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said debts out of his other estate; consequently his burdening the tailzied estate *pro tanto* was no contravention of the obligement, nor a deed falling under the act of parliament 1621; and if this be not sustained, no heir of tailzie could safely pay any debt upon the tailzied estate out of his separate fortune, but behoved of necessity to break and dispose of the tailzied estate, contrary to the very design of the tailzie. *2do*, The warrandice must operate against the heirs of tailzie, as well as the maker's other lands. *3tio*, Whatever might be pretended (had Earl Alexander left the matter *in dubio*) as to his designing the benefit of the melioration of the tailzied estate by disburdening it of debt, in favours of the heirs of tailzie; he hath expressed the contrary, by taking assignations to himself and his successors whatsoever, and granting the 500,000 merks bond. *4to*, The half of the conquest was not truly Lord James' estate, and so fell not under the tailzie, but did properly belong to the Lady Dumfermling, Dowager of Callander, and her heirs, and was acquired from Dumfermling as an estate extrinsic from Callander, the Lady not being in the case of a creditor in general, but of a creditor *speciei*, to whom the property of the lands belonged.

Answered: The 500,000 merks bond was a downright contravention of the tailzie, being in fraud thereof, and directly to overturn it. And Earl Alexander having taken the assignation in his own name, the debt was extinguished by the application; after which he could not make it revive by a gratuitous bond. *2do*, The warrandice can only operate against the heirs of line of Lord James and his executors, and against the other heirs of tailzie who are creditors, by the obligement of warrant as well as Lord Alexander. *3tio*, Earl Alexander did apply the payment to the tailzied estate by the assignation in his own name. *4to*, The Lady's right of conquest was purchased by a part of the tailzied lands; and being tailzied by Lord James, they cannot be questioned, as not belonging to their author.

The Lords found, that the bond could not subsist for the meliorations, made even by Earl Alexander's extrinsic estate, and reduced the 500,000 merks bond *in toto*.

Harcarse, *No.* 962. *p.* 271.

*** See No. 70. p. 2211. and No. 38. p. 9323.

1705. *December* 7.

Sir Thomas Young of Rosebank, *against* Bothwels, Elder and Younger of Glencorse.

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A tailzie with prohibitory clauses hinders not the fiar to dispone for necessary causes anterior to the tailzie.

Glencorses, elder and younger, enter into a minute of sale of their lands of Glencorse, with Sir Thomas Young, obliging them to purge incumbrances, and give a sufficient progress. Sir Thomas charges to purge incumbrances on the minute; and, in discussing the suspension, it was alledged, that the said lands are disponed by old Glencorse to his son in his contract of marriage, and to the heirs of the marriage, and other heirs of tailzie therein specified, with prohi-

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bitory clauses, disabling him, and all the heirs of tailzie, to alter the order of succession, or to sell, annailzie, or burden the tailzied estate; whereupon there followed infeftment duly registrated, and thereupon Sir Thomas has also raised a declarator of nullity of the minute.

It was alledged for the suspenders: That the contract contains no irritancy in case of contravention, and thereby the fee is unlimited; for irritancies do only make tailzies effectual, because thereby the right of fee and property becomes void, otherwise the power of disposal is implied in the nature of property; therefore no obligement not to contract debt is effectual, except in case of interdiction or weakness, or tailzies with irritancies.

It was answered: Contracts of marriage are onerous in favours of heirs of the marriage and heirs of tailzie, much more when prohibitory clauses are adjected; and whatever might be pleaded in favours of onerous creditors, yet the suspenders, who entered into that contract containing a qualified fee, they can never go contrary to the provisions and qualities of the contract.

It was replied: Contracts of marriage are indeed onerous in favours of the heirs of the marriage and more especially when prohibitory clauses are adjected; and therefore it is not arbitrary to the suspenders to dispone at their pleasure. But here the cause of disponing is necessary, *viz.* a burden of debts anterior to the contract, which the estate can never defray, and which in a short time must inevitably carry away the fee, and make the suspenders and their families miserable; whereas, by a timeous sale, the debts would be discharged, and a superplus remain for their maintenance, and the purchase may be secured by diligence on debts anterior to the contract to be acquired by the price.

It was duplied: The suspenders ought to have considered the condition of the estate before contracting in such strict terms; but having bound themselves, they can never go against their own deed. *2do*, Neither can the charger be in security to advance money upon such a right, which is doubtful at best, and where his parties are heirs of tailzie yet *nascituri*, not called, nor in condition to appear in this process; so that no decision that can follow will prejudge them, nor secure the charger. And, lastly, the suspenders were *in dolo* to have engaged the charger into a minute, without fairly discovering to him the circumstances whereby he is ensnared. The Lords found that the suspenders might lawfully dispone the said lands for necessary causes, notwithstanding of the prohibitory clauses in the contract of marriage."

