

under the provisions and irritancies above mentioned, to be inserted in the infestment to follow thereon. And as to the registration, it was answered, That since he had accepted of a disposition, with these irritancies upon himself, they must certainly bind him, without regard to the act of Parliament; for, surely, the registration could have no influence upon the nature of the right by which he possessed.

2do, It was owned, that though the present Dorator was named fiar, yet it appeared clearly, that the intention of the tailzier was to bind him by all the clauses; for there were several of them which indeed mentioned only the heirs, but must be understood likewise to comprehend Dorator the institute—such as, “ That the heirs should pay the tailzier’s debt, and, for that end, should have right to the moveables;” and particularly a clause whereby “ the tailzier appoints tutors to such as shall be minors at his death;” where he says, “ failing the present Dorator, he appoints the same tutors also to the next heirs,” &c.

The Lords found, That the heir of entail was bound by the tailzie, although it was not registered; and found, That the irritancies affect the institute as well as the other heirs.

For Willison, *Ja. Ferguson, jun.* Alt. *Ja. Graham, sen. & Arch. Stewart, jun.* Clerk, *Hall.*

Edgar, p. 59.

1724. December 8.

COMPETITION JAMES WILLISON, with the CREDITORS of DORATOR.

In the ranking and sale of the estate of Dorator above-mentioned, this question occurred, “ Whether or not a tailzie, with irritant clauses in the procuratories and precepts, but not recorded in terms of the act 1685, does void the creditors’ rights?”

For the creditors, was urged the express tenor of the act, appointing a register for tailzie, and ordaining tailzies to be insert therein; subjoining, “ And being so insert, his Majesty, &c. declares the same to be real and effectual, not only against the contraveners, but also against their creditors, and other singular successors whatsoever, whether by legal or conventional titles;” whereby it is with certainty inferred *a contrario sensu*, if tailzies are not insert, the law does not militate, and creditors are safe; and truly was it otherwise, no reason could be given why such a register should have been appointed.

For James Willison it was contended, This act can never be understood as entirely setting aside what was always looked upon as an established principle in our law, namely, That wherever one by diligence affects a qualified right, especially when at the same time that he sees the right, he must see the quality, he can only carry that right with the quality that affects it. Upon examination of the following part of the law, this will appear to be far from the intention of the Legisla-

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A tailzie not recorded, has no effect against creditors.

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ture, in so far as there follows a certification in the law, " That if the said provisions and irritant clauses shall not be repeated in the rights and conveyances, the same shall not militate against the creditors or other singular successors, who shall happen to contract *bona fide* with the person who stood infeft in the estate, without the said clauses in the body of his right : " But there is no manner of certification upon neglecting to register. From which an observation or two do naturally arise : *1mo*, That it was the inserting the clauses in the infeftments and conveyances, the law considered as the proper notification to the persons who were to contract with the heir ; and therefore it is, that the omission thereof should put creditors or purchasers in safety to contract, by no means the omission of registration : It cannot be otherwise accounted for, that a certification is adjected to the one provision, and none to the other ; and the common rule will here apply, *Casus omissus habetur pro omisso*. And surely, if the reason of the thing be considered, one shall be at a loss to find any tolerable colour why a tailzie, because not registered, shall have no effect against a creditor, who at the same time has all the certification his heart can require, of his hazard in contracting with an heir of tailzie, from the heir's own rights in the ordinary record. *2do*, The Lords have already found this tailzie good against the heir, though not registered : But for what reason ? Not surely upon any thing in the statute literally taken : For, if according to the sense put upon it by the creditors, the tailzie is not to be allowed, or in other words, is to be no tailzie, if not registered ; then it must be a simple fee even *quoad* the heir. But the Lords found so from the nature of the right ; from which, as it can now be argued upon as law, this consequence follows, that the statute is not the sole and only governing rule in matter of tailzies : It leaves us still to be guided by maxims drawn from the nature of things, and our former established law ; which still regulates the heir, and must regulate those deriving right from him, when they have not the *bona fides* of a purchaser to plead, or any invincible ignorance of the quality that affected the right : But at the same time, that they see the right on the faith of which they pretend to have contracted, they see it affected with a quality ; and therefore cannot, in the nature of the thing, carry it free of that quality, or plead a *bona fides* to exeeem them from it.

Replied for the creditors to the *first*, The certification is not adjected to the clause touching the omission of registration, for a good reason, because it has no relation to it, being calculated to oblige every heir of tailzie to repeat the clauses irritant and resolute in his rights, in order that every heir's infeftment might be qualified by these clauses : But it never was designed that every heir should register the tailzie, one registration being sufficient for all. To the *second*, No argument can be drawn from heirs to creditors in this manner : A tailzie unregistered is good against the heirs, because every person is obliged to notice and know the qualities of his own right, which is no way contrary to the act 1685, ordaining tailzies to be registered, because that clause of the act, like all other clauses of publication, was intended with a view only to creditors, and with no manner of view to heirs. Nor will it follow, that an unregistered tailzie ought also to be

good against creditors who have a sufficient intimation otherwise of the tailzie, since it is expressed in the infestments: For if the law hath thought proper, for the more security of creditors, to order a publication both ways, creditors have good reason to insist upon their privilege; and though one of them might be thought sufficient security, there is no harm done in commanding both: Multitude of the law breaks not the law.

“The Lords found, That the tailzie not being registered in terms of the act of Parliament, cannot prejudice the creditors.”

Rem. Dec. v. 1. No. 52. p. 101.

* * Edgar's report of the sequel of this case is Sect. 5. *infra*.

No. 15

1726. *February.*HALL *against* CASSIE.

No. 16

Tailzies good against heirs without registration, but not against creditors. See APPENDIX.

Fol. Dic. v. 2. p. 436.

1728. *February 2.* LORD STATHNAVER *against* DUKE of DOUGLAS.

No. 17.

The deceased Jean Countess of Sutherland, proprietor of a small estate near the village of Inveresk, executed a disposition and tailzie thereof in favours of her son Archibald Earl of Forfar, and the heirs-male of his body; which failing, to William Lord Strathnaver, and the heirs-male of his body; which failing, &c. In these lands the Countess thereby “obliges herself, her heirs and successors, under the conditions therein expressed, duly and lawfully to infest the said Archibald Earl of Forfar, and the other heirs of provision; and for that effect to grant procuratories, precepts, and other writs necessary.” And in the procuratory of resignation contained in the said tailzie, provides and declares, “That it shall not be in the power of the said Archibald Earl of Forfar, and the heirs of provision above-written, to contract debts upon the foresaid lands, or others above disposed; or to affect the same with any sum exceeding two years rent for the time. To this is subjoined, “That it should not be in the power of the said Archibald Earl of Forfar, and his heirs of provision, to give away, dilapidate or impignorate the said lands, nor to allocate, or to bestow them in fee or jointure to their Ladies;” and in that case the tailzie is declared to be void and null, in so far as conceived in favours of the person so acting; and the next heir of provision is to succeed in his right and place. This disposition, containing a clause “dispensing with the not delivery,” was

Action competent against an heir to purge the tailzie of his debts, which he had laid upon it contrary to the will of the tailzier.