No. 95. applicable; for, in these, there was merely a prohibiton on the heir to contract debt; but no clause disabling the creditors from adjudging or evicting the estate. The entailer, in that case, must be considered as resting satisfied with the effect of the resolutive clause, to prevent the heir from contracting debt, without meaning to defeat the security and payment of onerous creditors, if debts should nevertheless be contracted.

It affords no objection to this entail, when opposed to the claim of creditors, that it does not contain an irritancy of the same kind in the case of a voluntary sale.—The statute makes it lawful to his Majesty's subjects to tailzie their lands, "with such provisions and conditions as they shall think fit," and to affect the said tailzies with irritant and resolutive clauses, &c. It is thus left optional to the entailer to direct his prohibitions and irritancies against such acts and deeds as he pleases.—The restrictions of the tailzie cannot be extended by implication *de causa in causam*, though they must have their full effect in those cases to which they extend.—An entail may effectually guard against a voluntary sale of the estate, and yet allow the heirs to contract debts upon it; or may effectually bar the contraction of debts, and leave the heirs at liberty to sell. The latter point was determined in the case of Hepburn contra the Earl of Hopeton, 1732, (See APPENDIX), and of Sincliar of Carlourie, November 8, 1749. No.22. p.15382.

The Court finally "found, That the deed of settlement of tailzie in question, is no bar to the sale now depending, upon the debts and contractions of James Watt, one of the substitutes in the said entail, and defender in the present sale."

Lord Ordinary, *Gardenston*. For Watt, *Rae, Belshes*. For Kempt, *J. Campbell, C. Ferguson*. Clerk.

Fac. Call. No. 61. *p.* 110.

1779. *March*, 2. JOHN LESLIE of Balquhain, *against* DAVID ORME.

No. 96.
How far the granting of leases of very long duration, is to be considered as an alienation of the estate?

In 1692, Patrick Leslie executed an entail of his estate of Balquhain in favour of his second son, and a series of heirs in succession.—This deed contained a prohibition on the heirs of entail to grant leases below the former rental; but the entailer afterwards, by a new deed, revoked this prohibition, and allowed the heirs to grant tacks below the rental. Under this entail, the estate of Balquhain was held successively by the institute George Leslie and his two sons.—Upon the death of the youngest, the succession opened to Antonius Count Leslie, who entered into possession.

Patrick Leslie Grant, the next protestant heir of tailzie, brought an action for setting aside the right of Count Antonius to the estate, on the ground of his being an alien. This process continued in Court several years, and was attended with considerable expense to the pursuer, the greatest part of which was advanced by

Mr. Orme, his agent, who had likewise expended money on Leslie's maintenance and education. The pursuer, in the end, prevailed both in this Court and in the house of Lords. No. 96.

After the judgment of that house, Leslie, upon a settlement of accounts, granted two bonds to Orme for the amount of the whole of his advances, together with a gratuity for his trouble and risk.

He afterwards executed various deeds in favour of Orme, in order to secure his payment. The first of these was a lease (25th April, 1765,) for nineteen years, of the whole estate of Balquhain, for which Orme became bound to pay a rent of £.300 yearly, and to apply what further should be received from the subtenants, after deducting the expense of management, towards the extinction of Leslie's debts.

In 1769, this lease was discharged by both parties; and, for the better security of Orme, a new lease of the estate was granted in his favour for the space of four times nineteen years, at the rent which the lands then paid, amounting to £.755 Sterling.—Orme, on the other part, agreed to deduct from the debt due by Mr. Leslie the amount of a grassum, which had been previously calculated by an accountant, as suitable to the value of the lease.—There is also a clause in this lease, relieving Orme of all future augmentations of stipends or schoolmaster's salaries, and of the expense of building and repairing kirks, manses, &c. and also of the rogue, bridge, and road-money.

Of the same date, Leslie gave bond of corroboration to Orme for the balance due to him, after deduction of the grassum.—For the payment and security of this and his other debts, he likewise executed in favour of Orme a trust disposition of the whole tack-duty during the lease, excepting £.300, payable annually to himself; and, in case any of the heirs should refuse to ratify the deed, the tack-duty is restricted to the same sum, until such time as the whole debts should be paid.—Leslie afterwards executed new deeds in Orme's favour. By one of these, August 1769, a privilege reserved in the former lease to him, his hers and assignees, of assuming possession of the mansion house and mains, is limited to him and his heirs.—By another deed. September 1773, Leslie further restricts his privilege to the heirs male of his body.—He likewise, (September 1773), upon receiving a small grassum, lets to Orme the whole estate for other nineteen years, after expiry of the four nineteen years. All the deeds were afterwards ratified by Patrick Duguid, next heir of entail.

