securing them;" meaning that very act in question. After all which, there could remain no doubt upon the import of the statute; and when this is our statute-law, that without clauses irritating the debts and deeds, and clauses resolving the right of the contravener, the heir of tailzie cannot be effectually barred from alienating the lands, or affecting them with onerous debts, however it be otherwise in England by the statute *de Donis*, there is no reason to apprehend that the House of Peers, when made to understand how our statute-law stands, will, in this, or any future case, give judgment contrary to it, whatever they may have done in the case above referred to, of the Creditors of Riccartoun, when possibly our statute law may not have been so fully laid before them. No. 84.

Kilkerran, No. 4. p. 540.

1746. *June* 17.

HEIRS of TAILZIE of AGNES CAMPBELL *against* The REPRESENTATIVES of PROVOST WIGHTMAN.

No. 85.
A tailzie prohibiting innovation thereof, or alteration of the succession, does not hinder the heirs to sell.

Agnes Campbell, relict of Andrew Anderson, King's Printer, made a tailzie of the lands of Rosebank, of Langlands, and Orchardton or Livingston's Yards, in favour of Humphry Colquhoun, her grandson by her daughter; which failing, to William, Agnes, and Elizabeth Hamiltons, her grandchildren by another daughter, under this limitation, "That it should not be lawful, nor in the power of the heirs of tailzie, to alter, innovate, or infringe the foresaid tailzie, or the order of succession therein appointed, or the nature or quality thereof, any manner of way; and the deeds so done should not only be void and null, but also the contraveners should amit and tyne all right that any of them had, or could pretend, to the lands, &c. by virtue of the present right."

The succession opened, by the death of Humphry Colquhoun, to the substitutes; who sold the lands to John Wightman, sometime Provost of Edinburgh; and of this disposition a reduction was brought by the children of the disponers, as being an infringement of the tailzie.

Pleaded for the pursuers: Tailzies have taken their rise from the *fidei-commiss.* in the Roman law, and are to be interpreted according to the principles laid down concerning them. An express *fidei-commiss.* was that by which the fiduciary was obliged to restore the subject to a certain person; and a tacit one, whereby he was enjoined to suffer the estate to remain in the family. In either of these cases, the fidei-commissary had a real action to recover the subject; but a bare prohibition, without bearing to be in favours of any person or series, was ineffectual; L. 114. § 14. De Legatis 1. Instances of these several kinds of *fidei-commiss.* occur. Of the first, L. 69. § 3. De Legatis 2. L. 77. § 27. eod. Tit. L. 114. § 15. De Legatis 1.: Of the second, L. 38. § 4. De Legatis 3. L. 93. in Principio eod. Tit. These *fidei-commiss.* were often made without any prohibition to alienate.

No. 85.

Agreeably to this, the intent of all tailzies is to preserve the subject to the heirs; it is upon their account the tailzie is made, and not out of any affection for the estate, which is only sought to be preserved out of regard to them; and from thence it follows, that a prohibition to "infringe the tailzie, or the order of succession therein appointed, or the nature and quality thereof, any manner of way;" is an express prohibition to contract debt, whereby the subject may be evicted, and much more wholly to alienate it, whereby the heir's interest is entirely cut off.

In the present tailzie, it is supposed the irritancy may be declared against the contravener himself, who, by his contravention, loses his right; and this must relate to alienations made by him, not simply to destinations of succession, which are to be of no effect during his life.

Mr. James Forsyth having tailzied his estate, by tying up his heir from altering the order of succession, but not having fenced the prohibition with an irritancy, and a question having afterwards occurred concerning the validity of a debt, the Lords found the clause in the tailzie not sufficient to annul the debts contracted, seeing the said clause contained no irritancy of the heir of tailzie's right; 11th March, 1707, Lady Reidheugh against Rebecca Forsyth, No. 80. p. 15489. Also an entail containing strict prohibitory and irritant clauses, with regard to the contracting of debt, but no prohibition to alter the succession, was found to imply it; 2d February, 1728, Lord Strathnaver against The Duke of Douglas, No. 17. p. 15373.

