1712. *June* 13.

The CREDITORS of the Deceased THOMAS CRAIG of Riccarton, *against* The CREDITORS of MR. ROBERT CRAIG, now of Riccarton.

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A tailzie with a clause prohibiting the members thereof to contract debt, and declaring debts contracted by them to be void and null for affecting the tailzied estate, but containing no irritancy of the contravener's right, found not to hinder the estate to be equally affected for debts contracted by one of the members of the tailzie, as for the debts of the maker thereof, according to their priority of diligence

In the ranking of Craig of Riccarton's creditors in order to a sale, a competition arose betwixt the creditors of Thomas Craig of Riccarton, and Mr. Robert, his brother's creditors. Thomas' creditors sought preference on this ground, that he by a tailzie in the year 1682 provided the lands to himself and the heirs-male of his own body, which failing to his brother Robert, and his heirs-male, and so on to three other brothers *successivè;* which all failing, to his own daughter, with this provision, that the said Robert and his brothers shall not have power nor liberty to contract debts, nor do any other deeds to prejudge the heirs-female, to be procreated of his body, of their succession to these lands; and it is declared all these deeds shall be void and null, and of no avail so as to affect these lands; which tailzie was perfected by a public infeftment, and they as creditors to him, have adjudged the estate, he being absolute unlimited fiar, whereas Robert was only a qualified fiar, by a prohibitory clause annulling his debts; and so his creditors can never compete with them, nor affect the tailzied estate, to the prejudice of Thomas, who made the tailzie. Alleged for Robert's creditors, that their author being in the full fee *pleno jure dominii*, the naked prohibitory clause contained in the tailzie, irritating the deeds, but not resolving and annulling his right of fee, can never debar his creditors, nor his free disposal; that being contrary to the nature of property, and as essential to the notion of dominion as light is to the sun, a natural efflux from its very definition; seeing no man can provide *ne leges in suo testamento locum habeant*, for which Joannes à Sande gives excellent reasons, in his Tractate, *De prohibita rerum alienatione*, *Cap.* 4, and which is likewise clear from that famous and elegant text, *L.* 38. § 4. *D. De Legat. III.* where there being a prohibitory clause, it is queried, If the disponer's heir could alienate contrary to the terms of the clause? And Scævola answers prettily, Cum hoc nudum preceptum sit nihil proponi quominus ad hæredes extraneos pertinerent: So that if there be not a cause adjected, nor a particular person named in the prohibition, who is empowered to vindicate or pursue the transgression when committed, it stands in the terms of a *nudum præceptum*, ineffectual to produce an action; whereas, if it bear a cause and a special person, then it is a *præceptum vestitum*, like our irritant resolutive clauses annulling the contravener's fee; but here there is nothing but a simple prohibitory clause annulling the deeds only, but nowise declaring that the contravener shall lose his right of property; nor a person in favours of whom the prohibition is made, who upon the transgression may claim the property: So the prohibition is ineffectual in law. 2*do*, The heirs female, in favours of whom this prohibition is made, are not the immediate heirs of tailzie after Robert; but his brothers yet on life are interposed; so Thomas' daughter has no interest to quarrel it till they shall actually succeed, which may never be, there being sundry

classes of heirs before them; and therefore Robert's creditors must be preferred, ay until the daughters, in whose favours the prohibition is made, come to succeed, which case may never exist. Answered, All this reasoning is very specious; but on a narrow examination, will be found destitute of any solid foundation, and eversive of the principles of law. Puffendorf and others define property to be, Quo alicujus rei substantia ita ad aliquem pertinet ut eodem modo in solidum non pertineat ad ullum alium hominem: Others call it jus de re corporali disponendi nisi quis jure prohibeatur: So that law may lay restraint on property, and so may it also per magistratum, testamentum vel pactum; which proves that proprietors may by tailzies be so restricted that they cannot alienate. Accidit aliquando ut qui Dominus rei sit alienare tamen non possit; as in pupils, minors, prodigals, interdicted and inhibited persons. Now, this prohibitory clause is precisely of the nature of an interdiction, and is sufficiently published by its being inserted in the charter and sasine, both which are registrated; but there was nothing to hinder Thomas to adject what conditions he pleased to his tailzie, he being absolute fiar et rei suæ moderator et arbiter; and by the laws of the Twelve Tables, uti pater familias rei suæ legassit ita jus esto: So that the power of disposal of his heirs of tailzie being restricted by him, it does not subvert dominion, being *inter naturalia*; and it is an undoubted principle in law, qui vult consequens vult etiam antecedens. He who named his slave to be his heir, or his children's tutor, was presumed to manumit him, seeing without his liberty he was incapable of either. He who constitutes a servitude *aquæ ducendæ* on his ground is understood etiam *iter dedisse*, L. 37. D. De. servitut. præd. rust.; so Thomas the maker of this tailzie having so anxiously provided against his brethren's contracting debts, to carry away the property, he must be understood to have intended all that was necessary to effectuate this prohibition, and consequently the simple not expressing of the heirs of tailzie irritating their fee cannot invalidate nor disappoint his will so express to preserve the estate in the family; and thus do the Roman lawyers argue in the case of their *fideicommissa*, which run parallel with our tailzies; and Sande, cited by the contrary party, makes against him; for he says, ex alienatione contra prohibitionem facta non transfertur dominium; and the learned Huber in his *Disputationes Fundamentales* goes the same way; to which we may add the memorable decision recorded by President Newton, Riddoch against Drummond, No. 7. p. 14000. *voce* REPRESENTATION. As to the *second*, a remoter heir of tailzie has a plain interest to impugn the contraventions of anterior branches of the tailzie, and may inhibit, else their right were elusory. Replied, That Thomas' design is most apparent not to annul his brothers' fee, if they should contract debts; for when he comes to the third class of the daughters, he does not content himself with a bare prohibitory clause, but adjects an irritancy of their fee; which evinces, that in his brothers' case it has been industriously omitted, being under view, expressed in the one, and not in the other; for casus omissus habetur pro omisso; and at most, non fecit quod potuit; but fecit id quod non potuit jure facere; and by the decision of Stormont's creditors, No. 5. p. 13094. and the act of Parliament