Fol. Dic. v. 2. p. 431. *Dalrymple, No.* 67. *p.* 86.

*** Forbes reports this case:

Sir Thomas Young having, upon a minute of sale entered into betwixt him and Alexander and Henry Bothwells, concerning the lands of Glencorse, charged them to purge these lands of all incumbrances, and particularly of a tailzie contained in the said Henry Bothwell's contract of marriage, whereby Alexander,

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his father, tailzied these lands to him, and the heirs therein mentioned, with a prohibitory clause to sell or annailzie, or contract debt;—they suspended, upon this reason, That the disposition of tailzie is no true incumbrance, in so far as, 1*mo*, Albeit a contract in favours of heirs-male of the marriage is effectual to hinder gratuitous deeds in prejudice thereof, it cannot obstruct this sale, which is a deed both just, onerous, and necessary. True, the provision contains a clause prohibiting to sell or contract debt; but this bare prohibition, without any irritancy, shows only the more enix desire of the contractors to preserve the estate to the heirs of entail; irritancies being the only thing that give right to heirs of tailzie to quarrel deeds against receivers, whatever they may do by virtue of a simple prohibitory clause against the granters. Nor can it be pretended, that the tailzie is secured by an irritancy, from the contract's bearing, "under the conditions, provisions, and irritancies after mentioned;" because this generally is to be understood, *applicando singula singulis;* that is, of simple provisions, without the clog of any irritancy, and of others to which irritancies are subjoined. So the only provision conceived by way of irritancy is, that about the heirs of tailzie marrying without consent. 2*do*, This tailzie is not valid against singular successors, not being made in the terms of the act of Parliament 1685, containing restrictions and irritancies with consent of the superior, nor duly registered as that act prescribes, but only recorded in the Commissary books of Edinburgh, and therefore cannot stop the present sale.

The charger raised also reduction and declarator of extinction of the minute, upon these grounds, 1*mo*, The suspender's infeftment being affected with prohibitory and irritant clauses, and not a simple and absolute right of fee, they can never make up a clear right to a purchaser; 2*do*, This minute is *ipso jure* null; because there was *dolus dans causam contractui*, in so far as the sellers concealed the tailzie, and the purchaser entered upon the bargain with them as heritable and absolute proprietors; whereas now their titles appear to be so qualified and limited, as the purchaser, had he known so much at the time of the minute, *non fuisset contracturus;* for who, in his right wits, would give a full and adequate price for so fettered an estate? As to the reasons of suspension, it is answered, 1*mo*, Whatever might be sustained in favours of one who lent his money *bona fide*, and came to affect the estate for his payment, it is against all reason to force the charger to complete a bargain *rebus integris*, where there emerged so notable and unexpected a difficulty as the Lords thought worthy to be advised upon informations, after several hearings in presence. And though they should find that Glencorse might complete the sale, it were hard to put the purchaser to depend upon a decision, where the parties concerned are heirs of tailzie *nati et nascituri*, so indefinite and uncertain, that to bring them into the field, or conclude them by any process is impossible; for the least to be expected by Sir Thomas, is a process at the instance of an heir now not called, when the circumstances are out of mind. And what prospect can he have to enjoy such a purchase quietly, when in the case of Saltcoats, on pretence of a destination of succession

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made by a minor, without any irritancy, near fifty years ago, so much dust and dispute is raised? It imports not, that the charger is a purchaser for an onerous cause; since he is conscious of his author's dole, and is not ignorant of the hazard, when he accepts of this disposition; *2do*, It is most apparent, from the conception of the contract, that the irritancy concerns every prohibitory clause; for to all the general clauses the provisions and irritancies are subjoined; and the fiar is allowed, in certain cases, to burden the estate with annual-rents and wadsets; which had been unnecessary if the prohibition were not understood to have the effect of an irritancy. Tailzies have not yet arrived to any fixed stile; and many of the older tailzies that are the securities of great families are conceived in terms less strict and prohibitory than this in question; *3tio*, If tailzies might be overturned for onerous and necessary causes, then the strictest tailzie would become arbitrary. Nor can Sir Thomas well rely upon the first decision in such a case; especially considering, that, in England, where the conception of tailzies is not so strict, allowance to dispone, for reasons of necessity and advantage, is only obtained by act of Parliament. Therefore, it is hoped Sir Thomas will not be found liable to advance 111,000 merks upon such a visible hazard emerging now before performance, whereof he had not the least suspicion at the time of the minute. But the Lords will reduce the minute, and find Sir Thomas free thereof, since he is willing to quit the bargain; according to the decision, 28th June, 1664, Black *contra* Moffat, No. 61. p. 8469.