Lessie having died without issue, the succession devolved upon Patrick Duguid, who raised a process of reduction for setting aside the whole deeds above mentioned, granted by Leslie to Orme. After Patrick's death, John Duguid his son, and next heir, insisted on this process on two seperate grounds, 1*mo*, That, in the deeds under reduction, an undue advantage had been taken of the granter;

2*do*, That they were null and void, as being *ultra vires* of Leslie, who held the estate under a strict entail—On the last of these grounds.

Pleaded for the pursuer: 1*mo*, By the entail of Balquhain, it is rendered unlaw-

No. 96. ful for the persons called to thes succession, " to sell, anailzie, or dispone the lands," &c. The expressions *anailzie* and *alienate*, are not technical words, appropriated to signify a deed conceived in a particular form.—Whether a deed is to be considered as an alienation or not, must depend on the substance and extent of the right conveyed. The leases to Mr Orme for five times nineteen years alienated the estate as much as if the defender's right had been completed in the feudal form. In some respects, they took away more from the heir of tailzie than if a perpetual right had been granted; for the heirs of tailzie were burdened with the augmentations of stipends, and other taxes above mentioned.—In substance, these leases resolved into a sale of the estate for an annuity out of it.

A lease of extraordinary endurance is held by the writers on the law to be an alienation: Craig, Lib. 3. Dieg. 3. § 26. Stair, B. 2. T. 2. § 13. Sir G. M'Kenzie, in his observations on act 1621, which prohibits alienations by debtors in defraud of creditors, takes notice, that the act was interpreted " as extending ' to tacks let by the debtor to the prejudice of his creditors." In a reduction on the head of death bed, a tack for three times nineteen years, was held to be a species of alienation by the Court, and set aside; Christieson against Ker, December 1733, (see APPENDIX).

The consequences of a contrary doctrine would lead to the annihilation of many old entails. They seldom contain any restrictions with regard to the endurance of the leases, to be granted by the heirs, leases being then unknown.

On the same ground that a prohibition to alienate is supposed not to restrain the heir as to the endurance of the lease, it can have no effect to restrain him as to the *quantum* of rent to be stipulated. The word alienate reaches to both, or neither.—Were the latter construction to be put upon it, the heir of entail in possession might reduce the right of all the succeeding heirs to a shadow, and effectually alienate the estate, provided only he does not execute the conveyance according to the feudal forms.

But, if the clause in the entail of Balquhain is not sufficient to restrain the heirs of tailzie from granting leases, though of the longest endurance, no clause whatever could answer this purpose; and an express prohibition in the deed not to grant long leases, would be ineffectual against the lessees.

The maker of a settlement is no doubt considered, in the act 1685, as entitled to insert any provisions into it he chooses; and these will be binding on heirs who succeed under the settlement. But it is not by this act made lawful for the entailer, by irritant and resolutive clauses, to render all such provisions effectual against creditors and third parties transacting with the heir.—These clauses can only be applied with effect in the case of prohibitions " to sell, anailzie, or dispone the lands, or any part thereof, or contract debts, or do any other deed whereby the samen may be apprised, adjudged, or evicted," &c. The clause in the entail of Blaquhain is expressed in the very words of the statute. If it is not held to strike against leases, even of the longest endurance, it follows, that the statute does not authorise the inserving and resolutive clauses in the case

of any prohibition to grant such leases: Consequently, the prohibition, though in terms ever so explicit, not being supported by the statute, would be ineffectual against singular successors.—Thus an end might be put to all entails, as there would be no means by which a lease, flowing from an heir of entail, though for any length of time, and at any rent, however low, could be rendered ineffectual against the lessee. No. 96.

The last of these leases is likewise *ultra vires* of the heir, on another ground; for he can have no power to anticipate the administration of his estate at so distant a period as 76 years, and grant a lease of it to commence then.

