Case 29. Fountainhall, 13 June 1712. Forbes, 22 July, 1712.

John Falconer Esq. and others, Creditors of Thomas Craig, late of Riccarton, Esq. deceased, - - - - *Appellants*;

John Mushet and others, Creditors of Robert Craig of Riccarton, - - - *Respondents*.

3d *July* 1714.

Tailzie.—It being found that, in respect an entail, with prohibitory clauses, contained no irritancy of the right of the contravener, the debts of the heir in possession did equally affect the estate with the debts of his predecessors; the judgment is reversed.

An entail executed prior to the act 1685 sustained, though objection made that it was not registered in terms of that act.

Construction.—The Court of Session having found that the irritancy of the contravener's right in the entail of Riccarton did only respect the heirs female, and not the heirs male; their judgment is reversed.

THOMAS Craig late of Riccarton, deceased, executed an entail of his estate of Riccarton and other lands, which had been long enjoyed by his ancestors, in the following manner:—On the 14th of March 1684, he executed a procuratory for resigning the same to the crown, and afterwards procured a charter under the great seal, dated the 29th of January 1686, whereby the said estate and lands were granted (*a*) "dilecto nro Thomæ

Destination. Heirs male.

"Craig de Riccarton et hæredibus masculis ex ejus corpore ltime "procrean. quibus deficien. Roberto Craig ejus fratri et hæredi- "bus masculis ex ejusd. Roberti corpore ltime procrean. quibus "deficien. Joanni Craig ejus fratri et hæredibus masculis de "corpore dict. Joannis ltime procrean. quibus deficien. Jacobo "Craig ejus fratri et hæredibus masculis ex ejus corpore ltime "procrean. quibus deficien. Wmo Craig ejus fratri et hæredibus "masculis ex ejus corpore ltime procrean. quibus deficien. filiæ

Heirs female.

"legitimæ natu maximæ dict. Thomæ Craig ex ejus corpore "procrean. absque divisione, et hæredibus masculis ex corpore "ejusd. filiæ procrean. quibus deficien. dict. Thomæ Craig "ejus alteri filiæ sine divisione et hæredibus masculis ex ejusd. "filiæ corpore ltime procrean. et ita deinceps successive quam "diu dict. Thomas Craig filias habuerit; quibus oibus deficien. "dict. Thomæ Craig ejus propinquioribus ltimis hæredibus et "assignat. quibuscumque hærie et irredimabiliter cum et sub pro- "visionibus restrictionibus limitationibus et conditionibus subtus

Conditions, provisions, &c.

"express. Omnes et singulas terras baronias aliaque rexive postea "ment. viz. totas et integras terras de Riccarton, &c. Cum et "sub hac tamen provisione et conditione quod dict. Robertus "Joannes Jacobus et Wmus Craigs fratres dict. Thomæ Craig et "hæredes masculi ex eorum Corporibus procrean. nullam potesta-

(*a*) On account of the singular importance of this case, and as the clauses of the charter are not recited verbatim either in the Appeal Cases or the Decisions where it is reported, a copy of the destination and clauses irritant and resolutive was procured from the General Register House, which is here made use of.