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No. 81. about tailzies in the year 1685, it is plain nothing excludes creditors but an irritant clause; and so the Lords lately found, 11th March, 1707, Grizel Bruce against Bruce, alias Forsyth of Garvel, No. 80. p. 15489. that the prohibitory clause without an irritancy of the heir of tailzie's own right was not sufficient to reduce the debts contracted; and however the *dominium supereminens* in the Legislative power may limit, diminish, and restrain property, yet private persons by their pactions and entails cannot assume the same power; so that however a person may prohibit his heir of tailzie to alienate or contract debts, yet unless he also declare, that upon the transgression, the heir of tailzie's right of property shall become void and null, the prohibition is ineffectual, albeit it is expressly declared, that all deeds done contrary to the prohibition are null, and cannot affect the estate. The Lords were generally clear, that Robert had right to the rents during his life, and consequently his creditors, and that the irrritancy took effect at his death: Others thought that the daughters had no title to quarrel, till they actually succeeded: But the Lords by plurality found, that in regard the tailzie contained no irritancy of the contravener's own right, by alienation or contracting of debts; therefore Mr. Robert Craig of Riccarton's debts did equally affect the estate of Riccarton with the debts of Thomas his predecessor, according to the priority of their diligence.

Fol. Dic. v. 2. p. 432. Fountainhall, v. 2. p. 737.

*** Forbes reports this case:

The deceased Thomas Craig of Riccarton tailzied his estate 2d August 1681, to himself and the heirs-male of his body; which failing, to Robert Craig his brother, and the heirs-male of his body; which failing, to his other brethren *successive*, and the heirs-male of their bodies; which failing, to the said Thomas' eldest daughter without division; and so forth to his other daughters, and his nearest lawful heirs and assignees whatsoever; with a prohibition to Robert Craig, and his other three brethren and the heirs-male of their bodies, to contract debt, or do other deeds in prejudice of the foresaid heirs-female; declaring all such debts or deeds to be void, and of no avail for effecting the estate, or their persons, when succeeding thereto. Upon the procuratory of resignation in the tailzie, resignation was made in the sovereign's hands *anno* 1684, and a charter and sasine in the terms aforesaid expede. Mr. Robert Craig, who was served and retoured heir of tailzie to his brother Thomas in the year 1691, having contracted much debt, there arose a competition betwixt his creditors, and the creditors of Thomas Craig, who alleged, that the debts contracted by Mr. Robert contra leges talliae, could not effect the tailzied estate in prejudice of them: The prohibition to contract debt being in effect *a fidei commissum* in their favours, the transgression thereof is a null deed, and the nullity pleadable by those who have good interest, as anterior creditors to the maker of the tailzie. For such conditions or prohibitions annexed to contracts irritate the facts

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of contravention in so much, that ex alienatione contra prohibitionem conventionalem facta, non transfertur rei dominium, Ann. Robert. Rer. Judic. Lib. 3. C. 14. Sande de prohibita rerum alien. part. 3. Cap. 4. Par. 4. Cap. 2. § 19. Huber Disput. Fundam. 5. ad Tit. Quib. Alien. Lic. vel non § 14. And as a testamentary prohibition hath this effect; so our tailzies are of a testamentary nature, being designationes successorum, et justa voluntas de eo quod quis post mortem suam fieri velit. Now the conveyance Thomas Craig made of his estate to his brethren, being sub modo et conditione, there can be no question of his will and intention, which is the grand rule of all deeds of a testamentary nature: And he being absolute and unlimited proprietor, there was nothing to hinder him to give what laws to his own he thought fit.

