Sir John Schaw, of Greenock, Bart. - *Appellant*; Case 46.
Dame Margaret Schaw, alias Houſton, and Sir John Houſton, Bart. her Huſband, - *Reſpondents*. Brute, 15 July 1725.

10th *March* 1517-18.

Tailzie—A father infeft in an eſtate in life-rent, and a ſon infeft in fee, jointly entail the eſtate in the ſon's contract of marriage, with prohibitory, irritant, and reſolutive clauſes, and with a proviſo, that the father and ſon ſhould jointly have power to alter; this entail was inſert in the regiſter of tailzies upon the joint ſupplication of the father and ſon, but no reſignation was made nor infeftment taken thereon: the irritancies and clauſes not to alter were binding upon the ſon (after the father's death) even ſuppoſing the ſubſtitution were gratuitous.

IN 1686, Sir John Schaw, Bart. deceaſed, father of the appellant and reſpondent Dame Margaret, ſettled his eſtate of Greenock upon himſelf in life-rent, and failing him to the appellant and the heirs male of his body in fee, whom failing to the other perſons therein mentioned; reſerving a jointure to the appellant's grandmother of about 72*l.* per annum, and about 150*l.* per annum to his mother, and a power to the father to raiſe 50,000 merks for younger childrens' portions, and to make leaſes for his life and 19 years after at one-third leſs than the then rent.

A marriage being afterwards agreed upon between the appellant and Margaret, the daughter of Sir Hew Dalrymple, Lord Preſident of the Seſſion, by their contract of marriage in March 1700, entered into with the ſpecial advice and conſent of their reſpective fathers and mothers, who are parties thereto, and ſubſcribe the ſame, the ſaid Sir John the father, and the appellant, in conſideration of the marriage and of the portion of the ſaid Margaret Dalrymple, bound and obliged themſelves jointly and ſeverally with mutual conſent to reſign their lands and eſtate therein particularly mentioned; viz. the lands and barony of Greenock, and alſo the lands of Broadſtain and others, (which laſt were not contained in the ſettlement of 1686) to Sir John the father in life-rent, whom failing to the appellant and the heirs male of his body by that or any future marriage; whom failing to his five younger brothers ſucceſſively and the heirs male of their bodies, whom failing to the heirs male of Sir John the father's body, by his then or any future wife; whom failing to the reſpondent Margaret and *the heirs of her body*; with ſeveral other ſubſtitutions of heirs, whom all failing to the heirs and aſſignees whatſoever of the appellant. The deed contained the uſual prohibitory, irritant, and reſolutive clauſes againſt the appellant and the heirs of entail, and clauſes to the following effect:

Reſerving power to Sir John the father, and the appellant, during their joint lives, with mutual conſent, to alter or diſcharge any of the ſaid prohibitory and irritant clauſes and conditions as they ſhould jointly think fit; and to alter the ſaid courſe of ſucceſſion, except in ſo far as concerned

concernea the proviſions thereby conceived in favour of the ſaid Margaret Dalrymple, &c.

Provided, that out of Sir John the father's life-rent, there ſhould be particularly excepted and reſerved to the appellant for his and his wife's preſent maintenance, lands of the yearly value of 6000 merks, to be increaſed as they ſhould have children:

And Sir John, the father, thereby renounced his power of charging the eſtate of Greenock with 50,000 merks for his children' portions, and all the other powers, which he had reſerved by the ſettlement in 1686; and, his wife Dame Eleanor, with his conſent, gave up her life-rent in the ſaid eſtate of Greenock, to which ſhe was entitled by her contract of marriage:

And in regard the heirs female of the appellant's body, failing heirs male thereof, were thereby excluded from the right of ſucceſſion to the ſaid eſtate, there was a particular proviſion of 50,000 merks made for their portions.

