

1701. June 25.

BORTHWICK *against* BORTHWICK.

RANKEILLOR reported Borthwick of Fallahill against Borthwick of Craikstone. Borthwick of Craikstone, in 1660, grants a bond of tailzie, whereby he obliges himself, if he succeeds as heir to his father, to resign in favours of himself and the heirs of his own body; which failing, to Alexander Borthwick, his brother, with irritant clauses *de non alienando, et non contrabendo debitum*. Six years after this, old Craikstone marrying his said son to Riccarton's daughter, he disposes the estate to him in the contract of marriage, and there the tailzie nor irritant clauses are not repeated; but, on the contrary, 12,000 merks provided to the younger bairns of the marriage, and the spouse to 1200 merks of annuity; all which seemed inconsistent with the former tailzie: The said Alexander Borthwick of Fallahill pursues a declarator against Craikstone, as heir to his father on the said bond of tailzie, to resign and take the rights in the terms thereof, especially seeing inhibition was served thereon. *Alleged*, As the tailzie was never completed, so it was a latent deserted paper, never obligatory, but innovative, renounced and passed from, in so far as, posterior thereto, the father who remained fiar of the lands, disposed the same simply to his son by his contract of marriage, without either mention or relation to the former bond of tailzie or resolute clauses therein contained; which was a plain and direct passing from the said tailzie: Likeas, Fallahill being the defender's tutor, he served him heir of line without taking notice of the tailzie, and accepted a wadset-right of a part of the tailzied lands, and did not defend him against the debts upon the tailzie; all which were manifest and downright contraventions thereof. *Answered*, That renunciations of rights is one of the hardest and obscurest presumptions in law, and ought to be clearly demonstrate, otherwise it ought not to be presumed; and though the contract matrimonial makes no mention nor relation to the tailzie, yet it noways revokes, casses or annuls it; and therefore what hinders it to stand; and the deeds condescended on are not so incompatible with it but they may both subsist. The Lords found the succession being put in another channel by the contract of marriage, the tailzie was not obligatory, nor effectual now, which was mainly designed in that event of his succeeding as heir; which never existed, seeing he got the estate *præceptione hereditatis* by a disposition in the contract of marriage, clogged with no irritancies, but rather clauses inconsistent therewith.

*Fol. Dic. v. 1. p. 191. Fountainhall, v. 2. p. 116.*

No 46.

A party granted a bond of tailzie, obliging himself, if he succeeded as heir to his father, to resign in favour of the heirs of his body, with irritant clauses. After six years, his father disposed to him, with provisions inconsistent with the tailzie. The tailzie found not obligatory.