" tem vel libertatem habebunt debita contrahere vel aliquod aliud " facere in prejudicio hæredum feminarum ex corpore dict. " Thomæ Craig procrean. penes eorum ſucceſſionum ad terras et " ſtatum ſuprament. deficien. hæredibus maſculis dict. Roberti " Joannis Jacobi et Wmi Craigs ltime procrean. Quin etiam " providetur et declaratur qd. oia talia debita et facta contract. " vel fact. per illos nullius erint valoris roboris aut effectus ad " afficiend. dict. Terras et ſtatum aut dict. Thomæ Craig ejus " filias et hæredes feminas quæ eiſdem ſuccedent liberæ et im- " munes ab omni onere quoeunque ſine prejudicio tamen dict. " Roberto Joanni Jacobo et Willielmo Craigs et eorum hæredibus " maſculis antedict. providen. ſuis ſponſis in vitali redditu ad " quartam partem dict. terrarum et ſtatus duran. oibus eorum " vitæ diebus et proviſiones et portiones earum filiabus conceden. " ſi modo dict. proviſiones non excedent trium annorum reddit. " dict. terrarum inter liberos uniuſcujuſque fratris. Providetur etiam " et declaratur quod ſi dict. terræ et ſtatus quovis tempore futuro " (deficien. hæredibus maſculis dict. Thomæ Craig et ejus fra- " trum ex corporibus ſuis procrean.) evenerint ad dict. hæredes " feminas tunc et in eo caſu hæres femina natu maxima de tem- " pore in tempus tantum ſuccedet ſine diviſione, et dict. hæres " femina tenebitur et obligabitur nubere viro generoſo cogno- " mine de Craig vel viro generoſo cujuſvis alius cognominis qui " et hæredes ex ejus corpore procrean. omni tempore poſtea " dict. nomen de Craig aſſument et inſignia ſeu arma domus de " Riccarton gerent et utentur. Et ſub hac etiam proviſione quod " minime fuerit in poteſtate dict. hæredum fæminarum vel hære- " dum ex earum corporibus procrean. dilapidare vel alienare dict. " terras et Statum nec debita contrahere vel aliquod aliud facere " quo dict. terræ aut ulla pars earum ab illis evinci poterint, et " ſi contravenire, vel in contrarium facere contigerint eo ipſo " perdent et amittent jus ſuum ad dict. terras et ſtatum pro omni " tempore inde ſequen. et licitum et ltimum erit proximo hæredi " Talliæ actionem declaratoriam deſuper proſequi et immediate " poſtea intrare ad poſſeſſionem dict. terrarum et ſtatus abſque " onere nullius partis dict. debitorum aut factorum. Et ſimiliter " providetur et declaratur quod dict. debita et facta declarabuntur " nullius fore valoris aut efficaciæ ſed vacua et irrita erint quoad " afficiend. et onerand. dict. terras et ſtatum vel proximum " hæredem Talliæ et licitum et ltimum erit proximo hæredi " Talliæ ad eaſdem ſuccedere vel tanquam hæres contravenientis " libero et immuni oneris dict. debitorum et factorum vel tanquam " hæres illius qui obijt ultimo veſtit. et ſaſit. immediate ante " dict. contravenien. et eund. contravenien. præterire cum et " ſub quibuſdam proviſionibus et conditionibus antedict. Tallia " et ſubſtitutio ſupra ſpecificat. eſt fact, et conceſs. per dict. " Thomam Craig in favorem dict. perſonarum tantum et non " aliter. Quæquidem Terræ de Riccarton, &c." Upon this charter infeftment was taken; but the entail was not recorded in terms of the ſubſequent act of parliament 1685.

Thomas

Thomas Craig died without male iſſue, leaving one daughter ſurviving him, who was alive when this appeal was diſcuſſed. At the time of his death, he was indebted to the appellants in conſiderable ſums of money; and theſe debts to the appellants had been contracted by the ſaid Thomas Craig himſelf, or by his father or brother (to whom he was ſerved heir) before the making of the ſaid entail.

After the death of Thomas Craig, his brother Robert was ſerved and retoured heir of entail and proviſion to him, and accordingly poſſeſſed the ſaid lands as heir of entail. Sundry of the creditors of Thomas took new ſecurities from this Robert Craig, who alſo contracted large debts of his own, and more than the ſaid eſtate could have ſatisfied; and he thereby became and was declared a bankrupt. Adjudications of the ſaid lands were alſo obtained by ſeveral creditors of Robert Craig, and of his brother Thomas, the entailer.

The reſpondents having afterwards brought an action of ranking and ſale before the Court of Seſſion, the appellants appeared for their intereſt, and pleaded that the creditors of Robert had no right to be paid out of the eſtate, ſince the deed of entail, under which Robert claimed, prohibited him from contracting any debts, and declared that any debts he did contract ſhould be void: The reſpondents inſiſted, that as there was merely a prohibitory and no irritant and reſolutive clauſe, Robert ſtill had the *dominium* and property of the eſtate, which muſt be liable to his debts. The Court, on the 25th of July 1711, "found that in "reſpect the entail contained no irritancy of the right of the "contravener, the debts of the ſaid Robert Craig do equally "affect the lands and eſtate of Riccarton, with the debts of his "predeceſſors, according to their priority of diligence."—And to this interlocutor the Court adhered on the 13th of June 1712.

The appellants having further reclaimed, praying the Court either to find that there was no neceſſity for an expreſs reſolutive clauſe, to make the prohibition upon the heirs male effectual, or to find that the reſolutive clauſe in the entail did affect the whole heirs therein mentioned. The Court on the 22d of July 1712, after anſwers for the reſpondents "adhered to their two former "interlocutors; reſerving to the parties to be heard before the "Lord Ordinary in the cauſe, if the above-mentioned irritant "and reſolutive clauſes in the entail affect the whole heirs." Parties were accordingly heard, and a report being made to the Court, their Lordſhips on the 8th of July 1713, "found that "the irritancy of the contravener's right in the ſaid entail, doth "only reſpect the heirs female, and not the heirs male."

