

No 2.
presumed to
have been ap-
plied in *utile-*
tatem ecclesiae.

the possessor had received money, as the defenders offered them to prove he had done by his acquittance; because the said money was presupposed to have been converted *in utilitatem ecclesiae*; and also refused to give them a day to call the successor, because the said Mr Archibald, pursuer, was successor, who was present at the bar, and so he should seek his warrant by way of exception, quia quæ de evictione tenet actio eundem ab agendo repellit exceptio.

Fol. Dic. v. 2. p. 346. Maitland, MS. p. 207.

1580. April 22.

LORD BOYD *against* ABBOT of KILWINNING.

No 3.
An abbot and
convent o-
bliged to war-
rant a feu
granted by
their prede-
cessors.

THE Lord Boyd pursued the Abbot of Kilwinning to warrant to him a feu, set to him by his predecessor Hamilton. It was *answered* by Hamilton, That he ought not to warrant the same, because he was in feu of the same lands set to him by another person, which was confirmed first; and according to the act of Parliament made at Stirling, the first confirmation makes the feu to be available and stand, albeit it be last set, and the other feu to be taken away by exception or reply. To this was *answered*, That notwithstanding of the act of Parliament, yet he ought to warrant his predecessor's deed, because he knew the first set to be set *aut saltem scire potuit*, because it was subscribed by the same Convent et sic predictus commendatarius videbatur commississe crimen stellionatus in locando et alienando eandem rem duabus diversis personis. To this was *answered*, That he ought not to warrant; for how should he be decerned to warrant the thing which was null of the law? For the first feu being declared null in itself of the law, there could no warrantice follow upon the same. THE LORDS pronounced *definitive* the Abbot to warrant the said feu, albeit it was null in itself, and taken away by the first confirmation.

Fol. Dic. v. 2. p. 346. Colvil, MS. p. 283.

A. *against* B.

No 4.

A PRELATE may oblige himself, and his successors, to warrant lands disposed by him *titulo oneroso*, with consent of the Convent or Chaptour.

Fol. Dic. v. 2. p. 346. Kerse, MS. fol. 9.

1662. February

VISCOUNT of STORMONTH *against* THE CREDITORS of ANNANDALE.

No 5.
A man may
be served heir
to the contra-
vener of the

BY a tailzie under the Great Seal, the Lordship of Scoon, upon the resignation of David Viscount of Stormonth, was resigned in favours of the said David and the heirs male of his body; which failing, to Mungo and the heirs male of

his body ; which failing, to Andrew Lord Balvaird, and the heirs male of his body ; which failing, to Sir William Murray of Clearmont, and the heirs male of his body ; which failing, to the nearest heirs male of the House of Balvaird ; upon this provision, That it should not be lawful to the said Mungo, nor any other person contained in the tailzie, or their heirs male, to violate or dissolve the said tailzie, or dispone or wadset the estate, or any part thereof, or to do any deed whereby the same may be evicted or comprised from them, without the special consent of all the persons contained in the tailzie, or their heirs, being of perfect age ; and if any of the said persons, or their heirs, should contravene the said provision, That they should loss their right and title to the said infestment, and of all the lands and others therein contained *ipso facto* ; and the said charter and infestment, with all right and title thereof, should be null and expire, and their right thereof should accresce and belong to the next heir of tailzie who is immediately provided to succeed failing the contravener. Whereupon the Viscount of Stormonth, who now is, being son and heir to Andrew, Lord Balvaird, having inteded action of declarator against the deceased Earl of Annandale, in his own time, as he who contravened the clause, and against his creditors, comprisers of the estate of Scoon upon debts owing by him, to hear and see it found, That the Earl had amitted his right, and consequently the creditors' bonds and comprisings were null ; and that it should be lawful to the pursuer to enter to the said lands as heir of tailzie to Mungo Viscount of Stormonth, or otherwise to the said Earl of Annandale, free from payment of his debt ; and that by a special service to the said lands only ;—it was *alleged*, 1mo, That clauses *de non alienando cum pacto de non contrahendo debitum*, in prejudice especially of a third party, a lawful creditor *bona fide* contracting, are noways sustainable in law and justice ; seeing the creditor is not obliged to know the qualifications and conditions of his debtor's infestments, unless public inhibition had been served ; 2do, The certification contained in the tailzie, annuls only the contravener's right, but not the right made to the party-creditor ; 3tio, It appoints in case of contravention, the estate to pertain to the next heir of tailzie of the contravener, and consequently the pursuer must be heir to the Earl of Annandale, and so liable to his debts and deeds. It was *answered*, That clauses *de non alienando* were not prohibited by the law ; and law reprobates no transactions unless prohibited ; Yea, clauses *de non alienando* are usual in many infestments granted by superiors to their vassals, which, if contravened, make the lands return to the superiors, without respect to deeds or debts done by the vassal ; and in all ward-holdings, *de jure est*, that the vassal may not dispone without the superior's consent, but in the cases excepted by law ; and therefore the condition *de non alienando* in this tailzie being *lex talziæ et feudi*, is real, and obligeth all that meddle with the debtor to know the condition and points of his infestments with whom he contracts ; and the interdiction mentioned in his right and infestment thereupon, is as public as any personal interdiction or

No 5.
irritancy in a
tailzie, with-
out danger of
his debt, as in
the case of a
party inter-
dicted.

