

1707. *March 11.*

The LADY REIDHEUGH *against* REBECCA BRUCE, *alias* FORSYTH, and her HUSBAND.

Mr. James Forsyth tailzies his lands of Taylortoun to James Bruce of Garvel, his nephew, and other substitutes therein mentioned, under certain conditions and restrictions; especially, that the heirs of tailzie should assume and bear the name and arms of Forsyth for ever, and that the husbands of the heirs-female succeeding should assume and retain the said surname, and that if they failzied they should tyne and amit the benefit of the tailzie; and thereafter follows a clause, in these terms: "And it is also provided, that it shall no ways be leisom to the said James Bruce, and his heirs of tailzie and provision foresaid, to do any act or deed whatsoever which may frustrate or prejudice the tailzie and course of succession above written; and if they do in the contrary, the same shall be void and null, with all that may follow thereupon, and the same shall be reducible at the instance of the apparent heir of tailzie.

After the succession of the said James Bruce, by virtue of the tailzie, he becomes tutor to the Lady Reidheugh, who, shortly before his death, obtained a decret against him for a considerable sum, as the balance of his tutor accounts, and thereupon pursues Rebecca Forsyth, his daughter, as heir in special to him in the said lands of Taylortoun.

The defender alleged, Absolvitor, because she was not simply heir, but an heir of tailzie, containing prohibitory clauses, and could not be liable to the performance of any act or deed which might frustrate the tailzie and course of succession, which the sum libelled, and others of that kind, would quickly do.

It was answered: *1mo*, The prohibitory clause did only relate to the course and order of succession, but did not hinder the heirs of tailzie to contract debt or dispone of the estate for just and onerous causes, which is never omitted to be expressed in tailzies, when intended; *2do*, Whatever might be the import of the prohibitory clause, yet there is no provision that the right of the contravener should become void; which is also the ordinary style of strict tailzies; and in this particular case there is an irritancy upon the right of the contravener who should failzie or delay to assume the name and arms of Forsyth; and the like irritancy not being repeated in this case, it must be understood not to have been intended.

It was replied: The words of the tailzie are very express, that the heirs should do no act or deed whatsoever which may frustrate or prejudice the tailzie and course of succession; which general words comprehend every particular much better than when particulars are expressed; because, if there be any omission, the prohibitory clause extends not to that case, whereas in this general every particular is comprehended, and most especially the contracting of debt, which effectually prejudices the tailzie and course of succession; and this debt was contracted after

No. 80.

Prohibitory clauses in a tailzie with irritancies of the deeds of contravention, but containing no irritancy of the contravener's right, found to afford no defence to the heir of tailzie, though these clauses were inserted in the retour and sasine in favour of the heir.

No. 80. the defender's father had actually succeeded, and his infestment bore the quality of his right. *2do*, There is an express irritancy subjoined that the deed of contravention shall be void and null with all that may follow thereupon, which though in different words from the irritancy in the other case above specified, yet the intention and design of both are the same.

It was duplied: The prohibitory and irritant clause here can only extend to voluntary and gratuitous deeds; and though contracting of debts may indeed prejudice the tailzie and course of succession, yet that is not directly, but by diligence that may follow as a consequence thereof. But the ground that the pursuer mainly fixes upon is, that there is no irritancy of the right of the contravener subjoined; without which a prohibitory clause can take no effect in prejudice of creditors; for the right of property consists in the power of disposing, affecting, and burdening, at the owner's pleasure; and it was very long a question in our law, whether tailzies could be so framed as to bind up the proprietor from contracting of debt; and it was never determined till the case of Stormont, No. 5. p. 13994.; and the foundation of that decision, and of all others in prejudice of tailzied estates, is singly this, that by the deed of contravention, the right of the contravener becomes void, and consequently his debts and deeds can no more affect the tailzied estate, whereof he *ipso facto* ceases to be proprietor; and, therefore, an irritancy upon the deed of contravention, without irritating the deed of the contravener, has no effect in law; for, as long as the property of the tailzied estate remains with the contravener, his debts must affect his property; and therefore no free and absolute proprietor can, by a tailzie, provide that his own or his heir's debts shall not affect his property; but if he substitute an heir *sub modo*, or with conditions and qualities, or that he contract debts, &c. his right shall *ipso facto* become void, then his debt cannot affect the tailzied estate, whereof he *ipso facto* amits the property.

The Lords found the defender liable as heir of tailzie, notwithstanding of the prohibitory clause, and of the provision that deeds of contravention should be null, in respect the right of the contravener is not also provided to become void by the contravention."