Entered, 12 April 1714.

The appeal was brought from "ſeveral interlocutors orders or "decrees of the Lords of Council and Seſſion of the 25th of "July 1711, the 13th of June and 22d of July 1712, and 8th "of July 1713."

Heads

Heads of the Appellants' Argument.

By the clauſes in the ſaid deed of entail, it was not only provided, by the ſaid Thomas Craig, that the ſaid Robert and his brothers ſhould have no power to contract debts, or do any other thing in prejudice of the heirs female of his body; but it was alſo declared that ſuch debts *ſhould be of no validity to affect his ſaid eſtate.* And the ſaid Robert being ſerved heir of entail and proviſion to his brother Thomas in the very terms of the ſaid ſettlement, his, the ſaid Robert's debts could not affect the ſaid eſtate, or come in competition with the debts due to the appellants, which had been all legally contracted by Thomas Craig the entailer and his predeceſſors, and to which he and the ſaid eſtate were liable before the making of the ſaid entail.

This entail being made before the act of parliament 1685, there was no neceſſity for regiſtering it; and the proviſoes and conditions therein were ſufficiently publiſhed and made known by the ſaid Robert's ſervice and retour as heir of proviſion to the ſaid Thomas, wherein thoſe proviſoes and conditions are expreſsly repeated, as well as in his infeftment following thereon. Theſe being all matters of record, were ſufficient to caution the appellants againſt the ſaid Robert's contracting debts with them.

It is apparent, that it was the ſaid Thomas's intention to prohibit Robert and his other brothers to contract debts, or do acts not only in prejudice of his heirs female, but of one another, *by the exception of a power to make jointures, and provide portions for younger children.* But it does not concern the appellants to diſpute the import of the prohibition, whether it reſpected the other members of the entail, or only the heirs female; for either way it muſt operate in favour of the appellants, who were creditors before the entail; and it being expreſsly declared that Robert's debts ſhall be of no force or validity to affect the ſaid eſtate, of conſequence, in the ranking of creditors upon the eſtate theſe cannot come in competition with the appellants' debts which affected the ſame before the ſaid entail.

It cannot be denied, that Thomas, the maker of this entail, had an unlimited property in his eſtate, and was under no obligation to call his brothers to the ſucceſſion, much leſs to prefer them to his own daughters: but as ſuch abſolute proprietor he had an undoubted privilege of giving laws to his own, and might therefore diſpoſe of his eſtate in ſuch manner and under ſuch proviſoes and conditions, for precluding the ſame from being affected with the debts of his ſucceſſors, as he thought fit. And he has here diſponed the ſame to the ſaid Robert and his other brothers, under the ſaid reſtrictions, whereby Robert after the death of his brother Thomas had only a limited property therein, ſo as that his debts ſhould not affect the ſaid eſtate. The debts owing to the appellants, therefore, which were contracted by the prohibitor himſelf, who was under no reſtriction, were preferable to the reſpondent's debts, which had been contracted by Robert contrary to the ſaid prohibition.

An heir of entail is not bound to the payment or warrandice of all his predeceſſor's debts and deeds: for his predeceſſor being a limited proprietor, and the heir of entail only ſucceeding to him as ſuch, he is only bound to pay and warrant ſuch debts and deeds as do not evict and take away the limited fee.

The interlocutor of the 25th of July 1711, was founded upon a ſeeming inconſiſtency of a perſon's being proprietor, and yet not having the right of alienating or affecting the property, without irritating his own right and fee at the ſame time: but the appellants in a reclaiming petition, ſhewed from the common definition of *Dominium* or property, and ſeveral authorities, that there was no ſuch inconſiſtency; but that a property may be ſo limited that the proprietor cannot alienate, though at the ſame time the contravention may not import an irritancy of the fee. If there be no ſuch inconſiſtency, the clauſe containing the limitation muſt be taken *cum effectu*, and thereby the appellants have an abſolute right of preference.