No 5. inhibition whatsoever; *2do*, The clause appointing the contravener's right to be null, and the estate to belong to the next heir, cannot be interpreted *cum effectu*; that is, That the estate should pertain to him, *absque onere* of that which is the subject-matter of the contravention, else Annandale might have down-right broken the tailzie any ways he pleased, which is absurd. And it belongs to the next heir in respect of the real interdiction; just as if the estate of a person interdicted, belongs to his heir, notwithstanding of any personal published interdiction; *3tio*, And if the pursuer shall take the way to be served in special to this estate, as heir to the Earl of Annandale, he may lawfully do it. And the LORDS ought to declare, That it should be free of the payment of his debts and sums, just as he were to be retoured heir to any person, either simply interdicted, or partially interdicted from alienation of such a part of his estate; in which case, if the heir should be only served heir in special to that part, and with a declaration, That the heir intends not be heir to any other thing, he would reduce all bonds and deeds made by the person interdicted, so far as the same might affect that part of the estate.

The matter being at great length debated, from law, practise, and reason; THE LORDS repelled the allegances, and found that the pursuer should succeed to the estate free of Annandale's debts and burdens, whether he was heir of tailzie to Annandale or Stormonth, or to either of them, wherein he might take the most legal way as by advice he should think fit. See TAILZIE.

Fol. Dic. v. 2. p. 344. Gilmour, No 39. p. 28.

* * * Stair reports this case :

1662. February 22.—THE Viscount of Stormount pursues a declarator against the Heirs of line of umquhil James Earl of Annandale, and several creditors of the said umquhil Earl, who had apprised the Lordship of Skoon, and were infest thereupon; to hear and see it found and declared, that David Viscount of Stormount had disposed these lands to Mungo Viscount of Stormount, his brother, and the heirs male of his body; which failing, to Andrew Lord Balvaird, and the heirs male of his body, &c.; with this express provision in the charter, and repeated *verbatim* in the sasine, that it should not be leisom to the said Mungo, or any of the heirs of tailzie for the time, to alienate the lands, or alter the tailzie, or to do any deed, whereby the same may be evicted or apprised from the heirs of tailzie, otherwise their right should expire, and should belong to the next heir of the contravener; and that thereby James Earl of Annandale last infest had contravened the said clauses by contracting those debts, whereupon the lands were apprised, and thereby lost his right; and that the said creditors' bonds and their apprisings are thereby null and void; and likewise that the said James Earl of Annandale his retour was null, and that the pursuer might yet enter as heir to Mungo Viscount of Stormount, as if the said

James Earl of Annandale, had never been infeft. The defender *alleged, 1^{mo}*, No process in this order without a reduction, without which no infeftment can be taken away.

THE LORDS repelled this allegiance, and found that a declarator was as effectual as a reduction, when all was produced that was necessary to be produced before the ground of nullity were discussed, with which all the rest will fall in consequence; and that reduction was only necessary to force the defenders to produce by the certification; but if the defender would produce himself, he might proceed by way of declarator of nullity.

2do, The defender *alleged* no process, because by the conception of the clauses irritant, the right is declared to belong to the nearest heir of the contravener; and therefore the pursuer, as served heir-male-general to Andrew Lord Balvaird, hath no interest till he be served heir-male to James Earl of Annandale, the contravener, in which case he cannot quarrel his deeds or debts. The pursuer *answered*, That by heir here cannot be understood the heir actually served, but the person only that might be heir; for the pursuer insited in this same processes against the Earl of Annandale, when he was living, and could not have been then excluded because he was not his heir; and therefore, as is ordinary in all clauses in relation to heirs, which cannot be effectual, if heirs served be understood, their heirs appearing are understood; *verba sumenda sunt cum effectu*.

THE LORDS also repelled this defence.

3dly, The defenders *alleged* absolutor; because, first, clauses *de non alienando* are never understood to extend to necessary alienations, as for provision of the fiar's wife and children, for redemption of him from captivity, or any other accident, without his fault. *2dly*, Clauses *de non contrahendo debitum* are against commerce, and utterly rejected. *3dly*, Clauses irritant and resolute, albeit contained in the infeftment, are but personal obligations, and the ground of an action against the contravener; but if the contravener be denuded, they are not effectual against singular successors, especially creditors contracting *bona fide* with one standing infeft, before the matter became litigious by processes upon that clause, seeing no inhibition was used; *ita est*, these creditors had apprised and were infeft before any such processes upon this clause, or inhibition used, and no personal provision could transmit the right from Annandale to Stormont, upon contravening the clauses, nor could hinder the transmission thereof from Annandale, who had the only real right, to the creditors, by virtue of their apprisings and infeftments, which denuded Annandale of the real right, and which real right stands now only in the person of the creditors infeft; so that there can be no more in Stormont's person, but a personal provision; for the being within the body of the infeftment will not make this clause real, and to affect the right *quoad singulares successores*, more than the clause of warrandice in the infeftment, which without question reaches not singular successors; and albeit some provisions, in themselves personal, may affect sin-

