

TAILZIE.

SECT. I.

Nature and Effect.

1667. July 16. SIR JAMES KEITH *against* LUNDIE.

A decret being obtained against Sir James, as charged to enter heir of tailzie to his brother Alexander, *in foro*, for payment of a debt due to Lundy; two exceptions being proponed and admitted, and the term circumduced, he craved to be reponed against the said decret, alleging that the procurator, who pretended to compear for him in the decret, had no warrant, and was sick for the time.

The Lords inclined to repone him as to personal, but not as to real execution; and desired the Reporter to deal with the party to consent.

Clerk, *Hamilton.*

Dirleton, No. 98. p. 39.

No. 1.

1669. January 20.

LAIRD KILBURNY *against* The HEIRS of TAILZIE of KILBURNY, and SCHAW of Greenock.

Umquhile Sir John Crawford of Kilburny, having only two daughters, the eldest married to Blackhall, disposes his estate to Margaret the younger, and to the heirs male of her body; which failing, to the eldest heir-female, without division, throughout all the succession; and failing the issue of this daughter, his eldest daughter and her issue; and failing of these, Jordanhill and Kilburny, their issue; all which failing, his own heirs and assignees whatsoever. In which disposition there is a clause, that the said Margaret, and the heirs of tailzie, should not alter the tailzie, nor dispoene or burden the lands, or contract debts, whereby they might be apprised, and carried from the heirs of tailzie, otherwise the contraveners should loose their right *ipso facto*, and there should be place to the next

No. 2.
Power to sell
tailzied land
for payment
of the en-
tailer's debt.

No. 2. heir of tailzie. But there is a clause subjoined, that the said Margaret, and the heirs of tailzie, might sell, dispone, and wadset the lands of Easter Greenock and Carsburn, and might burden the same with sums of money, for paying and satisfying of the defunct's debts. The said Margaret Crawford having married the Earl of Crawford's son Patrick, they did sell the lands of Easter Crawford and Carsburn to Sir John Schaw of Greenock, at a rate far above the ordinary price, having expected a bargain with the Town of Glasgow for a harbour there; but the Town having made another bargain with Newark, Greenock pursued Kilburny, either to annul the minute, or fulfil the same, and to secure him, in relation to the clause *de non alienando*; and to that effect, Kilburny raises a declarator against the heirs of tailzie, to hear and see it found and declared, that by the right granted to the lady by her father, she might lawfully sell the lands of Easter Greenock and Carsburn. The heirs of tailzie compeared not, but Greenock compeared, and was admitted for his interest, which was, that the process, being for his security, he might propone all the defences which he thought competent to the heirs of tailzie; and alleged that the libel was nowise relevant, bearing a power to sell simply, but that it ought to have been conform to the clause in the disposition, viz. to sell, wadset, or burden, for payment of the defunct's debts, which did necessarily import, that no further could be sold than what was sufficient to pay the debt, and therefore no process, till the libel were so ordered, and the debts produced. The pursuer answered, that he opposed the clause, having two members, one bearing with full power to dispone the lands of Easter Greenock and Carsburn, and the other bearing to affect the same with sums for paying of the defunct's debt; which payment of the defunct's debts was but the end, motive, and consideration for which the power was granted, but was no restriction, quality, or limitation of the power; *2dly*, It did only relate to the second member of the clause, and not to the first member, which bore, with full power to sell and wadset, &c. which full power is directly opposite to a limited power; *3dly*, Albeit the pursuer were obliged to instruct the debt, and apply the price for satisfying thereof, yet the clause doth not limit him to sell only so much as will be equivalent to the debt, but he satisfying the debt, more or less, hath acted conform to the clause, which uses to be so expressed in clauses of this nature, as that the heirs of tailzie may dispone so much as will be sufficient for payment of the debt; which not being expressed, these restrictive clauses being against common law, are *strictissimi juris*, and not to be extended beyond what the words expressly bear; *4thly*, Albeit the pursuer were obliged to instruct that there were debt which might be a price, yet he were not obliged to instruct that they would be equivalent to this price, but to such a price as were not a third part within the ordinary rate, in which latitude every seller hath power, and the alienation cannot be quarrelled; and albeit that price would be more than the debt, yet these lands, being two entire tenements, which none would buy by parcels, the pursuer could only be compatible to the heirs of tailzie for the superplus. The defender answered, That he opposed the clause, being one and copulative; and that these

lands being but *per expressum* in the clause *de non alienando*, it could not be thought that the immediate following clause would give the Lady as much power, as to these lands, as if they had not been in the former clause ; but the intent to satisfy the defunct's debt, being the last words in the clause, is relative to the whole clause, and natively resolves into a restriction or quality, not bearing that they might be more able to pay the debts, but for payment and satisfaction of the debts.

