1744. *July* 5.

EXECUTORS-CREDITORS of Mr HUGH MURRAY KYNYNMOUND, Advocate, *against* Mrs AGNES MURRAY KYNYNMOUND, &c.

No 212.
A Disponee found not liable to pay the debts of the disponer, further than the value of the subjects disponed, tho' he omitted to confirm and inventory the same.

ANNO 1710, Sir Alexander Murray executed an entail of his lands of Melgund, &c. in favours of himself in liferent, and to Sir Alexander Murray last deceased, his son, and the heirs-male of his body in fee, &c. And by a deed, of the same date, relating to the entail, failing heirs of his own body, he substituted Mr Hugh Murray (then Dalrymple) his brother uterine, and the heirs of his body, &c. The disposition contained strict prohibitive, irritant, and resolutive clauses; and, in particular, it provided, that it should not be in the power of Sir Alexander, the first institute, nor any others of the heirs of entail, to alienate or contract debt; declaring all such deeds to be void and null; and, in the end thereof, there was a precept for infefting Sir Alexander, "with and under the express provisions, declarations, burdens, reservations, faculties, restrictions, &c. above specified, and no otherwise." A few days thereafter, sasine was taken thereon, without repeating the prohibitory and irritant clauses *verbatim* in the instrument of sasine; but it recited the disposition, and that sasine was granted under the express "conditions, provisions, declarations, burdens, &c." mentioned in the foresaid bond and right of tailzie, and which are held as repeated *brevitatis causa. Anno* 1713, the maker of the entail died, whereupon his son Sir Alexander entered to the possession of the estate, in virtue of the tailzie which was duly recorded in the year 1724.

Sir Alexander having got possession, he contracted several debts, posterior to the registration; and, in the 1736, having no hopes of issue of his own body, he executed a disposition in favours of Mr Hugh Murray, of all his subjects heritable and moveable, which should belong to him at his death, other than those which should relate to the entailed estate, burdened with the disponer's debts.

Soon after the date of this disposition, Sir Alexander died, whereupon Mr Hugh Murray completed his titles to the estate, by serving himself heir of tailzie, under the several prohibitory, irritant, and resolutive clauses in the original entail; and, in consequence of the disposition last mentioned, he intromitted with the whole of Sir Alexander Murray's effects, without confirmation, or making up any inventory, from which the extent of these effects could be made appear. He likewise paid several of his personal debts, to some of which he took discharges, and to others assignations. Mr Murray having died likewise, his creditors confirmed some of those debts contracted by Sir Alexander, and paid by Mr Murray; and brought an action against the defender, his daughter, heir of entail, to have it found and declared, that the said estate is affectable for payment of those debts.

The defences were, 1*mo*, That the estate was not at all affectable for the late Sir Alexander Murray's debts, the right in him being of a qualified nature,

No 212. which no creditor of his could carry, otherwise than with the burden of the quality with which it was originally affected.

2do, Supposing Sir Alexander's debts were chargeable on the tailzied estate, by Mr Hugh Murray's accepting the foresaid general disposition, and intermeddling with the effects without inventory, the whole debts of Sir Alexander became thereby extinct.

Answered for the pursuers, to the *first* defence; That Sir Alexander Murray had neglected to engross *verbatim* in his sasine the prohibitory, irritant, and resolutive clauses in the tailzie, contenting himself with a general reference thereto, which was contrary to the express directions of the statute 1685, which provides, That only such tailzies shall be allowed, in which the irritant and resolutive clauses are insert in the procuratories of resignation, charters, precepts, and instruments of sasine. And that if the said provisions shall not be repeated in the rights and conveyances, whereby any of the heirs of tailzie shall bruik and enjoy the tailzied estate, the said omission shall import a contravention of the irritant and resolutive clauses, against the person and his heirs, who shall omit to insert the same; whereby the said estate shall *ipso facto* fall and accresce to the next heir of tailzie, but shall not militate against creditors, and other singular successors, &c.

In terms of which clause, it is absolutely requisite to the very being and original constitution of any entail, that such clauses be inserted in all and each of the procurataries of resignation, charters, precepts, and instruments of sasine. That the intention of the law was manifestly to give force only to such entails, wherein the statute was strictly observed, and to secure the interest of creditors against all tailzies which were not constituted in the precise form and manner therein prescribed; and the proviso in the act does plainly relate to the original constitution of the entail, whether in the person of the disponer, if resignation is made in his favours, or in the person of the disponee, or heir institute. Further, if the former practice of extending the precepts on a paper a-part were still practised, it would have been a good objection against Sir Alexander's precept, that it did not contain the said clauses *verbatim*, in terms of the above act; but the pursuers have no occasion to argue the point so high; because, in every view, it must be apparent, that at any rate these clauses behoved to be repeated, not only in the title-deed, but also in the instrument of sasine; which not having been observed by Sir Alexander Murray, this entail cannot be allowed to the creditors, whatever effect it might have had towards forfeiting Sir Alexander's right to the estate, had that been quarrelled. And it is impossible to plead, with any colour of argument, that a general reference in the instrument of sasine to the irritant clauses, as contained in a separate deed, is the inserting of these clauses in the sasine itself; because, the question at present is not, What the Legislature ought to have deemed a sufficient interpellation to creditors contracting with the person who stood so infeft, in which there may be various opinions? But singly, What is the direction of the statute in this

No 212.

particular? And as the law has *in terminis* required, that these clauses should be inserted, not only in the charter and procuratory of resignation, but also in the instrument of sasine; unless the defender can say, that these were so inserted, she can say nothing to the purpose.

