[14th *May* 1835.]

JAMES CORBETT PORTERFIELD, Appellant.—
Lushington—T. F. Ellis.

Mrs. JEAN PATERSON or HOWDEN'S TRUSTEES,
Respondents.

Entail — Clause — Provisions to Children. Under a strict entail containing clauses against contracting debts, &c., "but excepting and reserving furth and from the said "clause irritant full power and liberty" to the heirs of tailzie "to take on debts for the provision of their "younger children, not exceeding three years free rent "of the lands and others foresaid, after deduction of "liferents and real debts," &c. Held (affirming the judgment of the Court of Session), 1. That the heir in possession might grant provisions to his younger children to the extent of three years free rent, payable at the first term after the failure of heirs male of his body, when the lands should devolve on an heir not descended of him: And, 2. That the parties in right of the provisions might recover them from the heir in possession, with interest from the time the provisions fell due, although that heir was not descended from the grantor, and had not succeeded to the lands at the time the provisions became payable.

IN October 1721 Alexander Porterfield of Porterfield executed a deed of tailzie of the estates of Duchall, and other lands, in a contract of marriage between his son William Porterfield and Julian Steele.

By this deed he conveyed the lands to a series of heirs,—the heirs male of the body of the institute and

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the heirs male of the body of the substitutes being preferably called as heirs of tailzie; and he prohibited selling, or granting infeftments of annual rent, or any security on the lands, or contracting debts, or doing any other deed whereby the lands might be adjudged or evicted, "excepting as is after excepted," together with the usual irritant and resolutive clauses.

The exception here referred to was expressed in these terms:—"And also, excepting and reserving furth "and from the said clause irritant, full power and liberty "to the said William Porterfield, and the heirs male of "his body, or the others heirs male of the body of the "said Alexander Porterfield, or the other heirs of tailzie "above mentioned, to contract and take on debts for "the provision of their younger children, not exceeding "three years free rent of the lands and others foresaid, "after the deduction of liferents and real debts, and the "annual rents of personal debts."

This was followed by a permission as to borrowing in these words: "And also, to contract and take on, for "just and necessary causes, the sum of 6,000 merks "therewith, at least with as much of the said 6,000 "merks as shall be uncontracted, and the estate not "affected with for the time, so that the debt to be "contracted by them, and wherewith they may burden "and affect the said lands, shall never exceed 6,000 "merks at one time, and three years free rent of the "lands and others foresaid, after deduction of liferents "and real debts, and the annual rents of personal debts."

By a subsequent clause it was provided, "that if any "apprising, adjudication, or other diligence shall be led "and deduced against the said lands and others foresaid, "or any part thereof, for the other provisions or sum

" of 6,000 merks, wherewith the said William Porter-
" field, and the heirs male of his body, and the other
" heirs or members of tailzie above mentioned, have
" power and liberty to burden and affect the foresaid
" lands, as said is, then and in that case the heir of
" tailzie who shall happen to bruick and possess the
" said lands and estate for the time shall be bound and
" obliged to purge the said diligences three years before
" the expiry of the legal thereof, in case they shall
" happen to succeed, or bruick, or possess the said
" estate three years and six months before the expiry
" of the said legal; and if they succeed or possess not so
" soon, they shall be obliged to purge the same within
" six months after their succession, or bruicking, or
" possessing; and in case the same be not purged and
" redeemed three years before the expiry of the said
" legal, at least six months after the succession, or
" bruicking, or possessing, the person so contravening,
" and the descendants of his or her body, shall, ipso
" facto, amit, lose, and tyne the right of the said lands
" and others foresaid, with the pertinents."

Alexander Porterfield, the entailer, died in 1743, and was succeeded by his son, William Porterfield. William died in 1752, and was succeeded by his nephew, Boyd Porterfield, who completed titles to the estate as heir of entail, and continued thereafter to possess the estate, in virtue of the above deed.

On the 14th April 1791 Boyd Porterfield, being then the heir of entail in possession of the entailed estates, executed a bond of provision, which commenced by specially narrating the deed of entail, and the power and liberty above mentioned, and then proceeded as follows:—" And that I am resolved, in terms of the said

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" power and liberty, to burden the heirs succeeding to " me in my said entailed estates of Porterfield and " Duchall with the payment of the provision herein- " after mentioned to my younger children herein-after " named, in case allenarly of the failure of heirs male " of my body, whereby the said lands and estate will " devolve upon an heir of entail not descended of me; " and that by a rental of the said entailed estate, and " scheme of the debts affecting the same, signed by me " of the date hereof, and as relative hereto, it appears " that I have full power and liberty, in terms of the said " entail, to grant a bond of provision to my younger " children, to the extent after specified, do therefore " hereby bind and oblige myself, and my heirs of " tailzie succeeding to me in my entailed lands and " estate of Porterfield and Duchall, but with and under " the provision, declarations, and reservations herein- " after written, to pay to Mrs. Camilla Porterfield alias " Alexander, my third daughter, and wife of Boyd " Alexander of Southbar, Esq., and to Mrs. Christian " Porterfield alias Fothringham, my fourth daughter, " and wife of Frederick Fothringham, writer in Edin- " burgh, equally between them, and their heirs, execu- " tors, and assignees, the principal sum of 2,400*l.* " sterling, and that at the first term of Whitsunday or " Martinmas next after my death, in case I shall happen " to die without heirs male of my body, or if I shall " leave heirs male of my body, who shall succeed to me " in my said tailzied lands and estate, but shall there- " after fail, then at the first term of Whitsunday or " Martinmas next after the death or failure of the last " of the heirs male of my body; together with 480*l.*, " money foresaid of penalty in case of failure, and the