There were two parts of the ſaid contract executed by all the parties in preſence of the then Lord Chancellor of Scotland, and above 40 other lords and gentlemen, who all of them ſubſcribed their names as witneſſes thereto: but no reſignation was made, or charter and ſaſine taken out thereupon. Upon a petition, however, in the name of Sir John the father, and the appellant, ſigned by Sir David Cuninghame, uncle to the appellant's wife, their procurator, the Court of Seſſion ordered the contract to be recorded in the regiſter of entails purſuant to act of parliament; and it was therein regiſtered accordingly, and the deed returned to the appellant.

The appellant's father having died, and alſo his five younger brothers without iſſue, and the reſpondent Margaret then ſtanding the next ſubſtitute failing iſſue male of the appellant, the reſpondents brought an action before the Court of Seſſion againſt the appellant, to compel him to exhibit the ſaid contract of marriage, to the end that it might be ordered to be regiſtered in the books of Seſſion, and the reſpondents have an extract thereof. The appellant brought a counter action againſt the reſpondents to declare his right to alter the ſucceſſion, and diſpoſe of the property as he ſhould think fit, as to all others except the heirs of the marriage; upon the ground, that notwithſtanding theſe prohibitory clauſes, yet he, as having the fee of the eſtate veſted in him long before the ſaid marriage-ſettlement, and being the firſt maker of the entail, could not be tied up by them, but might ſtill alter the ſaid order of ſucceſſion, and cut off all other ſubſtitutes, except the heirs of the marriage, for whoſe ſecurity the contract was treated for and made.

In the debate ariſing on both theſe actions, it was at firſt alleged for the appellant, that the ſaid contract of marriage was his own proper evident, wherewith he might do as he pleaſed, and that therefore he was not obliged to produce the ſame, before it ſhould appear on the event of the action, that the reſpondents had a right to require the exhibition and regiſtration thereof. The reſpondents made anſwer, that Dame Margaret being expreſsly nominated

nominated in the entail, which was a contract and conveyance of lands, ſhe had good right to call for production thereof, to the end the ſame might be preſerved. The Court thereupon "Or- "dered the appellant to exhibit, reſerving all defences againſt "regiſtration or any other legal effect."

The contract being accordingly exhibited, after various proceedings, the Court at firſt, on the 22d of February 1715, "Found that the irritancies in the appellant's contract of mar- "riage did not affect the appellant who made the tailzie, and "therefore declared in favour of the appellant, ſo far as con- "cerned the lands contained in the charter and infeftment "1686."

The cauſe, however, being re-heard upon the petition of the reſpondents, the Court, on the 15th of July 1715, "Found that "the irritancies and clauſes not to alter contained in the contract "of marriage were binding upon the appellant who made the "tailzie, even ſuppoſing the reſpondent Dame Margaret were a "gratuitous ſubſtitute." The reſpondents having then applied to the Court to have the appellant's counter action diſmiſſed, their lordſhips, on the 30th of July 1715, "Found the tailzie "a delivered evident, and ordained the contract containing the "ſame to be regiſtered in the books of Council and Seſſion, that "any concerned might take extracts thereof, and aſſoilzied the "reſpondents from the appellant's declarator."

The appeal was brought from "an interlocutor of the Lords of "Seſſion the 15th of July 1715, and alſo from an interlocutor of "the ſaid Lords of Seſſion, dated the 30th of the ſame July." Entered, 29 March 1717.

Heads of the Appellant's Argument.

