

No. 121. Sir Alexander, the father, from whom the estate was derived, and who imposed the conditions upon his son. Whereas the question is here only concerning a naked bond of tailzie, without infestment, altered by the maker of the tailzie without consent of the first institute. *3tio*, It is plain that the first tailzie was young Sir William's voluntary free deed, without any payment of money, paction, or mutual tailzie. Sir William's providing, that the heirs of entail should tailzie their estates to the heirs-male, and do no deed to evacuate the same, was not the onerous cause of his tailzie, no not so much as the motive thereof, but only a condition adjected to his own voluntary deed, which qualified it upon the acceptor's part.

The Lords found, That there being no antecedent onerous cause made or done to Sir William Scot, younger, of Harden, for making the former tailzie of his estate, especially in favours of heirs to be begotten and born, and that seeing the said former tailzie did remain in the terms of a personal right, without being perfected by charter and sasine, it is revocable by Sir William, the maker thereof, with consent of Sir William, his father, the first institute, and is actually revoked by them conform to the revocation in process; and therefore assoilzied from the reduction of the second tailzie.

*Forbes, p. 685.*

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1715. July 15.

MRS. MARGARET SCHAW, Daughter to the deceased Sir John Schaw of Greenock, and JOHN HOUSTON, younger, of that ilk, her Husband, for his Interest, *against* SIR JOHN SCHAW of Greenock, her Brother.

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Irritancies, and a clause not to alter contained in a contract of marriage, found binding on the maker of a tailzie, although this was insisted for at the instance of a gratuitous institute.

The deceased Sir John Schaw of Greenock, father to the present Sir John, had put his son in fee of the lands and barony of Greenock, by charter and infestment following thereupon, *in anno* 1686; and, in 1700, in a contract of marriage betwixt this Sir John and his present Lady, both father and son, for their several rights to their said lands, make a tailzie of the estate, in favours of the said Sir John, younger, and the heirs-male of his body; which failing, to his younger brothers *nominatim* then alive *successivè*, and the heirs-male of their bodies; which failing, to the other heirs-male of the said Sir John the father's body; which failing, to the said Mrs. Margaret Schaw *nominatim*; and that under prohibitory and irritant clauses *de non alienando et non contrahendo debitum*, but with this exception, that it should be leisom and lawful to the father and the son jointly to alter the succession.

Sir John's whole younger brothers being deceased, without issue of their bodies, the said Mrs. Margaret Schaw, as standing next in the tailzie, pursued an exhibition of the contract, that it might be recorded in the books of Session for preservation; "and accordingly the Lords ordained the principal contract to be exhibited by their interlocutor on the 25th day of January last, but reserving all

defences against registration, or any other legal effect, as accords." Which decision stands marked in the Collection of that Session, No. 12. p. 15266. In obedience thereto, Sir John did exhibit one of the principal sides of the contract; whereupon he was allowed to repeat his defences against the registration of the said principal; which he did, by repeating an executed summons of declarator at his instance, concluding, that he, by the charter *in anno* 1686, being the original and unlimited fiar, and maker of the tailzie, the foresaid contract could not qualify the fee of the said estate in his person; and therefore, that he had right to alter the succession at his pleasure, and that the pursuer had no manner of interest to call for exhibition, far less to oblige him to register the contract.

And here it was alleged for Sir John: That this contract not being completed by charter and sasine, and still but in the terms of a personal obligation, was not to be reckoned a delivered evident *quoad* the pursuer Mrs. Houston; because, that though a contract of marriage be onerous *quoad* the interest of the contracters, yet it is most gratuitous as far as concerns the substituted heirs not descended of the marriage. And, as Dirleton says, p. 86. and Sir James Stewart, in his Notes on him, p. 145. "Heirs of the marriage are in obligations, but the substitutes in destination only;" so that here is indeed no question about delivery, in so far as concerns the wife and children of the marriage; but as to the pursuer, and all others, the contract is to be held undelivered; since, in mutual contracts, the principal parties may cancel the writ, at their pleasure, as to third parties concerned. *2do*, As to its being registered in the record of tailzies, though this has effect against creditors, in the case of infeftment following on it, yet the registration of a bond of tailzie, which in itself is incomplete, imports nothing as to the delivery, because the principal is given back to the presenter. Besides, that the registration of a bond of tailzie seems to require a written procuratory, (it being a great restriction upon property), which this has not, but only bears a bill prefixed, and signed by an advocate; but nothing ever followed upon this tailzie, either by resignation, infeftment, or possession, either in the father's life-time or since; nor was there ever any deed of homologation to validate the registration.

