1742.

STEWART v. DENHAM.

ARCHIBALD STEWART, *alias* DENHAM, *Appellant*;
ALEXANDER DENHAM, - - - - *Respondent.*
et è contra.

8th April, 1742.

TAILZIE,—IRRITANCY.—Found that under an entail prohibiting "debts, whereby the estate *may* be adjudged or evicted," the contracting of personal debts, on which no diligence had followed against the estate, does not infer an irritancy.

Found that the arrear of an annuity reserved to the entailer's widow, is the debt of the entailer, and not of the heir in possession, although the annuity should have been paid by him.

The heirs being prohibited under an irritancy from "contracting "debts, or doing other deeds of *omission*, or commission, where- "by the lands, or any part thereof, may be adjudged," &c. and the entailer's widow having led adjudication for the arrears of her annuity,—Found that the right of the heir in possession was not thereby irritated.

[Elchies *voce* Tailzie, Nos. 9 and 13. Kilk. *ibid.* No. 1. Fol. Dict. II. p. 434. Mor. Dict. p. 15557. Brown's Supp. V. p. 657.]

No. 63.

In consequence of the reservation contained in the judgment of the House of Lords, 17th July, 1737,* in the case between the same parties, Archibald Stewart proceeded before the Court of Session upon the other irritancies contained in his original libel.

The first of these was that which Sir Robert Denham was alleged to have incurred by contracting debts, for which he had given bonds and other securities. It was admitted, that Sir Robert had contracted debts to a considerable amount; but it was contended, that as those debts were not actually made a lien upon the estate, they did not fall within

* *Supra*, page 233.

the spirit of the condition, although they might within its letter. *Answered*, that the spirit as well as the letter of the condition was broken by contracting debts, the maker of the entail having not only prohibited the contracting of debts, but even provided that such debts should not affect the lands, although they actually defeated the right of the contractors; it being his intention that the person succeeding to the estate should take it free from suits as well as from incumbrances. Neither was it extraordinary that the entailer should annex a forfeiture to the contracting of such debts as the Court of Session afterwards determined did really affect the lands, although this determination has since been reversed.

The Court (15th Dec. 1737) found, "That the "simple contracting of personal debts, on which "no diligence followed against the estate, does not "infer an irritancy of the contractor's right."

The next point was founded upon the clause, whereby the penalties of the entail are extended to any person who shall "contract debt, or do other "deeds of omission or commission, whereby the "said lands, and others foresaid, or any part "thereof, may be apprised, adjudged, evicted, or "become caduciary, escheat, or confiscate," &c. But it is afterwards provided and declared, that if "any apprising, adjudication, or other diligence, "shall be led and deduced against the said lands "and others foresaid, or any part thereof," for sums already contracted, or to be contracted hereafter by the said Sir William Denham, (the entailer,) or for any part of the said sums; "then and "in that case, the haill heirs and members of tail-"zie above specified, who shall happen to bruik

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" and possess the said lands and others aforesaid " for the time, shall be bound and obliged to purge " the said diligences three years before expiring of " the legal thereof, in case they shall happen to " succeed thereto three years and six months be- " fore expiring of the said legal; and if they suc- " ceed not so soon, they shall be obliged to purge " the same within six months after their succes- " sion," under pain of forfeiture of their right in case of contravention.

There is also a clause, reserving to dame Katherine Erskine, the entailer's wife, " her liferent in- " feftment of such parts and portions of the lands, " or the yearly annuity payable to her forth there- " of, as is provided to her by her contract of mar- " riage or otherwise."

Sir Robert Denham having allowed this annuity to remain unpaid for two years, the widow, in Jan. 1718, led an adjudication against the lands for the arrears, amounting to L.500. Sir Robert died in 1721, without having paid any part either of the principal or interest, and they remained unpaid till 1726, when the appellant obtained possession in virtue of the interlocutors declaring the irritancy, and when by discharging the whole he cleared off the adjudication.

The Court (22d Dec. 1737) found, " that the " irritancy is incurred, by suffering an adjudication " to pass for the liferent annuity due to the wi- " dow."

In a reclaiming petition, it was argued that the arrears of the annuity incurred in Sir Robert's time could not be regarded as a debt contracted by him, but were in fact a debt of Sir William, the entailer, and therefore no forfeiture was incurred by the

former, in suffering adjudication to be led for them, the forfeiture for such debts being incurred only by his omitting to purge the adjudication before the expiry of the legal.

Answered, the arrears incurred in Sir Robert's time were properly his debt. The arrears of every year or term are a distinct debt, upon which distinct adjudications might be obtained, and distinct prescriptions would run; and therefore if the possessor of the estate might, without incurring a forfeiture, permit the annuity to run in arrear for any number of years, and suffer several adjudications to be led for the different years' arrears, the whole estate must sink under the incumbrance.

The Court (12th July, 1738) altered their former interlocutor, and found, "That the irritancy is "not incurred by Sir Robert Denham's suffering "an adjudication to pass for those annuities, which "fell due during the said Sir Robert Denham his "possession of the estate."

A third ground of irritancy was, that the lands had been underlet; but a proof being allowed, the Court, upon the report of the Lord Ordinary, (23d Dec. 1740) Found, "That there is no such evi-"dence of the diminution of the rental, as to incur "the irritancy of the entail of the said estate."

