

1725. *February 13.*

JEAN LOTHIAN, Relict of LUDOVICK CALLENDAR, and GRIZEL CALLENDAR,
Her Daughter, *against* JAMES WILLYSON, Merchant in Glasgow.

No. 108.

Found that the heir of entail could not challenge as deeds of contravention, rational provisions to a wife and children made before pronouncing interlocutor in the declarator.

The irritancies in the tailzie of the estate of Dorater being incurred, and declared against Ludovick Callendar, (as observed No. 14. p. 15369.) in the ranking of his creditors, there was produced a bond granted by him for 600 merks of annuity to his wife, and £8,000 Scots to his daughter.

Mr. Willyson, who had prevailed in the declarator, objected to the bond, as being granted not only subsequent to the deeds inferring the irritancy, but after executing a libelled summons of declarator and a pleading before the Ordinary.

It was answered for the wife and daughter: That by the tenor of the tailzie, there was express power given to the said Ludovick, to provide his wife and children with suitable provisions out of the estate; which power could not be taken from him without a sentence.

Replied for Willyson, That the Faculty to provide supposed the subsistence of the heir's right; but after forefaulting of that by the contravention, his posterior deeds could be of no effect; and it appeared that this must have been the meaning of the tailzier, in so far as by the tailzie, not only the contravener's own right is irritated, but that of the descendants of his body; and it would be absurd, that the contravener should have it in his power to bring in these very descendants, to carry off by their provisions the subjects from which they were excluded by the contravention.

Duplied for Mrs. Callendar and her daughter: That the cause of granting the bond was anterior to the contracting of the debts which had irritated Ludovick's right; and the same writ which gave Willyson a title to quarrel these provisions, authorised Callendar to make them.

The Lords found, That the heir of entail could not quarrel rational provisions to the wife and children made before pronouncing the interlocutor in the declarator.

For Willyson, *Ja. Fergusson, sen.*Alt. *Arch Stewart, jun.*Clerk, *Hall.**Edgar, p. 168.*

* * See No. 15. p. 15371.

1726. *December 27.*

JEAN CANT, Relict of BORTHWICK of Hartside, *against* BORTHWICK of
Crookston.

No. 109.

How far heirs of tailzie are at liberty to

Betwixt these parties the question occurred, If tailzies made before the act 1685, anent tailzies, fall to be regulated thereby, so as to be ineffectual against creditors, if not registered, &c.

And for Jean Cant, it was pleaded, That the law makes no distinction, but lays down a plain and general rule, to disallow of all tailzies where the directions of the statute have not been observed, without any limitation or exception; and therefore Lord Stair, Tit. Infeftments of Property, § 58. near the beginning, speaking of the statute 1685, adds, "That this statute did weaken the former tailzies with clauses irritant;" which it could not, did they not fall under the statute. And if better authority could be necessary, we have that of the Legislature in the act 33. 1690. There it is laid down for a rule, and a just one it is, "That such rights as are not in a man's power to alienate by consent, should not be confiscated by his crime:" And, in consequence of this rule it is statuted, that the possessor of an entailed estate should not forfeit in prejudice of the heirs of entail; but with this express *proviso*, "That the right of tailzie be registered conform to the act of Parliament in the year 1685;" which plainly shows the sense of the Legislature, that even a tailzie made before the act 1685 ought to be registered, otherwise to have no effect against forfeiture, and of consequence far less against creditors. And thus also it was determined, 28th July, 1725, Viscount of Garnock against the Master, &c. Sect. 7. *h. t.*

To which it was answered: This law has no retrospect; it gives directions concerning tailzies to be made, leaving those that were made to stand upon the principles of law then received; and where it says, "That such tailzies shall only be allowed, &c. it cannot possibly understand any tailzies, but "such as were to be made;" and had it been otherwise, the Legislature would certainly have found proper words to have expressed it plainly, and not left it to a construction or implication, since it was a case that could not escape notice. As to the authority from the act 33. Parl. 1690, it is true, the *proviso* of the act 1685 is there only mentioned, with no view to exclude former tailzies that were not in terms of the *proviso*, but *ex eo quod plerumque fit*; because the generality of settlements of that kind, were posterior to the act. As to the decision of the Viscount of Garnock, the Lords did not find, that the act 1685 regulates the constitution of tailzies made before the act, but only the transmission; and for good reason, for though the act has no retrospect to invalidate tailzies habilely constituted *ab ante*, it may well regulate the transmissions of tailzies; which transmissions are posterior to the act. To conclude, This act of Parliament has no retrospect; registration belongs to the constitution of tailzies; and if it was not necessary to tailzies before the act, the act has not made it necessary.

"The Lords sustained the tailzie, though not recorded conform to the act of Parliament 1685, in respect the same was granted before the act."

There was another point debated betwixt these parties, If an heir of an entailed estate with strict prohibitory and irritant clauses, can give a life-rent provision in favours of a wife; or if the same is excluded by the generality of the prohibitive clause *de non alienando*?

And it was argued for Jean Cant the relict, who had got a bond of annuity from her deceased husband, That if not mentioned in the most express terms, it

No. 109.
provide
wives.

The act 1685
regulates not
the constitution
of tail-
zies made
prior to it.

- No. 109. will never be understood any tailzier designed to restrict his heirs from making suitable provisions to their wives and children, which is necessary for the continuance of the tailzie, because otherwise it would be a tacit exclusion of marriage; and therefore a general clause, *de non alienando, et non contrahendo debitum*, will never exclude them.

It was allowed from the other side, That an heir of tailzie, however strictly tied up, is still understood to have a power of endowing his wife and children with rational provisions: But it was contended, that the wife's share can never go beyond the terce, which is determined by the law to be a rational provision.

"The Lords found, The bond of annuity is comprehended under the prohibitive clause in the tailzie; but sustained the said bond, in so far as the same can be supported by a terce."

Rem. Dec. No. 90. p. 178.

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

No. 110.

An entail containing strict prohibitory and irritant clauses with regard to the contracting of debt, but no prohibition to alter the order of succession, was found notwithstanding to imply such a prohibition.

Fol. Dic. v. 2. p. 434.

* * This case is No. 17. p. 15373.

1730. February. EARL of LAUDERDALE *against* HEIRS OF ENTAIL.

No. 111.

A general clause in a tailzie, prohibiting the heirs of entail to sell, annalzie, alienate, wadset or dispone the lands, &c. under irritancies, is not understood to restrain them from selling for payment of the tailzier's debts. See APPENDIX.

Fol. Dic. v. 2. p. 433.

1730. February. BORTHWICK *against* BORTHWICK.

No. 112.

An heir of entail, with strict prohibitory and irritant clauses, *de non alienando et non contrahendo debitum*, cannot grant bonds of provision to his younger children, so as to affect the estate after his decease. He can indeed grant a jointure to his wife, equivalent to the legal third, but there is no consequence from that,