

because the one is a deed of the law, the other of the fiat; and the irritancies and prohibitions of tailzies de non alienando et non contrahendo debitum, are directed only against the last, not against the first. See APPENDIX.

No. 112.

*Fol. Dic. v. 2. p. 434.*

1738. July 12. DENHAM *against* DENHAM of Westshiels.

No. 113.

By a deed of entail made in the year 1711, the heirs of entail are put under a prohibition of altering and alienating, and of contracting debt, "and of doing other deeds of omission and commission," either civil or criminal, whereby the lands may be evicted, &c. and to this there is added a strict irritant clause; and there is this second irritant clause, "That if any apprising, adjudication, or other diligence, should be led against the estate for sums contracted, or to be contracted by the maker, the heir of tailzie shall be obliged to purge the same three years before expiry of the legal, or at least within six months after their succession, under the pain of irritating the right." After the tailzier's decease, the annuity contracted by him with his Lady being allowed to run in arrear, the question occurred, whether an adjudication led by her for payment of her arrears, did infer an irritancy against the heir, notwithstanding it was purged in terms of the last clause, three years before expiry of the legal. The question occurred in a declarator of irritancy at the instance of a substitute against the heir in possession; and it was pleaded for the pursuer, That allowing the adjudication to pass, though upon the tailzier's obligation, yet for annuities arising due during the heir's possession, was a deed of omission that fell under the first irritant clause, and which was not purgeable. Answered, The first clause relates only to debts and deeds of the heirs of entail, with regard to the tailzier's debts; the payment of these is provided for in the second clause, and a just and proper difference is made betwixt them; the annuity due to the relict was a debt of the tailzier's, though arising due after his decease, equally with the annual-rents of a personal bond granted by him. The Lords found the irritancy not incurred.

*Fol. Dic. v. 2. p. 434.*

\* \* See Kilkerran's report of this case, No. 83. p. 15500.

\* \* See also No. 94. p. 7275. *voce* IRRITANCY.