Answered for the pursuer: That the contract is mutual, whereof there are two doubles signed and interchanged; the most effectual delivery that can be of any evident. And when this is done, there is no *locus pœnitentiæ* to resilie or retire the writ; yea, the marriage followed, in implement; so that, though it had not been recorded in the register of tailzies, it was a delivered evident, and differs far from a bond of tailzie granted only by one person, lying by him, or in that manner that he could easily, with consent of another person, retire and destroy it; which indeed was the case of Lindoires and Innernity. Nor in this point can the distinction hold betwixt that part of the contract that concerned the prestations regarding the marriage and other parts of it; because, as to delivery, and being out of the granter's power to retire, it is *unicum instrumentum indivisibile*, and could not be a delivered evident in part, and in part not. The act of delivery is *facti*, and so indivisible in its nature; the interchanging of a mutual contract

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must make it a delivered evident as to all its contents. And as to the citation from Dirleton, it does not concern the present question; for his position only takes place in contracts of marriage, bearing only a simple obligation, without irritancies; but wherever these occur, the whole persons substituted are in obligation as well as the marriage. And as to the recording in the tailzie-register, it is sufficient that it was done upon a supplication given in, in name both of the father and son, and subscribed by an advocate. But, be it as it will, it is enough for the pursuer's purpose that, *1mo*, It is registered by order of the Lords; *2do*, That the act of Parliament requires no special warrant from parties; *3tio*, There is no part of jurisdiction here, it being recorded, not for execution, but *ad futuram rei memoriam*; so that this being a register of probative writs, there seems no special mandate requisite, more than for putting writs in the other register of probative writs; *4to*, It was given in to the proper officer, the clerk of that register.

It was further urged for the defender, That granting it to have been a delivered evident, yet no prohibitory or irritant clauses in the contract can qualify the defender's fee, which was established in his person before the contract, or afford any title to the pursuer to crave registration, since the defender is the maker of the tailzie, and so can unmake it at his pleasure; because, *1mo*, The defender being in the fee, the power of disposal follows *ex jure dominii*, whereby *unusquisque est rei suae moderator et arbiter*, which is the character of property; for though the right of an heir of tailzie which is qualified, and *sub modo* may in certain events resolve, yet the defender's fee being originally simple and unlimited, it cannot be subject to any limitation in his person, more especially by a personal right not completed by charter and sasine; *2do*, This effect of property is *juris publici cui pactis privatorum non derogatur*; nobody can assume to himself the state of a minor, a prodigal, or furious person, for whom the law has provided special privileges; and the methods of restraining and enlarging such persons are settled by law, and peculiar forms and methods introduced for both, which must be punctually observed. Why all these niceties in law to disable a person to dispose on his property, if a simple bond were of itself sufficient? *3tio*, A bond of tailzie cannot derogate from the power of disposal in the maker, because, it obliges him to resign in favours of himself and his heirs of tailzie, and therefore *quoad* himself he is both debtor and creditor in the whole obligations in the bond, which obligations as to him are null; *4to*, Neither is the tailzie more obligatory upon the maker, in favours of the heirs of tailzie, because he is the first fiar himself, and their succession depends on him, whom they must represent and fulfil his deeds, and are not his creditors, but his creatures, and are to receive the succession qualified as he gives it; *5to*, The act of Parliament 1685, provides only to secure the succession against deeds of heirs of entail, but leaves the case of the maker of the tailzie absolutely free; because the tailzie is made in his favours for preservation of his family, and *cullibet licet juri pro se introducto renunciare*; *6to*, The tailzie of Harden was determined in much a straiter case than the defender's; for it was registrated by an express written warrant, and inhibition raised on it; yea, by the first tailzie,

Sir William the son being the fiar, was obliged to resign in favours of himself in life-rent, and his father in fee, with prohibitory and irritant clauses upon both; yet, because the father was the first fiar, and so the irritancies could not take place in him; therefore the Lords found the second tailzie made by the son with his consent, was good. See No. 121. p. 15569.

