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It was first by interlocutor on report, found, " That the irritancy was incurred by the heir's suffering an adjudication to pass for the bygones 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."

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.

No. 84.
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.

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 expede 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

No. 84. the tailzie. The only question, therefore, is, If the tailzie-maker executed his intention in a proper way? Upon this head it may be oberved, that what made tailzies effectual before the act 1685, was because the heirs were considered as limited fiars; but this limitation could not be effectual to the heirs of tailzie, unless it contained a clause voiding the contravener's right; hence came clauses irritant and resolutive. But the reason why a clause voiding the debts can have no effect, is, because it is not in the power of a third party to declare a contract betwixt third parties null; the heir remains debtor, and he who lent his money creditor, notwithstanding such declaration; but what makes the tailzie effectual is, that the proprietor dispones his fee with what limitations he thinks fit, and with the condition that the contravener shall make the subject forfeited, and descend to another; see 11th March, 1707, Redhuegh, No. 80. p. 15489; 26th February, 1662, Viscount of Stormont, No. 5. p. 13994.

The Lords found the debts might affect the estate.

C. Home, No. 257. *p.* 414.

*** Kilkerran reports this case:

By the tailzie of Dunnipace in the year 1677, it was declared, "That it should not be lawful for the institute, nor for the substituted heirs of tailzie, to dispone the lands, wadset the same, nor to contract debts, whereby they might be affected or evicted, without consent of the granter, during his life, and after his decease, without consent of certain persons therein named; and in case they contravened," it was declared, "That the contravener, and heirs of his body, should amit and tyne their right to the lands and others therein and above expressed."

Sir Archibald Primrose, now of Dunnipace, having contracted several debts contrary to the prohibition in the tailzie, whereupon adjudication had been led, the creditors brought a process 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 a resolutive clause, that the heir of tailzie contracting the debts should amit his right and interest in the estate, the debts due to the pursuers, with the adjudications following thereon, did lawfully affect the estate.

And the Lords, after a full reasoning among themselves, by a great plurality, "Found and declared in terms of the libel, that the adjudications did lawfully affect the estate."

The contrary opinion was argued by some able Judges, who laid it down as a position grounded in the nature of the thing, and not contradicted by the statute, but upon a just construction, rather confirmed by it, that wherever there was a prohibition to dispone, or to contract debt, whereby the estate might be evicted, the prohibition implied an irritancy, though not expressed; for that there is no more in the disponer's power, but to prohibit, and the irritancy is the act of the law; and therefore, wherever there is such prohibition to alienate or contract debt, &c. it is the *modus* of the right in the heir of tailzie, That he cannot affect

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the estate; and they insisted that the case would be the same, though there were not an irritancy of the contravener's right; and the notion commonly received with us, and to be met with in many decisions, that it was inconsistent that at the same time one should retain the fee, and yet his debts not affect the estate, was said to have no foundation in the principles of law. The time was, added they, when personal debts could not at all affect land, and that they now can, is only in consequence of the statute; that at present it is the undoubted law of our neighbouring country, that the right of fee in a man may be so qualified as to put it out of his power to alienate or affect it; there can therefore be no such principle. And that agreeably to this, it was found in the last resort, in the case of the tailzie of Riccarton, No. 81. p. 15494, that a prohibition to contract debt, with an irritancy of the debt, was effectual, though there was no irritancy of the right of the contravener. From all which they concluded, that whatever may be found in our law-books antecedent to the statute, of irritant and resolutive clauses, whether of the debt or right of the contravener, as necessary to annul the debt, were but conceits taken up without foundation in law.

And as to the statute 1685, it was said, 1*mo*, That it had no retrospect; 2*do*, That the irritant and resolutive clauses therein mentioned were only directed to the right of the contravener, which behoved to subsist if not by sanction declared void; and, 3*tio*, That the words, "declaring all such deeds to be in themselves null and void," were not the supposed words of the maker, but were the words of the law-giver; that is, the law declared all such deeds void, as were made contrary to the conditions and provisions in the tailzie, in conformity to what had been said from the nature of the thing.

In answer to all this, it was said, That whatever may be the law of other countries, we are to be governed by our own; that there is not a point in which our law-books more uniformly agree than this, that a simple prohibition has no other effect than to bar gratuitous deeds or debts from affecting the estate; but that onerous deeds and debts are no otherwise barred than by clauses irritant of the debts, and resolutive of the granter's right. Nor was this any other conceit of our ancient lawyers, than what is consonant and analogous to the general rules of law and to our practice in other cases. Thus a churchman is forbid to set a tack of teinds without consent of the chapter, and if he do in the contrary, he is by statute to forfeit his benefice; yet if he do set such tack, as the statute does not declare the tack void, it will be effectual to the tacksman, although the setter lose his benefice. The case is the same of a member of the College of Justice, who is forbid to buy a plea, under the certification of deprivation: His right to the plea will notwithstanding subsist, although he should be deprived. As the statutes in these cases, so the granters of deeds of entail, are understood to intend nothing else, than to deter from transgressing the prohibition by the particular sanction thereto annexed, and which must especially obtain in respect to entails, now that the statute allows every man to make his entail under such conditions, and with such provisions as he shall think fit.