Fol. Dic. v. 2. p. 432. Dalrymple, No. 77. p. 97.

* * * This case is reported by Forbes:

Mr. James Forsyth, minister of the gospel, having tailzied his lands of Taylortoun, to James Bruce of Garvel, his nephew, and the heirs substituted to him, with this provision, "That it should not be leisom to the said James Bruce, and his heirs of tailzie and provision foresaid, to do any act or deed that might frustrate or prejudice the tailzie and course of succession above-written; and any thing done in the contrary should be void and null, and reducible at the instance of the next apparent heir of tailzie;" upon Mr. James Forsyth's death, the said James Bruce, then called Forsyth, was, by virtue of the tailzie, served heir in special to him in

the lands of Taylortoun, and infest; and thereafter became tutor to Mrs. Grissel Bruce, heiress of Reidheugh; who having, after her minority, obtained decret against him for £.15,900, pursued his daughter, Rebecca Forsyth, for payment, as being heir served and retoured to him in the foresaid tailzied estate, and Hugh Wilson, her husband, for his interest.

Alleged for the defenders: That she, Rebecca Forsyth, could not be liable for her father's debt, in respect he was bound up by the tailzie from doing any deed that might frustrate or prejudice it; which necessarily includes a prohibition to contract debt; seeing, otherwise, the defenders' succession would be frustrated, the debt being near equal to the value of the lands; and she, as heir of tailzie, may lawfully question any deed of her predecessor's contrary to the provision in the tailzie, by virtue whereof both he and she succeed.

Replied for the pursuer: There being no prohibitory clause to contract debt, or to alienate the estate, but only to do any deed to frustrate and prejudice the tailzie or course of succession; that is, in plain Scots, to change the destination of heirs; the defender's father was at liberty to dispose of the property for onerous causes, or to affect it by debts; especially considering, that the clause irritant makes the deed of contravention void and reducible, without irritating the contravener's own right. For whatever might be as to deeds in favour of an heir or representative, it is impossible to conceive a tailzie so as the debt of a lawful creditor may be prejudiced, and yet the contravener or contracter of the debt enjoy the full benefit of his estate; which would choke the principles of common justice. Therefore, by the new common stile of tailzies, the contravener's right becomes null *ipso facto*, and the creditor cannot have access to the estate, which returns to the next heir of tailzie as if the contravener were naturally dead. *2do*, It is in vain for the defender to deny the passive title, being an heir by service, who must represent simply. For *aditio hæreditatis est actus legitimus, qui nec diem nec conditionem recipit*. Again, the irritancy is provided to take effect by reduction at the instance of the apparent heir; so that, *esto* the clause founded on did prohibit the contracting of debt, the irritancy not being declared, or the deed of contravention reduced by the defender before her service, she can have no benefit thereby.

Duplied for the defender: The irritating or annulling of an heir of tailzie's right is neither a necessary nor a proper clause, nor can the want of it make the next heir of tailzie liable to that heir's debts; for if the heir's own right were to be null by such an act of contravention, nobody would trust him, though never so virtuous, even to the value of his yearly rent, which he may spend; *2do*, As voluntary interdictions are effectual, in favour of the interdicted person's heir, to secure him against all posterior debts, so this perpetual prohibitory clause, being published and repeated in the several services, precepts, and sasines following thereupon, should annul the debts contracted by these heirs, as prejudicial to the tailzie and course of succession.

No. 90.

Duplied for the pursuer : There is no other way to restrain the common liberty inherent in the transmission of property, but by an irritancy of the proprietor's right ; for to give laws, and fix irritancies upon the rights of third parties, who are not concerned in the making of the tailzie, without any danger to the right of the contravening heir of tailzie, is absurd and ridiculous ; and an heir of tailzie's credit would be much the same, whether the debt or succession were irritated ; *2do*, There is a great disparity betwixt tailzies with prohibitory clauses, and voluntary interdictions, which require publication and execution, and have their force by particular public acts.

The Lords found the clause in the tailzie whercby it was not leisom to James Bruce and the heirs of tailzie or provision to do any act or deed which might prejudice the tailzie and course of succession, although inserted in the sasine following thereon, and in the retour, is not sufficient to annul the debts contracted, or to liberate the defender from the passive title ; seeing the said clause contains no irritancy of the heir of tailzie's right.

Forbes, p. 141.

