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 resolutive 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 contravention.—Irritancies strictly interpreted.—Registration.

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 apprised 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, disponed 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-

ants; and as the objector was descendant of the contravener, it was not competent for him, whose own right was irritated, to make the objection. No. 23.

And accordingly the Lords, on the 21st June, 1748, on report, found, " That by the conception of the entail in question, the person contravening forfeits for himself and his descendants; and that, therefore, it is not competent to Alexander Gordon, the son of the alleged contravener, to object to the debts upon the estate of Carleton;" and, of this date, " adhered."

A variety of points occurred in the argument on this case.

As to the dispute, Whether the irritancy struck only against the contravener, or if it was extended to the heirs of his body? it turned upon the particular form of words in which it was expressed, and can be of little or no use in any other case. Only this much it may not be amiss to observe, that it was in general argued for the creditors, that *in dubio* all such irritancies, when not expressly limited to the contravener himself, extend to his heirs; for which they referred to the statute 1685 as supposing it: But the Court were of a different opinion, as all irritancies are to be strictly interpreted, and as the irritancy expressed in the statute 1685 was statutory.

Again, as to the deed importing the contravention, it was not laid upon Nathaniel's disponing his estate to his son in his contract of marriage, it being admitted, that, notwithstanding the tailzie, he might lawfully dispone to his expectant heir of tailzie by anticipation. But the irritancy was laid on this, that the disposition was to his son and his heirs whatsoever, in direct contradiction to the tailzie.

This entail had never been registered in the register of tailzies; but then neither had ever infeftment followed upon it; and therefore, as the creditors could not plead that they had contracted on the faith of the records, with a person infeft, or who was apparent heir of a person infeft, it was understood that they could not object to their being barred by every clause in the tailzie, as if it had been recorded in the register of tailzies, and as if their debtors had been infeft, and the irritant clauses inserted in their infeftment; as was adjudged by the House of Peers in the question between Mr. James Baillie and Mr. Archibald Stewart, *alias* Denham, of Westshiells, Sect. 3. *h. t.* Neither was this point controverted by the Creditors; nor is it likely the Lords would have hearkened to them, if it had, in respect of the said judgment of the House of Peers.

The Court of Session had in that case found, that even the prohibitory and irritant clauses in a personal right were not effectual against creditors, when not recorded in the register of tailzies, on this ground, that the statute 1685 was a total settlement of the whole system of entails; and they appear to have thought, that as where, upon a disposition of tailzie, a sasine had been taken, containing the several irritant clauses, and registered in the register of sasines, it was nevertheless not effectual against creditors, unless recorded in the register of tailzies, so the reason was the same in the case of personal rights upon the construction of the statute 1685; but the House of Peers put a more limited construction on the statute, as only concerning tailzies upon which infeftment had followed.

No. 23. And, *lastly*, as to the competency of the objection, some of the Lords doubted if it was competent to any other than the next heir of tailzie to object the irritancy to Alexander; but the Lords found, as above, that the objection was competent to the creditors, who had interest to support their debts against all and sundry not entitled to quarrel them.

Another point, however, occurred,—Whether, supposing Alexander, the present opponent of the Creditors, to be himself the heir called by the last termination, notwithstanding his right was found irritated by his father's contravention, he might not appear in the other character as heir in the last termination?

But there was no access to give judgment on this, as there was another heir whose right was not irritated; and who, having appeared, was remitted to the Ordinary to be heard.

Kilkerran, No. 7. p. 545.

