

1751. *January 11.* JOHN FOULIS *against* The KING'S ADVOCATE.

No. 26.

A tailzie made before 1865, never recorded, prohibited alienation without consent of certain persons all dead. The proprietor's debts were found by declarator to affect the estate.

Sir Archibald Primrose of Carington, in 1677, acquired the estate of Dunipace, to himself in life-rent, and to Archibald Foulis his grandson, and the heirs-male of his body in fee; with other substitutions, "declaring that it should not be lawful for the said Archibald Foulis, &c. nor the heirs-male of their bodies, to dispone the lands, &c. nor to wadset the same, nor to contract debts, wherewith they might be affected or evicted, without the consent of the said Sir Archibald Primrose, during his life, and failing of him by decease, without the consent of certain persons named, or such of them as were alive:" And declaring that it should be lawful to the heirs, with the said consent, to burden the lands with competent provisions; and in case they should happen to contravene, by disposing the foresaid lands, or burdening the same, otherwise than by consent in manner foresaid; in that case the contravener, and the children of his body, should amit and tyne their right; but there was no clause annulling the debts and deeds.

George, Sir Archibald's second grandson, succeeded in virtue of the substitution; and was succeeded by Sir Archibald Primrose his son, (the heirs being obliged to carry that name) who contracted considerable debts; and thereupon Thomas Gardner, and other his creditors, led adjudications; and obtained a declarator 27th January 1744, That notwithstanding the tailzie, the lands contained might be affected by adjudication and other legal diligences, raised or to be raised at the pursuer's instance, for what debts Sir Archibald had contracted, or might contract; and that the said debts might become real burdens thereon; and that the creditors might bring the estate to a judicial sale. (Sect. 3. *h. t.*)

Sir Archibald was attainted for the Rebellion, and his estate surveyed, which was claimed by his brother John Foulis as heir of tailzie.

Answered: By the law of England estates tailzied are forfeited for treason, saving the remainder; but there is no such right in Scotland as that of remainder; and if there were, the claimant would not have it; the substitution was to Archibald and his heirs; which failing, to George and his heirs; which, in the English stile, would have been expressed, remainder to George and his heirs; but the late Sir Archibald and this claimant being both sons to George, he is not in the remainder.

2dly, Sir Archibald had power to burden and alienate the estate, and actually did so; consequently it was forfeitable for his treason,

3dly, The tailzie was never recorded, so no tailzie.

Pleaded for the claimant: The entail was made before 1685, so is effectual without recording; as by common law proprietors were empowered to tailzie their estates: It is true the act then made required recording, but that did not affect former valid tailzies; and so the Lords have always found: By the same law the debts of the heir of tailzie were null, if he was prohibited to contract them under the irritancy of his right, as in Stormont's case; (Sect. 3.) nor was it necessary the

tailzier should declare they should be so : He could not make them null, except in so far as they might affect the estate ; and this was sufficiently done, by prohibiting the contracting, and irritating the contractor's right ; but the other clause having been introduced by the anxiety of writers, was ordered to be inserted by the statute, and since then it has become necessary to add it : The claimant is not bound by the decret, finding Sir Archibald's debts affected the estate : It is true he was cited, but as it was pronounced in absence of him, and was collusive of Sir Archibald, he may be heard against it : The decret itself does not find Sir Archibald had right to dispose of the estate, but only that his debts might be made effectual against it, which is not enough to make it forfeitable. for his crime, as he could not alienate by the nature of his right. By the English law remainders may be disappointed, and an entail docked, by suffering a recovery ; but, until recovery actually suffered, and the estate thereby reduced to a fee-simple, the remainder is safe against forfeiture ; and yet the tenant in tail is not reckoned guilty of any fraud, nor incurs any obligation to the person in remainder by docking the entail. It has often been found, on occasion of the former Rebellion, that heirs-substitute have their rights saved, as being in the remainder, and there is with us no distinction of heirs-substitute ; but the right of all is stronger than his who, in England, has a remainder, as the heir's right with us cannot be disappointed, at least without fraud.

No. 26.

Pleaded for the respondent : Tailzies made before 1685 do not invalidate the debts, unless it were so provided, and therefore the judgment to which the claimant was cited was rightly given ; and it will appear by the decret there was no collusion : By this tailzie the heirs were only prohibited to contract, without consent of certain persons, or the survivors of them ; and by being all dead, the estate became a fee-simple in Sir Archibald : The ground of the decision in the case of Park was, that the estate was unalienable ; but there is no ground for saving an estate which might be alienated, whatever warrandice the alienaters might incur thereby.

The Lords dismissed the claim.

Clerk, *Pringle*.

*D. Falconer, v. 2. No. 179. p. 213.*

1751. July 17.

STRANG *against* STRANG.

A tailzie containing unreasonable conditions in defraud of the tailzier's contract of marriage reduced-

No. 27.

\*.\* This case is No. 118. p. 12988. *voce* PROVISION TO HEIRS AND CHILDREN.