No 5. gular successors, as the provision, that if two years run together the feu shall become void, or the clauses of reversion, or the inherent clauses or quality in ward-holding; but these become real by law and statute; for we have a particular act of Parliament anent reversions, to be effectual against singular successors, and another anent feus, *ob non solutum canonem*, and there is no other case that such provisions are real. The pursuer *answered* to the first, Albeit alienations do not comprehend judicial alienations by apprising in recognition, and are oft-times not extended to necessary alienations; yet here the clause bears expressly not to alienate, and also to do no deed whereby the laws may be evicted and apprised; without which the clauses *de non alienando* were utterly ineffectual; and repeats the same to the second. As to the third, albeit *de facto*, the real right be in the appriser's infestment, yet it is in them affected with that quality in the condition and bosom of it, that gives good ground, not only against the Earl of Annandale contravener, to annul his right, but also the apprisers in consequence, *quia resolutio jure dantis resolvitur jus accipientis*, especially in feudal rights, where *provisiones investituræ sunt leges feudi*, as all feudists agree, and therefore all such pactions and provisions are equivalent to law. *2do*, This clause of the infestment is not only resolutive, but also is an interdiction prohibiting the fiar for the time to alienate, or do any deed prejudicial without consent of such other persons of the tailzie as were majors for the time; and, therefore, though the pursuer should enter heir to Annandale, he might annul these rights, just as in the case of an heir of an interdicted person, who may annul all rights by his predecessors after the interdiction. The defenders *answered*, That as to this point, concerning the interdiction, it cannot be effectual, because by the act of Parliament all interdictions are appointed to be published, and to be registered in the registers of inhibitions, otherwise they are null; this interdiction is neither published nor registered in that register. The pursuer *answered*, It is also public, because it is not only in his infestment, at the great seal, but it is *verbatim* in the first sasine, and repeated in the Earl of Annandale's retour and sasine, so as that the creditors ought to have considered his condition when they lent him money, and known that he was infest, otherwise their mistake, though it might be alleged to be *bona fide*, yet if Annandale had never been infest, their *bona fides* would have wrought nothing; seeing therefore they did it on their peril, unless they knew he was infest, and they could not know he was infest by inspection of his sasine, or of the register, but they behoved to know this clause, which is *verbatim* in it.

THE LORDS did also repel this defence and duply, in respect of the reply and triply, and found the resolutive clause effectual against singular successors, especially considering it was so public and *verbatim* in the sasine, and that it was equivalent to an interdiction.

3dly, The defender further *alleged*, Absolvitor, because the pursuer had behaved himself as heir to the Earl of Annandale, by intromission with the mails and duties of the same lands.

REPRESENTATION.

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THE LORDS repelled this defence, because the pursuer having intented declarator against Annandale in his own life, they thought the provision was equivalent to an interdiction, which purged that passive title.

No 5.

Stair, v. I. p. 106.

1666. July 3.

FLEMING against FLEMING.

No 6.

DAME ELIZABETH FLEMING being executrix to her husband, and tutrix to her children, gave out the sum of 6000 merks to the Lord Cardross, and took a bond, bearing the same payable to herself in liferent, and to Malcolm and Andrew Flemings, and failing the one by decease, to the other. This bond, by a former interlocutor, was found not to be altogether a donation, but it satisfied the two bairns' portions *pro tanto*. Malcolm being now dead, Andrew, the survivor, claimed the sum by the substitution. Thereafter the children, as executors to Malcolm, claimed the same, on this ground, that this sum not being found a donation, but to be given in satisfaction of Andrew's portion, the tutor could not substitute any heir to Malcolm, but behoved to remain as it had been lent, as Malcolm's own means, in which case it would belong to his whole brethren and sisters, and not to Andrew only. Andrew *alleged*, That he being substitute by his mother, who had now right from the remanent children, she who had constituted this substitution could never quarrel the same. It was *answered* for the Mother, That she did not quarrel the substitution; but that albeit the substitution took place, Andrew was her substitute, and so was in the same condition as Malcolm, so that Malcolm's half behoved still to be taken away by compensation, in so far as she was creditor to Malcolm, as if Malcolm were alive. It was further *alleged* for Andrew, That in such a clause as this there was no fiar, and heir, but two conditional, or alternative fiars, viz. either of the children that survived; and therefore such clauses would never make the substitute heir to represent the defunct, and be liable to his debts.

Heir of provision in a bond liable only *in valore*.

THE LORDS found, that, by the clause of substitution, the person substitute was heir of provision, yet not so as to be liable to the person substitute his whole debt, but *quoad valorem* of what the substitute had obtained by the substitution; and therefore found the sums to belong to Andrew as heir substitute, and yet with the burden of the compensation, in the same case as was competent against Malcolm himself.

By which decision it follows, that the Mother's substitution to Malcolm was effectual, for which there is no reason, but the error was in the first concoction, for this sum should have been found a pure donation by the mother, not only in respect of her liferent reserved, which she past from, but in respect of the