

No. 109. will never be understood any tailzier designed to restrict his heirs from making suitable provisions to their wives and children, which is necessary for the continuance of the tailzie, because otherwise it would be a tacit exclusion of marriage; and therefore a general clause, *de non alienando, et non contrahendo debitum*, will never exclude them.

It was allowed from the other side, That an heir of tailzie, however strictly tied up, is still understood to have a power of endowing his wife and children with rational provisions: But it was contended, that the wife's share can never go beyond the terce, which is determined by the law to be a rational provision.

“ The Lords found, The bond of annuity is comprehended under the prohibitive clause in the tailzie; but sustained the said bond, in so far as the same can be supported by a terce.”

*Rem. Dec. No. 90. p. 178.*

1728. February 2. LORD STRATHNAVER *against* DUKE OF DOUGLAS.

No. 110.

An entail containing strict prohibitory and irritant clauses with regard to the contracting of debt, but no prohibition to alter the order of succession, was found notwithstanding to imply such a prohibition.

*Fol. Dic. v. 2. p. 434.*

\* \* This case is No. 17. p. 15373.

1730. February. EARL OF LAUDERDALE *against* HEIRS OF ENTAIL.

No. 111.

A general clause in a tailzie, prohibiting the heirs of entail to sell, annalzie, alienate, wadset or dispone the lands, &c. under irritancies, is not understood to restrain them from selling for payment of the tailzier's debts. See APPENDIX.

*Fol. Dic. v. 2. p. 433.*

1730. February. BORTHWICK *against* BORTHWICK.

No. 112.

An heir of entail, with strict prohibitory and irritant clauses, *de non alienando et non contrahendo debitum*, cannot grant bonds of provision to his younger children, so as to affect the estate after his decease. He can indeed grant a jointure to his wife, equivalent to the legal third, but there is no consequence from that,

because the one is a deed of the law, the other of the fiat; and the irritancies and prohibitions of tailzies de non alienando et non contrahendo debitum, are directed only against the last, not against the first. See APPENDIX.

No. 112.

*Fol. Dic. v. 2. p. 434.*

1738. July 12. DENHAM *against* DENHAM of Westshiels.

No. 113.

By a deed of entail made in the year 1711, the heirs of entail are put under a prohibition of altering and alienating, and of contracting debt, "and of doing other deeds of omission and commission," either civil or criminal, whereby the lands may be evicted, &c. and to this there is added a strict irritant clause; and there is this second irritant clause, "That if any apprising, adjudication, or other diligence, should be led against the estate for sums contracted, or to be contracted by the maker, the heir of tailzie shall be obliged to purge the same three years before expiry of the legal, or at least within six months after their succession, under the pain of irritating the right." After the tailzier's decease, the annuity contracted by him with his Lady being allowed to run in arrear, the question occurred, whether an adjudication led by her for payment of her arrears, did infer an irritancy against the heir, notwithstanding it was purged in terms of the last clause, three years before expiry of the legal. The question occurred in a declarator of irritancy at the instance of a substitute against the heir in possession; and it was pleaded for the pursuer, That allowing the adjudication to pass, though upon the tailzier's obligation, yet for annuities arising due during the heir's possession, was a deed of omission that fell under the first irritant clause, and which was not purgeable. Answered, The first clause relates only to debts and deeds of the heirs of entail, with regard to the tailzier's debts; the payment of these is provided for in the second clause, and a just and proper difference is made betwixt them; the annuity due to the relict was a debt of the tailzier's, though arising due after his decease, equally with the annual-rents of a personal bond granted by him. The Lords found the irritancy not incurred.

*Fol. Dic. v. 2. p. 434.*

\* \* See Kilkerran's report of this case, No. 83. p. 15500.

\* \* See also No. 94. p. 7275. *voce* IRRITANCY.