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Answered for the pursuer: That this being a complete contract, and having the force of a delivered evident, there was no distinction as to the granter, whether the same was completed by charter and sasine, seeing the power to alter did not lie in this, that it was still but a personal obligation, but that it arose from the nature of the thing; for whatever the charter and sasine could do, the personal obligation not to alter had the same effect against the granter, to oblige him to fulfil, since in both cases the granter is still fiar, and therefore may still dispose, unless otherwise bound up; so that the point does not lie in this; and therefore, *2do*, Only let it be supposed, (which is already proved) that the evident was delivered or holden as such; and then whether it was completed by charter and sasine or not, there can no reason be given why one may not tie up himself in relation to succession, as well as voluntarily take himself to a life-rent; for *ex eo quod unusquisque est rei suæ moderator et arbiter*, it follows that he may dispose on his property as he pleases, and tie up himself in relation to it, even *ex causa lucrativa*; this is the foundation upon which all donations are grounded, these at first being free *et voluntatis*, but afterwards upon the intervention of legal and effectual rights, they become *necessitatis*, and infer a tie unalterable. Thus, in the common law, § 3. Inst. De donat. it is expressed in as many words: Nor was it ever heard with us, that a free donation could be altered by a second; nor as to these is there any difference here, whether they be *pure*, or only to take effect *post tempus*, or *conditionally*, which is the present case; and to this prerogative of property pleaded by the defender, may very well be opposed a much more sacred rule in L. 1. D. De pact. nihil tam congruum fidei humanæ, quam ea quæ inter eos placuerunt servare; and as the Roman niceties about *pacta de hæreditate viventis*, and *pacta nuda*, were never received with us, so there is nothing to hinder a paction whereby a man ties up himself not to alter a succession, from being binding even according to the common law, L. 35. § 5. C. De Donat.; to which agrees the now universally received rule in the canon law, *omne verbum de ore fidei cadit in debitum*; and as to the pretences, that he becomes thus both debtor and creditor, and that the substitutes are not creditors; this proceeds upon a mistake, since here there is plainly *à jus quæritum* to the successors designed, and that whether *nati* or *nascituri*; so that every substitute is truly a creditor, else the obligation were elusory; and this must hold more strongly in the present case, where the pursuer is *nominatim* substitute. As to the act 1685, *1mo*, It was only declaratory of what was law, but does not determine the case in hand; *2do*, The declaring it lawful to impose conditions on heirs, does not say that they cannot impose them on themselves, for that was the subject of the law, yea was not doubted; for it was more doubtful, if persons could impose conditions on their heirs, because it fell out at a time when

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There were also adduced for the pursuer two decisions, the first upon 3d February, 1674, Drummond against Drummond, No. 5. p. 4306. where a person having taken a bond payable to himself and the heirs of his body, which failing, to his father, which failing to a third party, and obliging himself to do no deed prejudicial to the tailzie, and that the debtor should not pay without consent of the said third party, notwithstanding the first creditor having exacted the debt, the third party's assignee pursued a declarator of the irritancy of payment ; and the Lords found, that by the conception of this bond, payment made by the debtor, without consent of the heir of tailzie, was not warrantable ; and if this hold in substitutions of sums of money, much more will it hold in lands, where parties have regard to their families.

Answered for the defender : That here the original bond was qualified, being the price of land sold with consent of the substitute, who thereby appeared to have an interest in the cause, and the debtor was also bound up as to the payment.

The other decision adduced for the pursuer, was 28th January, 1668, Binning against Binning, No. 3. p. 4304. where an heiress having obliged herself to enter heir to her father, and resign her lands in favours of herself and the heirs of her own body, which failing to the heirs of her father ; and obliged herself to do nothing contrary to that succession ; she afterwards married, and in the contract disposed these lands to her husband *nomine dotis* ; but before this contract, she stood inhibited at the instance of her father's son of a second marriage ; whereupon she being charged to fulfil the bond, in discussing the reasons of suspension ; the Lords found the letters orderly proceeded, till she entered and resigned conform to the bond ; and by the words of the interlocutor, it appears, that the *ratio decidendi* was founded in her obligation not to alter.

Answered for the pursuer : That in that case the lands were to descend to the daughter as heir of line or of provision to her father, who might have qualified her succession as he pleased, and he did the equivalent by taking her bond, which on the matter did qualify her right, and so that bond was onerous.

