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fit; each of the annuitants has a separate real right, for a sum proportioned to his bond, as 10,067 bears to 10,453, and this is at an end by his death, and cannot encrease the real right of any other which was originally fixt by the same proportion.

Answered, The annuitants have right by their bonds, to L. 10,453 in security whereof they are infeft in L. 10,067, and though there can no more be drawn annually out of the estates, yet this sum remains payable while any part of the debt secured is due.

"THE LORDS found that the annuitants had a real right upon the estates disponed, for an annuity extending to L. 10,067, and no more; and found them preferable on the said estates for payment thereof; and found the subsequent creditors had not access to recover their payment, till after payment of the said annuity, and all arrears incurred thereon; and that then they had access."

Act. *H. Home*. Alt. *Lockhart*. Clerk, *Gibson*.

D. Falconer, *v*. 2. *No* 174. *p*. 208.

1753. *November* 21.

The CREDITORS of CARLETON *against* WILLIAM GORDON.

No 75.
While an entail remains a personal deed, and is made the title of possessing the estate, it will affect the creditors of the heir in possession, although it has not been recorded, and although the provisions and irritant clauses have not been repeated in the title deeds of such heir.

IN April 1684, James Gordon executed a tailzie of his estate of Carleton, holograph. By this tailzie, he disponed the estate, and granted procuratory for resigning it in favours of the heirs-male of his own body; whom failing, to John Gordon, third son to Gordon of Earlston; whom failing, to Nathaniel Gordon of Gordonston, and their respective heirs-male; whom failing, to his own heirs-male whatsoever, &c.; under prohibitory, irritant, and resolutive clauses, against altering the order of succession, &c. selling, &c. and against contracting debts, or doing any other deeds, directly or indirectly, above the half of the value of the estate.

The procuratory was not executed by the maker of the entail; neither was the entail recorded. The first substitute died before the maker of the entail; and both died without issue male. In 1702, Nathaniel Gordon the next substitute made up his title to the procuratory in the deed of tailzie, as heir male and of provision to the maker of the entail; and his retour contained the prohibitory, irritant, and resolutive clauses; but he took no infeftment.

In the contract of marriage of Alexander his son, without taking notice of the tailzie, Nathaniel disponed, as absolute proprietor, the estate of Carleton to his said son, with the burden of his debts, &c.; but the son was never infeft.

The father and son having contracted debts above the value of the estate, and adjudications being led, and the legals thereof expired, the creditors brought a process of ranking and sale of the estate. William Gordon the defender, a

remote heir under the general substitution, appeared and objected, that the sale could not proceed; because, according to the prohibitory clause in the entail, the debts could not be sustained above the half of the value of the estate.

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Answered for the Creditors; 1mo, That the entail, though executed holograph in 1634, yet was not complete till 1688; for not till 1688 was the clause mentioning the date of the witnesses's subscription filled up. If so, the tailzie fell under the first clause of the act 1685, Jam. VIII. Parl. 1. Ses. 1. cap. 22. by which it is provided, 'that only such tailzies shall be allowed as are put 'upon the record;' but that this tailzie had never been put upon the record, so could not bind creditors.

Replied for William Gordon; The tailzie being holograph, was a complete deed in 1684, without witnesses. It was very true, that in the same year the maker, by an unnecessary anxiety, had owned his subscription before witnesses, who then subscribed; and the date of their subscription was filled in 1688. But all this operation was quite unnecessary. The tailzie, therefore, being a complete deed before the said act of Parliament, could not fall under it as to the necessity of recording.

Argued for the Creditors; 2do, That supposing in general such a tailzie as this did not fall under the act of Parliament as to the necessity of recording; and supposing that upon common law deeds would be cut off where there was a prohibition to contract any debt at all; yet the case is different where the half or any part of the estate may be burdened; for as no register showed either the value of the estate, or when the half was exhausted, the creditors were *in bona fide* to go any length. The case is similar to that of a disposition of lands with a general burden of the disponer's debts, which would not stand in the way of the disponee's creditors.

3*tio*, As to the creditors of Alexander the son, they are further secured upon the second clause of the act 1685, which is extended to entails made even before its date, in so far as it appoints the provisions and irritant clauses to be repeated in the rights and conveyances of the heirs of tailzie, otherwise not to militate against creditors.

Replied for William Gordom; That creditors who contract with a person not infeft, do so upon his personal faith, and not upon the faith of the records; and so every right, however latent, which affects the debtor, must affect his creditors; and it is believed that, in such a case, a disposition with a general burden of the disponer's debts, would bind the creditors of the disponee; or, what is more, a latent back-bond of trust, would do so as effectually as a trust expressed in the debtor's rights, or a back-bond registered in the register of reversions. This principle answers all the objections, whether of the whole creditors in general, or of Alexander's creditors in particular; and does so without distinction, whether the tailzie was made before or after the act; or whether any part of the act has a retrospect. For it is obvious the act of Parliament does not relate to the case, seeing it provides for the security of such creditors

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only who have contracted *bona fide* with the person infeft. Upon this principle, in the case of the Creditors of West Shiel, where the entail was not recorded, and where the heir had made up his titles to the procuratory by a general service, without repeating the irritant clauses in his retour, the House of Lords reversed the interlocutor of this Court, and found, that creditors contracting with such heir not infeft were bound by the entail. *See* TAILZIE.

