

No. 77. Another's contract of marriage with her father, and she having married a gentleman of good family and portion, it was not in her power now to force him to change his name, especially her father having died in great debt, and her husband having bruik'd the estate by virtue of an adjudication as having right to debts due to lawful creditors; 2do, The said tailzie did contain no clause irritant, and so cannot be a ground of this declarator. It was replied to both, That the tailzie and disposition was, notwithstanding, a just title for this action and declarator, and would not be called a latent deed as lying beside their father until he died; because, as it was in his power to provide his estate as he should think fit, so he was the only person that ought to have the keeping thereof; and having left it entire, it was obligatory against his apparent heir; and as to her *bona fide*, that it was not intimated, albeit it were true, yet it cannot hinder the declarator, the pursuer being yet content that her eldest sister's husband should yet assume the name and arms for preserving the family as was appointed, and intends not to take advantage of any prior forbearance; and as to the *last* part, that there was no clause irritant, it was replied, that albeit there was no such express clause in the tailzie, yet the conditions of succession being so clear, that if the first sister named should fail, the next should succeed, it was a good ground for this declarator.—The Lords did find, that the husband having adjudged the said lands and possessed them *singulari titulo*, might bruik the said estate until it was redeemed; but the pursuer being next heir, might be served, and take her hazard of the burdens, if she thought fit.

Fol. Dic. v. 2. p. 431. Gosford MS. No. 1005. p. 679.

* * * See Stair's report of this case, *vide* WRIT.

1686. December 1. EARL OF CALLANDER *against* LORD JOHN HAMILTON.

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Found, that a prohibitory clause contained in a tailzie was a sufficient ground for the next heir to reduce, upon the act of Parl. 1621, any posterior gratuitous or voluntary deeds not depending on prior onerous causes, tho' it wanted a clause irritant.

The Earl of Callander, second son to the Earl of Linlithgow, pursuing a reduction of the disposition granted by Alexander last Earl of Callander to John Lord Hamilton, (Duke Hamilton's second son), of the estate of Callander, on this ground, That by the tailzie he was bound up to do no deed which might disinherit my Lord Linlithgow's second son, and other substituted heirs of tailzie, which clause militated against this voluntary and gratuitous disposition to Lord John Hamilton; and so he might reduce it on the act of Parl. 1621;—alleged, That his title as apparent heir was not *nomen juris*; and the pursuit at his brother the Lord Livingston's instance was only on a bond granted by the said Earl of Callander to Livingston, his brother, for a vast sum of money, to make up a simulate ground of debt whereon to charge him to enter heir, and which being also a gratuitous deed, made a contravention of the tailzie discharging such deeds, and so was contrary to their own reason of reduction; and if it came into his person, it was a passive title, as in the Earl of Nithsdale's case. Answered, This

was an allowable method by our practice to make up a title in law. The Lords, on Saline's report, sustained Livingston's and Callander's active title to quarrel Lord John Hamilton's right; but declared they would hear the principal cause in their own presence. No. 78.

1687. *January 27. & 28.*—The most part of these two forenoons were taken up in advising the famous debate betwixt Lord John Hamilton and the Earl of Callander. The interlocutor ran on three points; and Lord John lost them all.—*1mo*, The Lords found the prohibitory clause contained in the tailzie was a sufficient ground for the next heir, or my Lord Livingston, who on a bond had adjudged from him, to reduce, on the act 1621, any posterior, gratuitous, or voluntary deeds, not depending on prior onerous causes, though it wants a clause irritant; for that would resolve, irritate, annul, and reduce, even onerous creditors' debts; *2do*, That the discharge betwixt Earl James and Earl Alexander, in 1672, neither could, at least did not, extend to discharge this prohibitory clause; *3tio*, That Earl Alexander could not burden his estate of Callander equivalent to Bramford's and Dumfermline's debts, which he had paid, though he was not obliged thereto by the first disposition of tailzie; seeing they were paid out of the estate, and extinct, no assignations being taken thereto, though he, by his frugality, had spared so much of his rents (which he had power to consume) as might help to pay them; whereas he might have left these debts unpaid, as a burden to the next heir of tailzie. This was the hardest point of all. The President, and three more of the Lords, were for the Duke in this last; and there were some *non liquet*; but the plurality carried it against Duke Hamilton's son; and many applauded the decision as equitable. Strathmore was declined, as brother-uterine to Callander. A bill being thereafter given in against this by Lord John, the Lords, on the 1st of February, 1687, declared they would further hear the parties on the last point,—How far the debts paid should affect the tailzied estate?