The Lords considering that the heirs of tailzie were absent, and that as to them, the interlocutor would be in absence, found it most just and safe for both parties to declare conform to the clause, that the alienation was valid for satisfying the defunct's debts, and found not that the debts behoved to be equivalent to this price.

1669. *February 3.*—The Laird and Lady Kilburny did insist in the declarator against the heirs of tailzie, disputed the 20th of January, and according to the interlocutor then given, gave in a condescendence of Kilburny's debt, amounting to £.51,000, and that the rent of the land did not exceed 3600 merks. It was alleged, that the annual-rents were here accumulated for five years after Kilburny's death, which ought not to be, the Lady having possession of the lands, and ought to have paid the annual-rent, and the clause empowering her to sell, is only for satisfying Kilburny's debt, due the time of his death, which cannot extend to annual-rents, due after his death, and that these annual-rents were truly paid by the Lady, and so could not come in as a debt upon the estate ; *2dly*, The moveable debts ought to be satisfied by the executry, which must first be exhausted, the Lady herself being executrix, and so cannot burden the heirs of tailzie, or the estate ; for if they had been distressed, they could have craved payment from her, *quoad vires inventarii*, so that the principal sums not extending to £.40,000, and the lands being bought by Greenock, at the rental of 4000 merks, and 20,000 merks being gotten more for the lands than the debt, the power of selling granted to the Lady in the disposition, can never extend to so vast a difference, albeit a small difference of the price would not be noticed ; and, *Lastly*, It was offered to find a party, who would take a wadset of the lands, in satisfaction of all the defunct's debts ; so that the Lady cannot, in prejudice of the heirs of tailzie, sell, where wadsetting may do the turn, and the wadset should contain a reversion, and no requisition ; and whereas it might be pretended that the matter was not entire, because the lands were actually sold to Greenock, he offered to consent, and renounce his bargain. It was answered, That this clause *de non alienando*, being against the nature of property, was odious, and not to be extended, and the faculty of selling, or affecting, being suitable to the nature of property was favourable, and not to be restricted further than the defunct's own words and terms ; who having given full power to his daughter to sell, or affect the lands named, for payment of his debts, and not having said “ to sell, or burden so much of the land as were equivalent to the debt ;” neither having said, “ so much of the debt, as exceeded his moveables,” or “ his moveables being first exhausted,” it is most rational, and to be presumed to be his meaning, that as to his moveables he did not burden her at

No. 2.

all; and that this part of his lands he set apart for his debt, for he understood his debt to be about the value of it, otherwise he could have set apart less land, or could have more limited the faculty of disposing; but the principal sums of this debt being £.40,000, and the rental not being pretended to have been above 4000 merks, the principal would amount to the value of the land at fifteen years purchase; and there being unquestionably a latitude to the fiar to sell at such a price, as in discretion he thought fit, though he had sold at twelve years purchase, or not under the lowest rate of land, neither could the buyer be quarrelled, nor the seller, as incurring the clause irritant; and therefore the Lady having sold at a far greater rate than the ordinary, Greenock and the Town of Glasgow being both dealing for the land, they to make a harbour there, and he not to suffer them, in prejudice of his Town and Harbour in Greenock, there is no reason to exclude the Lady from the benefit of her bargain, or to necessitate her to quit the same, and give only a wadset, seeing the clause gives her power both to sell, and affect, and does not limit her to either of them.

The Lords repelled the defences, and declared that the Lady had warrantably sold these lands, and that the principal sums being so considerable, although the rental had been more, they were sufficient; and found that the clause laid no necessity upon her to exhaust the moveables, and that she might thereby wadset, or sell at her pleasure.

Fol. Dic. v. 2. p. 433. Stair, v. 1. p. 586. and 597.

Gosford reports this case:

In a declarator pursued at the instance of the Laird of Kilburny and his Lady against the heirs of tailzie, to hear and see it found and declared, that he had full power and liberty to make an absolute and irredeemable disposition of the lands of Greenock, conform to the tailzie of the estate of Kilburny, wherein there was an irritant clause, in case of alienation of any of the lands, or any part of the estate, qualified with a reservation, giving power and liberty to sell, dispone, and wadset the foresaid lands for payment of his debts;—compearance being made for Greenock, it was debated, If there was a necessity to instruct, that there was as much debt resting as the full price of the lands did amount to, or, if the payment of debts was only the impulsive cause, and that Kilburny had full power to sell the lands, without necessity of instructing that he had satisfied as much debt; the Lords found, That the said reservation did give him liberty to sell the lands, he instructing payment of all Kilburny's debts, albeit not extending to the full worth of these lands, which they found to be the meaning of the said clause, specially seeing it was offered to be instructed, that the debts did amount to the ordinary rate of so much rent, and that Greenock, upon the consideration of building of harbours and houses, had given an extraordinary price.

Gosford MS. p. 32.