

No. 129. 1726. *December 27.* CANT *against* BORTHWICK.

The act 1685 has no retrospect, and therefore regulates not the constitution of tailzies made before the act, so that such need not be recorded.

Rem. Dec.

* * * This case is No. 109. p. 15554.

No. 130. 1741. *November 23.* BAILIE *against* STEWART.

The act 1685 was introduced for the security of creditors, as well as for the security of entails; and therefore a declarator of irritancy having been obtained against an heir of entail, who possessed the estate upon a general service, for neglecting to insert in the retour the limitations of the disposition of entail, with which he connected by the service, his debts were found good against the next heir, the tailzie not being recorded in the terms of the act 1685, which they would not have been at common law, in respect of the provisions in the right itself, which was sufficiently qualified thereby, at least while it stood as a personal right without infestment: And it was found, That the estate might be affected for these debts, though, by declarator of irritancy, the same was established in the person of the heir, who did not represent the defunct debtor, and so the estate was now neither in the debtor's person, nor *in hæreditate jacente* of him; which the Lords did not regard, because, as to the creditors, the case was the same, in virtue of the act 1685, as if the debtor had been absolute proprietor. See APPENDIX.

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

No. 131. 1743. *December 20.* LORD MAXWELL *against* WILLIAM TAIT.

Tailzie not recorded, what effect it has with respect to disabling heirs to sell?

The Earl of Nithsdale having tailzied his estate, disposed the same to Lord Maxwell; who, having sold part thereof by a minute of sale to the said William Tait, charged him to implement the same; and, in support of the charge, pleaded, That the disposition in favours of the charger having never been recorded in the register of tailzies was not good, by the act 1685, against third parties, it being there ordained, that such tailzies should only be allowed which are recorded in the manner therein prescribed; *2do*, That although the tailzie be the deed by which the charger holds the lands, and so must make part of the progress given to the suspender, who, on that account, cannot plead ignorance, in case his title were quarrelled by any succeeding heir, yet this can afford no objection, in respect the same is clothed with infestment long ago.

Answered: That entails were valid before the act 1685; and, when regularly guarded by prohibitory and irritant clauses, did bar all alienations. No. 131.

An attempt to sell, or contract debt, was a forfeiture; after which, the right granted was truly *a non habente potestatem*: That it was not the intendment of the statute to alter the law, but to give new force to it, with respect to such entails as should be made thereafter: That the entail in question was made preceding the act; and the minute of sale charged on was a forfeiture of Lord Maxwell's right; consequently, the suspender cannot be bound to pay the price, when any right flowing from the charger would be *a non habente*. As for the clause in the statute, "that tailzies shall only be allowed which are recorded," the meaning is, that tailzies not recorded shall have no countenance or support from the act. Did it mean, that all tailzies were to be cut down that were not recorded, it would necessarily follow, that they would not be good against heirs nor creditors; 2do, Taking the statute to respect creditors only, leaving entails not to affect heirs, which is commonly understood to be the meaning of it, yet still, upon that footing, the suspender is not safe, as he cannot plead a *bona fides*, being now in a process about this very entail; and if the person who contracts with the heir of entail acknowledges he was intimately acquainted with the deed of entail, there is no pretext for his having the benefit of the statute.

Replied: If an entail not recorded be not good against creditors, neither ought it to be effectual against a purchaser; and if a creditor could carry it off by adjudication, so may a purchaser, who is truly creditor to the seller; more especially ought this to hold in this case, where there is no prohibition on the charger to suffer adjudications to be led. And as to the suspender's private knowledge putting him *in mala fide* to accept of a disposition from the charger, it was answered, That if, by the public law, a tailzie not recorded is not good against third parties, private knowledge will not hurt:—if a writing is executed, but not so as the law directs, nobody is bound to pay any regard to it, but in full safety to act as if no such thing were.

The Lords suspended the letters, on this ground, That the case was doubtful, and that the proper contradictors were not in the field; and, therefore, that the suspender could not be bound to accept of the bargain.

C. Home, Na. 252. p. 406.

1744. July 5.

MURRAY against MURRAY.

No. 132.

An heir of entail, in whose sasine the irritant, prohibitory, and resolute clauses, were not repeated, but referred to, having contracted debt, these were found a burden upon the estate.

* * Kilkerran's report of this case is No. 20. p. 15380.; C. Home's is No. 212. p. 9881. *voce* PASSIVE TITLE.