1687. *February 25.*—The case of Lord John Hamilton and the Earl of Callander was again advised; and the Lords found the *emponemata* and meliorations of the estate itself, made either by selling of a part, or by the rents, did not constitute the heir of tailzie such a creditor as that he could burden the estate to that value; but that the debts, though assignations were taken thereto as to Dumfermline's, became extinct in his person. The words of the interlocutor were: Find *quoad* the debts that were paid by Earl Alexander, and whereof discharges were only taken, that they were extinguished, and cannot revive: As also find the debts paid by Earl Alexander, whereto he took assignations, are likewise extinct by confusion in the person of Earl Alexander; and that upon neither of the said accounts the tailzied estate can be burdened: And find, with respect to the debts wherein the Earl of Dumfermline was creditor, and whereto Earl Alexander acquired right, that they are likewise extinguished; and that Earl Alexander, upon

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Then he gave in a bill, representing he was not paid out of the tailzied estate, but that he had a separate and distinct estate, viz. Glentirren, &c. and therefore *quoad* that he was a creditor. This being on the very last day of the Session, and being specious and new, they ordained my Lord Livingston and Callander to see the petition, and to answer the same against the 1st of June; and declared they will then take the grounds therein represented to their consideration; and stopped the extracting of the decret in the mean time; but allowed my Lord Livingston, if he think fit, to extract the interlocutor.

1687. *June 23.*—The Earl of Callander's reduction of Lord John Hamilton's bond was again debated, as to the debts which Earl Alexander paid, how far this made him a creditor, where he took assignations; for it was confessed, that discharges extinguished and confounded the debts; and where he paid them out of the rents of the lands, which were unquestionably his own, or out of Glentirren, and his other extrinsic and unentailed estate; for he might have gifted these rents, or bought another estate with them; or if resting at his decease, they would have fallen to his executors, and not to his heir of tailzie. And as to the *emphymata* and meliorations, they are always allowed even to a *malæ fidei possessor*, *L. 38 D. De hæred. petit.* and an *emphyteuta*, when the fee returns *sine ejus culpa finitâ generatione*, gets these allowed. The Earl of Callander's procurators were very unwilling to enter on the debate, but objected the act and interlocutor already extracted, where they alleged all this was proponed, and under consideration, and repelled; for they privily acknowledged there was some weight in this last point.

This cause being advised on the 18th of July, the Lords found the last Earl Alexander could not burden his estate of Callander gratuitously, not even in so far as he had meliorated the same, and made it in a better case than when he found it, either by his extrinsic estate of Glentirren, or by taking assignations to the debts he had paid, or by improving the rents of the lands; and that these meliorations cannot sustain the bond; and therefore reduced it, and adhered to their former interlocutor. Though the heir be declared free of this bond, yet Duke Hamilton intends to make it affect not only Earl Alexander, but also Earl James' executry, upon the warrandice of his disposition; Alexander having paid debts which James his uncle was bound to have relieved him of.

Fountainhall, v. 1. p. 432, 443, 450, & 459.

* * Harcarse reports this case :

1687. *February 26. & July 20.*

In anno 1660, James Earl of Callander tailzied his lands of Callander to Alexander Lord Almont his nephew, and the heirs-male of his body ; whom failing, to the Lord Linlithgow's second son, &c. without any obligation upon the heirs of tailzie not to alter the same, or any irritant or resolute clause, and obliged himself to warrant the lands from all evictions, or other debts than those enumerated in the disposition of the tailzie, without reserving any power to alter or novate. *In anno 1663* Lord Alexander, in his contract of marriage with Duke William Hamilton's daughter, provided the lands to heirs-male of the marriage which failing, to the heirs-male of his body in any other marriage ; and these failing, to the other heirs mentioned in Lord James' disposition of tailzie ; and obliged himself to do no deed to disinherit the heirs above mentioned. *In anno 1672*, by a contract betwixt Lord James and Lord Alexander, narrating the disposition 1660, and that a debt had emerged due to the Lord Bramford, which was not contained in the said disposition, Lord Alexander obliged himself to pay and relieve Lord James of the said debt, and Lord James discharged a debt of 3000 merks due to him by Lord Alexander, and warranted the said Lord Alexander against all other debts than those formerly undertaken. Lord Alexander having no children of the marriage, and finding himself valetudinary, and that my Lord Linlithgow's second son was like to succeed to the honours and estate of Linlithgow, for that his elder brother the Lord Livingston was childless, which would confound the two families, he granted a bond of 500,000 merks to Lord John Hamilton, for love and favour, and other onerous causes in general. The Lord Linlithgow's second son having succeeded to the title of Callander, after Lord Alexander's decease, granted a bond to his brother, on which he led an adjudication against the present Lord Callander, and raised reduction of Lord John Hamilton's bond, as a contravention of the obligation to do no deed to disinherit the heirs of tailzie.

