

1751. *July 19.* CARRE of Cavers *against* CARRE of West-Nisbet.

No. 28.

The other representatives of a person who had entailed his estate, found not obliged to relieve his heir of tailzie of his debts, under particular circumstances of former transactions, and lands sold under an act of Parliament.

Sir Thomas Carre of Cavers, February 1677, granted two bonds for 16,000 and 12,000 merks Scots to Anne and Margaret Carres his grand-daughters, in satisfaction of all they could crave by their father and mother's contract of marriage, and of all portion-natural, &c. legacy, or any other thing whatsoever; and of all lands or estate that might fall to them, as heirs-portioners of line to him, or to Andrew Carre deceased, their father, by any manner of way; by acceptance whereof they should be obliged to denude in favour of him and his heirs of tailzie, who were obliged to relieve them of all debts of their father and grandfather.

Sir Thomas, 2d April, 1678, tailzied his estate to himself, and heirs-male of his body, whom failing, to John Carre of West-Nisbet his nephew, prohibiting alienation or contracting of debts under an irritancy; burdening it with all debts contracted by him, which the heirs should be bound to pay; it being declared lawful for them to burthen and affect the estate with such debts and provisions as should be resting by him at his debt, and should not be paid out of his moveables or otherwise.

John Carre of West-Nisbet, in 1681, succeeded to the tailzied estate, and also was confirmed executor to his uncle, and obtained from the young Ladies conveyances to certain heritable subjects, on their being served heirs of line; and lived till the year 1731.

The two Ladies, with consent of their husbands, in the year 1687 and 1693, assigned blank their bonds of provision, the blanks being after filled with the name of Walter Riddel; and he, in the year 1772, transferred them to his son John, who both were alleged to be trustees for John Carre of Cavers.

Robert the eldest, and John a younger son of Cavers, were bound in certain debts to John Kennedy and others, for which John had his brother's bond of relief; and Cavers their father, in the year 1723, granted his bond of corroboration obliging him to relieve his sons.

John Riddel, in the year 1726, on the narrative that the two bonds of provision stood in him in trust for Robert Carre, disposed them to John Kennedy, and his other creditors mentioned, together with a bond of corroboration granted to him in the year 1721 by Cavers of the said sums, wherein he bound his heirs in the estate of Cavers allenary, and to which his sons Robert and John were consenters.

Thomas Carre, the son of Robert, succeeded his grandfather in the estate of Cavers, to whom, in the year 1740, succeeded John his uncle; and George, another brother of a second marriage, succeeded by deed in the estate of Nisbet and executry, and obtained from John Kennedy and the other creditors a disposition to the bonds in their person affecting the estate of Cavers.

John, the second of Cavers, and John his son, granted bond of corroboration in the year 1742 to George Carre for the said sums, extending to 28,000 merks; as also for other debts due by Cavers, extending to £.35,000 Scots: And, in conse-

quence of a communing at that time, whereby Cavers was to undertake the payment of the provisions to the children of John the first, extending to 23,000 merks, which else might have been charged on his estate unentailed and executry; and of an annuity to the relict of Robert of 2,000 merks, which by the tailzie could not be charged on the estate, he having never succeeded thereto; and George Carre was to discharge him of £.700 Sterling, part of the £.35,000 Scots, and of all other claims competent to him as executor to their father, or otherwise, except the said 28,000 merks and remainder of the £.35,000 contained in the bond of corroboration; the said John Carre, in the year 1743, did homologate the said bond, and sum of 23,000 merks contained in the bonds of provision by John the first to his children; and annuity of 2,000 merks to the relict of Robert, contained in her contract of marriage; and discharged George Carre of any claim of relief they had against him, as executor to his father, upon the personal obligation incurred by him, for payment of the said 23,000 merks, and annuity of 2,000 merks and of all claims competent to them as heirs of entail, or any manner of way against the said George Carre, preceding the bond of corroboration; and George Carre discharged them of £.700 Sterling, part of the £.35,000 Scots, and of all claims competent to him against them, as executor to his father or otherwise.

