1779. *January* 28. James Kempt *against* George Watt.

No. 95.
Effect of an irritant clause in contradiction to one merely prohibitory.

James Watt, brewer, executed an entail of a small subject called Livingston's Yards, belonging to him, on Sarah Watt his second lawful daughter, and a series of heirs in succession. This deed contained a clause in the following terms: "Providing always, that it shall not be in the power of my said daughter, nor any other of the heirs of tailzie, &c. above mentioned, to contract any debts whereby to burden or affect the houses, yards, and others above disponed, with the pertinents, above the extent of one year's free rent thereof; nor shall it be in the power of, nor lawful to any creditor or creditors of my said daughter, or the other heirs of tailzie, to adjudge or evict the said houses, &c. for such, or any other debt, contracted, or to be contracted by my said daughter, or other heirs of tailzie; but only to have access to, and possess the mails and duties of the said houses, &c. till payment of any debts contracted by her or them; and that to the extent of one free year's rent only, and no further." The deed likewise contained a prohibition on the heir of entail to sell, and a resolutive clause in the usual form. But there was no clause in it expressly declaring, that all the debts and deeds of the contravener should be null and void. This deed was recorded in the register of tailzie.

On the death of the entailer, the succession in the subject devolved on James Watt his nephew, who entered into possession, without making up titles. Adjudications were led against the subject, both by the creditors of the entailer and those of James Watt, the heir in possession; and a process of ranking and sale of the subject was brought at the instance of these creditors. George Watt, next heir of entail, having raised a declarator of irritancy against James, appeared in the process of sale, and

Objected: That, by the clause of entail above recited, the subjects in question cannot be attached for the debts of the heir in possession to any greater extent than a year's rent; and, therefore, the debts of James Watt ought not to be taken *in computo* with those of the entailer to render the estate bankrupt and authorise the sale.

Answered for the creditors: As the irritant clause is entirely wanting in the entail of these lands, the entail is ineffectual against purchasers and creditors. The clause on which the defender founds is merely prohibitory.

The irritant clause is distinguished in the statute 1685 from all prohibitory clauses, by these words, in which it is described, "declaring all such deeds to be in themselves null and void." It is thus made a separate requisite and condition of the entail. The deeds themselves must, *in terminis*, be declared null, otherwise all prohibitions to grant or receive them are of no use.

It is not enough that the intention of the entailer to render the debt or deed void may be inferred from the prohibitory and resolutive clauses. Creditors and purchasers are entitled to have the entail strictly interpreted. Accordingly, it is laid down in the law books, that an irritant clause is essential to the entail, and, where it is wanting, cannot be reared up against the heir by implication; Stair

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B. 2. T. 3. § 58. Ersk. B. 3. T. 8. § 20. Bankt. B. 3. T. 3. § 139. On these principles, it has been found, that a prohibition against heirs to contract debt, attended with a clause forfeiting the right of the contravener, however strongly they may imply the intention of the entailer that the debts shall be null, do not make up for the want of an express irritant clause; Bailie *contra* Carmichael, July 11, 1734, No. 82. p. 15500.; Primrose, 27th January, 1724, No. 84. p. 15501. These decisions are in point to the present case. Though the prohibition in this entail is directed against the creditors, as well as the heir, forbidding them to attach the estate, the clause is nothing more than prohibitory. It may show more clearly the intention of the entailer; but still, as there is no irritant clause, the entail wants a condition required by the statute to render it effectual against creditors.

Though this prohibition should be considered as equivalent to an irritant clause, it extends only to the case of creditors. A purchaser from the heir in possession would be safe, there being no clause prohibiting persons to buy the lands.—As the maker of the entail, therefore, did not qualify the right so as to deprive the heir in possession of the power of disponing the subjects, the entail is not good against creditors. The heir may, if he chooses, do justice to his creditors, by selling the subjects, and appying the price to their payment. If he will not make a voluntary sale, the creditors are entitled to have the subjects sold judicially.