Alledged for the defender, who had also raised a declarator : That the fore-said obligation not being adjected to the tailzie by Lord James, but by Lord Alexander, it could not hinder Lord Alexander to grant bonds, as voluntary and lucrative tailzies may be altered by the granter. *2dly*, Though the obligation might be thought onerous as to the heirs-male of the marriage, if there had been any, in respect of the mother's tocher, and that marriage is of itself onerous ; it was not onerous as to the remoter heirs, and so not to be presumed a security designed for them. *3tio*, The 500,000 merks bond was onerous as to the heirs of tailzie, in respect of Bramford's debt, which fell under the disposition 1660 ; and though Lord Alexander was obliged to relieve Lord James of it, he was not bound to relieve the heirs of tailzie. *4to*, Lord Alexander paid several debts besides that to Bramford ; and the half of the conquest, with the several bygone years annual-rent thereof, was evicted by the Lord Dunfermling, which was a

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contravention of the Lord James's warrandice in the disposition 1660, and the contract 1672; so that as Lord James would have been liable for these to Lord Alexander, his heirs of tailzie must be also liable to Lord Alexander's creditors, and to Lord John Hamilton; besides, Lord Alexander hath transferred to the said Lord John an assignation made to the Lord Alexander, of the Lord Dumfermling's right of conquest. *5th*, The general discharge in the year 1672, being posterior to the obligation to do no deed to disinherit, cuts it off, there being some exceptions from the discharge, and no mention of the obligation, which *firmant regulam in non exceptis*; nor can negative obligations to do no deed in prejudice, be more effectual than positive obligations to do deeds *in favorem*, which are usual in contracts of marriage, and do not hinder parents to dispoise and contract debt even for lucrative and rational causes, as was decided in the case of Littlejohn's wife, and in the tailzie of Cockburnspath, though, to secure the tailzie, there was a bond of borrowed money granted to the heir in order to apprise the estate in case of contravention, which was thought stronger than a bare obligation not to disinherit; yet the matter was thought fit to be settled, and the heir of line, in whose favours the tailzie was broken, got £.1000 Sterling of composition.

Answered for the pursuer: By such obligations tailzies that even *ab initio* were *voluntatis* and gratuitous, are secured, as in the case of Binnie contra Binnie. *2dly*, The remoter heirs have equally the benefit of the obligation as Lord Alexander's heirs of the marriage would have had, the obligation being conceived in favours of all them without distinction. *3tio*, The debts above mentioned were paid by the tailzied estate and profits, or borrowed money, which continue a debt upon the heirs. And seeing Lord Alexander took a discharge of Bramford's debt, he designed to extinguish it, so as it cannot be any onerous cause for supporting the £.500,000 bond. Again, whatever might be said, had Lord Alexander granted bonds to creditors for onerous causes, yet lucrative bonds, as this to Lord John Hamilton is, must be looked on as fraudulent, and a contravention of the said obligation. *4to*, The general discharge cannot be extended to the said obligation, in respect the particular sum discharged was but 3000 merks, and the general clause ought not to be extended to things of greater import than the particulars expressed, especially to heterogeneous things. And as it had been absurd for Lord James to cut off his own children, if he had any, from the succession by such a discharge; so it is absurd to think, that he would evacuate the tailzie by such a deed.

The Lords repelled all the defences, and reduced the bond *in toto*.

But thereafter it was alledged for Lord John, That if the heirs of tailzie were not allowed to recur on the tailzied estate for debts due by the maker of the tailzie, no heir of tailzie would ever pay a farthing of debt, but live plentifully upon the rents, and transmit the debts unpaid as a burden upon the subsequent heir. And Lord James was bound in absolute warrandice by the disposition 1660, and the contract 1672, to relieve Lord Alexander of all other debts not undertaken,

which other debts Lord Alexander paid out of the rents which belonged to himself, or out of his own proper estate, which fell not under the tailzie, and hath taken assignations to these debts. *2dly*, The Lord Dumfermling's heirs being provided to the half of the conquest lands acquired by Lord James, and having evicted the same, these evicted lands were not truly Lord James's lands, but the Lady's, and so could not be tailzied. And Lord Alexander's assignation from the Lord Dumfermling doth not concern the tailzied lands belonging to Lord James. And it were incongruous to find the Lord James, and his heirs of line, liable in the contravention of the warrandice, and yet that the tailzied lands are not affectable with that warrandice; for as the posterior heirs of tailzie are reputed creditors, in respect of contravention of the clauses of tailzie, so they ought to be considered as debtors as to any contravention of Lord James's obligation of warrandice.