*** D. Falconer reports this case:

James Gordon of Carleton tailzied his said estate to the heirs-male of his body, and their heirs-male, *à stirpe ad stirpem successivè;* whom failing, "to the persons after-mentioned, whom he thereby nominated and appointed to succeed him, as his heirs of tailzie and provision therein to him, and their heirs-male lawfully gotten and to be gotten of their own bodies; which failing, to return, fall, and appertain to his heirs-male whatsoever, and the heirs-male of their own bodies;" resigning, failing heirs-male of his body, and their heirs-male, for infeftment to "John Gordon, whom he specially burdened with this provision, that Nathaniel Gordon of Gordonston should be sole tutor to him during his minority; and appointed the said Nathaniel, the next substitute in the tailzie, failing the said John; which failing, to James Maitland, and their heirs-male lawfully gotten or to be gotten of their bodies, and their heirs-male *successivè;*" which failing, to such persons as he should name; which failing, to his own heirs-male whatsoever, and their heirs-male of their own bodies; which failing, to his heirs and assigns whatsoever; "they and each of them that so enjoyed the benefit of his said estate, nowise breaking, altering, or innovating the said tailzie or order of succession; nor yet selling, wadsetting, impignorating, nor anywise away putting, either legally or conventionally, his lands and estate foresaid; nor granting any annual-rents nor yearly duties forth thereof; nor contracting debts; nor doing any other deeds, directly nor indirectly, above the equal half of the full value thereof, whereby the same might be apprised, adjudged, or otherwise evicted in law from them, in prejudice of the foresaid tailzie; but preventing, *debito tempore*, all inconveniencies whatsoever, that anywise might occasion the eviction of his said estate, and extinction of the said tailzie; wherein if they or any of them, and their heirs and successors in time coming, should anywise fail or conrravene, in any point or article thereof, then, in these or any of these cases, all such facts, acts, and deeds, so done or to be done, contrary or prejudicial thereunto, were thereby declared not

No. 23.

only to be void and null in all time thereafter, without any declarator to follow thereupon, but also the person or persons so contravening, each of them and their heirs above-said, should from thenceforth lose and amit his lands and estate aforesaid, and hail benefit thereof, and be totally excluded therefrom, sicklike as if they were naturally dead, nor ever had been tailzied or provided thereto; and the same lands and estate, or others above-mentioned, should, in that case, fall and accresce to the next substituted person, and heir of tailzie to succeed therein, who should have thereby just right and interest thereto; in whose favours, and their heirs-male *successivè*, the said persons contraveners were thereby holden and, by acceptation, should be obliged to renounce, and denude themselves *omni habili modo quo de jure.*"

Nathaniel Gordon coming to the estate, contracted debts, as also did Alexander, his son; against whom the creditors pursued a sale, and, on his death, insisted therein against Alexander, his son; who pleaded, That the debts of his father and grandfather, in so far as they exceeded the half of the estate, were void; and it could not be sold upon them.

Answered: The defender cannot object to the validity of the debts, since debts contracted by an heir of tailzie can only be rendered ineffectual by virtue of the irritancy of the heir's right thereby incurred: And as, by the present tailzie, the contracter irritates for himself and his heirs, he cannot object to his father and grandfather's debts; which, if not good, infer an irritancy of his own right.

Pleaded for the defender: It is *jus tertii* to creditors to urge this personal objection against him; for his plea, if not competent to himself, would be so to the next heir of tailzie—Their debts are null, and can never be charged on the estate.

2*dly*, The destination is to the persons named, and their heirs-male, *and their heirs-male;* so that the heirs-male of the heirs-male are distinctly considered: And therefore, when it is said, that the heirs of tailzie, and their heirs-male, should forfeit, the meaning is, not that a person should forfeit for himself and heirs-male, but that the person contravening should forfeit, and his heir, if he contravened, should forfeit.

The Lords, 21st June, 1748, found, That by the conception of the entail in question, the person contravening forfeited for himself and his heirs; and that therefore, it was not competent to Alexander Gordon, the son of the alleged contravener, to object to the debts upon the estate of Carleton: And, on bill and answers, this day, adhered.

Act. *A. Macdouall & Lockhart.* Alt. *R. Craigie & Hay.* Reporter, *Kilkerran.*

D. Falconer, v. 2. p. 105.