

No. 82.

1734. *July 11.* MR. JAMES BAILLIE *against* CARMICHAEL of Maulsley.

A tailzie recorded in the register of tailzies, contains the following clause ; “ And it is hereby provided, That my heirs of tailzie above designed shall not sell, dispone, or alienate my said lands or estate in whole or in part, nor shall they contract or take on debts or sums of money, nor do no other deeds whatsoever in prejudice of the foresaid tailzie, or whereby my lands or estate, or any part thereof, may be evicted, or that may prejudge the next heir in his succession, otherwise it is hereby specially provided, That the contravener shall amit and lose his right to my lands and estate, and it shall be leison to the next heir to serve himself heir of tailzie, and to obtain himself infest sicklike as if the contravener were naturally dead.” A personal creditor to one of the heirs of entail, insisting for payment against the next substitute after his debtor’s death, it was objected, That the tailzie contained a forfeiture upon the contracting of debt, and if the debtor was forfeited, the creditor could not have access to the estate. It was answered, That the forfeiture of the heir’s right does not necessarily imply a forfeiture of the debt ; and therefore, because tailzies are strictly to be interpreted, there behoved to be a special provision to that effect. For instance, where it is provided by a tailzie, under the penalty of forfeiture, that the heir shall use a certain surname and arms, a forfeiture upon this clause to be sure could not disappoint anterior debts lawfully contracted ; and it is probable that the maker of the entail was satisfied with this penalty of forfeiture, as a sufficient check against their contracting of debt, not willing to go the whole length of forfeiting also the debt. It was added, That the statute 1685, in order to make tailzies effectual against lawful creditors, seems to require, that there should be a clause declaring the debt to be null and void, and that, upon the contravention, the heir may pursue a declarator of irritancy, and serve himself heir to the person last infest before the contravener. The Lords found the pursuer’s debt effectual against the estate.—

See APPENDIX.

*Fol. Dic. v. 2. p. 432. and 433.*1737. *December 22. and 1738. July 11.*STEWART, *alias* DENHAM, *against* DENHAM of Westshiells.

No. 83.

Irritancy in case of deed or omission inducing adjudication.

Where, by a tailzie, it was declared an irritancy, “ If the heir should contract debt, or do any act or deed of omission or commission, whereby the lands, or any part thereof, might be apprised, adjudged, evicted, &c ;”—and by a separate clause, “ That if any apprising or adjudication should be led and deduced against the lands for sums already contracted by the deviser of the tailzie ; in that case the heir of tailzie for the time should be obliged to purge the same three years before expiry of the legal, otherwise to amit and lose his right to the estate, &c.”

It was first by interlocutor on report, found, "That the irritancy was incurred by the heir's suffering an adjudication to pass for the by-gones of an annuity, which the deviser had constituted in favour of his now relict, as being a debt contracted through the omission of the heir, and therefore falling under the first irritancy, upon the heir's contracting or doing deeds of omission, or commission, &c."

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But thereafter, upon a petition, this was altered, and it was found, "That the irritancy was not incurred by the heir's suffering said adjudication to pass, in respect the annuities due to the relict were a debt of the tailzier's, though arising after his decease, as annual-rents suffered to grow on a personal bond granted by him would be."

*Kilkerran, No. 1. p. 538.*

1744. January 27.

THOMAS GAIRDNER, &C. CREDITORS OF SIR ARCHIBALD PRIMROSE of Dunnipace, *against* The HEIRS of ENTAIL of the said Estate.

Sir Archibald Primrose of Carington, tailzied his estate of Dunnipace to a certain series of heirs, and provided that none of the heirs of entail should dispone, or contract debts, whereby the same might be affected, or evicted, without the consent of certain persons: "And if they should do on the contrary, the heir of tailzie contravening, and the heir-male of his body, shall amit and lose all right or interest which they may have in the said lands."

Upon this disposition a charter was expedie in the year 1677, upon which infeftment followed; but the same was never recorded in the register of tailzies. Sir Archibald Primrose, son of the instituted heir of tailzie, having contracted several debts, his creditors led adjudications against the estate; and insisted likewise in a declarator, for having it found and declared, that there being no irritancy in this tailzie, declaring the debts which should be contracted void and null, but only that the heir contracting should amit his right therein; therefore they could lawfully affect the estate for payment of their debts. In support whereof, it was urged, that tailzies were unfavourable, and ought to be strictly interpreted, so that creditors should not be frustrated of their payment, or property further restricted than the same appears to be from the precise words of the tailzie. And here the intendment of the tailzie is, to tie up the hands of the heirs from disposing, or contracting debts on the estate, for which purpose the irritating the heir's right was thought sufficient security; but the intention could not be, that a just and lawful creditor, who should lend his money to the heirs of tailzie, should forfeit the same. See the case of the tailzie of Keith Marshall, (See Appendix); and 11th July, 1734, Mr. James Baillie, No. 81. p. 15500.

Answered: Sir Archibald meant to preserve the estate as well from eviction as alienation; and, if the pursuer's doctrine hold true, adjudications upon debts will affect the same, because there is no irritancy of the debts provided for: So would a total alienation for the same reason be effectual, which would altogether evacuate

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If a tailzie does not contain a special provision, voiding debts contracted, they will affect the estate, although the contravener lose his right by such contraventions.