The like determinations have been given in cases where persons have been obliged otherwise than in virtue of the tailzie under which they held, not to alter their succession. A person bound by decreet-arbitral to entail his lands, for an onerous cause, was found to have implemented it, by making the entail, and that he could afterwards sell the estate, and even was not bound to refund the money he had gotten for making the entail, since it was not qualified against him that the sale was made to defraud the heir of tailzie; 15th July, 1636, Drummond against Drummond, No. 2. p. 4302. Two persons being bound, by contract, to entail their estates, failing heirs of their bodies, respectively upon each other, the Lords found, that neither, without the other's consent, could break the tailzie, but that they could sell; 14th January, 1631, Helen Sharp against John Sharp, Sect. 6. *h. t.* A father who is bound by his contract of marriage to let the succession of his estate descend to the children, is under as strong a prohibition of altering as he can be laid under by a tailzie; and yet, as he is fiar, he can dispose of the subject. And the question is put by Dirleton, If he can dispone after an inhibition used against him? who answers, that he may. No. 85.

Pleaded for the pursuers: There can no distinction be made betwixt an onerous and a gratuitous deed, because the tailzie prohibits any deed whereby the heir's right of succession may be infringed; and there is this difference betwixt the case of a tailzie and that of a father bound by his contract of marriage, that there he is not prohibited to do any thing whereby the children's succession may be prejudiced, under a forfeiture of his own right; but suppose a father to convey an estate, in his son's contract of marriage, with the same prohibitory and irritant clauses as in the present case, and there can be no doubt but the son's onerous deeds would be void.

The tailzie of Mauldsly, which did not declare the deed of contravention void, is not similar to the present, which vacates it as well as the contravener's rights; as neither is the tailzie of Keith, which forbids contracting of debt, but not the sale of the estate; for though particular prohibitions may not be extended, yet here is a general one, of doing any thing by which the tailzie may be frustrated.

The Lords, in respect the tailzie contained no prohibition to alienate nor to contract debts, repelled the reasons of reduction.

Act. *A. Macdouall.* Alt. *Ferguson.* Reporter, *Elchies.* Clerk, *Gibson.*

D. Falconer, v. 1. *No.* 116. *p.* 140.

1758. *February* 8.

CREDITORS of JAMES HEPBURN of HUMBY, *against* His CHILDREN.

No. 86.
Entail wanting resolutive clause, not effectual against creditors.

Anno 1663, Adam Hepburn executed an entail of the estate of Humby, whereby, *inter alia*, it was declared, "That it shall neither be lawful, nor in the power of me, the said Adam Hepburn, nor any of the three persons, or heirs of tailzie above

No. 86. mentioned, nor to mine or their heirs male succeeding to the foresaid living and estate, conform to the tailzie, above specified, to violate, break, or dissolve the foresaid tailzie, neither yet to annailzie, dispone, wadset, or burden the said lands and estate, or any part thereof, or to do any deed whereby the samen may be comprised, or any ways evicted frae them.—All whilks deeds shall be, and hereby are declared to be, void and null *ipso facto*, and to be no ways valid, nor effectual, either to burden, affect, or evict the foresaid lands, living, and estate, or any part thereof, or rents and duties of the samen, except such of the samen deeds as shall be made and granted by the advice and consent of the friends above specified, had and obtained in writ."

But this entail was understood not to contain a resolutive clause, voiding the right of the contravening heir of entail, who should contract debt, or transgress the other prohibitions of the entail.

James Hepburn possessing the estate of Humby under this entail, contracted great debts; whereupon the creditors adjudged the estate of Humby, and pursued a sale of it.

In this process of sale, the children of James Hepburn of Humby appeared for their interest, and maintained, that in virtue of the entail 1663, the estate could not be evicted by creditors.

The creditors made several objections to the validity of the entail; but waving these, the Lords ordered a hearing in presence on this abstract point, Whether an entail containing an irritant clause, that is, a clause voiding the debts contracted, but not containing a resolutive clause, that is a clause voiding the right of the heir contracting the debts, was safe against creditors?

Pleaded for the creditors, A power of aliening and charging an estate with debt is considered by the law of Scotland as inherent in property; and there is no method of divesting the owner of this power, but by adding to the prohibition to alien, or charge, a resolutive clause, voiding or forfeiting the right of the owner immediately upon his contravening the prohibition: A prohibition without this resolutive clause, is no more than an injunction, or command, from the maker of the entail; which cannot either take from his heirs the power of aliening, and charging with debt inherent in his right of property, or from the creditors the remedy which the law gives them for satisfaction of their debt, by attaching every right in the person of their debtor. By force of this resolutive clause, and the subsequent decree of declarator, the right of the contravener being forfeited from the time of the contravention, the estate cannot be affected by his creditors; but the next heir takes it, passing over the contravener, and making his title as heir to the intermediate heir, who contravened. The entail in question contains no resolutive clause, expressly annulling the right immediately on contravention; and therefore the estate may certainly be attached, and sold for payment of James Hepburn's debts.