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And as to what had been said by way of argument, though not directly to the present question, That a prohibition to contract debt and irritating the debt in case of contravention, would be effectual though not irritating the contravener's right, it was replied, That the contrary was so much established with us, that even while our lawyers were not agreed, that an irritancy of the debt was necessary where the contravener's right was irritated, yet so far as can be discovered from our law-books, no lawyer had ever doubted the necessity of irritating the contravener's right, or maintained that it was in any man's power, even by the most express declaration of his will, to incapacitate the heir of entail to affect the estate with debt, unless he at the same time irritated the heir's right in case of contravention; for that were to impose a condition contrary to law, that a man should be at the same time fiar, and yet not have power to affect the fee; but as there is nothing inconsistent that the contravener should forfeit his right, and yet his debts be declared to affect the next heir, which is the point at present in dispute, there could be no reason why the tailzie should not be taken as the granter had made it; and which is also agreeable to the statute, whereby every man is allowed to tailzie his estate, under what conditions he thinks fit, provided only these conditions be consistent with the principles of law.

And though the statute has no retrospect, it has always been considered as settling the several subtilities about which lawyers had been so much divided, and particularly the import and effect of irritant and resolutive clauses, which, if they be not repeated in the precept of sasine, the tailzie is declared to have no effect against creditors, &c. And that the question upon the import of the statute seemed to resolve in this, What should be thought the meaning of these words in the statute, "irritant" and "resolutive" clauses? As to which there was no other way to come at the meaning of technical words, but by enquiry into the sense in which they had been understood by lawyers.

And whether we look into our older or later lawyers, they uniformly consider the irritant clause to refer to the deed or debt; thus Hope, Minor Practiques, Tit. Tailzies, § 369; if, says he, the tailzie bears a clause irritant, "Declaring all deeds done in prejudice thereof to be *ipso jure* null." And Sir George M'Kenzie, whose authority for this, may, of all others, be thought the best, as he was not only a member of the Legislature at the time the statute was made, but was probably penman of it, had wrote his Treatise on Tailzies, and was at the time writing his book of Institutions, has left no room to doubt of this. In his Treatise of Tailzies, he defines the "resolutive clause," to be a clause resolving the contravener's right, and the "irritant clause" to be, that whereby the deed of contravention is declared void. And in his Institutions, *voce* Succession, in heritable rights, § 17. "If the maker design that the tailzied lands should not be alienable, even for onerous causes, then he adjects to the *pactum de non alienando* a clause irritant and resolutive, declaring all deeds contrary to and in prejudice of the tailzie to be null and void," &c. And afterwards adds, "And because such clauses prejudge creditors and commerce very much, and seem to be inconsistent with the nature of property, therefore an act of Parliament was necessary for

securing them;" meaning that very act in question. After all which, there could remain no doubt upon the import of the statute; and when this is our statute-law, that without clauses irritating the debts and deeds, and clauses resolving the right of the contravener, the heir of tailzie cannot be effectually barred from alienating the lands, or affecting them with onerous debts, however it be otherwise in England by the statute *de Donis*, there is no reason to apprehend that the House of Peers, when made to understand how our statute-law stands, will, in this, or any future case, give judgment contrary to it, whatever they may have done in the case above referred to, of the Creditors of Riccartoun, when possibly our statute law may not have been so fully laid before them.

No. 84.

Kilkerran, No. 4. *p.* 540.

1746. *June* 17.
HEIRS of TAILZIE of AGNES CAMPBELL *against* The REPRESENTATIVES of PROVOST WIGHTMAN.

No. 85.
A tailzie prohibiting innovation thereof, or alteration of the succession, does not hinder the heirs to sell.

Agnes Campbell, relict of Andrew Anderson, King's Printer, made a tailzie of the lands of Rosebank, of Langlands, and Orchardton or Livingston's Yards, in favour of Humphry Colquhoun, her grandson by her daughter; which failing, to William, Agnes, and Elizabeth Hamiltons, her grandchildren by another daughter, under this limitation, "That it should not be lawful, nor in the power of the heirs of tailzie, to alter, innovate, or infringe the foresaid tailzie, or the order of succession therein appointed, or the nature or quality thereof, any manner of way; and the deeds so done should not only be void and null, but also the contraveners should amit and tyne all right that any of them had, or could pretend, to the lands, &c. by virtue of the present right."

The succession opened, by the death of Humphry Colquhoun, to the substitutes; who sold the lands to John Wightman, sometime Provost of Edinburgh; and of this disposition a reduction was brought by the children of the disponers, as being an infringement of the tailzie.

Pleaded for the pursuers: Tailzies have taken their rise from the *fidei-commiss.* in the Roman law, and are to be interpreted according to the principles laid down concerning them. An express *fidei-commiss.* was that by which the fiduciary was obliged to restore the subject to a certain person; and a tacit one, whereby he was enjoined to suffer the estate to remain in the family. In either of these cases, the fidei-commissary had a real action to recover the subject; but a bare prohibition, without bearing to be in favours of any person or series, was ineffectual; L. 114. § 14. De Legatis 1. Instances of these several kinds of *fidei-commiss.* occur. Of the first, L. 69. § 3. De Legatis 2. L. 77. § 27. eod. Tit. L. 114. § 15. De Legatis 1.: Of the second, L. 38. § 4. De Legatis 3. L. 93. in Principio eod. Tit. These *fidei-commiss.* were often made without any prohibition to alienate.