Replied for the suspenders: Albeit in a perfect tailzie, duly made, registered, and taken effect by conveyance of the estate to one of the heirs of tailzie, the subsequent heirs may pretend a *jus quæsitum* and interest against the preceding heir possessing only by virtue of the tailzie, yet here, where there is no formal effectual tailzie, because not conceived with a clause irritant, nor perfected by the due solemnities of the superior's consent, and registration, such an inchoate design of tailzie may be easily and freely dissolved by the suspenders, who made it, and before were absolute fiars; seeing *unumquodque dissolvitur eodem modo quo colligatur*. Nor can heirs of tailzie, who have no *jus quæsitum*, but *nudam spem*, quarrel or impugn the deed. So, whatever ground of scruple the purchaser may fancy to himself, he has no ground to resile: And the reason given, with the Lords' interposed authority, may satisfy all the scruples, as they will relieve him of all hazard.

The Lords found, That Henry Bothwell, with consent of his father, could validly dispone the lands contained in the minute of sale, for necessary causes, notwithstanding of the prohibitory clause in the contract of marriage.

Thereafter, December 18, 1705, it was alleged for Sir Thomas, That suppose young Glencorse, with consent of his father, could, notwithstanding of the tailzie, dispone, for necessary causes, he could not dispone the whole lands, according to the minute, but only so much as might satisfy these necessary causes. And

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the purchaser could not be obliged to accept of a partial disposition, or partial implement of the minute, which he entered into upon the hopes of lodging all his money together upon that estate; more than a creditor is bound to accept of partial payment. Thus, July 20, 1675, Maitland *contra* Gordon, No. 22. p. 9158. a minute of agreement is null where complete performance by one of the parties is imprestable. Nor is an offer of real warrandice or equipollent security sustained; because the maxim, *loco facti imprœstabilis subit interesse*, holds only *in contractibus monopleuris*, and not *in dipleuris*. Where parties mutually contract, performance must be precise *in forma specifica*, and where either fails to implement completely, the other is free, *ex causa data non secuta*. It hath often been so decided, particularly betwixt Gordon of Lesmore and the Marquis of Huntly, (see Appendix). Nor was retention of a proportional part of the price equivalent to what was to be performed sustained; July, 1665, Wedderburn *contra* M'Pherson, No. 3. p. 15121. Yea, so far have the Lords regarded the interest of purchasers, not only as to real security, but even as to their satisfaction of mind in being free from the anxious expectation of pleas and hazards, that a person who, for a parcel of cloth sold to him, was bound by contract to assign a bond with warrandice only from fact and deed, was not allowed to claim the cloth, unless he would assign with absolute warrandice; 28th June, 1664, Black *contra* Moffat, No. 61. p. 8469. And a buyer was not found obliged to accept of a forty years progress, or acquiesce in absolute warrandice offered; in regard it was sufficient for him to say, that possibly there might be interruptions, and personal action upon warrandice might be ineffectual; June 13, 1676, Nairn *contra* Scrimzeour, No. 11. p. 14169.

Answered for Glencorse: The necessary causes mentioned in the interlocutor are not to be reckoned as adequate and commensurate to the sale; but only such as might justly move any rational man, in such circumstances, rather to sell, and save a part of the price for the behoof of those concerned therein, than to keep up a burdened estate, to the ruin of the whole.

The Lords adhered to their former interlocutor, the necessary causes being always prior to the contract of marriage.

Forbes, p. 50.

*** Fountainhall also reports this case:

1705. *July* 6.—Sir Thomas Young of Rosebank charges Bothwells, elder and younger, of Glencorse, on a minute of contract, by which he had bought from them the said barony, for £.74,000 Scots, that they might purge the lands of incumbrances; and they offering an extended disposition, he objected, That they were tied up and incapacitated by a strict tailzie in the the young Laird's contract of marriage with Neil Campbell's daughter, containing irritant clauses, and an express *pactum de non alienando;* and thereby a *jus quœsitum* arising to the heirs of

