1722. *July* 18.

HUGH SCOT, now of Gala, *against* The PERSONAL CREDITORS of the deceased SIR JAMES SCOT of Gala.

No 72.
Liferent escheat of a vassal once fallen, will stand good to the superior, though the vassal afterwards lose his tailzied fee by incurring an irritancy.

SIR JAMES SCOT, liar of a tailzied estate, with resolutive and irritant clauses, *de non alienando et non contrahendo debitum*, during his incumbency contracted considerable personal debts; upon which diligence following, a gift was taken of his single and liferent-escheat, in name of the deceased Lord Bowhill, who granted back-bond to be accountable to the creditors. After Sir James's decease, Hugh Scot, now of Gala, raised a declarator of irritancy, wherein he insisted to have the gift of escheat declared void, and the profits of the estate, from the incurring of the irritancy, even those that arose and fell due during the life of Sir James, to belong to him as heir. And it was *pleaded* for him, that though no adjudication was led against the tailzied estate, till after the gift of escheat, the personal debts, contracted anterior thereto, were a sufficient irritancy, expressly contravening the clause *de non contrahendo debitum;* upon which the contravener falling *ipso facto* from his right, his escheat could not be gifted thereafter, in prejudice of the next heir of entail.

To which it was *answered*; It is not the contracting of debt that makes an irritancy, but the allowing that debt to become a real burden upon the property, whereby the same might be evicted from the heir of tailzie. This is clear from the words of the act 1685, 'It shall be lawful to affect the said tailzies 'with irritant and resolutive clauses, whereby it shall not be lawful to the heirs 'of tailzie, to sell, anailzie, &c. or contract debt, or do any other deed, whereby the samen may be apprised, adjudged, or evicted from the others substitute 'in the tailzie, or the succession frustrated or interrupted.' There the prohibitory clause is as to the contracting debt, whereby the estate shall be adjudged or evicted; for, as the words *may* and *shall* are, according to our manner of speaking, the same in grammar, so here they are plainly the same in meaning. If then, though a debt be contracted, the estate shall not be evicted thereby, there is no irritancy incurred, and no manner of reason why there should; for, if this were law, no heir of entail could enjoy his estate a week, without incurring an irritancy; he could have no commerce with mankind; he could make no bargain, not even for necessaries; nor use his credit in any way, though, over and above an entailed estate, he had other funds ten times greater than his debts; for, still if the simple contracting of debt be an irritancy, the moment he becomes bound, he hath incurred it, be his other estate what it will. It may indeed be pretended, that these inconveniencies are salved, by allowing the heir to purge before declarator. But, 1*mo*, This is not in the law; and it is ridiculous to suppose the legislator would make such a law, unreasonable in itself, and which every heir of tailzie must contravene every day, only because the injustice of it could be mollified by a soft interpretation. But, 2*do*, Allowing the

No 72. heir to purge, does by no means remove either the injustice or the hardship: As to the injustice, what imaginable reason can be for it, that one who intends not to frustrate the succession of his heir, nor to burden the entailed estate, should be brought under an irritancy in strict law, by dealing in a common way of commerce, which will necessarily require borrowing of money upon several occasions, by dealing even to the advantage of his heir of entail. As to the hardship, let us suppose a case, a man hath an entailed estate, he contracts a good deal of debt for useful purposes; he hath a sufficient unentailed estate, much more than to answer all that debt; he comes to be attached by declarator of irritancy; he cannot clear that debt before decreet of declarator, and perhaps it were the vastest loss to oblige him to it: In the mean time, none of the debt is charged upon the entailed estate: Must it nevertheless be judged he hath incurred an irritancy, or would the power of purging salve the inconveniencies? There needs no more be said to illustrate this point, but to reflect, if any thing earthly could make up the inconveniency of a man's being subjected every day of his life to a declarator of irritancy. It might likewise be noticed, that this doctrine is inconsistent with the nature of the thing: It is a very natural effect of property, that a man should have power to burden the right of his own estate, with what conditions, touching that estate, he pleases; but, that he should bind up an heir as to other things, than what concerns the estate, is unreasonable; therefore, when a proprietor throws this condition into an entail, that his heir shall not contract debt; by the nature of the thing, and from consideration of the fountain from which the power of throwing in such conditions flows, to wit, the dominion in the estate, it must be a contracting debt upon the estate. Upon these grounds, then, were there no more, the gift of escheat must be supported; for, being lawfully completed before the irritancy incurred, no after-deed of omission of the heir of entail will cut it off, especially not being a right inconsistent with the tailzie, or which could frustrate the succession of the heir, but only a right to the profits during that heir's life.

It was *pleaded*, in the *next* place, for the Heir; There is the same reason for making the actual contracting of debt an irritancy, as where an adjudication is led; because the law declares the adjudication void, and the estate is not evicted, or the heir prejudged any more by the adjudication, than by the contracting of debt. To which it was *answered*, The reason why the estate is not evicted by the adjudication, is plainly because suffering the adjudication to be led is an irritancy of the proprietor's right, whereby the adjudication is rendered ineffectual, as being led against a *non dominus;* without which there could be no way to prevent a tailzied estate from being torn to pieces by adjudications: And this is the precise reason why this alone, and not the simple contracting of debt, makes an irritancy.