The appeal was brought from the interlocutors of the 15th Dec. 1737; 12th July, 1738; 16th July and 23d Dec. 1740. Entered Jan. 12, 1740.

Pleaded for the Appellant:—1. Sir Robert Denham incurred the irritancy by contracting debts, although no legal diligence has actually ensued; because the very words of the irritant clause extend not only to debts upon which diligence has ensued, but also to debts whereupon diligence may ensue.

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The intention of the entailer was not simply to prohibit the contracting of such debts as should directly affect the estate, because he has provided that the debts contracted should not be a charge upon it, although he annexed a forfeiture to the very act of contracting them. He had it in view to save his successor in the estate from the expense and trouble of defending it against the claims of creditors, who might subject the possessors of the estate to great expense, even although they did not succeed against him, as in fact happened in the present instance in the question between the appellant and James Baillie.*

2. Sir Robert Denham incurred an irritancy, by suffering an adjudication to be led for the arrears of the annuity payable to Sir William's widow. For although the annuity was created by Sir William's contract, yet it was due by Sir Robert while he possessed the estate, and it was only by his omission that any arrears of the annuity were incurred. These arrears, therefore, are to be considered as Sir Robert's debt, it being plainly by his neglect that they became an incumbrance on the estate, and thereby occasioned the adjudication led by the grantee of the annuity.

Debts of this nature were the debts which it was most incumbent on the maker of the entail to provide against, because these must affect the estate in the hands of any of the heirs of entail; whereas debts of any other nature were prevented by the provisions of the entail from becoming a charge upon the estate. For this reason, debts occa-

* *Supra*, p. 114.

sioned by *omission* are expressly mentioned in the clause above quoted.

But it is evident, that should the construction contended for by the respondent be admitted, it would be in the power of any possessor of the estate to defeat the whole entail. He might suffer the annuity to run in arrear for ten as well as for two years, and allow several adjudications against the estate before a forfeiture could be incurred; and when the incumbrances had swelled to that height, it would not be the interest either of the possessor, or of any other heir of entail to purge the adjudications.

Pleaded for the Respondent:—1. By no reasonable construction of the clause prohibiting the heirs of entail to contract debts, whereby the lands may be apprised, adjudged, or evicted—nor by any words of the statute 1685, (upon the plan of which this entail was formed,) can the simple contracting of personal debts, which have never been made real upon the estate, and upon which no diligence by adjudication or otherwise has followed, be deemed sufficient to import a forfeiture against the person so contracting for himself and the descendants of his body. If such were the construction of law, every heir of entail must unavoidably forfeit his estate, as a thousand occasions daily occur, which render it impossible altogether and absolutely to avoid contracting debt, even in purchasing the common necessaries of life, &c.; so that if the appellant's argument prevails, an heir of entail would forfeit his estate if he should owe any one of his tradesmen the smallest item even for the space of twenty-four hours.

2. The adjudication which Sir Robert allowed

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to pass for the arrears of the annuity due to Sir William's widow, was not upon any debt contracted by Sir Robert. On the contrary, this annuity was constituted by Sir William himself, the entailer, in his own contract of marriage, and made a real burden upon the estate; and therefore Sir Robert's suffering decree of adjudication to pass, was not a contravention of the first prohibitive clause, by which the several heirs of entail are prohibited from contracting debts, whereby the lands may be adjudged or evicted.

By the other clause it is provided, that if any adjudications or other diligences shall be deduced against the tailzied lands for sums already contracted, or to be contracted by Sir William Denham the entailer, the heirs of entail shall be bound to purge the said diligences three years before the expiry of the legal, with an express declaration, that the heir failing to do so shall irritate his right for himself and the descendants of his body; whereby it is perfectly manifest that no forfeiture is incurred by Sir Robert's having suffered the adjudication to pass for the arrears of an annuity which was constituted by Sir William himself in favour of his own lady.

Upon the reversal by the House of Lords of the judgment in the former case, Alexander Denham presented a petition to the Court of Session, setting forth that Archibald Stewart had obtained and continued possession upon no other title than that decree, and that, it having been reversed, the estate ought now to be sequestrated, and the interim rents applied to the payment of the widow's annuity and the other burdens. Answered, that he ought not

to be dispossessed before judgment upon the other points in the declarator of irritancy, more especially as he had paid sundry debts, and expended considerable sums of money upon the faith of that decree, which at all events ought to be repaid before he could be obliged to cede possession.

A remit was made to the Lord Ordinary to report upon the payments made by Archibald Stewart of debts chargeable on the estate; and after various proceedings, the above appeal having been entered in the original cause, the following interlocutor was pronounced, (19th January 1742,) "At advising the petition, it appeared to the Lords, "that there was an appeal served in the cause, and "although it was contended for the petitioner that "those petitions for sequestrations was no part of "the process appealed from, the Lords refused to "proceed in this petition."

A cross appeal was brought from this interlocutor of the 19th January 1742, and from others of the 13th July 1737, and 13th July 1739. Entered Feb. 2, 1742.

After hearing counsel, "it is ordered and ad- "judged, &c. that the said original and cross ap- "peals be, and are hereby dismissed; and that the "said several interlocutors therein complained of "be, and the same are hereby affirmed." Judgment, 8th April, 1742.

For the Appellant, *A. Hume Campbell, James Erskine.*

For the Respondent, *Alexander Lockhart, W. Murray.*