

No. 17.

The pursuer answered, That after all is said, he is insisting in nothing but a common action for reparation : The Earl of Forfar, as heir of line to the Countess of Sutherland, maker of the entail, was obliged to fulfil the conditions under which she bound herself and her heirs, that the heritage should descend : Instead of fulfilling these conditions, he burdened the heritage with his debt, and did thereby all in his power to disappoint the entail. Do not the common principles of law dictate, that he and his representatives ought to make reparation to the substitutes for the damage he has done them, and for that reason purge the heritage of these debts ? It does not admit of a question ; and if the contrary were found, the act of Parliament 1685 would be of no significancy to preserve a subject entailed ; for an heir entering would have nothing to do, but omit inserting the irritancies which the law directs in the subsequent conveyances, and charge the estate with debts to the value ; and having thus the price of the estate in his pocket, he could apply it in what manner he thought fit, as being subject to no action at the instance of the substitutes : And it is a jest to say, that this would be an irritancy of his right ; for what does he suffer when he has got the full price of the subject, and at the same time shaken himself loose of the fetters put upon him, and disappointed the anxious settlement of the donor ?

“ The Lords found, That the heirs of tailzie in the Countess of Sutherland’s disposition, could not alter the order of succession therein set down ; and that the last Earl of Forfar, who was infeft as the said Countess’ heir of line, was obliged to have resigned, in terms of the procuratory contained in the tailzie ; and that the Duke of Douglas, who was heir of provision to the said Earl of Forfar, is thereby bound to disburden the said Countess’ tailzied estate, and to relieve her heirs of tailzie of the debts of the family of Forfar.”

*Fol. Dic. v. 2. p. 435. Rem. Dec. v. 1. No. 104. p. 198.*

No. 18.

1736. *February 4.* EARL OF PETERBURGH *against* FRASER.

A wadset purchased by an heir of entail, the reversion of which made part of the entailed estate, found affectable for his debts.

*C. Home.*

\* \* This case is No. 9. p. 3086. *voce* CONSOLIDATION.

1744. *January 31.*

MRS. MARGARET LAUDER *against* SIR DAVID BAIRD of Saughtonhall.

No. 19.  
An heir of  
retail not

The estate of Saughtonhall descended to Sir Robert Baird by a tailzie, under irritant and resolute clauses, but with power to the heirs of tailzie to give life-

rent provisions, by way of locality, to their wives, the same not exceeding a third part of the said lands.

Sir Robert intermarried for a second time with Dame Helen Hope, to whom he gave a life-rent infestment, by way of locality, not exceeding a third.

Sir Robert died in September 1740, and his wife in the April thereafter; whereupon her representatives brought an action against Sir David Baird, as heir to Sir Robert, (his father) for payment of £.20 as aliment to the said Dame Helen Hope, till the term of Martinmas 1740, when her life-rent provision commenced; and likewise for £.48 for mournings she had taken off for her husband; founding their plea on this, that a widow had a right to be alimented to the next term when her life-rent commences, whether the provision in her favours be a legal or conventional one. That mournings were also of the nature of an alimentary provision, where the rank and quality of the widow rendered them necessary: That both were a debt of the husband's: And, in this case, it seemed to be a consequence of the tailzie, that the widow should have both; since it is plain, with respect to the aliment, that the intention of the entailer was, that the widows should be supported suitable to their rank and quality, consequently she behoved to have an *interim* aliment, until her jointure took place, otherwise she might have starved; and in the same manner it could never enter into the minds of the merchants who furnished the mournings to the widow, that a woman of her rank was not entitled to have them, or that the same would not affect the heir. Tailzies are indeed to be strictly interpreted, where they lay a restraint on the heir; but where powers are given, dispensing with the restraints for necessary and honourable occasions of the family, these powers ought to be amply and largely interpreted. Now, the clear and evident design of giving the heir a power to provide a wife, is, That she may be supported suitably to the dignity of the family; and it was impossible this intention could be answered, unless she had an *interim* aliment, and mournings for her husband, the representative of the family; therefore the tailzie can afford no defence in this case.

Answered: That, supposing mournings and aliment to the next term, are considered as a debt of the defunct's, yet it will not affect the defender as heir of entail, unless the pursuer will show, that it is warranted and authorised by the entail: Now it is impossible to plead, that the power of granting localities necessarily comprehended under it mournings and aliment. It is true, that in the ordinary case, where the husband is absolute proprietor, and grants a life-rent locality to the wife, she has a claim for an *interim* aliment till the same become payable; but this does not arise from the nature of a life-rent locality; it arises from the natural obligation upon the husband to aliment his wife; and, as to the argument drawn from the tailzier's intention, the presumption lies quite the other way; as, from the conception of the clause, the power of the heir in possession is declared not to operate so as to burden the estate, or succeeding heir, with any thing to the wife; for as her provision is to be by way of locality, so it is anxiously provided, that whatever rents of the localled lands might be resting to the wife, the same should not

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liable for mournings, or an *interim* aliment to the widow of a preceding heir, unless authorised by the entail.

No. 19. affect the estate after the locality is at an end. And although the wife's claim for aliment and mournings, may be called a *debitum humanitatis*, yet such debt cannot compete with other lawful creditors; and it would look odd, that a debt which is postponed to all others, should yet affect an heir of entail, who is not liable for the most onerous contract of the preceding heir.

The Lords found, That Sir David Baird is not in this case liable, as heir of tailzie to his father, either for mournings, or aliment to his widow.

*C. Home, No. 258. p. 415.*

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1744. July 5.

The EXECUTORS-CREDITORS OF MURRAY KYNNYNMOUND *against* AGNES MURRAY KYNNYNMOUND.

No. 20.

General reference in the sasine to the clauses in the disposition.

Although the act 1685 declares, "That such tailzies shall only be allowed, in which the irritant and resolute clauses are insert in the procuratories of resignation, charter, precept and instrument of sasine," yet this has not been so understood, that, where the procuratory of resignation and precept of sasine are *in eodem corpore*, the several irritant and resolute clauses must be repeated in each: For, by an equitable construction, all the clauses in the same deed are understood to be inserted in every part of the deed, and therefore, where the irritant and resolute clauses are inserted in the procuratory, it is enough that, in the precept thereto subjoined, they be referred to; for in that case the precept of sasine is the whole deed. But where the instrument of sasine, neither in reciting the precept, nor in the notary's act of giving sasine, recites these irritant and resolute clauses otherwise than by a general reference to the disposition, in which the precept is contained, which was the present case, the statute was found not to be complied with, and that the debts of the heir so infeft, might be charged upon the entailed estate.

*Kilkerran, No. 5. p. 543.*

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1748. July 28.

BARON KENNEDY *against* AGNES MURRAY KINNYNMOUND, and Mr. GILBERT ELLIOT her Husband.

No. 21.

How far the heirs of tailzie liable for the entailer's debts?

Sir Alexander Murray of Melgund married Grizel Kinnynmound, heiress of Kinnynmound, which she conveyed to him, and he infeft her in a liferent annuity upliftable out of both estates.

He afterwards tailzied the said estates by a dispoission to himself in liferent, and Alexander his son in fee, and failing him and the heirs of his body, to Mr. Hugh Dalrymple, advocate, his own brother uterine, "under the burden of the said liferent annuity;" and also with the burden of the sums contained in an