No. 126. doth also comprehend the irritancies; and that these clauses irritant, though not expressed, but only related to in the tailzie of Rutherford, do affect that tailzie, so as Sir Alexander Don of Rutherford could not gratuitously alter the order of succession.

Fol. Dic. v. 2. *p.* 433. *Forbes, p.* 654.

1725. *July* 28.

The Viscount of Garnock, *against* the Master of Garnock, and The other Heirs of Entail of Sir John Crawford of Kilbirny.

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The act 1685 relates to all posterior conveyances, whether the tailzies were made before or after it.

Irritancies must be recorded *verbatim.*

Sir John Crawford, *anno* 1662, made an entail of his estate of Kilbirny and others, in favours of his daughter Margaret, and the heirs therein substituted to her, with prohibitory and irritant clauses against contracting of debt; upon which followed a sasine to Margaret, containing verbatim the limitations and provisions in the entail. After the death of Margaret, the first institute, John, afterwards Viscount of Garnock, her son, was infeft as heir to her; but neither his service or sasine contained verbatim the limitations and clauses irritant, only a general reference "with and under the reservations, provisions, and conditions specified in the former charter and infeftment." The late Viscount having contracted a great burden of debts which were corroborated by the present Viscount, it was thought advisable to raise a process of sale of part of the entailed estate, that the Lords might interpose their authority thereto. Compearance was made for the creditors, and at the same time for the master of Garnock and the heirs of entail; who being called as defenders, did object, "That the estate could not be sold for the payment of any debts contracted by the pursuer, or by the deceased Viscount, his father, in regard that by the settlement and entail of the estate, made by Sir John Crawford of Kilbirny 1662, both the pursuer and his father were so limited and restrained, that they could not charge the estate with debts; and of consequence, could not sell the estate for payment of those debts that were illegally contracted." The creditors on the other hand alleged, "That the entail could not be effectual against them, because the irritancies were not repeated in the retours, precepts and sasines, according to the direction of the act of Parliament 1685."

In answer to which, it was pleaded for the master and other heirs of entail, that the act 1685, does not at all concern deeds of settlement, or entails made prior to its date; it does not declare what was law before, or what was the import of deeds made before: Nor does it once, in any clause, mention deeds of a prior date; but every clause is introduced by words relative to what is statuted by the act itself, and to nothing else. Nor is it absurd, that at this rate, tailzies made before the act, are stronger than those made after: The Legislature thought fit by the act 1685, that creditors might not be ensnared, to regulate the form of entails thereafter to be made, and to enjoin some solemnities that were not necessary before the act: But does not this happen every day with relation to correctory laws?

Thus, a sasine before the act 1617, is valid without registration; and thus an obilgation, though now ineffectual without the writer's name and designation of the witnesses insert in the body of the writ, was formerly good without these solemnities.

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Replied for the creditors: The words *statutes* and *declares* are general, equally referring to prior and posterior tailzies; nor will the design of the act, which was the security of creditors, admit of any distinction: It was obvious, that creditors were exposed to innumerable snares by the then constitution of tailzies. From the nature of the thing, a tailzie being once established by limitations and qualifications in the original infeftment, the limations were good against all singular successors, because none of them could convey the right otherwise than they had it; and no *bona fides* could protect the purchaser, unless joined with a forty years positive prescription: Now this being highly inconvenient, this act has appointed various certifications, whereby creditors and purchasers are absolutely secured; and as there is the same reason that these certifications take place in all tailzies, whether before or after the act, it is against reason to imagine, that the lawgiver, who has confessedly discovered such anxiety to secure strangers contracters, with respect to entails to be made after the law, designed to leave them exposed to tailzies made before. Here the creditors are not pleading that the act has a retrospect; they contend only, that without distinction of tailzies when made, it regulates whatever transmission is posterior thereto: And it is certainly just as easy to insert the prohibitory and irritant clauses in the conveyances of tailzies made before the act, as where they are made after.