Cavers obtained a decret of declarator before the Court of Session, that the sum of 28,000 merks were true debts, contracted by the maker of the entail, and affecting the tailzied estate; and thereupon an act of Parliament in the year 1744, empowering him to sell land for the payment; which he did, and made payment to George Carre on his discharge 15th February, 1745.

John Carre the third of Cavers, who had joined with his father in the bond of corroboration, pursued George Carre of Nisbet to relieve him of the sum of 28,000 merks, portions granted by the tailzier to his grandchildren.

Pleaded for the pursuer: Sir Thomas Carre the tailzier did indeed lay the provisions granted by him to his grandchildren, a burden on the tailzied estate; which being debts of his, they would have affected without any express provision; but this does not hinder the relief due to the heir of tailzie from the heir of line and executor. John his nephew sustained all these characters, having obtained a disposition from the young Ladies to the unentailed heritable subjects; and being confirmed executor, and thereby having acquired subjects of greater value than these bonds, out of which he was bound to relieve the tailzied estates. This obligation he counteracted, by taking assignations to the bonds upon payment, in name of his trustee; but he still continued bound to relieve the heir of tailzie; and this obligation was prestable by his executor the defender, to the pursuer his heir in the tailzied estate.

Pleaded for the defender: The right an heir of tailzie has to relief from the heir of line can only be once demanded; and if he recover it, and do not apply it to the disburdening the estate, it cannot be again sought by a subsequent heir of tailzie: John the first, the heir of tailzie, was relieved, in as much as assignations

No. 28. being procured from the Ladies to their bonds, these were made over to his creditors, which was equal as if the money had been given to him.

2dly, John, this pursuer's father, and he himself, have discharged their claim of relief on a transaction: They have not only discharged all claims against the defender, but have homologated the bond of corroboration granted him for these sums, which was an express discharging any claim of relief on the same bonds.

3dly, The act of Parliament fixes this debt on the tailzied estate, and allows lands to be sold for payment of it, which has been done; after which there can be no looking back.

Replied: Although when the heirs of line and tailzie are separate persons, it should be held the heir of line has performed his obligation of relieving the other, by advancing the money, although the heir of tailzie should not apply it; yet, when they are one person, it can never be said he, as heir of line, has relieved himself as heir of tailzie in the tailzied estate, by taking his money and paying debt, which did not affect the tailzied estate.

2dly, The claim of relief is not discharged, for the general clause will not comprehend this claim, as there are others expressly mentioned.

3dly, The act of Parliament finds the debts affect the estate, but says nothing of the relief.

Observed: Though an heir of tailzie has relief from an heir of line, when they are separate persons, it may be doubted if a person tailzieing his estate, expressly with the burden of his debts, and giving a separate estate to the same person, the heir will be bound to disburden the one out of the other: That if the pursuer prevailed, the tailzied estate would not be relieved, for the lands were sold and the debts paid: That the purport of this action was to make the defender account for Sir Thomas Carre's executry, and unentailed subjects, which ought not to be sustained after so long a time, as it could not appear what burdens they were subject to.

The Lords, 4th June, sustained the defences for Mr. George Carre, defender, found no foundation for this action, and assoilzied; and on bill and answers, adhered.

Act. *W. Grant & Lockhart.*
Reporter, *Dunmore.*

Alt. *R. Craigie & Fergusson.*
Clerk, *Justice.*

D. Falconer, v. 2. No. 225. p. 270,

1751. December 20. SCOT of Harden against His HEIRS of TAILZIE.

No. 29.
An heir of tailzie paid debts of the tailzier. His debts after contracted were found

Sir William Scot made a tailzie of his estate of Harden, providing that it should be lawful to the heirs at their accession to the said estate, to sell such parts of certain lands destinated and appointed by him for an adequate price, as should be sufficient for payment of his debts due at his decease, they applying the price of the said lands for payment of his said debts, at the sight of certain persons