Pleaded for the defenders: There is nothing better established in our law than the distinction betwixt a prohibition to alter or contract debt and to alter the succession; which last strikes only against gratuitous, not onerous, deeds; Stair, p. 220. (228); Dirleton, *voce* Tailzie, Question 4th; Stewart, on that place. Such tailzies, containing only a prohibition of altering, are ordinary, and are the most reasonable; and, in these cases, a sale or contraction of debt is no infringement, since the subject is only tailzied to the heir so long as it exists. Indeed, if the sale were fraudlently made, to give away the price to other heirs, the alienation of the price might be quarrelled; but the onerous purchaser would be safe.

The irritancy adjected cannot make the prohibition larger than it is; and it is ordinary to add irritancies when no other limitation is imposed than to bear the name and arms of the tailzier.

By the tailzie of Keith, the heir was prohibited to alter or contract debts, but not to sell the estate; and the Lords refused to extend the one prohibition to the other, though no reason can be given for the prohibition, but that that those debts might carry off the estate; Earl of Hopeton against Hepburn of Keith, (see Appendix). And where a tailzie contained the prohibition, but did not declare the debts contracted void, they were sustained; July, 1734, Mr. James Baillie against Carmichael of Mauldsly, No. 82. p. 15500.

The like determinations have been given in cases where persons have been obliged otherwise than in virtue of the tailzie under which they held, not to alter their succession. A person bound by decreet-arbitral to entail his lands, for an onerous cause, was found to have implemented it, by making the entail, and that he could afterwards sell the estate, and even was not bound to refund the money he had gotten for making the entail, since it was not qualified against him that the sale was made to defraud the heir of tailzie; 15th July, 1636, Drummond against Drummond, No. 2. p. 4302. Two persons being bound, by contract, to entail their estates, failing heirs of their bodies, respectively upon each other, the Lords found, that neither, without the other's consent, could break the tailzie, but that they could sell; 14th January, 1631, Helen Sharp against John Sharp, Sect. 6. *h. t.* A father who is bound by his contract of marriage to let the succession of his estate descend to the children, is under as strong a prohibition of altering as he can be laid under by a tailzie; and yet, as he is fiar, he can dispose of the subject. And the question is put by Dirleton, If he can dispone after an inhibition used against him? who answers, that he may. No. 85.

Pleaded for the pursuers: There can no distinction be made betwixt an onerous and a gratuitous deed, because the tailzie prohibits any deed whereby the heir's right of succession may be infringed; and there is this difference betwixt the case of a tailzie and that of a father bound by his contract of marriage, that there he is not prohibited to do any thing whereby the children's succession may be prejudiced, under a forfeiture of his own right; but suppose a father to convey an estate, in his son's contract of marriage, with the same prohibitory and irritant clauses as in the present case, and there can be no doubt but the son's onerous deeds would be void.

The tailzie of Mauldsly, which did not declare the deed of contravention void, is not similar to the present, which vacates it as well as the contravener's rights; as neither is the tailzie of Keith, which forbids contracting of debt, but not the sale of the estate; for though particular prohibitions may not be extended, yet here is a general one, of doing any thing by which the tailzie may be frustrated.

The Lords, in respect the tailzie contained no prohibition to alienate nor to contract debts, repelled the reasons of reduction.

Act. *A. Macdouall.* Alt. *Ferguson.* Reporter, *Elchies.* Clerk, *Gibson.*

D. Falconer, v. 1. *No.* 116. *p.* 140.

1758. *February* 8.

CREDITORS of JAMES HEPBURN of HUMBY, *against* His CHILDREN.

No. 86.
Entail wanting resolutive clause, not effectual against creditors.

Anno 1663, Adam Hepburn executed an entail of the estate of Humby, whereby, *inter alia*, it was declared, "That it shall neither be lawful, nor in the power of me, the said Adam Hepburn, nor any of the three persons, or heirs of tailzie above