" legal interest of the said principal sum from the said " term of payment thereof, during the not-payment of " the same." The bond concluded as follows:—" And " I farther declare, that these presents are over and " above any provisions already granted or to be here- " after granted by me to my said daughters, or their " said husbands, which will affect only my unentailed " estate and effects; and as I reserve full power and " liberty to me at any time of my life to revoke or " alter these presents in whole or in part, so I dispense " with the delivery hereof, and declare that these pre- " sents, though undelivered at my death, shall be " equally good and effectual, to all intents and purposes, " as if formally delivered by me, any law or practice to " the contrary notwithstanding; and for more security, " I consent to the registration," &c.

By the rental of the estate, and a scheme of the debts affecting it, which accompanied this bond, it appeared that the sum of 2,400*l.* did not exceed three years free rent of the estate, in terms of the permissive clause of the entail.

Boyd Porterfield died in the year 1794, leaving an only son, Alexander Porterfield, and two daughters. Alexander succeeded his father in the entailed estates, and died in May 1815, without issue, and thereby the heirs male of the body of Boyd Porterfield failed. Thus the bond of provision became payable at the term of Martinmas 1815, being the first term after the death of Alexander Porterfield, the last heir male of the grantor's body.

Upon the death of Alexander Porterfield, the succession to the entailed estates became the subject of a competition between the appellant's father, the late

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Mr. Corbett Porterfield, and the late Sir Michael Shaw Stewart; which was renewed by the appellant, Mr. James Porterfield, and the present Sir Michael Shaw Stewart, and gave rise to litigations which were not terminated till September 1831, when final judgment was pronounced in favour of the appellant, Mr. Porterfield.

In September 1832 the present action was raised against the appellant as heir of entail, concluding for payment of the principal sum of 2,400*l.*, with interest since Martinmas 1815.

The record having been completed, the Lord Ordinary pronounced an interlocutor in favour of the respondents.

Against this interlocutor the appellants presented a reclaiming note to the First Division of the Court of Session, on advising which their Lordships ordered Cases, and, on 17th June 1834, adhered.[1]

Mr. Porterfield appealed.

Appellant.—The question is on the construction of the bond of provision. The deed of entail of 1721 contains general and anxious prohibitions against contracting of debt, and these general prohibitions are only limited or qualified with a single exception or permission. The prohibition against contraction of debt is the general canon of the tailzie; and the heirs of entail are excluded from such contraction, unless in the particular case which forms the exception. It is for the respondents to show that this bond of provision was granted in conformity with the exception, and in the fair exercise of the power

[1] 12 S., D., & B. p. 734.

thereby conferred; and this they have nowhere done. The exception or permission must be construed with reference, not only to the dispositive and other clauses in the deed, but more especially with reference to the terms of the prohibitory clause of which it forms a part. Besides being obviously framed contrary to the terms of the permissive clause in the entail, the bond is executed under mere cover of that clause, and in evasion of the entail. The bond of provision not having been granted in the fair exercise of, but having been made in evasion of, or being disconform to the permissive clause in the entail, it is completely ineffectual against the appellant as a subsequent heir of entail. At all events the appellant is not liable, under a proper construction of the entail, for any interest due upon the bond prior to his own succession as heir of entail.[1]

Respondents.—It is a general position in the law of Scotland, that entails are strictissimi juris, and the prohibitory, irritant, and resolutive clauses contained in them are subject to the most rigid and unfavourable construction.

Where powers of making provisions for younger children are made exceptions from the prohibitory clauses of an entail, such powers are very favourably considered, and instruments exercised in favour of them are very liberally construed; both from the ordinary presumption in favour of liberty, and also from the natural duty and obligation incumbent on parents to make provision for their children.

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[1] *Appellant's Authorities*. — Thomson, 8 Dec. 1675 (Mor. 5939); Earl of Rothes, 29 Jan. 1829, (7 S. & D. 339); Kennedy, 11 Feb. 1829.

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The bond of provision is executed strictly in terms of the clause of reservation upon which it purports to proceed; and instead of exceeding the powers thereby provided to the grantor, it, on the contrary, falls short of those powers.

The appellant, as heir of entail in possession, is liable for the arrears of interest falling due upon the bond, both before and subsequent to his own succession.[1]

The House of Lords ordered and adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the interlocutors therein complained of, be, and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant.

MONCRIEFF and WEBSTER — SPOTTISWOODE and ROBERTSON, Solicitors.

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[1] *Respondent's Authorities.*—4 Stair, t. 18, s. 6, 7; 3 Ersk. t. 8, s. 29; Halket Craigie v. Halket Craigie, 4 Dec. 1817 (F. C.); Sandford on Entails, 167; Macgill v. Macgill, 13 June 1798; Smollet, mentioned in a note to the Fac. Rep. (247) of the case of Wemyss v. Trail, 23 Nov. 1810; Crawford v. Holchis, 11 March 1809 (F. C.); Campbell v. Campbell, 29 Nov. 1815 (F. C.); Erskine v. Earl of Mar, 7 July 1829; Jardine v. Macdonald Lockart, 14 June 1833. 11 S 720