1758. *February* 7. CREDITORS of HUMBIE *against* The HEIR.

[Kaimes, No. 146; *Fac. Coll.* II, No. 94; Kilk. *February* 8, 1758.]

THIS case was mentioned before, 24th January last; and the point that was then appointed to be heard was this day determined, after a very full hearing in presence; and it was found that this tailyie, wanting a clause resolutive of the right of the contravener, was not good against creditors, though made before the Act 1685. Some of the Lords put their opinion on the statute; but the greater part of the Lords on that side thought that the statute had no retrospect, as there were not words in it importing that; but they put their opinion upon the common law, which, they said, from the decision in the case of *Stormont*, appeared to be, that, without a clause irritating the right of the heir, there could be no forfeiture of creditors; and this proceeded from a notion, that, if the property remained with a man, a power also of contracting debts and alienating must remain.

The PRESIDENT said, a tailyied succession in Scotland was founded upon this,—that, in case of the contracting of debts by any of the heirs, the next heir succeeded, not to him, but to the preceding heir that had not contravened; for, if he succeeded to the contravener, it was impossible but that he must be liable for his debts and deeds; and, therefore, he said, it was expressly provided in the statute, that the next heir may serve to the heir that did not contravene without representing the contravener. Now, this supposes that the contravener must forfeit his right, otherwise the service must of necessity be to him as the person that died last vested in the fee; and therefore a clause irritating his right, was absolutely necessary, without which there could be no tailyie that could make his debts ineffectual against the estate.

On the other side, it was said by AUCHINLECK, that, according to this argument, wherever a man serves heir to his predecessor in a tailyied estate, who had contracted debts, he must be liable to the payment of those debts: that this certainly was not the law; and the only meaning of the clause in the Act of Parliament, was, that, if the next heir shall pursue a declarator of irritancy against the heir in possession, during his life, and shall prevail, he may, in that case, serve to the heir last infeft who did not contravene; because it appears to serve heir to a person alive: but where the person is dead, no service to him in a limited fee will subject the heir to any debts or deeds of his contrary to the limitations of the fee, because it is only a service to a man in fee-simple, as heir in general, that can subject to all his debts and deeds; and this is the opinion of Sir George M'Kenzie in his treatise upon entails.

LORD PRESTONGRANGE said, that it was an error to say that property necessarily implied the power of alienation or burthening: this, indeed, was the characteristic of the *plenum dominium;* but property, like other rights of men, was variously modified and limited, either by the law or by the will of the donor: *uti quisque legassit ita jus esto*, and *unusquisque rei suæ moderator et arbiter*, are fundamental rules both of law and of natural justice; and it seems a cruel restraint upon men that they cannot dispose of their lands in such a way

