

No. 21. the suspender did not reclaim against the Lord Ordinary's interlocutor finding her liable, and he is willing to consent to the suspension of further diligence.

Second reason of suspension, adjudication is pronounced for an year's annuity, more than is contained in the decret of constitution, and for a term's more than in the summons of adjudication.

Answered, The decret is for payment of the sum then due, and for what should become due in time to come, and was taken for what was resting at the Martinmas preceeding. The adjudication was raised before next Martinmas, for that sum, and for what should fall due; but one year having been paid, the decret, which was not pronounced till after Martinmas, was taken making the accumulation at that term, when the sum happened to be the same with that in the constitution.

The suspender being minor, the Lords did not lay weight on the *res judicata*.

The Lords found the adjudication was sufficiently supported by the decret of constitution, and, of consent of the charger, suspended the execution of all diligence against the persons of the suspenders, and against any estate belonging to them, other than the tailzied estate of Melgum and Kinnymound.

D. Falconer, v. 1. p. 378.

1749. November 8. SINCLAIR *against* SINCLAIRS.

No. 22.

A prohibition to contract debt does not imply a prohibition to sell.

Though the tailzie of the lands of Carlourie contained the most proper prohibitory, irritant, and resolute clauses, against altering the order of succession, and against granting wadsets, annual-rents, or other securities whatsoever thereupon, or the doing of any other fact or deed that might anywise affect, burden, or evict the lands, or whereby the right and benefit of succession, by virtue of the tailzie, might be prejudged any manner of way, or whereby the lands might be evicted, adjudged, appraised, &c. yet, in a declarator at the instance of Captain Henry Sinclair, the heir in possession, wherein he called all the heirs to him substituted, whom he could discover, to have it found and declared, that as the tailzie contained no prohibition to sell, he therefore had right to sell the lands;

The Lords, in respect there was no clause *de non alienando* in the entail, "found the pursuer not thereby restrained from selling, and decerned in the declarator at his instance."

The grounds the Lords proceeded on were, *first*, in general, That as restraints upon property were contrary to the rules of the common law, they were not to be inferred by implication, or extended farther than the express words: And accordingly it was determined between the Heirs of Provost Wightman and Great-grandchildren of Mrs. Anderson, in 1745, that a prohibition to alter the course of succession expressed in the strictest manner, and declaring all deeds of altera-

tion null, and to infer an irritancy of the contravener's right, did not infer a prohibition to sell or to contract debts, and that therefore the debts contracted by the heir of entail to the Provost, and sale to him made, was effectual, though thereby the succession of the substitute in the entail was absolutely defeated. And upon the same principle, where an entail contained not only a prohibition to alter the course of succession, but also a prohibition to contract debt, whereby the estate might be evicted, and with an irritancy in case of contravention, it had been found not to import a restraint upon the heirs of entail from selling or alienating the lands, though such sale effectually altered the course of succession, and carried even a stronger prejudice to the substitutes than the charging the estate with debt; Heir of Tailzie of Hepburn of Keith *contra* the Earl of Hopetoun, *anno* 1732, (see APPENDIX); and the judgment was affirmed by the House of Peers. And upon the like principle it had been often found, that where there was a prohibition to alter the order of succession, or to contract debts, or to alienate the estate, with an irritancy of the heir's own right, in case of contravention; yet, if there was no clause annulling the deeds of contravention, the deeds were effectual against the estate. So it was found, July 11, 1734, between Mr. James Baillie and Carmichael of Maudsley, Sect. 3. *h. t.* and lately in the case of the Creditors of Dunnipace, January 27, 1744, Sect. 3. *h. t.*

The very terms of the statute 1685 were also said to be observable, as distinguishing three different prohibitions thereby authorised—*1st*, To sell, annailzie, or dispoise the lands; *2dly*, To contract debts whereby the same may be evicted; *3dly*, To do any deed whereby the succession may be altered or interrupted—and it were contrary to the plan of the statute to suppose that the putting the heirs under one or two of the restrictions should import the third by implication.

2dly, It was also the declared opinion of the Court, that a prohibition to alter the succession, or to contract debt, did not even, by implication, comprehend a prohibition to sell; as many will alter a succession, or even contract debt, who will not sell; wherefore, the maker, while he prohibited only the one, is supposed to have taken his hazard that the heir would not do the other.

On the 8th December following, an application was made to the Court by the said Captain Henry Sinclair, setting forth, That he had been served with a writ of appeal, and praying that the Lords might give warrants for ingrossing the informations in the decree; which the Lords granted, but found that he was to bear the expense of the extract, so far as it was occasioned thereby.

N. B.—This judgment was upon the appeal affirmed.

Kilkerran, No. 6. p. 544.

* * D. Falconer reports this case :

Henry Sinclair of Carlourie tailzied his estate to a series of heirs, amongst whom he called the second son of Sir Robert Sinclair of Longformacus; providing, that

No. 22.

it should not be in their power “ to alter, innovate, or infringe the foresaid tailzie, or order of succession therein appointed, nor yet to contract or take on any debts or sums of money, or to grant any rights therefor, or any life-rent rights, annual-rents, or annuities, upliftable out of the estate, or to do any other fact or deed that might anywise affect, burden, or evict the lands resigned, or whereby the right or benefit of succession, by virtue of the foresaid tailzie, might be prejudged any manner of way, or whereby the said lands might be evicted, adjudged, or apprised;” excepting, that the heirs had power of granting to their wives a life-rent annuity to a limited extent; with irritant and resolute clauses. The succession opened to Captain Henry Sinclair, second son to Sir Robert; who entered into a minute of sale of the estate with James Davidson, bookseller in Edinburgh. He suspended the minute, for that the seller was disabled, by the tailzie, to alienate. Whereupon Captain Sinclair raised a declarator of his powers, calling the subsequent heirs of tailzie.

Pleaded for the pursuer: He is not prohibited to sell the estate; and prohibitions with irritancies, in tailzies, are not to be extended from one case to another.

Pleaded for the defender: He is prohibited from doing any deed whereby the right of succession may be prejudged.

The Lords found, That the pursuer and charger was not restrained from selling by the entail in question, there being no clause therein *de non alienando*; and therefore found that he might sell.

Act. R. Craigie.

Alt. Lockhart.

Clerk, Justice-Clerk.

D. Falconer, v. 2. p. 102.

1749. November 14. CREDITORS of GORDON of Carleton *against* GORDON.

No. 23.

Effect of con-
travention.—
Irritancies
strictly inter-
preted.—Re-
gistration.

The ranking of the creditors of Nathaniel and Alexander Gordons, elder and younger of Carleton, being, after the death of both, transferred against Alexander, the grandchild of Nathaniel, he objected, that his said father and grandfather had right only by an entail made in 1688, by James Gordon, then of Carleton, by which several heirs of entail were prohibited to alter the order of succession, or to contract debt beyond the half of the value of the estate, whereby the lands might be appraised or adjudged, &c. and, in case of contravention, the deeds of contravention declared void, and the contravener to forfeit his right, in the terms therein expressed; and that Nathaniel having, in the contract of marriage of his son Alexander, disposed the estate to him and his heirs whatsoever, his right, and the debts contracted, became void, so that the right of succession was devolved upon him, free from the debts.

Answered for the Creditors: That by the terms in which the irritancy is expressed in the entail, the contravener irritated not only for himself, but for his descend-