No. 87.
A tailzie not irritating the contravener's right, though inhibition be used upon it, does not bar a sale.

In 1716, John Bryson and John Chapman executed a mutual tailzie, whereby they disponed to themselves, and the heirs of their bodies, whom failing, to each other, and the heirs of their respective bodies, certain tenements in Glasgow, under strict prohibitory clauses against contracting debt upon the subject, or selling or alienating the same, and an irritancy of all deeds done to the contrary.

Upon this tailzie no infeftment followed, nor was it recorded in terms of the act 1685; but, in 1735, inhibition was executed upon it, at the instance of Chapman against Bryson.

In 1757, the said John Bryson entered into a minute of sale with Robert Barrie, whereby he bound himself to sell to Barrie, for a certain price, the subjects belonging to him, and contained in the entail.

Barrie suspended the minute, on this ground, That Bryson could not effectually convey the lands to him, in respect of his being bound by the entail not to sell. Robert Chapman, the son of the other tailzier, and, by the tailzie, third in succession to Bryson, appeared, for his interest, in support of the reasons of suspension.

Objected, for Bryson, to the tailzie: That it could not be any bar to a sale, as it was not recorded, nor completed by infeftment, and especially as it does not contain any resolutive clause of the contravener's right. No man can settle his estate under prohibitory and irritant clauses, that the deeds of contravention shall be annulled, without, at the same time, annulling the contravener's right, upon this plain principle, That if the estate remain with him, it must be subject to his debts and deeds.

Answered for Chapman: 1*mo*, As the entail remains a personal deed, a purchaser can only take the right as Bryson himself has it; and therefore barred by the prohibitory clauses binding upon him, as contained *in gremio* of the only title which he has to the lands, agreeable to what was found, in the last resort, in the case of Westshiel, No. 94. p. 7275. *Res est integra*, and the purchaser is not *in bona fide* to accept of the sale, when he sees the limitations; 2*do*, At any rate, the tailzie is secured by the inhibition. When a man obliges himself not to sell land to the prejudice of another, and inhibition follows on that obligation, it follows, that he cannot sell contrary to such obligation.

Replied for Bryson: 1*mo*, Purchasers are *in bona fide* to buy where they see no legal impediment, and are supposed to know, that the law gives no authority to limitations upon property, so as to irritate the acts of contravention, without resolving the contravener's right; which therefore distinguishes this case from that of Westshiel, where the prohibition was enforced by both irritant and resolutive

No. 87. clauses; 2*do*, The inhibition can never supply the defect in the right itself. It may secure the right *tantum et tale* as it is, but cannot render it more obligatory or effectual than the law has made it.

"The Lords repelled the reasons of suspension, and found the letters orderly proceeded."

For Bryson, *Hamilton Gordon, Lockhart.* Alt. *Jo. Dalrymple.* Reporter, *Woodhall.* Clerk, *Gibson.*

Fac. Coll. No. 211. *p.* 381.

1761. *January* 15.

SIR ARCHIBALD DENHAM of Westshiel *against* WILLIAM WILSON, Writer in Edinburgh.

No. 88.

It was provided in an entail, that the heirs should not grant tacks with diminution of the rental. It was found, that bonds or bills taken from the tenants for certain sums, payable by annual moities during the course of their tacks, transmitted to the succeeding heir of entail, altho' there was a separate rent paid not less than the old rent.

By the entail of the estate of Westshiel, it was provided, that the heirs of entail should not grant tacks with diminution of the rental, or for a longer period than nineteen years.

Sir Robert Denham succeeded to this estate; and when he came to renew the leases, he thought it was unnecessary to raise the rents so high as might have been done; but having stipulated in the tacks a rent somewhat above what the lands formerly gave, he, at the same time, took from several of the tenants bonds and bills for certain other sums, payable in equal yearly proportions, for the same period of years with the endurance of their tacks, but without mention of the tacks in any of these bonds or bills, or that they were given on account of the possessions of the granters.

These bonds Sir Robert assigned to William Wilson, writer in Edinburgh, to whom he owed a considerable sum of money; and the bills were confirmed by Mr. Wilson, after Sir Robert's death, as a part of his executry.

Sir Archibald Denham, the succeeding heir of entail, brought an action against Mr. Wilson, concluding, that these bonds should be delivered up to him, the heir of entail, as his property, seeing they had been granted by the tenants as part of the future rents of the estate.

Pleaded for the defender: 1*mo*, There is no evidence that they were granted by the tenants in respect of their possessions; 2*do*, Allowing this to be the fact, they can only be considered as *grassums*, which it is lawful and customary for heirs of entail to take; and this pursuer has no reason to complain, as Sir Robert counteracted none of the prohibitions of the entail. He granted leases for no longer space of time than nineteen years; and, instead of diminishing the rental, he considerably augmented it.

Answered for the pursuer: The bonds and bills themselves, when compared with the endurance of the several tacks, afford real evidence that they were granted by the tenants on account of their possessions; and as it is the legal and necessary consequence of a right of property in lands, that the proprietor is entitled to the