that the donee may possess them all his life, but shall not have it in his power to alienate or contract debts; but the moment he does either, the fee *ipso facto* departs from him. This is a plain subtlety, invented out of odium to entails, and with an intention to defeat the plain and express wills of testators. Properties of this kind are well known in the Roman law: their perpetual fideicommisses were all of that kind; and the property which the husband had in the *fundus dotalis* was of the same kind: and, in our law, the property of a Papist possessing a land estate is limited in the same manner by the Act 1701, so that he cannot alienate or contract debt to the prejudice of his Protestant heir; and, by the Act 1681, an heir, for the first year after his predecessor's death, cannot make any alienation to the prejudice of the defunct's creditors; and, in general, all the persons mentioned in the title, *quibus alienare non licet*, are all proprietors yet cannot alienate: That this device was not known to our old lawyers; neither Craig, Sir Thomas Hope, nor even Sir George M'Kenzie: That in their time the law was, that a simple prohibition was not sufficient to annul debts contracted unless the lieges were put upon their guard by an inhibition, or unless there was a clause irritating the debt, or resolving the right of the contravener; but either of these was sufficient, as plainly appears from Sir Thomas Hope's *Minor Practicks*; and the lawyers of those times do not seem to distinguish very accurately betwixt the two. In the case of *Stormont*, one of these clauses, and that the most material, viz. the clause annulling the debts, was wanting, which plainly shows that, according to the opinion of the lawyers of those times, both were not necessary. It was, in the case of *Redheugh*, in the year 1707, that President Dalrymple seems first to have fallen upon that subtlety; as appears from the way in which he has collected the case, where he marks, as a decision of the Court, what was no more than an opinion of some of the judges on a general point of law, which was altogether out of that case; for, there, there was only a simple prohibition, and no clause, either irritant or resolutive,—and in this manner the decision is truly recorded by my Lord Fountainhall: That afterwards, in the case of *Riccarton*, the point was indeed precisely determined; and it was found that a resolutive clause was necessary, as well as an irritant: they also determined there a point of fact, that the resolutive clause did not extend to the heirs-male of that tailyie; but their judgment was reversed by the House of Peers in both points: so that the judgment in the last resort seems to be on this side: That it is impossible to defend the contrary opinion, upon the Act 1685, which has no retrospect, and, besides, enacts nothing new, or that was not common law before, except that there shall be a particular record for tailyies: that they shall be produced and allowed by the Lords of Session: that the clauses, irritant and resolutive, shall be inserted in every part of the feudal right, and shall be transmitted down and repeated in every after conveyance. This is all that is done by the statute 1685: but, as to the nature and effect of clauses prohibitive, irritant, and resolutive, it has determined nothing, but left the law as it stood before; neither has it required that a man shall insert all these in his tailyie, but he may choose all or any of them at his pleasure, and the effects of each of them will be different. The effect of a simple prohibition will only be to oblige the heir to make good to the next heir any debts with which he shall charge the estate; but it will not forfeit his right unless there be added a clause resolutive: if that

be added, still the debts or deeds of alienation will be good, only the heir-contravener will forfeit his right, unless there be added a clause irritant annulling the debt or deed of contravention. That the prohibitive clause operated separately from the other two is not denied; neither is it denied that the resolutive clause has a separate operation: and why should not the irritant have also a separate operation without the resolutive? Nevertheless, the contrary opinion prevailed. *Dissent.* Prestongrange, Auchinleck, and Edgefield.

This day, the Lords also decided that a tailyie, made before the statute, need not be recorded; in the same manner as a sasine taken before the Act 1617, appointing the register of sasines, did not need to be recorded; *dissent. tantum* Coalston.

1758. *February* 15. WILLIAM WEMYSS *against* MAJOR CUNNINGHAM.

[*Fac. Coll.* II, No. 102.]

IN this case the Lords found, that, since the statute of the 20th of the King, taking away escheats, horning is not a diligence that can affect lands; and therefore, that a disposition made by a debtor of an heritable subject, in favour of one creditor, after horning was executed against him, and he denounced at the instance of another creditor, was not reducible upon the Act 1621. In finding so, they found that so much of the statute 1621 was virtually repealed by the statute of the 20th of the King.

In this case the Court was of opinion that an arrestment upon an unregistered bond might compete with an arrestment upon a horning, if, at the time of the competition, the bond was registered; for they considered an arrestment upon an unregistered bond as equivalent to an arrestment upon a dependance, upon which there cannot be execution by forthcoming till there be a decree recovered; because forthcoming is an executorial which cannot be without either decree or a registered bond.

1758. *July* 5. SIR GEORGE SUTTY *against* ———.

A TENANT, who had a tack to him and his heirs, excluding assignees, when he grew old and infirm assigned the same to his eldest son, who was *alioqui successurus.* The Lords found that such a tack could be assigned to the eldest son, in the same manner as a ward-fee could formerly have been conveyed to the heir, or as a tailyied estate can yet be disponed to the next heir of tailyie; *dissent. tantum* Preside, who was for interpreting strictly the clause excluding assignees in tacks, the meaning of which, he said, was, that the master should have no other tenant except the person he had chosen for his skill and industry, during his life.