It is certain, that before the ſaid marriage-contract, the appellant was poſſeſſed in fee ſimple of the eſtate intended to be tailzied, and the interlocutors appealed from ſuppoſe the tailzie to be grtuitous or voluntary with reſpect to the reſpondent. That a tenant in fee ſimple could ſettle the order of his ſucceſſion by tailzies as he thought proper, by the law of Scotland, was not doubted; nor was it doubted that he could alter ſuch entail whenever he would: but of late men were not contented to ſettle their eſtates by way of entail, changing the order of ſucceſſion from the heirs at law, to any other heirs; they proceeded to add conditions or limitations for reſtraining their heirs from altering the order ſettled by ſuch entails, and that if the heirs of entail ſhould do contrary to ſuch conditions, their right ſhould become irritated. Theſe clauſes are called prohibitory and irritant clauſes, but it ſtill remained a queſtion till the year 1685, whether ſuch irritant and prohibitory clauſes expreſſed in tailzies did limit the heirs of entail and bar them from altering the ſucceſſion or charging with debt. But it is remarkable that throughout the act 1685, c. 22. the legiſlature had no view to abridge the power known to belong by the law of Scotland to makers of tailzies, of altering the deſtination or order of their own ſucceſſion, but only 1685, c. 22.

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to make their own deſtinations the more effectual by confirming what limitations ſoever the makers ſhould think fit to impoſe upon their heirs. So that, at preſent, tailzies in Scotland, in ſo far as concerns the maker's power of altering are regulated, by the principles of the common law of that country; but in as far as relates to the reſtrictions and limitations of the fee in the perſons of the heirs of entail, tailzies are regulated by the above-recited act 1685.

That the maker of a gratuitous or voluntary tailzie has power to alter it at pleaſure by the law of Scotland, is evident; 1ſt, Becauſe tailzies, as they regard the makers of them, are really deſtinations of ſucceſſion, which by the known principles of the civil law, copied in that particular by the law of Scotland, are alterable at the pleaſure of him who made the deſtination; nothing being more common than that a variety of accidents ſhould with juſtice alter his intentions before his death, it was judged neceſſary, as well as expedient, to provide that a man ſhould not have it in his power to deprive himſelf of the faculty of ſettling his ſucceſſion as he ſhould find proper by any previous voluntary deed. This fundamental maxim of the civil law, in matters of ſucceſſion, the law of Scotland has admitted univerſally, with one exception, and that is where a ſettlement is made for an onerous cauſe; in ſuch a caſe, the law of Scotland looks upon the tailzie to be in effect a contract, which juſtice obliges the performance of, and therefore does not allow the maker to alter at pleaſure.

2d, As this poſition is agreeable to the principles above eſtabliſhed, ſo it is the unanimous opinion of all the writers on that ſubject: the learned Hope, in his Leſſer Practicks, lays it down for certain, that a bond of tailzie *ex nulla cauſa oneroſa* is revocable, but admits that it is binding, if it be granted for an onerous cauſe, or in view of a mutual tailzie. And Lord Stair, in his Inſtitutes, b. 2. tit. 3. § 59. agrees in the ſame opinion, with this difference, that though a tailzie be made for an onerous cauſe, yet if that conſideration were not adequate to the tailzie, it may be altered. Of the ſame opinion are the other lawyers who treat of this ſubject.

Hope.

Stair's Inſtit.

Dirleton's Doubts and Stewart's Anſwers, p. 146, 147.

The appellant ſupports their opinion by the deciſions of the Lords of Seſſion in two important caſes, lately determined, where the Judges were unanimous. The firſt was, the caſe of Lord Lindores againſt Oliphant and Stewart. The other caſe was that of Scott of Harden againſt Scott of Raeburn. Both theſe caſes do incontrovertibly ſupport the reaſons inſiſted upon by the appellant, and prove, that the firſt maker of an entail cannot by any clauſes be tied up from the power of diſpoſing of his inheritance as againſt all voluntary ſubſtitutes.

Ld. Lindores againſt Oliphant and Stewart, Dalrymple, 8 Dec. 1714. Bruce, 18 Feb. 1715. Scott of Hardin v. Scott of Raeburn, a ſubſequent caſe in this Collection.

But further, as the maker of a tailzie muſt, from the nature of that ſettlement, be poſſeſſed of a faculty of altering it, the appellant conceives, that he having by the deed now in queſtion reſerved to himſelf the fee of the eſtate according to the law of Scotland, and as the property does ſtill abſolutely remain with

the appellant, the power of alienation muſt likewiſe remain with him. It is true, that if the appellant had made himſelf life-renter, he could not have pretended to the power of alienation, becauſe the fee in that caſe would have been lodged in another; and it is equally true, that an heir of entail limited with uſual clauſes, cannot alter: but neither of them is the caſe here; the appellant was and ſtill is abſolute liar.

