

SECT. X.

Clauses in Entails.

1748. July 13. Mr CHARLES HAMILTON-GORDON *against* SIR JOHN GORDON.

No 67.

An estate was tailzied to heirs female of the disponent's body, and the heirs male of the said heirs female, under a *proviso*, that the said heirs female should bear his name. The son of his daughter succeeding was found obliged to bear it.

SIR WILLIAM GORDON of Dalfolly afterwards of Invergordon, married Isabel Hamilton, eldest daughter of Sir John Hamilton of Halcraig or Milton, and provided his estate, by his contract 1704, to the heirs male of the marriage.

Sir John Hamilton, 1705, made a tailzie of his estate in favour of himself in liferent, and of John Hamilton his son in fee; and after several substitutions of the heirs, male and female, of the heirs male of his own body, 'to the heirs female of his body, the eldest always succeeding without division, and to the heirs male of the bodies of the said heirs female, which failing, to the eldest heir female without division, of the said heirs female;' under a provision, 'that, in case at any time thereafter, the succession to the said lands and estate should fall to heirs female unmarried, then, and in that case, they should be holden and obliged to marry a gentleman of the name of Hamilton, who, and their heirs, should assume the name of Hamilton, and should take, bear, and carry, the arms and title of Hamilton of Halcraig in all time coming thereafter; and if married at the time of their said succession, they, and their husbands and their heirs, should be obliged to assume, bear, use and retain the said name and arms; at least, in either case, they should be obliged to settle and establish the right of the estate above-mentioned in the person of the second son of the said heirs female, who should assume, bear, use and retain the name and arms of Hamilton of Halcraig, in case their said husbands had another estate of greater value to be represented by their eldest son, so as it would be inconvenient to change his name; and if they failed therein, by not performing one or other of the said alternatives, they and their descendants should be secluded from any benefit of succession to the said estate, and thereupon the next person appointed to succeed, and their foresaids, assuming the said title, name, and arms, should have free right and access to the said lands, &c.' providing that it should not be in the power of heirs female to alter, dispo-
ne, or contract debt.

Sir William, 1742, when he had acquired a considerably larger estate than he was possess of at the time of his marriage, and was also much incumbered with debts, made a settlement, disposing part of his estate to trustees for payment of his debts, and tailzieing the lands of Invergordon to his sons, and their heirs male successively, with other substitutions, providing that they should be ob-

liged to use the name and arms of Gordon of Invergordon, and no other surname or arms: And in case the said estate, and the estate of Milton, provided to the second son of the marriage betwixt him and his lady, should devolve upon Alexander his second son, or any other of his sons, or their descendants, that person should only enjoy one estate at one time, and should be obliged to denude himself of the estate of Milton in favour of the next heir.

Sir John Hamilton was succeeded by his son John; by whose death, in September 1706, the succession opened to Lady Gordon; whereupon her husband entered upon the possession, without making up titles, or changing his name; and she dying in 1740, he continued to possess till about the time of his death in Summer 1742, when he put his then second son, Mr Charles Gordon, advocate, into it, who thereupon took the name of Hamilton-Gordon.

On Sir William's death his estate was sequestrated; and Mr Charles, some time after, raised a declarator of his right, and action against his brother to denude, as he did not bear the name of Hamilton, and had it not now in his power to do, after so long a delay since the opening the succession.

Pleaded for Sir John, That, in order to hold the estate of Milton, he was not obliged to bear the name of Hamilton, for that the tailzier had only laid that obligation on an heir female succeeding thereto; and, by that term, as used throughout the tailzie, was meant a female, as there was frequent mention of the heir male of an heir female; and irritancies were not to be extended by interpretation from case to case.

Pleaded for Mr Charles, That it was provided, on the estate's falling to heirs female, that they and their husbands should bear the name, or *they* should denude; so that the same *they* were obliged to denude, who ought to have born the name, to wit, now Sir John, in favour of Charles the second son of the heir female; that if this were not expressly contained in the deed, it might be supplied by interpretation, as it was plainly the intention of the tailzier; being not any further prohibition laid upon the heir, in which third parties contracting with him were concerned; but only determining amongst the successors of the tailzier themselves, on which of them the conditions were imposed; and thus, in the case of the tailzie of the estate of Nairn, which was disposed with limitations upon the heirs, these limitations were by the House of Peers found to affect the disponee who did not take it as heir. *See* TAILZIE.

THE LORDS found, that the obligation in the entail of Halcraig, made by Sir John Hamilton, to carry the name and arms of Hamilton of Halcraig, or to denude in favour of the second son of the heir female, to whom the succession first opened, was binding upon Sir John Gordon the defender, and that he could not take the said estate without bearing the said name and arms. *See* Case between the above parties, *voce* IRRITANCY.

Reporter, *Tinwald.*

Act. *W. Grant, Lockhart, Brown, et Elliot.*

Alt. *R. Craigie, H. Home, Ferguson, et J. Craigie.*

Clerk, *Forbes.*

Fol. Dic. v. 3. p. 129. D. Falconer, v. 1. No 275. p. 368.