

No. 19. affect the estate after the locality is at an end. And although the wife's claim for aliment and mournings, may be called a *debitum humanitatis*, yet such debt cannot compete with other lawful creditors; and it would look odd, that a debt which is postponed to all others, should yet affect an heir of entail, who is not liable for the most onerous contract of the preceding heir.

The Lords found, That Sir David Baird is not in this case liable, as heir of tailzie to his father, either for mournings, or aliment to his widow.

*C. Home, No. 258. p. 415.*

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1744. July 5.

The EXECUTORS-CREDITORS OF MURRAY KYNNYNMOUND *against* AGNES MURRAY KYNNYNMOUND.

No. 20.

General reference in the sasine to the clauses in the disposition.

Although the act 1685 declares, "That such tailzies shall only be allowed, in which the irritant and resolute clauses are insert in the procuratories of resignation, charter, precept and instrument of sasine," yet this has not been so understood, that, where the procuratory of resignation and precept of sasine are *in eodem corpore*, the several irritant and resolute clauses must be repeated in each: For, by an equitable construction, all the clauses in the same deed are understood to be inserted in every part of the deed, and therefore, where the irritant and resolute clauses are inserted in the procuratory, it is enough that, in the precept thereto subjoined, they be referred to; for in that case the precept of sasine is the whole deed. But where the instrument of sasine, neither in reciting the precept, nor in the notary's act of giving sasine, recites these irritant and resolute clauses otherwise than by a general reference to the disposition, in which the precept is contained, which was the present case, the statute was found not to be complied with, and that the debts of the heir so infeft, might be charged upon the entailed estate.

*Kilkerran, No. 5. p. 543.*

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1748. July 28.

BARON KENNEDY *against* AGNES MURRAY KINNYNMOUND, and Mr. GILBERT ELLIOT her Husband.

No. 21.

How far the heirs of tailzie liable for the entailor's debts?

Sir Alexander Murray of Melgund married Grizel Kinnynmound, heiress of Kinnynmound, which she conveyed to him, and he infeft her in a liferent annuity upliftable out of both estates.

He afterwards tailzied the said estates by a dispoission to himself in liferent, and Alexander his son in fee, and failing him and the heirs of his body, to Mr. Hugh Dalrymple, advocate, his own brother uterine, "under the burden of the said liferent annuity;" and also with the burden of the sums contained in an

heritable bond to Sir David Dalrymple advocate, (to wit, debts paid by him on the estate of Kinnymound) which last sums were declared not only “to really burden and affect the said estate, but likewise that the heirs of tailzie should be personally bound to make payment thereof in terms of the bond.”

After Sir Alexander's death, his relict married to Thomas Kennedy, one of the Barons of Exchequer; and a very large arrear was incurred of her jointure, the estate being in the mean time successively possessed by Sir Alexander Murray younger, Mr. Hugh Murray (formerly Dalrymple), and Agnes Murray his daughter married to Mr. Gilbert Elliot, advocate; but it was alledged by Baron Kennedy, the contraction was so far from being a prejudice to the present possessors of the estate, that by means of his forbearance it had been disburdened of a larger sum bearing interest, which the annuities, till adjudged for, did not.

Mr. Hugh Murray's creditors being confirmed executors to him, and Baron Kennedy claiming as such on the arrears then incurred, it was objected to him by the other creditors, that Mr. Murray was not personally liable, but they were a burden on the estate; whereupon it was found, 23d June 1743, “that he as heir of entail to Sir Alexander Murray, was personally liable for the life-annuity secured upon the entailed estate, and therefore the Baron ought to be ranked as a creditor on the executry; but in so far as he drew out thereof, he behoved to assign the arrears in favour of the other moveable creditors, to the end that they might recur therefor against the heritable estate, reserving the heir's defences.”

Baron Kennedy brought an action for payment against Agnes Murray the heir of tailzie, and obtained decret, and thereupon adjudged; of which she, with her husband, offered a bill of suspension, for that an heir of tailzie was not personally liable to the tailzier's debts, but only to the extent of their intromissions with the rents of the subject; an heir of provision or tailzie, who was a singular successor, could not be further liable than to the extent he was benefited, or than he was bound to the quality of his right; and by this settlement they were not made personally liable for the annuities, though they expressly were for another debt.

Answered, Sir Alexander Murray younger became bound *præceptione hereditatis* for his father's debts; and though the succeeding heirs do not represent him in his extraneous debts, yet they do in those he was liable in, as being debts of the tailzier.

*2dly*, The present question is concerning the suspension of an adjudication founded on a personal decret for payment; now supposing the defender could be reponed against the decret, yet as it is granted, the arrears are a burden on the estate, and may be made effectual thereon by adjudication proceeding, as the suspenders plead, on a declaratory decret; so the present decret ought to be sustained to that effect, the personal conclusion being only suspended; in like manner as when an heir who has neglected to renounce is reponed, the adjudication is sustained, as on a decret of cognition; for the charger ought not to suffer the prejudice of losing his annual-rents since the date of his adjudication, because

No. 21. the suspender did not reclaim against the Lord Ordinary's interlocutor finding her liable, and he is willing to consent to the suspension of further diligence.

Second reason of suspension, adjudication is pronounced for an year's annuity, more than is contained in the decret of constitution, and for a term's more than in the summons of adjudication.

Answered, The decret is for payment of the sum then due, and for what should become due in time to come, and was taken for what was resting at the Martinmas preceeding. The adjudication was raised before next Martinmas, for that sum, and for what should fall due; but one year having been paid, the decret, which was not pronounced till after Martinmas, was taken making the accumulation at that term, when the sum happened to be the same with that in the constitution.

The suspender being minor, the Lords did not lay weight on the *res judicata*.

The Lords found the adjudication was sufficiently supported by the decret of constitution, and, of consent of the charger, suspended the execution of all diligence against the persons of the suspenders, and against any estate belonging to them, other than the tailzied estate of Melgum and Kinnymound.

*D. Falconer, v. 1. p. 378.*

1749. November 8. SINCLAIR *against* SINCLAIRS.

No. 22.

A prohibition to contract debt does not imply a prohibition to sell.

Though the tailzie of the lands of Carlourie contained the most proper prohibitory, irritant, and resolute clauses, against altering the order of succession, and against granting wadsets, annual-rents, or other securities whatsoever thereupon, or the doing of any other fact or deed that might anywise affect, burden, or evict the lands, or whereby the right and benefit of succession, by virtue of the tailzie, might be prejudged any manner of way, or whereby the lands might be evicted, adjudged, appraised, &c. yet, in a declarator at the instance of Captain Henry Sinclair, the heir in possession, wherein he called all the heirs to him substituted, whom he could discover, to have it found and declared, that as the tailzie contained no prohibition to sell, he therefore had right to sell the lands;

The Lords, in respect there was no clause *de non alienando* in the entail, "found the pursuer not thereby restrained from selling, and decerned in the declarator at his instance."

The grounds the Lords proceeded on were, *first*, in general, That as restraints upon property were contrary to the rules of the common law, they were not to be inferred by implication, or extended farther than the express words: And accordingly it was determined between the Heirs of Provost Wightman and Great-grandchildren of Mrs. Anderson, in 1745, that a prohibition to alter the course of succession expressed in the strictest manner, and declaring all deeds of altera-