Heads of the Reſpondents' Argument.

There is nothing plainer than that, as a man having an unlimited fee or property, may diſpoſe thereof at pleaſure; ſo he may leſſen or reſtrain his own right in favour of another, and what is granted to that other, is as much his property as what remains with the firſt proprietor. It was indeed in the appellant's power to have joined in making this entail or not; but when he had joined in making thereof, whereby the eſtate is limited, for want of heirs male, to the reſpondent Dame Margaret by name, with prohibitory and irritant clauſes, not only upon the heirs of entail, but expreſsly upon the appellant himſelf, he and all the heirs of entail are thereby bound up and diſabled from making any alteration therein, whereby the appellant's right or property, which was before free and unlimited, is become limited. There are here not only the ordinary prohibitory and irritant clauſes, but an expreſs obligation on the appellant and all his ſubſequent heirs to ſtand ſeiſed and poſſeſſed by virtue of that contract and by no other title. But, beſides, it appears in this caſe, that Sir John Schaw, the appellant's father, was tenant for life in poſſeſſion, with the reſervation of a jointure for his lady; ſo that the appellant was not proprietor of the whole fee ſimple; and the appellant's father and mother joined in this ſettlemettt, and thereby made a preſent proviſion for the appellant and his lady, which they could not have had, without the father and mother's joining; and therefore the appellant ought to be bound by the terms and agreements of the deed in which they joined.

The appellant contended, that by the contract of marriage, the fee was veſted in him, whom all the heirs therein mentioned, or whoever might ſucceed to the ſaid eſtate, muſt repreſent, and therefore could not controvert, but muſt fulfil his deeds; and in caſe of the appellant's contravention, no perſon could be ſerved heir, for that the next in ſucceſſion muſt be ſerved heir to him, (which would be abſurd, for that he had loſt his right) and not to his father, for he was denuded. But this argument *de abſurdo* is of no validity; for, as to the queſtion, whether the appellant be bound or not by his contract, it is to be determined without regard to what might fall out. And if the appellant ſhould contravene, upon an action brought againſt him by the next in ſucceſſion, he would be decreed to denude, and adjudication would follow thereupon in favour of the next heir of entail, by virtue of the obligation in the ſettlement for that purpoſe.

The ſtatute 1685 gave a liberty to perſons to tailzie their eſtates, and burden their heirs as they thought fit, which before then had been

been controverted, as if a perſon could not burden heirs that were not in being; and the deſign of the ſtatute was to prevent that objection. But it was never brought in queſtion, either before that ſtatute or ſince, whether a preſent and abſolute proprietor could tie up himſelf as he thought fit; and the act of parliament does no way relate to that matter.

The entail is in a contract of marriage, whereof there were two parts ſubſcribed and mutually interchanged and delivered: and the ſame was regiſtered in the regiſter of entails, by decree of the Lords of Seſſion, upon a ſupplication of the appellant and his father, mentioning to be for the benefit of all parties therein concerned: and this being a complete contract, and having the force and effect of a delivered evident or deed, there was no diſtinction either as to the grantor or grantees, whether the ſame was completed by charter and ſaſine or not, ſince the power to alter did not ariſe from this, that it was but a perſonal obligation, but from the nature of the thing, for whatſoever the charter and ſaſine could do, the perſonal obligation had, by the law of Scotland, the ſame effect againſt the grantor to oblige him to fulfil; and with reſpect to the grantor's power of altering, there is no difference whether it was completed by charter or not; and the appellant might as well have altered the ſucceſſion as to his five brothers, were they now living, as to think of doing it to the prejudice of the reſpondent.

