

to Reduction and Declarator Stair Inst. Lib. 2. Tit. 20. §. 36.

It hath been questioned whether the bare contracting of Debt by an Heir of Tailzie makes an Irritancy, so as that the Contraveener falls from his Right to the Estate ipso facto, tho it were never apprifed or adjudged for it? Because Law declares an Adjudication for such Debt to be void, and the Estate is not willed nor the next Heir of Tailzie injured more thereby, than by simple contracting of Debt. But it is said that it is not the bare contracting of Debt by an Heir of Tailzie, but his becoming a real Burden upon the tailzied Estate; whereby the same might be taken from the Heir of Tailzie that makes an Irritancy de non contrahendo debitorum. In a Tailzie 18 July 1722 Scot of Gala contra the personal Creditors of Sir James Scot of Gala: For if an Irritancy were incurred by the simple contracting of Debt, no Heir of Tailzie would enjoy his Estate: a Vassal without being an Irritancy; he could have no Commerce with Man and Man; he could not buy, sell, or give; not even for Necessaries; nor use his Credit in any way; his entailed Estate, he hath other Times ten Times more than his Debt; and an Heir of Tailzie who hath an unentailed Estate, more than sufficient to answer all his Debt may perhaps find it a vast Loss to him to clear it. Besides the aforesaid Burden upon his Estate, with such Conditions as he pleases; it were unreasonable to bind up an Heir as to other Things than what concerned the Estate. For in the contracting of Debt that the Act of Parliament shews makes an Irritancy, but the contracting Debt upon the Estate, or the adding that Debt to the Burden upon the Property. The Reason why a tailzied Estate is not affected by an Adjudication thereof against the Contraveener of the Tailzie is because his suffering it to be led Irritates his Right of Property, and therefore such an Adjudication is ineffectual as being obtained contra non dominum. The incurring an Irritancy of a Tailzie, takes not away the Benefit of the Contract; as in the Case at already said 18 July 1722 Hugh Scot of Gala contra the personal Creditors of Sir James Scot of Gala. For a Vassal may indeed affect his own Property with what Clauses and Conditions he pleases, which will be effectual among his Heirs and Successors to the utmost Extent, and the Superior cannot refuse to allow such irritant and resolute Clauses to be inserted in the Infeftments: But the Vassal cannot thereby impair the Benefits and Privileges belonging to the Superior as such; which are expressly reserved to him de Act 22. Stat. 4. Cap. 7. The Escheat once established is a Casualty of Superiority, which must have its Course, and no Decree of the Outlaw by voluntary alienating his Lands, or incurring an Irritancy can take away: For in this a lifeferent Escheat differs from a common Assignation to Mills and Butts, which, because it is no real Right upon the Land, but depends upon the Contract, ceaseth how soon his Interest comes to be extinguished. It is disputed whether an Irritancy of a Tailzie once incurred by the Heir's suffering the Estate to be apprifed or adjudged for his Debt may be purged by his redeeming the Apprifing or Adjudication after it is led? It is said on the one Hand, that

his quasitum to the next Member of Tailzie; by such an Apprifing can not be taken from him without his Consent: His Recognition incurred by giving Seifin of Ward Lands under Reversion, is not purged by the Heir's redeeming the Lands before the Superior commences his Process; Recognition. But on the other Hand it may be pleaded, and will be, that a Heir who is an Apprifing for the Heir's Debt, not being his direct Heir, is a Heir of Recognition is the Heir of the Ward Vassal, but only his Heir by Infeftment; an Irritancy thereby incurred may be more easily taken off. Besides if it be redeemed before any Process thereon at the instance of the subsequent Heir of Tailzie, no Harm is done; and to transmit the Heir to him free and unaffected, is all intended by the Statute made. Whereas in the Case of Recognition more Respect is had to the Contract done to the Superior, which is not satisfied by the Vassal's redeeming the Ward Lands than to any real Prejudice he sustains. Sir Thomas Hope is for allowing the Heir to purge the Irritancy, before any Summons raised against him by the next Heir of Tailzie, because Irritancies in Tailzie are not real, and abridge the free Property and Commerce, but thinks that the Contraveener ought not to be allowed to purge after he is cited in a Decree for the Extinction of his Right. That great Lawyer is also of Opinion that an Apprifing led against a Member of Tailzie for Debt contracted before the Tailzie, will infer an Irritancy, because he having accepted to the benefit of the Tailzie upon that Condition, ought to have paid his own former Debt, to wipe the Irritancy: And the Continuation of the Debts unpaid after the Tailzie is equivalent as if he had then contracted them. ~~But~~ But yet a Decree done by a Member of Tailzie, before the Succession fell to him, doth not import an Irritancy. 29 Decemb. 1710 Lesly and Johnston contra Dick of Grange. For a Man cannot forfeit a Right before he have it; if there be a Clause irritant and resolute in a Tailzie, an Inhibition is not necessary for securing the tailzied Estate, from being affected by Decrees of Contravention, as in the Treaty of Tailzie. When a Tailzie is made with Clauses irritant to certain Heirs successively; all which failing, to return to the Donor's Heirs and Assigns whatsoever: These Heirs and Assigns in the last Termination, are not upon the Return of the Fee to them, affected with Irritancies; for then the tailzied Fee becomes simple. 29 Decemb. 1710 Lesly & Johnston contra Dick of Grange. Stair Lib. 2. Tit. 3. §. 43. And Returns to the Donor's Heirs whatsoever, not as Substitutes in the Tailzie: Who will have Right to the Lands without the Burden of personal Debts contracted by the last Member of the Tailzie. But since he was Free and might have disposed the Lands freely, real Burdens as Wadsets or Annuallents imposed by him for an Apprifing and for his Debts, would stand good: For the Clause of Return seems only