The act of Parliament 1685, which gives effect to entails, and has declared the mode of entailing, expressly requires a resolutive clause, voiding the right of the

heir, immediately on his contravening the provisions of the entail. It is declared, that, unless this resolutive clause is inserted in the procuratories of resignation, charters, precepts and instruments of sasine, the entail shall not be allowed to be effectual against creditors; and the necessity of this clause, to render an entail effectual against creditors, has been so much established by authorities of great weight, and so much acknowledged in practice, that of 437 entails, executed and recorded from the year 1685 to 1755, it is omitted in very few of them. No. 86.

Answered for the children of Humby: A power of aliening, and charging with debt, is by no means an inherent consequence of property. The distinction betwixt a qualified and a simple fee, at one time or other received in almost every nation in the world, shows the possibility of holding an estate, which yet the holder cannot throw away. In other nations there are bars to alienation; but in hardly any nation except our own is this bar made effectual by a clause irritating the right of the contravener; which clauses are but of late invention in the law of Scotland, and were introduced by the excessive anxiety of men to guard their entails, not only by prohibiting alienation, and voiding the deed, but even by voiding the right of the heir who alienates; but though such are wanting, the entail will be good.

The act 1685 only declares it "lawful for the lieges to tailzie their estates, with such provisions and conditions as they shall think fit, and to affect said tailzies with irritant and resolutive clauses." It leaves it open to the lieges to affect their estates with such of these clauses as they think fit; but does not impose upon them the necessity of imposing both clauses. A clause voiding the debt, and a clause voiding the right of the person who contracts it, are quite separate and distinct from each other, and have separate effects; the one to annul the debt, the other to punish the contractor of it. Accordingly, if there is no clause voiding the debt, but a clause voiding the right of the person who contracts it, the entail will be open to creditors on the one hand, and the heir forfeited on the other; and, in the same manner, where there is a clause voiding the debt, and no clause voiding the right of the person who contracts it, full effect ought to be given to the clause that protects the entail itself, although there be no clause to forfeit the heir who attempts to hurt it.—It is impossible to suppose the act of 1685 so unjust to creditors, o r so inhuman to posterity, as to require necessarily of entailers to forfeit their heirs immediately upon contravention; the effect of which would be, to punish the heir beyond bounds, and, besides, to strip his creditors of the benefit of his liferent, which they would otherwise have had.—The act of 1690, Cap. 33. passed soon after the revolution, and intituled, "Act for the security of the creditors, vassals, and heirs of entail of persons forfeited," omits the resolving clause, as no ways essential to the purpose of the act, which was the security of entails. The words of that act are, "That no heirs of entails, &c. in infeftments, or other deeds, affected with prohibitive or irritant clauses, in case of contravention of the provisions therein mentioned, shall be prejudged by the forfeiture of his predecessor, but only in so far as the party forfeited had liberty to contract debt, or affect the lands, or others, by the quality of the right and infeftment."

No. 86. "The Lords found, in respect the tailzie contains no resolutive clause, forfeiting the right of the heirs of tailzie who should contravene the prohibitions and conditions thereof, that therefore the said tailzie cannot be effectual against the onerous deeds and debts of the heirs of tailzie in possession, nor bar the creditors from proceeding in the present action of sale."

To this entail it was further objected by the creditors, That though it contained a prohibition to annailzie, dispone, wadset, or burden the estate, it contained no prohibition to sell; and therefore might be sold; as entails admit of no latitude of interpretation to support them.

"The Lords found, That these prohibitions imported a prohibition to sell the tailzied estate."

It was further objected, That though this entail was executed, and completed by infeftment, before the act 1685, yet there was a necessity for recording it afterwards in the register of tailzies appointed by that act.

"The Lords found, That as the tailzie was executed, and completed by infeftment, before the act 1685, there was no necessity for recording it in the register of tailzies appointed by that act."

N. B.—The argument on this last head having been afterwards the subject of a hearing in presence, in the case of The Creditors of the Earl of Rothes against The Earl, 14th December, 1758, will be seen in Sect. 7. *h. t.*

Act. *W. Stuart, And. Pringle, Advocatus, Ferguson.* Alt. *Cockburn, J. Dalrymple, Lockhart.*

J. D. *Fac. Coll. No.* 94. *p.* 168.

*** The case of Hepburn was appealed. The House of Lords, December 7, 1758, "DECLARED, That it appears not to be necessary, in the present cause, to determine the questions arising upon so much of the interlocutor as is complained of by the cross appeal, (viz. that which found, That the tailzie having been made, executed, and completed by infeftment, before the statute 1685, there was no necessity of recording it in the register of tailzies appointed by that statute; and that the clause in the tailzie annulling the debts contracted, or deeds granted by the heirs of tailzie, contrary to the prohibitions and conditions of the tailzie, extends to all debts and deeds in general); and therefore ordered the cross appeal to be dismissed: And it is further ordered and adjudged, That the original appeal be dismissed; and that so much of the interlocutor as is therein complained of (which found, That the tailzie contains no resolutive cluase forfeiting the right of the heirs of tailzie who should contravene the prohibitions and conditions thereof; and therefore, that the tailzie cannot be effectual against the onerous debts and deeds of the heir of tailzie in possession, or bar the creditors from proceeding in the present action of sale of the tailzied estate,) be affirmed.

*** See Lord Kames' report of this case in Sect. 7. *h. t.*