The Lords found the defender ought to exhibit, reserving all defences against the registration, or any other legal effect, as accords. No. 12.

Act. *Sir Walter Pringle, &c.* Alt. *Hugh Dalrymple, &c.* Clerk, *Mackenzie.*

Bruce, p. 51.

*** See case, Schaw against Schaw, Sect. 6. *h. t.*

1723. *January.* IRVINE *against* IRVINE.

No. 13.

It was found, in conformity with Symson and Home against Home, No. 6. p. 15353. That a remote substitute may pursue contravention of a tailzie, where the nearer heir lies by and neglects his right. See APPENDIX.

Fol. Dic. v. 2. p. 427.

1724. *February* 26. JAMES WILLISON *against* CALLENDER of Dorator.

No. 14.
Tailzies good against heirs without registration.

Callender of Dorator tailzied his estate, with clauses irritant and resolutive, in favours of Ludovick Willison, *alias* Callender, the present Dorator, and the heirs-male of his body; and failing of him, to James Willison, his brother; with several other substitutions. The said Ludovick Willison, *alias* Callender, of Dorator, having contracted debts, contrary to the tenor of his right, James Willison, the substitute, pursued a declarator of irritancy: Against which this was made, That the tailzie not being registered in terms of the act 1685, the same could not be allowed, and was ineffectual to prejudge either Dorator or his creditors.

To make good this defence, it was pleaded, That the act 1685, anent tailzies, is an entire new constitution, settling the rules that govern the whole subject of tailzies; and therefore derogates from all former practice in this matter: But so it is, that the act gives allowance or authority only to such tailzies as are authorised by the Lords, and recorded; consequently, without that, tailzies can have no manner of effect, and so can neither be good against heirs or creditors, these being the two classes with respect to which the act statutes equally.

It was answered, That the act 1685 is no new correctory law, abolishing every former practice anent tailzies. It is plainly a declaratory law, not restricting the power of making tailzies; introducing, indeed, some things new, for the security of creditors, but leaving the heirs entirely to that footing they are placed upon by the tailzie. Hence, the receiver of a disposition, containing strict prohibitory and irritant clauses, if he contravene the condition of his own right, must fall from the same, as the disponer has appointed, this new act notwithstanding; for though the creditor may, the heir can never object, that the tailzie is void, because not

No. 12. registered: And truly, without the most express words, one should never imagine that, in a question with the disponee himself, the registration of the right by which he possesses can have any influence upon the nature of it; and the words insinuate rather the contrary—" And being so insert, his Majesty, with advice and consent aforesaid, declares the same to be real and effectual, not only against the contraveners and their heirs," (which manner of expression plainly insinuates, that so far the matter is taken for granted, and supposed from the nature of the thing,—and then follows) " but also against their creditors, apprisers, or other singular successors:" Which last was the only intendment of the statute. It continues, therefore, a principle, and probably will to the end of the world, " That any quality in his own right must necessarily affect the possessor."

" The Lords found the tailzie binding upon the institute, who had accepted the same, though not registered."

Rem. Dec. v. 1. *p.* 94.

*** Edgar reports this case:

Callender of Dorator tailzied his estate, in favours of Ludovick Willison, and the heirs-male of his body; which failing, to James Willison, Ludovick's brother, with a clause *de non alienando et non contrahendo debitum;* and a clause irritant and resolutive of the debts and right of the person who should contravene and contract the debt, and that the lands should pertain to the next substitute, without the burden of the said debts.

Ludovick having succeeded, did contract debts, to that extent that his creditors pursued a sale of his estate; and James Willison insisted in a declarator of irritancy of his brother's right.

It was alleged for the defender, 1*mo*, That the irritancies could not strike against him, since the tailzie was neither registered, nor did contain the irritant and resolutive clauses in the procuratories and precepts, both which are required by the act of Parliament 1685; and since that law was an entire new regulation as to tailzies, it must be the sole rule of judging in questions anent the effect of such irritancies: And the Lords having found, as in the cases of Borthwick of Hartside, and of Wisheart of Logie against the Creditors of his Brother, that tailzies not registered did not affect creditors, by the same argument they cannot affect the heirs; for these two are, by the act of Parliament, put *in pari casu.* See Sect. 7. *h. t.*

2*do*, Though this tailzie were good, yet the irritancies therein being only adjected to the right of the heirs, they could not affect him; for, by the express words of the tailzie, the present Dorator is not heir, but fiar, and needed no service.

It was answered for the pursuer, 1*mo*, That the tailzie contained the prohibitory and irritant clauses fully engrossed; and though the procuratory and precept did not, at full length, resume these clauses, yet, by a reference they bore, to be

No. 14.

under the provisions and irritancies above mentioned, to be inserted in the infeftment 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.

No. 15.
A tailzie not recorded, has no effect against creditors.

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-