In all events, the lease must be reduced, in so far as respecting the mansion-house, gardens, &c. It is understood, that heirs of entail have not the power of letting the mansion-house, by which they might exclude all succeeding heirs from residing upon their own estates; and this was expressly found by the Court, Lord Cathcart against Stewart Nicolson Shaw, 31st January 1755. No. 33. p. 15399.

2do, The assignation to the surplus rents of Blaquhain, after allowing an annuity to the heir, was *ultra vires* of the granter, and could only be effectual during his life.—The whole debts for which it was granted, were due by Leslie, and contracted on his faith singly. Any deed by him, appropriating the rents of Blaquhain to payment of his own debt, ceased at his death.

Answered for the defender: 1*mo*, A lease is merely a personal contract, which supposes the property of the subject to be constantly vested in the granter, whether it is for a long or a short term of years. Consequently, a lease of any endurance is not an alienation of the subject; for the property of it can never be in the lessee from the nature of his right.

The authorities founded on do not apply. In some branches of law, where the same strictness of interpretation is not required, as in tailzies, a lease of long endurance may be considered in the same light with an alienation of the subject, and held to be implied under it. But it is an established principle, that, in tailzies limitations on the heirs cannot be implied.—It is not enough that the act challenged should be equally prejudicial to the heir as that prohibited. If there are not words in the entail expressly discharging the act, third parties transacting with the heir are in safety.

It is no reason for holding long tacks to be a species of alienation, that, otherwise, an express prohibition to grant such tacks in the deed of entail would be ineffectual. This only shows, that the law is defective in not expressly allowing tailzies to be made, with clauses prohibiting long tacks to be granted. But, if a long tack is not in law an alienation, the Court cannot supply the defect in the statute, whatever the consequences of it may be.

The lease for the additional nineteen years is in no different situation from the other.—Though it is granted by a new deed, it is clearly nothing more than a prorogation of the former lease.

No. 96. *2do*, It is not *ultra vires* of the heir of entail to grant the assignation challenged. —If the heir had chosen it, he might have gone farther; and, by letting the lands for the same length of time, at a low rent, obtained large grassums, instantly advanced, with which the debts could have been paid off.

The greater part of these debts were contracted for the benefit of the pursuers, and the whole subsequent heirs of entail, as it was by means of the process in which they were incurred, that the present line of heirs came to be entitled to the succession.

The judgment of the Court was, Find, "That the insisting in a reduction of the tack dated the 5th April 1765, was inept and incompetent, and assoilzie the defender from that conclusion of the pursuer's summons. Repel the reasons of reduction of the tack granted by Peter Leslie Grant to the said David Orme, dated 29th March 1769. Repel the reasons of reduction of the obligation and assignation, dated the 29th March 1769, in so far as respects the restriction of the tack duty, and assignment of the surplus over and above the £.300, during the lifetime of the said Peter Leslie Grant, and of the pursuer's father; but sustain the reasons of reduction thereof, in so far as regards the restriction and assignment of the tack duty of all years from and after the death of the pursuer's father. Repel the reasons of reduction of the ratification by the pursuer's father, in so far as regards the tack itself, and the restriction of the tack duty, and assignment of the surplus thereof, for the purposes therein mentioned, during the lifetime of the pursuer's father, after his succession to the estate of Balquhain; but sustain the reasons of reduction *quoad ultra*. Sustain the reasons of reduction of the deed of restriction granted by the said Peter Leslie Grant to the said David Orme, dated the 5th day of August 1769 years; and of the tack and deed of restriction, granted by the said Peter Leslie Grant to the said David Orme, dated the 7th day of September 1773; and also of the tack granted by the said Peter Leslie Grant to the said David Orme, dated the 11th day of September 1773.

Lord Ordinary, *Covington.* Act. *Lord Advocate, M, Laurin, Blair.* Alt. *D. Graeme, Crosbie. Armstrong, Ferguson.*
Clerk, *Robertson.*

Fac. Coll. No. 75. p. 141.

*** This case was appealed. The House of Lords, 25th February, 1780, ORDERED and ADJUDGED, that the appeal be dismissed, and the interlocutors complained of be affirmed.

1786. *March* 10.

WILLIAM DICKSON, *against* JOHN DICKSON, WILLIAM CUNINGHANE, and Others.

No. 97.
The prohibitions of an entail cannot

William Dickson, the owner of the estate of Kilbucho, executed an entail, by charter and infeftment, in which the prohibitions, irritancies, and resolutive clau-