Answered for the creditors of Mr. Robert Craig: The prohibition to contract debt, cannot be effectual against them; their debtor's right being affected with no clause irritant or resolutive upon his contravention by contracting debts, but only the debts so contracted declared void and null, 11th March 1707, Lady Riddoch *contra* Rebecca Bruce, No. 80. p. 15489 . and in the case of the tailzie of Anandale in the year 1662, No. 5. p. 13094. the clause irritating the fee in the person of the heir of tailzie contracting, was the sole ground sustained for evacuating the creditors' rights. The act of Parliament 1685, doth further clear that our law hath always required irritant and resolutive clauses to evacuate a right of property. It implies a contradiction, that Mr. Robert Craig should be absolute fiar and *dominus*, without the exercise of *dominium*, which is as inseparable from it, as heat or light is from the sun. Nemo facere potest ne leges in suo testamento non habeant locum, whereof Sande De Prohib. Rer. Alien. doth elegantly set forth the reason. *Vide* also to this purpose, L. 38. § 4. D. De Legat. 3. where such a prohibition without naming the person in whose favours made, is called *nudum præceptum*, in opposition to *præceptum vestitum*. Persons may indeed effectually adject lawful qualities to their alienations, such as, that the receiver contravening shall forfeit and fall from his right: But Thomas Craig, the disponer, hoc non voluit, quamvis potuit, but, voluit quod non potuit; he hath adjected qualities to his disposition, authorised by no law, and inconsistent with property. For seeing Robert doth not lose the fee, the next member of the tailzie could not come to the estate, without serving heir to him, and thereby behoved to acknowledge his deeds, notwithstanding the prohibitory clause, Sande Ibid. Cap. 9. § 32. L. 149. D. De. Reg. Jur. L. 11. C. De. divers. et temp. præscr. L. 7. C. De liberali causa.

Replied for the creditors of Thomas Craig: It is not inconsistent for a person to be proprietor, and yet restrained in the exercise of his property, so as not to be capable to alienate; there being a multitude of instances both in the civil, feudal, and our own laws, of property so restrained, as that the proprietor cannot alienate, and yet remains proprietor. Lawyers go into the distinction of *Dominium plenum*, and *diminutum*, or *limitatum*, that the free power of disposing is only the effect of the one, and not of the other. Is it not so in the case of a minor, and of a *pra-*

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Duplied for the creditors of Mr. Robert Craig : By the old civil law, the contravention of such prohibitions produced not *actionem in rem*, or *rei vindicationem*, against the person to whom the subject was disponed, but only an extraordinary prosecution against the fiduciary or contravener; upon which account fiduciary heirs under such prohibitions, were obliged to find caution, that the subject should remain with the heir-substitute, L. 67. § 5. D. De Leg. 2.; and when by the law of the Codex, L. 1. 2. C. Commun. de Legat. Rei Vindicatio was introduced to fidei-commissary heirs, the fiduciary heirs fell from their right of consequence, but never had *hæres fidei-commissarius* any right to the subject at the same time, while *hæres fiduciarius* remained proprietor : If the practice of other countries were to be looked into in this matter, many instances might be found coming nearer to our law, than the foreign authorities adduced for the other party, as appears from the seventeenth pleading of Mr. Le Maistre, Advocate to the King of France, Paris Edit. 1688. No doubt positive law can restrict and qualify the natural course of things, as in the case of minors, furious persons, &c.; but where positive law is silent, as in the case of simple prohibitions upon the full proprietor, the rules of the natural law must take place, which private persons have not power at their own hand to invert or contradict. The decision betwixt Riddoch and the Drummonds, No. 7. p. 14000. *voce* REPRESENTATION, is far from the case of a simple prohibition, a bond there being declared payable only with consent of the therein substitute; whereas a simple prohibition infers only an obligation among the heirs themselves. No. 81.

The Lords found, That in respect the tailzie contains no irritancy of the right of the contravener, by alienation or contracting debts; therefore Robert Craig of Riccarton's debts do equally affect the estate of Riccarton with the debts of his predecessors, according to their priority of diligence; for the Lords thought the power of disposing to be such a natural effect and consequence of property, that no authority less than the Legislative, could divest a proprietor thereof. And if the prohibition upon an heir of tailzie be not fenced with a resolutive clause, irritating the contravener's right of property, the next heir of tailzie must be liable to, at least, all his predecessor's debts and deeds. Yea, as a man cannot provide, that his heir should not be liable for his onerous debts; so neither can he provide, that his heir's heir should be free of his heir's debts; whence resolutive clauses took their rise as a necessary expedient to make prohibitions *de non contrahendo debitum* effectual; and generally tailzies provide, That the heir contravening shall lose his right, and the next heir shall enter to the heir last infeft before the contravener, as if the contravener were naturally dead.

Forbes, p. 622.