There was a *second* point insisted in by the pursuer, as follows, Granting the bare contracting of debt to be no irritancy, granting also, that the liferent-escheat of Sir James Scot was duly established, it could yet be no longer effec-

tual, after the first adjudication was laid upon the estate; for thereby, without controversy, the proprietor fell from his right *ipso jure*; the superior could not continue to claim his liferent of the lands, because the rebel no longer existed his vassal; and the escheat can last no longer than the vassal's right. In prosecution of this point, it was *urged*, that clauses *de non alienando, et non contrahendo debitum*, are generally conceived, so as to make the contravener *ipso facto* or *jure*, fall from his right upon incurring the irritancy, and that without any declarator: A declarator indeed is necessary, and infeftment thereon, to establish the right in the next heir of tailzie; for consent alone is not sufficient to transfer dominion; infeftment in every case being a necessary solemnity; but clauses so conceived are sufficient to extinguish, though not to transfer, and therefore it may be thought, that *ipso facto* or *jure* upon the incurring of an irritancy the contravener's right ceases: Nor is the superior any way prejudged, because the lands thereby fall in non-entry, and he has the interim profits; which is all that can be inferred from the act 1685, reserving the casualities of superiority notwithstanding of tailzies: For that act can never be interpreted to reserve casualities inconsistent with the nature of the thing, which a liferent-escheat certainly is of lands whereof the rebel is not proprietor. And, were this matter otherwise ordered, great difficulties might arise; for, if even after contravention, the contravener remain proprietor, it is not easily conceivable, how the estate can be secured against the diligences of creditors. An adjudication, if it once become real upon a tailzied estate, can never be extinguished but by satisfaction; and every adjudication may become real, upon this supposition being led against a debtor who continues proprietor, even after completing thereof: Nor will the power the contravener has to purge, before declarator, remove the difficulty; for what, if through negligence, or perhaps inability, he allow the declarator to be taken out? In such a case the adjudication becomes unavoidably a burden upon the tailzie, expressly contrary to the intention of the maker: Nor is there another remedy than what is of common use, viz. to make the heir *ipso jure* fall from his right upon the leading of an adjudication, whereby it can never become real upon the estate, since the very act that would establish the adjudication makes the heir's right cease, and of consequence the adjudication also, which is built upon the heir's right. No 72.

The creditors framed their answers after this manner, That as to the benefits and casualities belonging to superiors as such, none of the acts anent tailzies have in the least impaired them. As for the act 1685, the legislature intended to confirm the powers arising to the proprietor *jure dominii*; such as the burdening that property, so far as truly his own, with what clauses and conditions he pleases, which are to be effectual among his heirs and successors to the utmost extent: But it was never intended, that these powers of the vassal, which he hath upon his own property, should prejudge the right of the superior. Accordingly, it is observable, that the words of the act of Parliament are entirely directed towards the vassal, 'That it shall be lawful to his Majesty's sub-

No 72. ' jects to tailzie their lands and estates, and to substitute heirs,' &c. not one word of the consent of the superior: Yea, it does not appear from this act, that the superior could by any means refuse to allow the irritant and resolutive clauses to be insert in the infeftments: Is it then to be imagined, that the legislature intended to subject the rights of the superior, to the arbitrary pleasure of the vassal? Surely it cannot be thought; and this consideration destroys the only colour of argument could be used in this case, viz. That the consent of the superior intervenes, and that he may bind himself. To come close to the pursuer's argument, it can never be said, that the superior's casualities are reserved, when he gets only the non-entry duties, which the next heir of tailzie can at any time deprive him of, by entering vassal, instead of the escheat commensurate with the former vassal's lifetime. The escheat once established, is a casuality of superiority; it must run its course, and no deed of the rebel can take it away, whether voluntarily alienating the lands, or voluntarily incurring an irritancy. To confirm this, let a case be put of an heir of entail, who forfeits for himself and the descendants of his body; that his heir is minor, and that the first of the next branch is major: It is impossible to doubt from the act, that the ward would fall, by the death of him who incurs the irritancy; and it can never be said, that the first of the next branch, by entering heir, has it in his power to cut short the superior's casuality of ward. Nor is there any manner of inconsistency in all this; for it is no more but saying, that the right of the vassal may be qualified or voided, with regard to his heirs, without hurting the right of the superior: Thus, in the present case, the liferent-escheat of a vassal being once fallen, it becomes to the superior a temporary real right in the vassal's lands; which real right continues during the vassal's lifetime, whether he continue to be vassal or not. And in this a liferent-escheat differs from a common assignation to mails and duties, which being no real right in the lands, but depending upon the cedent's right, whenever that ceases, the assignation ceases of consequence.

' The Lords sustained the liferent-escheat.' *See* Tailzie.

Fol. Dic. v. 1. *p.* 257. *Rem. Dec. v.* 1. *No* 34. *p.* 68.

Voluntary rights granted by the rebel after denunciation, *See* Litigious.

Competition betwixt a donatar of single escheat and the porteur of a bill, *See* Bill of Exchange.

What is carried by a gift of escheat, *See* Gift of Escheat.

Gift of escheat, when presumed simulate, *See* Presumption.

Is simulation good against onerous purchasers? *See* Personal and Real.

See Accessorium sequitur principale.

See Note in Appendix, relative to cases referred to in No 16, p. 37.

See Appendix.