* * * Fountainhall also reports this case :

Mr. James Forsyth, Minister, disposes his lands of Taylortoun to James Bruce of Garvel, his sister's son, in these terms, That he should change his name, and he and all the subsequent heirs of tailzie should take and assume the name and arms of Forsyth ; and if they failed, neglected, or delayed so to do, the contravener should amit and lose the benefit of the tailzie, and denude in favour of the next heir ; and then follows this clause, That it shall not be lawful to the said James Bruce, nor any of the subsequent heirs of tailzie, to do any act or deed whatsoever, that may frustrate or prejudice the tailzie or course of succession thereby settled ; and if they do in the contrary, the same shall be void and null, and reducible at the instance of the next apparent heir of tailzie that would have succeeded. These clauses are both in the procuratory and sasine ; and Garvel having succeeded thereon on his uncle's death, and being infest, he assumed the name and arms of Forsyth ; and after his decease, Rebecca, his daughter, is heir served to him, and all the foresaid clauses *ad longum* engrossed in her retour and sasine. Garvel having been tutor to Grizel Bruce, the heiress of Redheugh, she pursues him for count, reckoning, and payment of his intromissions and administration, and obtains a decret against him for £.15000 Scots of balance ; and now insists against Rebecca Forsyth, his daughter, and her husband, for payment on the passive titles, and as heir served to her father, the debtor, in these lands of Taylortoun. Alleged, Though I represent my father, yet it is always *sub modo et conditione*, as heir to him in a tailzied estate, whereby he is expressly bound up and prohibited to do any deed in prejudice of the tailzie ; but so it is, there cannot be a more prejudicial deed than by accepting a tutory, and thereby subjecting himself to a

debt, that may exhaust, evict, or burden the tailzied lands; and the prohibitory clauses being repeated in her service, it can never make her *passivè* liable for her father's debt, nor affect the lands, contrary to the express condition of the tailzie. Answered, The prohibitory clauses *de non alienando, et non contrahendo debitum*, with an irritant resolute clause, annulling both the deed and his right, do now, by the act of Parliament 1685, and the constant decisions of the Lords, militate against creditors; but this tailzie is not of that kind, for it contains only a prohibitory clause, to do any act or clause to frustrate or prejudge the tailzie or course of succession, and declares such deeds null; which import no more, but that Garvel is discharged to change the destination of the heirs, or to invert their order of succession, but nowise takes from him the disposal of the property, or his power of alienating or contracting debts; for such restraints being *contra naturam dominii*, our lawyers long doubted of the validity thereof; and the first time they were sustained was, in the case of the Viscount of Stormont against the Creditors of the Earl of Annandale, 26th February, 1662, No. 5. p. 13094.; and by Sir George Mackenzie, in his Pleadings, page 40. Replied, That a prohibition to frustrate or prejudge the tailzie, must in all sense and reason comprehend a discharge to contract debts; for there cannot be a more short effectual method to evacuate a tailzie, than by contracting debt; and it was superfluous and needless to insert the clause *nominatim*, seeing it is sufficiently implied in what is expressed, and it needed no other registration than that of the sasine, seeing it is nine years before the act of Parliament 1685, *Vid. supra*, the case between Sir Thomas Young and Bothwell of Glencorse, No. 79. p. 15482. Duplied, Her service, however qualified, must oblige her to her father's debt, *aditio hæreditatis*; being *actus legitimus qui nec diem recepit nec conditionem*; and these prohibitory clauses may have indeed the strength of an inhibition, to reduce any voluntary gratuitous deeds, as was found in the year 1687, betwixt the Earl of Callander and Lord John Hamilton, now Earl of Ruglen, No. 78. p. 15476. marked by Dirleton in his Doubts and Questions, page 198; but without an irritant clause annulling the fee, they can never prejudge lawful creditors. Law, for supplying and obviating persons' unfitness to business, invented interdictions, which were but temporary, till the party turned more provident, or at most lasted only during life; and so men having estates, and doubting if their posterity or successors will prove virtuous or frugal, fell upon this device, of clapping a perpetual interdiction on them by tailzies under irritant resolute clauses; but then these must be *in terminis juris et habili modo* done, they being *strictissimi interpretationis*, and not to be extended beyond their precise words. The Lords found the tailzie in this case did not effectually bind him up from contracting debts, and therefore found his daughter, as heir served to him, liable for his debts, and that this tailzie was not in the terms of those now settled by the act Parliament 1685; and that the clause imported no more but the discharging the altering and changing the order of succession, and all gratuitous deeds, and could go no further.

Fountainhall, v. 2. p. 357.