The pursuer further alleged, That the succession in the charter 1686 is provided, failing the male-issue, to the resigner's eldest heir-female, which failing to the eldest heir-female of his father the defender's grandfather's body, which is a demonstration, that by heir-female of the resigner's body, was not meant the son's daughter, or otherwise this clause would be an absurd tautology ; so that this may be said to be the father's deed, at least his intention from the beginning.

Answered for the defender : That there was no tautology in the substitution, because the defender's grandfather had five daughters, who, failing the heirs-female of the last Sir John's body, would have been called to the succession by that substitution, because they were heirs-female of the grandfather's body, and not of the father's ; for the heirs-female of the defender's body were certainly the heirs-female of his father's, grandfather's, and all his predecessors' bodies ; and it was upon that consideration that the heirs-female of his father's body being called to the succession, there was no need of mentioning the heirs-female of the defender's body, because that branch comprehended both his and his father's daughters ; but to comprehend the grandfather's daughters, there was a necessity to go higher.

There were several other allegiances proponed for the pursuer, and answers for the defender, anent the onerosity of the contract ; but these not having influenced the final decision in the cause, shall be here past over. Only it is to be remarked, that the Lords, upon the 22d February, 1715, after consideration of the papers given in, and having heard the lawyers in presence, did find the irritancies in the contract of marriage did not affect the defender Sir John Shaw, who made the tailzie, and therefore declared in so far as concerned the lands in the charter and infestment in the year 1686, to which he had right before the contract and tailzie ; but a reclaiming bill being given in by Mrs. Houston upon the 25th thereafter, and answers for Sir John, the further consideration of the clause was delayed till the summer session.

And then it was further alleged for the defender, That the pursuer admits that gratuitous bonds of tailzie, unless clogged with prohibitory and irritant clauses, are revocable by the maker : But so it is, that an obligation not to alter, is of no greater force than an obligation to resign ; for if these words, " I bind and oblige me to resign," be revokable, for what reason can these additional words, " I bind and oblige me not to alter," make the former obligation more binding and effectual, since the second is at best but an accessory obligation to the first ?

Answered for the pursuer : That she never admitted such a position : What she advances is, That a person having obliged himself to resign in his own favours and several substitutes, without a clause prohibitory, stands bound, and has implemented his obligation, when he has actually resigned, and can change, not the obligation, (for by implementing, it becomes extinct) but his destination of succession, in virtue of his absolute and unlimited fee ; and if he refuse to implement, it is not because the substitutes have not right to compel him to it, that in this case they would intent no action, but because when he had implemented it, he could alter ; and this distinction wants not its own use ; for if the resigner was rendered incapable to alter by infirmity or sickness, the right will stand good in favours of the substitutes ; but if the clause not to alter be adjected, the freedom the granter had is now tied up ; and though the obligation to resign be not more binding than it was before that adjection, yet it becomes now of more use to the substitutes ; neither is the adjection accessory, but a new addition to the former obligation.

No 122. and ad actionem proficit, unde renovatus videtur contractus, as L. 7. § 6. D. De Pact, expresses it, it being the natural consequence of a *factum adjectum* to reform an obligation.

The defender further alleged, That by the civil law no man could be bound up from the free disposal of his estate by any paction or obligation, though a contract of marriage; and though our custom has receded from it as to onerous contracts of tailzie, yet as to all other effects that law yet takes place with us as to tailzies. Now, by the civil law, *institutio hæredis est ambulatoria usque ad supremum vitæ halitum*, and no engagement not to alter, is of any effect by the Roman law; nor can it be denied, that our tailzies are of the nature of testaments by that law, a testament being *voluntatis nostræ justa sententia de eo quod quis post mortem suam fieri velit*; and therefore tailzies are as ambulatory as testaments were by the Roman law, and as testaments concerning moveables are by ours.

Answered for the pursuer: That it is the first time that the authority of the Roman law was pleaded at our Bar in this point, for it is certain, that as to heritage, we have not so much as the name of a testament; and even in the subject where we use them, Lord Stair says, page 502. (524) Inst. That the power of testing may be restricted by paction, as it is actually restricted by law; and it were a strange thing with us now-a-days, to receive the subtle law of the Romans, which depended upon a long train of niceties special to that people, and neglect what they in concert with all nations reckon sacred, that is, paction and agreement. In fine, our successions imitate *donationem mortis causa*, which is certainly of its nature revocable, but by adjection not to alter, transit in *donationem inter vivos*, which is irrevocable.