"THE LORDS repelled the objection upon the act 1685; and found, that the heir in possession might lawfully contract debts to the extent of the half of the value of the estate."

Act. *Macdual et A. Lockhart.* Alt. *R. Craigie et Tho. Hay.* Clerk, *Justice.*

S. *Fac. Col. No 91. p. 138.*

*** Lord Kames reports this case:

JAMES GORDON of Carleton, executed a tailzie of his estate in favours of certain heirs, subjected to prohibitive and irritant clauses in common form, in order to prevent alienation and contracting of debt. Nathaniel Gordon, to whom the succession opened by the death of the entailer, made up titles by a general service as heir of entail; and after providing the estate to his eldest son Alexander, in the contract of marriage of the latter, without ingrossing any of the restraining clauses, he died without completing his titles by infeftment. Alexander turning insolvent, adjudications were led upon his debts; and the creditors reckoned themselves secure that the entail could not hurt them, because the irritant and resolutive clauses were not contained in Alexander's right; which is required by the act 1685, in order to make an entail good against creditors. It was admitted for the next heir of entail, that the act 1685 does not militate against the creditors. But he objected, that the right being to this day personal, the creditors can be in no better condition than the person from whom they adjudged; and like him must be affected with the irritant and resolutive clauses. By the common law of Scotland, a creditor or purchaser contracting with one who has only a personal right to lands, contracts at his peril; a latent back-bond is good against them, and *a fortiori* limitations upon the right engrossed in the title-deed itself. "And the LORDS accordingly found the prohibitory and irritant clauses were effectual against the creditors."

This judgment was pronounced without any debate upon the authority of former judgments of the same kind, and of a judgment of the House of Peers. I cannot justify in my own mind this opinion. I admit that the case comes not under the act 1685, but must be governed by the common law. Further I admit, that clauses qualifying a personal right, or qualifying the possessor's right, must be good against a purchaser, whether voluntary or judicial; because a purchaser cannot take more than what is in the disponer. But prohibitory and irritant clauses have no such effect as to qualify the proprietor's right, whe-

ther infeft or not infeft. It appears to me evident, that by the common law an entail is not good against creditors, even where the heir of entail is infeft; because a prohibitory clause does not limit the heir's right of property, but is only a personal prohibition, the contravention of which can go no farther than to subject him to damages, or perhaps to forfeiture. Now, if the possessor's right of property be not limited, every adjudication deduced against the estate for his debt must be effectual. This reasoning is equally applicable to the case of a person who possesses by a disposition without infeftment.

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Sel. Dec. No 55. *p.* 73.

1761. *June* 24.

ANDREW and JOHN CALLENDERS *against* GEORGE WADDEL of Easter Mothal.

No 76.
Legacy given in a disposition to lands, by which the disponee and his heirs are burdened with payment of it, is a real burden upon the lands.

GEORGE WADDEL of Above-the-hill made a settlement of his heritable subjects in favour of several of his relations. In which, amongst others, he disponed "to Robert Waddel his brother, his heirs, and assignees, heritably and irredeemably, with the burden of the legacy under written to the person aftermentioned, all and hail the lands of Mothal, &c.; and the said Robert, or his heirs, by acceptation hereof, is obliged to pay to Margaret Waddel his niece, the liferent of 900 merks, and to her children equally amongst them in fee." This disposition contained a precept with this clause: "And I require you, that, incontinent thir presents seen, ye pass to the ground, &c. and give heritable state and sasine, &c. under the burden of the legacies above mentioned, to the said Robert Waddel," &c. In virtue of this precept, one infeftment was taken for all the different disponees.

The lands of Mothal were afterwards disponed by Robert Waddel, the original disponee, to William Waddel his second son, and by him they were sold to George Waddel the defender.

These two last mentioned dispositions made no mention of the legacy with which the lands were burdened; but, in the assignment to the writs and evidents in the disposition to the defender, the original disposition to Robert and the infeftment following upon it, are specially assigned.

The pursuers, the only surviving children of Margaret Waddel, brought an action of poinding the ground against George Waddel and his tenants, in order to recover payment of a balance of the 900 merks above mentioned, which still remained unpaid.

After the commencement of this process, the pursuers were present at sundry meetings of the Creditors of William Waddel the defender's author, where it was resolved, that William Waddel's lands of Ardriehill should be sold, and that the price should be divided amongst the creditors proportionally, who, upon drawing their shares, should be bound to grant discharges of their res-