Answered: By the clause in the contract not to disinherit, &c. and another obligation in a contract 1668, to do all things to the benefit of the heirs of tailzie, it appeared; that whatever debt Lord Alexander paid, whether upon discharge or assignation, (which have the same effect in the heir's person), is simply extinguished as to the heirs of tailzie, who are not properly heirs of tailzie to Lord James, who was denuded in the year 1660, but heirs to Lord Alexander himself; *2do*, Lord James' bond, without an onerous cause, fell under the act of Parliament 1621, Lord Alexander being debtor to the posterior heirs of tailzie by the foresaid obligations; *3tio*, The Lord Dumfermling's debt upon the account of the conquest was satisfied, partly by the tailzied lands, partly by the rents thereof, and partly by debts by Dumfermling to Lord James, none of which should afford recourse against the heirs of tailzie, or the tailzied lands.

Replied: In the case betwixt Thomas Nicholson's heirs of line and tailzie, (the Lords) found debt of the tailzied estate paid by, and discharged, or assigned to the heir of tailzie, was to be repaid to his heirs of line by the next heirs of tailzie.

The Lords found, 1. That debts affecting the tailzied estate, or due by Lord James, and paid by Lord Alexander, by the rents and profits arising to him out of the tailzied lands, whether he had taken discharge or assignation upon payment, did not furnish recourse against the tailzied estate. (Though some thought these debts paid might recur against Lord James' heirs of line and executors; and it was acknowledged, that the rents of the lands resting in the tenants hands, or that were in money lying by the defunct, would not belong to the heir of tailzie, but to his executors.) And the Lords found no speciality in Dumfermling's eviction, and Lord Alexander's right from him; and therefore reduced simply the 500,000 merks bond.

Thereafter it was alledged for Lord John, that the clause in the contract could import no more than that the tailzied estate should (not) descend by Earl Alexander's deeds and debts to subsequent heirs of tailzie in a worse case, or with more burden than Earl Alexander had it; and *ita est*, that Earl paid some of the

No. 78. said debts out of his other estate ; consequently his burdening the tailzied estate *pro tanto* was no contravention of the obligation, nor a deed falling under the act of parliament 1621 ; and if this be not sustained, no heir of tailzie could safely pay any debt upon the tailzied estate out of his separate fortune, but behoved of necessity to break and dispose of the tailzied estate, contrary to the very design of the tailzie. *2do*, The warrandice must operate against the heirs of tailzie, as well as the maker's other lands. *3tio*, Whatever might be pretended (had Earl Alexander left the matter *in dubio*) as to his designing the benefit of the melioration of the tailzied estate by disburdening it of debt, in favours of the heirs of tailzie ; he hath expressed the contrary, by taking assignations to himself and his successors whatsoever, and granting the 500,000 merks bond. *4to*, The half of the conquest was not truly Lord James' estate, and so fell not under the tailzie, but did properly belong to the Lady Dumfermling, Dowager of Callander, and her heirs, and was acquired from Dumfermling as an estate extrinsic from Callander, the Lady not being in the case of a creditor in general, but of a creditor *speciei*, to whom the property of the lands belonged.

Answered : The 500,000 merks bond was a downright contravention of the tailzie, being in fraud thereof, and directly to overturn it. And Earl Alexander having taken the assignation in his own name, the debt was extinguished by the application ; after which he could not make it revive by a gratuitous bond. *2do*, The warrandice can only operate against the heirs of line of Lord James and his executors, and against the other heirs of tailzie who are creditors, by the obligation of warrant as well as Lord Alexander. *3tio*, Earl Alexander did apply the payment to the tailzied estate by the assignation in his own name. *4to*, The Lady's right of conquest was purchased by a part of the tailzied lands ; and being tailzied by Lord James, they cannot be questioned, as not belonging to their author.

The Lords found, that the bond could not subsist for the meliorations, made even by Earl Alexander's extrinsic estate, and reduced the 500,000 merks bond *in toto*.

Harcarse, No. 962. p. 271.

* * * See No. 70. p. 2211. and No. 38. p. 9323.

1705. December 7.

SIR THOMAS YOUNG of Rosebank, *against* BOTHWELLS, Elder and Younger of Glencorse.

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A tailzie with prohibitory clause hinders not the fiar to dispone for necessary causes anterior to the tailzie.

Glencorses, elder and younger, enter into a minute of sale of their lands of Glencorse, with Sir Thomas Young, obliging them to purge incumbrances, and give a sufficient progress. Sir Thomas charges to purge incumbrances on the minute ; and, in discussing the suspension, it was alledged, that the said lands are disposed by old Glencorse to his son in his contract of marriage, and to the heirs of the marriage, and other heirs of tailzie therein specified, with prohibi-