Replied for George Watt: There is no precise form, or words of style, essential to a clause irritant.—The statute 1685 does not require it. The passage of the statute founded on, is merely descriptive of the nature and import of that clause; but does not tie down the entailer to use the words of the act itself. Lord Stair takes notice of the variety of modes in which irritant clauses may be conceived; B. 4. I. 18. § 10.

The real intendment of the statute is fully answered in this entail, by providing, that it shall not be in the power of the heir "to contract any debts whereby to burden or affect" the subject; and that it shall not be "in the power of, nor, lawful to any creditor of the heir, to adjudge or evict the said subject, for such, or any other debt contracted, or to be contracted," by his daughter, or other heir of tailzie. This is more than a personal injunction on the creditors not to contract with the heir. It is, in effect, declaring, that the debt, if contracted, shall not be good against the estate; which is all that is intended by the statute.

The meaning of the statute is even more accurately expressed than if the debts had been declared null and void; for the purpose of the act is only to make the deed void, *quoad* the entailed estate, and not to annul the deed *in toto*. It remains obligatory on the heir personally, and is valid in every other respect. The words "null and void, therefore, express more than the intention of the act; and, when actually used in a tailzie, must be restricted to this meaning,—that the deeds to which they apply should not be a ground for adjudging or evicting the estate.

The decisions founded on in the cases of Carmichael and Primrose are not

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applicable; for, in these, there was merely a prohibiton on the heir to contract debt; but no clause disabling the creditors from adjudging or evicting the estate. The entailer, in that case, must be considered as resting satisfied with the effect of the resolutive clause, to prevent the heir from contracting debt, without meaning to defeat the security and payment of onerous creditors, if debts should nevertheless be contracted.

It affords no objection to this entail, when opposed to the claim of creditors, that it does not contain an irritancy of the same kind in the case of a voluntary sale.—The statute makes it lawful to his Majesty's subjects to tailzie their lands, " with such provisions and conditions as they shall think fit," and to affect the said tailzies with irritant and resolutive clauses, &c. It is thus left optional to the entailer to direct his prohibitions and irritancies against such acts and deeds as he pleases.—The restrictions of the tailzie cannot be extended by implication *de causa in causam*, though they must have their full effect in those cases to which they extend.—An entail may effectually guard against a voluntary sale of the estate, and yet allow the heirs to contract debts upon it; or may effectually bar the contraction of debts, and leave the heirs at liberty to sell. The latter point was determined in the case of Hepburn contra the Earl of Hopeton, 1732, (See APPENDIX), and of Sincliar of Carlourie, November 8, 1749. No.22. p.15382.

The Court finally " found, That the deed of settlement of tailzie in question, is no bar to the sale now depending, upon the debts and contractions of James Watt, one of the substitutes in the said entail, and defender in the present sale."

Lord Ordinary, *Gardenston*. For Watt, *Rae, Belshes*. For Kempt, *J. Campbell, G. Ferguson*. Clerk.

Fac. Coll. No. 61. *p.* 110.

1779. *March*, 2. JOHN LESLIE of Balquhain, *against* DAVID ORME.

No. 96.
How far the granting of leases of very long duration, is to be considered as an alienation of the estate?

In 1692, Patrick Leslie executed an entail of his estate of Balquhain in favour of his second son, and a series of heirs in succession.—This deed contained a prohibition on the heirs of entail to grant leases below the former rental; but the entailer afterwards, by a new deed, revoked this prohibition, and allowed the heirs to grant tacks below the rental. Under this entail, the estate of Balquhain was held successively by the institute George Leslie and his two sons.—Upon the death of the youngest, the succession opened to Antonius Count Leslie, who entered into possession.

Patrick Leslie Grant, the next protestant heir of tailzie, brought an action for setting aside the right of Count Antonius to the estate, on the ground of his being an alien. This process continued in Court several years, and was attended with considerable expense to the pursuer, the greatest part of which was advanced by