The preference given to the reſpondent Dame Margaret by the ſaid contract of marriage had been fully concerted and agreed to by all parties, and was what her father had ſtipulated for her, and not the mere voluntary deed of the appellant. For by Sir John her father's ſettlement in 1686, while the appellant was a minor, he, the appellant, had not a free and unlimited fee in the ſaid eſtate of Greenock, the ſame being conſiderably qualified and burdened by the father: but all theſe qualifications and burdens were by her ſaid father, in the contract on the appellant's marriage, renounced and given up; and conſequently what was thereby provided in her favour was a plain agreement between father and ſon, whereby her father prevailed with his ſon to prefer her to his own daughters in the ſucceſſion, and that for valuable conſiderations.

Theſe valuable conſiderations were; That by the ſettlement 1686, the eſtate in queſtion ſtood charged with the value of about 13,000 merks for a jointure to the appellant's grandmother, and about 150*l.* per annum to his mother, who are ſtill living, and with a power to Sir John the father to raiſe 50,000 merks for younger childrens' portions: Sir John the father had likewiſe a life-rent in the whole, and a power to make leaſes for his life, and nineteen years after, at one-third leſs than the then rent, whereby he might have raiſed fines. By the preſent ſettlement that power of making leaſes is diſcharged, and from the date thereof an immediate proviſion of 322*l.* ſterling per annum is made for the appellant, with a covenant therein to add more to it, as his children ſhould increaſe, and other lands included to the

the value of 1001. ſterling, which were not compriſed in the former ſettlement, and to which the appellant had no other right: and, beſides, Sir John, the father, had a perſonal eſtate of 20,000l. ſterling, which he might have diſpoſed of at his pleaſure, as he ſoon afterwards did to the appellant, the proſpect whereof was a further inducement to the appellant to join in this entail, and to ſettle the ſucceſſion as his father deſired.

After hearing counſel, *It is ordered and adjudged that the petition and appeal be diſmiſſed, and that the ſaid interlocutors therein complained of be affirmed.* Judgment, 10 March 1717-18.

For Appellant, *David Dalrymple. Rob. Raymond. Will. Hamilton.*

For Reſpondents, *Tho. Lutwyche. Sam. Mead.*

This caſe ſeems to be inaccurately reported in the Dictionary, vol. 2. p. 431. *voce* Tailzie.

Sir Peter Fraſer of Doors, - - - *Appellant;* Caſe 47.
Iſabel Sandilands, Widow of William Black Eſq; - - - - - *Reſpondent.*

12th *Jan.* 1718-19.

Preſumption—A perſon being ſued in 1718 by the widow of one to whom, in 1697, he had granted a bond of penſion for the conſideration of managing the grantor's law affairs; though never demanded by the grantee during his life, the bond is ſupported and the money decerned for.

Holograph.—Whether holograph or not being referred to the oath of the grantor of a bond, the term is circumduced againſt him for not deponing.

Coſts.—40l. coſts given againſt the appellant.

IN July 1697 the appellant granted a bond of penſion to the late Mr. Black, advocate, the reſpondent's huſband, of 10l. ſterling per annum, to be paid at Whitſunday and Martinmas by equal portions, with intereſt after the reſpective terms of payment. The bond mentioned the conſideration to be for Mr. Black's pains and management of the appellant's law affairs, and that it was to continue ſo long as the appellant had any law affairs. In July 1713, Mr. Black aſſigned the ſaid bond to the reſpondent in truſt for his children.

In 1715 the reſpondent, after her huſband's death, brought an action againſt the appellant before the Court of Seſſion for payment of the ſaid bond and intereſt; ſtating that Mr. Black did, from the time of the date thereof till his death in Auguſt 1713, carefully manage all the appellant's law ſuits and other his affairs, but that neither the ſaid penſion, nor any part thereof, had been paid to him: and that the reſpondent, after her huſband's deceaſe, applied ſeveral times by herſelf and friends for payment of