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the marriage, *vel jam nati vel nascituri*, and to all the subsequent heirs of tailzie, they could not, to their prejudice, sell the lands. Alleged, Tailzies being a restraint on property, and against the freedom of commerce, they are strictly to be interpreted; and this tailzie being disconform to the 22d act 1685, it can be no hinderance on Glencorse to sell his lands; for however it might impede him to do voluntary and gratuitous deeds, yet it cannot be extended to necessary and onerous ones; *necessary*, because it pays his debts; and *onerous*, because he gets a full and adequate price. The foresaid act seems to require, that the tailzie be expede by a public infeftment on resignation or confirmation; and, 2*do*, that it be registered in a special record appointed for that effect:—none of which are observed in this case. For, 1*mo*, This tailzie is perfected by a base infeftment only; whereas, Craig, Feud. p. 248.* says, no tailzie can be consummated *sine superioris consensu; 2do,* It is not recorded in the proper register, but only in the Commissary's court books, where no man would either expect or search for a tailzie; and so, not being in the forms prescribed by law, it can never hinder Glencorse to sell his lands, for paying his debts, whereby none can have prejudice; for creditors cannot complain, beingsatisfied; neither are the heirs of tailzie be prejudged, for the debt being all contracted before the tailzie, it will affect them, and there will be an excrescent superplus to them. Answered, Though the act 1685 mentions procuratories of resignation, yet it nowise requires that the tailzie be expede by a public infeftment; and there may be considerable estates now in Scotland where the infeftment is base; and the act of Parliament 1693 takes away the difference betwixt private and public infeftments, and equiparates them *in omnibus*. And as to the registration, 1*mo*, The want of it is not made a nullity by the said act of Parliament; 2*do*, The sasine here bears all the resolutive prohibitory clauses *nominatim* engrossed, and it being registered, *that* is sufficient to put all the lieges *in mala fide*, the design of registering being for publication and notification, which this abundantly does; and though the said act 1685 does regulate tailzies, yet they were received and sustained by our practicks long before, as appears by the famous decision of the Lords, in 1662, betwixt the Viscount of Stormont and the Creditors of the Earl of Annandale, No. 5. p. 13094. where these irritancies, being in the procuratory of resignation and sasine, were sustained to cut off posterior creditors. The Lords thought the case of great moment and importance, many great estates being now settled in that manner, which it were inconvenient to shake or brangle; and some thought the buyer here might complete his bargain by acquiring the debts prior to the tailzie, and adjudging thereon, all which would subsist and stand good against any of the subsequent heirs of tailzie; but his difficulty was, that the debts did not extend near to the price, and so he would be still liable to redemption, and left uncertain, and durst use no meliorations nor improvements. In respect of all which, the Lords resolved, for fixing a rule, to

* Edition 1655.

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1705. *December* 12.—The case betwixt Sir Thomas Young and Glencorse came to be decided, upon a point different from what was then pleaded; but it was urged in the debate *in præsentia*, viz. That the contract of marriage, as to the clause of not selling, was only prohibitory, but wanted the resolutive irritant clause that commonly uses to be adjected thereto; and that a naked prohibitory clause never hindered a singular successor to purchase and acquire for an onerous cause. Answered, That there was an irritancy in case of not bearing the name and arms, and which, being generally repeated, must be applied to all the clauses in the contract, though not adjected to every one; *2do*, A bare prohibitory clause is sufficient to put the granters *in mala fide* to sell; and Sir Thomas, now coming to the knowledge of it, to buy; and he was truly insnared, the same being kept up from him till they had fixed him in a subscribed minute; and who will give an adequate price for so dubious a right *in apicibus juris?* and which, if he had known in time, *non fuisset contracturus*. And the concealment of this incumbrance was truly *dolus dans causam contractui*. And President Gilmour observes, that one was freed from a bargain for less; 28th June, 1664, Black, No. 61. p. 8469.; see also this decision, from Stair, 24th June, 1664, IBIDEM. Replied, A bare prohibitory clause will have this effect, that they may not alienate, without a just onerous cause; but all these concurred here, seeing, without a sale, the estate must perish.—The Lords, by a small plurality, found, that Glencorse, in this case, was not impeded to sell, he instructing a just and necessary cause for such an alienation, notwithstanding the prohibitory clause in the contract of marriage. But it was thought, if the necessary causes do not extend to the full value of the lands, but fall much short thereof, then there could be no absolute security to the buyer; and sundry cases were cited, where perfecting minutes of sale turning imprestable or difficult, the parties were liberated, and the offering warrandice out of other lands, or security *per æquipollens*, was refused; because the maxim, That *loco facti impræstabilis succedit damnum et interesse*, takes only place *in contractibus monopleuris*, where one of the parties is only bound, and not in mutual contracts.—See 20th July, 1675, Maitland, No. 22. p. 9158.; and Gilmour's decisions, July, 1665, Wedderburn, No. 3. p. 15121. And Dirleton observes, 13th June, 1676, Nairn *contra* Scrimzeour, No. 11. p. 14169. that though forty years progress of the writs of lands infers prescription, and defends against a third party, yet a purchaser is not obliged to accept of it, and acquiesce in absolute warrandice offered; because the buyer may say, I will rather keep my money than run the hazard of latent interruptions within the forty years, or to be put to the unnecessary and ineffectual recouse of warrandice.

Fountainhall, v. 2. p. 282, 299.