The appellants in a reclaiming petition, after pronouncing the interlocutor of the 13th of June 1712, contended, that in the limitations of the ſaid charter, there are contained three diſtinct periods. *In the firſt*, beginning at *cum et ſub hac tamen proviſione*, &c. there is a prohibition upon Robert, and the other brothers and the heirs male of their bodies to contract debts, except in favour of their wives and children, with an irritancy of the debts themſelves, declaring, that the debts contracted by them ſhall neither affect the eſtate, nor the heir of entail. *In the ſecond*, beginning at, *Providetur etiam et Declaratur quod ſi dict. terræ*, &c. there is a prohibition upon the heirs female to contract any debt whatſoever, and an injunction to marry one of the name of Craig, or who ſhall aſſume that name, and bear the arms of the houſe of Riccarton, with a reſolutive clauſe, whereby it is provided, that immediately upon the contravention they ſhall loſe their right, and that it ſhall be lawful for the next heir of entail to purſue a declarator, and enter into the poſſeſſion of the eſtate, without any burden of their debts. And then there is a *third period*, beginning at *Et ſimiliter providetur et declaratur*, &c. wherein there is a proviſo relating to both the foregoing periods, and the heirs of entail therein mentioned, that not only all the debts and deeds done by the ſaid heirs of entail, ſhould be of no force or effect to charge the eſtate, but that it ſhould be lawful for the next heir of entail, either to ſucceed to the contravener, free of ſuch debts and deeds, or to paſs him by, and ſucceed to his predeceſſor. And all is concluded with theſe general words, "Cum et ſub quibuſdam proviſionibus "et conditionibus antedict. Tallia et ſubſtitutio ſupra ſpecificat. "eſt fact. et conceſs. per dict. Thomam Craig in favorem dict. "perſonárum tantum et non aliter." It is obvious, that in this laſt period, there is both an expreſſed irritant, and reſolutive clauſe, which is not only applicable, but muſt neceſſarily refer to both the antecedent periods, and by conſequence to the whole heirs of entail therein mentioned. If ſuch an interpretation can be made, it ought to be admitted in this caſe, as moſt agreeable

to

to the mind and intention of the maker of the entail; which evidently appears to have been to ſecure his eſtate, againſt being waſted or alienated by any of his heirs of entail, that it might deſcend to all the ſubſtitutes therein free and unincumbered in all the channels through which it was to paſs. To what purpoſe otherwiſe, was there ſo anxious a prohibition on his brothers to contract debts? and to what purpoſe was a liberty granted them to contract debts in one particular caſe? viz. for making proviſion for their wives and children, if his mind and intention had not been to bind them up in other caſes. The Court by their interlocutor having found, that, in reſpect the entail contained no irritancy of the right of the contravener, therefore his debts do affect the eſtate, have in a manner found that without a reſolutive clauſe, a ſimple prohibition is ineffectual. But there being now a general reſolutive clauſe fixed on, ſubjoined to all the prohibitions, both upon the ſecond and third claſſes of the heirs of entail, this clauſe muſt neceſſarily be ſo interpreted as to refer to the whole, *ut actus valeat*; and this the more plainly appears, if the tenor of that clauſe be conſidered with the others. The brothers, therefore, were not only under a ſimple prohibition, but under a prohibition with a reſolutive clauſe.

Heads of the Reſpondents' Argument.

All deeds of entail are inconſiſtent with the genuine notion of property, and plainly tend to a perpetuity: upon that account they are to be interpreted moſt ſtrictly, and not to be extended from one caſe to another. But in this caſe there is no manner of reſtriction upon Robert and the other heirs which can be of any uſe to the appellants: for the reſtriction upon the heirs male is expreſsly *that they ſhould not contract any debts in prejudice of the grantor's heirs female, and in caſe they did, the debts ſhould be void.* But the grantor's heir female is no party to this action, nor does ſhe complain; and conſequently it is *jus tertij* to the appellants whether the heir female be prejudiced or not, and they cannot plead that the debts are void as to them, for it would be of the worſt conſequence, if, becauſe there were a prohibitory or other clauſe in a deed of entail in favour of a particular heir, that therefore other heirs of entail (whom the grantor ſeemed to exclude by not including them) or their creditors ſhould be allowed to found upon this privilege merely perſonal in favour of the particular heir.

Though that prohibition to contract debts did extend to the appellants as well as the grantor's heirs female, yet it can be of no uſe to them, ſince there is no clauſe irritant or reſolutive of the heirs right upon contracting of debts: for it is the concurring opinion of all Scots lawyers, that theſe words are but a ſimple prohibition, and of no effect unleſs the ordinary irritant clauſe be likewiſe added; viz. that in caſe the heirs ſhould contract debts, theſe debts ſhould not only be void, but the contractor ſhould *eo ipſo* forfeit his right to the eſtate, and the next in remainder enter and hold the eſtate free of all the debts. It is not enough to void

