SECT. III.

Prohibitory, Irritant, and Resolutive Clauses.

1662. *February* 26.
VISCOUNT of STORMONT *against* CREDITORS of EARL of ANNANDALE.

No. 76.

Clauses in a tailzie, prohibiting the contracting of debts, and irritating the contravener's right, are effectual against creditors.

Stair. Gilmour.

*** This case is No. 5. p. 13994. *voce* REPRESENTATION.

1677. *July* 26.
JANET STEVENSON *against* MARGARET STEVENSON, and GEORGE MUIRHEAD, Her Husband.

No. 77.
A tailzie of lands was made by a father to his daughters *successive*, upon condition, that if the eldest did not marry one who should assume the name of the family, the next should succeed. The eldest failing to do so, it was found that the next might serve herself heir of tailzie, although there was no irritant clause.

In a declarator at the said Janet's instance against the said Margaret her eldest sister, to hear and see it found and declared, that they had lost the benefit of a tailzie and disposition of the estate of Stevenson, and that it did not accresce to the pursuer as second sister, upon that ground, that their father John Stevenson considering that he had only three daughters, and that his estate had been very ancient in that name, albeit not great, therefore, by a disposition or tailzie he did ordain his eldest daughter to have right to the estate, she marrying with advice of her nearest friends, one that should assume the name and arms of the house of Stevenson; and if she failed, the second; which failing, the third should have right to the said estate, fulfilling as said is; they always paying to the sisters who did not exceed 2,000 merks to each of them; and seeing the said Margaret, the eldest sister, had married one George Muirhead, who was not obliged by his contract to take the name and arms, and did not assume the same himself now for several years since his marriage, therefore they had lost the benefit of the tailzie, and it ought to accresce to the pursuer: It was alleged for the defender, 1*mo*, That the tailzie whereupon the declaration was founded, could be no ground for this conclusion, *first*, because it was a private and latent deed lying beside the father, whereupon no infeftment followed during his life-time, neither was it made known to the defender the eldest sister, to put her *in mala fide* the time of her contract of marriage, but on the contrary, by the advice of her nearest friends, she did only assign the sum of 5,000 merks provided to her as the eldest heir-female by her

No. 77.

mother's contract of marriage with her father, and she having married a gentleman of good family and portion, it was not in her power now to force him to change his name, especially her father having died in great debt, and her husband having bruiked the estate by virtue of an adjudication as having right to debts due to lawful creditors; *2do*, The said tailzie did contain no clause irritant, and so cannot be a ground of this declarator. It was replied to both, That the tailzie and disposition was, notwithstanding, a just title for this action and declarator, and could not be called a latent deed as lying beside their father until he died; because, as it was in his power to provide his estate as he should think fit, so he was the only person that ought to have the keeping thereof; and having left it entire, it was obligatory against his apparent heir; and as to her *bona fide*, that it was not intimated, albeit it were true, yet it cannot hinder the declarator, the pursuer being yet content that her eldest sister's husband should yet assume the name and arms for preserving the family as was appointed, and intends not to take advantage of any prior forbearance; and as to the *last* part, that there was no clause irritant, it was replied, that albeit there was no such express clause in the tailzie, yet the conditions of succession being so clear, that if the first sister named should fail, the next should succeed, it was a good ground for this declarator.—The Lords did find, that the husband having adjudged the said lands and possessed them *singulari titulo*, might bruik the said estate until it was redeemed; but the pursuer being next heir, might be served, and take her hazard of the burdens, if she thought fit.

Fol. Dic. v. 2. *p.* 431. *Gosford MS. No.* 1005. *p.* 679.

*** See Stair's report of this case, *voce* WRIT.

1686. *December* 1. EARL of CALLANDER *against* LORD JOHN HAMILTON.

No. 78.

Found, that a prohibitory clause contained in a tailzie was a sufficient ground for the next heir to reduce, upon the act of Parl. 1621, any posterior gratuitous or voluntary deeds not depending on prior onerous causes, tho' it wanted a clause irritant.

The Earl of Callander, second son to the Earl of Linlithgow, pursuing a reduction of the disposition granted by Alexander last Earl of Callander to John Lord Hamilton, (Duke Hamilton's second son), of the estate of Callander, on this ground, That by the tailzie he was bound up to do no deed which might disinherit my Lord Linlithgow's second son, and other substituted heirs of tailzie, which clause militated against this voluntary and gratuitous disposition to Lord John Hamilton; and so he might reduce it on the act of Parl. 1621;—alleged, That his title as apparent heir was not *nomen juris*; and the pursuit at his brother the Lord Livingston's instance was only on a bond granted by the said Earl of Callander to Livingston, his brother, for a vast sum of money, to make up a simulate ground of debt whereon to charge him to enter heir, and which being also a gratuitous deed, made a contravention of the tailzie discharging such deeds, and so was contrary to their own reason of reduction; and if it came into his person, it was a passive title, as in the Earl of Nithsdale's case. Answered, This