

No. 82.

1734. *July 11.* MR. JAMES BAILLIE *against* CARMICHAEL of Mautsley.

A tailzie recorded in the register of tailzies, contains the following clause ; “ And it is hereby provided, That my heirs of tailzie above designed shall not sell, dispone, or alienate my said lands or estate in whole or in part, nor shall they contract or take on debts or sums of money, nor do no other deeds whatsoever in prejudice of the foresaid tailzie, or whereby my lands or estate, or any part thereof, may be evicted, or that may prejudge the next heir in his succession, otherwise it is hereby specially provided, That the contravener shall amit and lose his right to my lands and estate, and it shall be leison to the next heir to serve himself heir of tailzie, and to obtain himself infest sicklike as if the contravener were naturally dead.” A personal creditor to one of the heirs of entail, insisting for payment against the next substitute after his debtor’s death, it was objected, That the tailzie contained a forfeiture upon the contracting of debt, and if the debtor was forfeited, the creditor could not have access to the estate. It was answered, That the forfeiture of the heir’s right does not necessarily imply a forfeiture of the debt ; and therefore, because tailzies are strictly to be interpreted, there behoved to be a special provision to that effect. For instance, where it is provided by a tailzie, under the penalty of forfeiture, that the heir shall use a certain surname and arms, a forfeiture upon this clause to be sure could not disappoint anterior debts lawfully contracted ; and it is probable that the maker of the entail was satisfied with this penalty of forfeiture, as a sufficient check against their contracting of debt, not willing to go the whole length of forfeiting also the debt. It was added, That the statute 1685, in order to make tailzies effectual against lawful creditors, seems to require, that there should be a clause declaring the debt to be null and void, and that, upon the contravention, the heir may pursue a declarator of irritancy, and serve himself heir to the person last infest before the contravener. The Lords found the pursuer’s debt effectual against the estate.—

See APPENDIX.

*Fol. Dic. v. 2. p. 432. and 433.*1737. *December 22. and 1738. July 11.*STEWART, *alias* DENHAM, *against* DENHAM of Westshiells.

No. 83.

Irritancy in case of deed or omission inducing adjudication.

Where, by a tailzie, it was declared an irritancy, “ If the heir should contract debt, or do any act or deed of omission or commission, whereby the lands, or any part thereof, might be apprised, adjudged, evicted, &c ;”—and by a separate clause, “ That if any apprising or adjudication should be led and deduced against the lands for sums already contracted by the deviser of the tailzie ; in that case the heir of tailzie for the time should be obliged to purge the same three years before expiry of the legal, otherwise to amit and lose his right to the estate, &c.”