the debts, but likewiſe the eſtate; and unleſs the eſtate is voided in that manner, it is impoſſible to prevent the debts from binding the eſtate, becauſe the perſon ſucceeding muſt ſerve himſelf heir to the laſt poſſeſſor; and if he does, he thereby ſubjects himſelf and the eſtate to thoſe debts. It was to prevent this that irritant clauſes were firſt invented, and added to the deeds of entail, by thoſe who intended to perpetuate their eſtates and families; and without the irritant clauſes, the poſſeſſor continues truly proprietor, may burthen his eſtate with debts, or ſell the lands for payment of debts. Indeed the act of parliament 1685, which is the foundation of all theſe deeds of entail mentions only theſe irritant and reſolutive clauſes, as of force to tie up the proprietors from alienation or contracting debts. The grantor himſelf, too, ſeems to have been of this opinion, for, where the eſtate is limited to the heirs female, the debts are not only declared void, but the fee or eſtate is voided, and the next in remainder has a power to enter. If the grantor, then, had intended to have voided the fee of the heirs male, as well as of the heirs female, it had been eaſy to have expreſſed it in both, but his doing it in one, and omitting it in the other, plainly ſhews his intention.

There is nothing more evident, than that in this deed, there are two branches of ſubſtitution; firſt the grantor's brothers and the heirs male of their bodies, next the iſſue female, to both of which there are diſtinct clauſes ſubjoined; to the firſt, only a ſimple prohibitory clauſe, of not contracting debts; but to the laſt not only a prohibitory clauſe, but irritant and reſolutive clauſes voiding the fee, from a juſt and reaſonable view, that by marrying they would be under the influence of their huſbands, who being of other families, had not the ſame natural ties upon them to preſerve the family, as the heirs male were preſumed to have. And as this is an ordinary practice in Scotland ſo upon view of the clauſe itſelf, it is impoſſible ſo far to ſtrain the words as to extend the irritant and reſolutive clauſe to the heirs male.

Upon the whole, to reverſe this decree would be a matter of the moſt dangerous conſequence, ſince the ſaid Robert Craig, according to the undoubted principles of the law of Scotland, was proprietor of the ſaid eſtate, and could ſubject it to his debts. Upon the faith of this the reſpondents *bona fide* lent him money, and ſeveral of the creditors of Thomas Craig cancelled their former obligations and took new ones from Robert; and the appellants were ſo much perſuaded of Robert's right to the ſaid eſtate, that they brought actions againſt him for their debts, and obtained adjudications, which was not a regular way if the fee had been voided. The appellants have adjudications of the ſame date with the reſpondents, and both will be equally paid, notwithſtanding of what the petition and appeal untruly ſuggeſts.

Judgment, 3 July 1734.

After hearing counſel, *it is ordered and adjudged, that the ſaid interlocutory order or decree of the 25th of July 1711, whereby the Lords of Seſſion in reſpect the entail contained no irritancy of the right of the contravener, found,* " *that the debts of the ſaid Robert Craig* " *do*

" do equally affect the lands and estate of Riccarton, with the debts " of his predecessors, according to their priority of diligence," and the two several interlocutory orders or decrees of the 13th of June and 22d of July 1712, whereby the Lords of Session adhered to their former interlocutor, be reversed; and that the said interlocutory order and decree of the 8th of July 1713, whereby the Lords of Session found " that the irritancy of the contravener's right in the said entail, " doth only respect the heirs female, and not the heirs male," be also reversed,

For Appellants, *Rob. Raymond. Sam. Mead.*
For Respondents, *Tho. Lutwyche. P. King.*

The judgment of the House of Peers in this case, is of the highest importance, as it reverses the doctrine laid down by the law writers, on the authority of this case at least, viz. That entails being of most strict interpretation, a mere prohibition to contract debt, if there be not also an irritant and resolutive clause, does not hinder the heir of entail from subjecting the estate to his debts. In support of this doctrine, the decree of the Court of Session, which *is here specially reversed*, is founded on in the Dictionary of Decisions, vol. ii. voce Tailzie, p. 432. Bankton, b. 2. tit. 3. sect. 139. Erskine, book 3 tit. 8. § 29. Though the decree of the Court of Session was in this case reversed, also upon another point, (the construction), it appears from the words of the Judgment, that the doctrine upon the first point, (the prohibitory clause without an irritant or resolutive one,) was also particularly under consideration.

It is also remarkable on another point, as supporting an entail, made prior to the act 1685. c. 22. but not registered in terms of that act. The decisions upon this point have been fluctuating, but it appears that since this judgment, the House of Peers in the case, *The Earl and Countess of Rothes* v. *Philp*, 16th January 1761, " declared that entails created of Lands in Scotland, with " prohibitive irritant and resolutive clauses, before the making of " the act of Parliament 1685, ought to be recorded in the " register of Tailzies, according to the said statute."