1778. *November* 21, and 1779, *January* 28. JAMES KEMPT *against* GEORGE WATT.

TAILYIE—IRRITANT CLAUSE.

Effect of an Irritant Clause.

[*Fac. Coll. VIII.* 110; *Dict.* 15,528.]

BRAXFIELD. I admit that tailyies are *stricti juris*, and that intention will not be supplied. But here I think that the entailer has expressed his intentions. The statute has required no *verba solemnia*. One conveyancer expresses himself in one way; and another in another. The words in this entail are more sensible than the words generally used. The clause declaring debts null and void is improper: the proper way is to declare that the debts shall not be good against the estate; and the clause here is still more proper.

HAILES. I shall only say, that, if this clause is sufficient to every purpose, conveyancers have bestowed much useless labour in securing estates by entails. "I prohibit every one from lending money to my heir of entail," will serve instead of all the anxious clauses hitherto devised.

COVINGTON. This entail contains all necessary clauses. Debts are allowed to a certain extent, and therefore adjudication may follow to a certain extent; but, if the debts contracted exceed that sum, how are the creditors to be ranked.

ELLIOCK. Here there is no irritant clause inserted, which the statute expressly requires.

MONBODDO. Entails are not creatures of the law, but of the maker of the deed. An entailer may not perhaps mean to forfeit the creditors of his heir. I do not say that any precise words are required as in the *formulæ actionum* of the Romans; but still the words must be express.

KAIMES. A man who has an entailed estate is still proprietor; therefore an adjudication against his estate is *prima facie* good. *Query*, Whether is not reduction necessary? An *ipso facto* forfeiture is never allowed.

On the 21st November 1778, "The Lords found that the sale cannot proceed."

Act. J. W. Belches. *Alt.* G. Ferguson. *Reporter*, Covington.

Diss. Elliock, Hailes.

1779. *January* 28.—BRAXFIELD. No person can hold an estate without paying his creditors. The maker of this entail has not so qualified it as to disappoint the creditors of the heir of entail, for he has omitted a resolutive clause, although he has thrown in clauses irritant and prohibitory. The debtor may sell, and therefore he must be obliged to do justice to his creditors. The very reason of the diligence of adjudication is to do what the debtor ought to have done, to pay his debts. As in this case, the heir of entail may sell,—the creditors may force him to sell.

PRESIDENT. If the heir of entail had sold, Would not the sale have been good as to the purchaser?

JUSTICE-CLERK. I am no great friend of entails, yet, when they appear in legal form, I will do justice to them; that is, when the necessary clauses are to be found in them, clear and intelligible to every one: which is not the case here.

MONBODDO. The cases of *Hepburn of Keith* and *Sinclair of Carlowrie* are contrary to the opinion given by Lord Braxfield. I think that, in this case, there are clauses sufficient for preventing the estate from being burdened. Is not this implied in the clause, that it shall not be in the power of a creditor to eviet or adjudge?

PRESIDENT. Implied irritant clauses are not to be received. If implication is sufficient, the case of *Carlowrie* was wrong adjudged. This entail is absurd, for it irritates the right, and yet leaves the estate to be sold.

On the 28th January 1779, "The Lords found that the sale must proceed;" altering their interlocutor of ———.

Act. G. Ferguson, Ilay Campbell. *Alt.* J. Belches, D. Rae.

Reporter, Covington.

1778, *December* 3, and 1779, *January* 28. MICHAEL LADE *against* ROBERT and WALTER SCOTT.

PRESUMPTION.

Presumption in favour of Life.

HAILES. This is an exceeding frivolous dispute. Lady Cranston might put an end to it by writing twice a-year, *I am alive, J. Cranston;* but since she will not indulge the defender in this, I do not see how she can be compelled, as long as she has a known domicile in England: were she to go out of the British dominions, I would require some evidence of her being alive. I do not think that the presumption of life to an hundred years is sufficient.

BRAXFIELD. The husband is *in petitorio*, and he must prove the fact that Lady Cranston is alive.

COVINGTON. When Lady Cranston leaves London, she must intimate that she is going to some other place, that so the persons concerned may not lose sight of her.

GARDENSTON. Why may not Lady Cranston certify that she is alive, when by marriage she assigns her right to her husband? Ought he not still to give the same evidence of her being alive which she would have done before, by signing discharges?

KAIMES. I do not see that the purchasers, the defenders, have any interest in this matter: as long as Lady Cranston resides in London, there is no use for a certificate.

ALVA. Lady Cranston's jointure is secured at Crailing: in strictness of