It was further urged for the pursuer, that as the opinions of all our lawyers favour her claim, so particularly Sir Thomas Hope in his little book, *voce Tailzies*, says, that if there be a clause not to alter, the party honoured may use inhibition.

Answered for the defender, that there the heir (according to Hope) is indeed burdened with the prohibitory clause, because he succeeds to a qualified fee; but he is far from saying, that the maker himself cannot alter. And of the same opinion are Dirleton and Sir James Stewart.

Replied for the pursuer, that though Hope mentions the case, as a restraint upon the heirs, which was the most usual; yet it is plain by saying in the general (that in this case the tailzie must not be broken) and allowing inhibition to be good upon it, he plainly establishes what is asserted. And conform to him, Sir George Mackenzie, in his Manuscript of tailzies, *voce Inhibition*, does likewise distinguish betwixt a naked destination, where he says inhibition can have no effect, and an inhibition raised upon an obligation to alter, which he says makes all deeds done to the contrary reducible.

Lastly, it was alleged for the pursuer, that though he the son were the fiar, yet it plainly appearing that this was not a simple deed of his *ex proprio motu*, but an agreement betwixt father and son, and whereon the father was made to rely as the settlement of his family; it becomes so much the more strictly binding upon

the son ; for upon the matter here, there was a contract of tailzie betwixt the father and son, and transfused into this contract of marriage, where the father must be understood to stipulate in favours of his own daughter *nominatim* ; and this is evident, since it is expressly provided that there should be no alteration, except in the case, that the father and the son during their joint lifetimes, and with mutual consent, did alter.

Answered for the defender, that the suppositions were only the pursuer's notions, without any foundation in law. For it has been sufficiently cleared, that the ordinary stile of contracts contains substitutions, in such manner as the parties please ; but none of these disables the fiar to alter, order, and direct what concerns the substitutes at his pleasure. *2do*, Though such a contract had been betwixt the father and the son ; yet it would be of the nature of an interdiction, which the law allows not.

The Lords found the irritancies and clause not to alter, contained in the contract of marriage, are binding on Sir John Shaw who made the tailzie, even supposing the pursuer were a gratuitous substitute ; and assoilzied Houston and his Lady from the declarator, and ordamed the contract to be registrated.

For Sir John Shaw, *Hew Dalrymple, Graham, &c.*  
 Alt. *Sir Walter Pringle & Colin Mackenzie.* Clerk, *Mackenzie.*

*Fol. Dic. v. 2. p. 430. Bruce, No. 119. p. 149.*

1771. *January 25. & August 2.*

ALEXANDER GORDON of Culvenan, and JEAN MACCULLOCH, Elder Daughter of John Macculloch, Elder of Barholm, *against* JAMES DEWAR of Vogrie, JOHN MACCULLOCH Elder, and JOHN MACCULLOCH Younger, of Barholm.

John Macculloch of Barholm, in 1742, executed a very strict and strange settlement and entail of his estate : He was succeeded by his grandson the defender ; who being advised to challenge the settlement on account of its irrational and absurd conditions, for that purpose concerted matters with his sister Isobel, and William Gordon of Greenlaw her husband ; Isobel, failing issue of his body, being the next heir of entail.

In the year 1751 an agreement was accordingly entered into ; by which John Macculloch the heir, for himself, and as administrator in law for his children, on the one part, and Isobel and William Gordon her husband, as administrator for his children, on the other part, covenanted and agreed, under certain condition, specified in the contract, that Isobel and her husband should not oppose the intended reduction of old Barholm's settlement ; and it was one of the conditions agreed on, that John Macculloch, in the event of his prevailing in the reduction, should execute a new entail of the estate, with a substitution in favour of his own issue and their heirs ; failing of whom, Isobel and her heirs, according to their degree of relationship, were to be next called to the succession.

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The proprietor of an estate having duly executed an entail in his own favour as liferenter, and to his son the institute as fiar, with a substitution of heirs ; and the deed having been recorded, and an investiture expedited thereon—the said liferenter and fiar cannot, by their joint