To the *second* defence it was *answered;* That the general disposition by Sir Alexander to Mr Hugh Murray, and his acceptance thereof, could not possibly infer an universal passive title; he was not made thereby personally liable for all Sir Alexander's debts, though the right itself was burdened therewith. No doubt Mr Murray was bound to apply the proceeds thereof, towards payment *pro tanto* of Sir Alexander's debts; and in this case, the creditors are able to show that he actually paid much more of Sir Alexander's debts than he received; and in so far Mr Murray became a proper creditor to Sir Alexander; and in that view, no doubt, took conveyances and assignations from most of the creditors, instead of discharges; and it is likewise upon the supposition the fact is so, that the pursuers, as creditors to Mr Murray, have brought this action of recourse against the tailzied estate. See 28th July, Viscount Garnock. *See* APPENDIX.

Replied for the defender; That though the act 1685 required the several provisions should be repeated in the investiture of every heir who bruiks in virtue of an entail, yet it was neither necessary, by the words of the act, nor agreeable to the practice which has followed upon it, to insert *verbatim* the several provisions in every part of each investiture. If these clauses are once insert *verbatim* in one part of the investiture, it is sufficient if the other parts of the investiture contain a reference in general to the conditions and irritancies, fully recited in the preceding part. Thus, if they are *verbatim* engrossed in the procuratory of resignation, it is sufficient, if in the charter, precept, or instrument of sasine, they are brought in by way of general reference; and when they are insert in that manner, it is certainly no stretch to say, that they are insert in the charter, precept, or instrument, although possibly they are not fully recited. And that this is the true sense and meaning of the act, is evident from the last clause thereof, which provides, "That the omission to insert these clauses, shall import a contravention against the heir, &c." If the act were to be understood in the sense of the creditors pursuers, the consequence would be, at one blow to strike off the greatest part of the tailzies in Scotland, since it is well known that the usual practice is to engross them *ad longum* in the dispositive clause, and to insert them in the procuratory and precept only by a general reference. And it is observable, that if, by the words of the act, it is absolutely necessary that the clauses should be insert *verbatim* in the instrument of sasine, by the same words it is equally necessary, that they should likewise be insert *verbatim* in the procuratory and precept.

Replied to the answer to the *second* defence; That the disposition by Sir Alexander to Mr Murray, was burdened with the granter's debts, consequently Mr Murray's acceptance thereof must subject him thereto. The acceptance of

No 212. a disposition, with the burden of the granter's debts, is a known common passive title; and has the same effect as if the accepter were served heir to him. The only expedient that the receiver of such a disposition has to relieve himself of the universal passive title, and to secure his being only liable to the extent of the subjects conveyed, intromitted with by him, is to confirm himself executor-creditor, upon the warrandice of the disposition expressed or implied. Such management exeems the disponee from all suspicion of fraud, and affords to the creditors of the defunct an easy charge against him, to operate their payment to the extent of his intromissions; but where he omits to confirm, and inventory the subjects intromitted with by him, he is understood to take his hazard of the effects answering the debts; so that if he should not make good so much of the effects as would answer the debt, he must, notwithstanding, satisfy the whole. And it is most just it should be so, since he did not follow the legal and ordinary precaution, by confirming the subjects, and thereby save himself from being further liable than to the extent, and furnish the creditors with a rule of charge against him, on the inventories of the same. Now, in the present case, Mr Murray, without confirming, or inventorying the effects, intermeddled with the same *per aversionem*, consequently he became universally liable to the Creditors of Sir Alexander Murray; and the debts paid by him, in consequence of his being so liable, became for ever extinct. See the act 12th Parl. 1617, touching the long prescription, and the cases of the Lady Little Cessnock 1718, and 2d February 1728, Lord Strathnaver. *See* Appendix.

The Lords found, That Sir Alexander Murray not having repeated the irritant, prohibitory, and resolutive clauses of the entail in the sasine, upon which he bruiked the estate, otherwise than by a general reference, the debts contracted by him may be charged upon the entailed estate. And further found, That Mr Hugh Murray, by the conception of the disposition founded on, granted to him by Sir Alexander Murray, of his effects, was not obliged to pay the debts of the granter, beyond the value of the subjects disponed. See Tailzie.

C. Home, No 269. p. 432.

*** See Kilkerran's report of this case, *voce* Tailzie.

No 213. 1745. *June* 6. Mercer *against* Scotland.

A person, passing by his brother and heir at law, disponed to his sister, and her heirs, all debts owing to him, heritable and moveable, and all his estate, goods, and gear, which should belong to him at the time of his death; with this *proviso*, That the right, and every person who should claim thereby, should be burdened with the payment of all his just and lawful debts; and he reserved a power to alter at any time in his life. After the death of the disponee, an