It was pleaded, in the second place, for the Master of Garnock, if it shall be found, that this tailzie is comprehended under the act 1685, he can still subsume and say, that the irritancies are engrossed in the conveyances, according to the appointment of that act; indeed not *verbatim*, but by a general reference sufficient to put creditors *in mâla fide* to contract, without looking into the original infeftments where the irritancies are at full length; which to all intents and purposes is answering the design of t he thing.

The creditors answered, That it will not be found a sufficient fulfilling the law, unless the irritant clauses are repeated in all the subsequent conveyances; for such are the words of the act: So that a general reference, which may be easily overlooked by creditors, can neither answer the words or intention of the statute.

The Lords found, That the act 1685 regulates the transmission of tailzies made before the said act, as well as those made since; and found, that the general reference in the sasine is not sufficient to interpel creditors according to the act 1685."

Fol. Dic. v. 2. *p.* 436. *Rem. Dec. v.* 1. *No.* 60. *p.* 115.

*** This case is reported by Edgar:

Sir John Crawford made an entail of his estate, *anno* 1662, in favours of his daughter Margaret, and the heirs therein substitute to her, wth prohibitory and

No. 127. irritant clauses against contracting of debts, or doing any other deed, whereby the estate, or any part thereof, might be apprised or evicted; declaring that all deeds contrary to the said provision, done by the heirs, should be void and null, by way of exception or reply. Upon this deed the said Margaret was infeft, and her sasine contained *verbatim* the limitations and provisions in the entail; which infeftment was, in June 1663, confirmed by a charter under the great seal, in so far as concerned the lands holden of the Crown; and the limitations were likewise specially engrossed in the charter.

John, late Viscount of Garnock, son to the said Margaret, was after her death infeft, *anno* 1684, in the lands of Drumray, holding of the Duchess of Lenox, by a precept of *clare*; and the sasine bore "Secundum formam & tenorem priorum infeofamentorum dict. terrarum, & sub & ex provisionibus in iisdem content. tradatis," &c.

The said John, *anno* 1690, was served heir in special in the lands that held of the Crown, and the retour expressly referred to Margaret's charter, and bore these words, "Secundum et virtute cartæ, &c. et sub et supra reservationibus, provisionibus ibi specificat. dedata," &c. and in like manner the sasine following upon the bore the same words.

The said John contracted considerable debts, which were corroborated by his son the pursuer, who as heir served and retoured to him, brought a process for the sale of the estate, or such part of it as would satisfy and pay his creditors: In which action he was opposed by the defenders the other heirs of entail, who objected, that the sale could not proceed for payment of the creditors, because they had not contracted *bona fide*, since they could not but know, that the estate was given under conditions disabling their debtor from contracting debts so as to affect the estate; for not only the infeftment and charter 1663 contained the irritant clause in the entail, but John's infeftment *anno* 1684, and his retour and sasine as heir to his Mother, *anno* 1690, contained a general reference to the charter upon the entail.

It was answered for the pursuers, That a general reference to former charters was by no means sufficient to put the creditors in *mala fide*; for by the act of Parliament 1685 it was necessary that in every conveyance and infeftment in the person of the succeeding heir, the provisions and irritant clauses should be repeated, otherwise they were not to militate against creditors: And the indulgence which the law has given to the settling of estates, so as to make them unalienable, against the nature of property, is not to be presumed to take place; but such open and plain notice must be given, as that none can pretend ignorance of the limitation of the right, which a general reference to former infeftments can never be; the creditors not being obliged to search any further than the present possessor's right, and if they should not thereby have full intimation of their hazard, they acted *bona fide*.

Replied for the defenders, 1*mo*, That the act 1685 could not regulate the present case, because the entail was made prior to that act; and the whole words of the act do relate to deeds and settlements to be made thereafter. 2*do*, That the act

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of Parliament appoints the irritant clauses to be inserted in procuratories, charters, precepts and sasines, in the original infeftment, that they may once become effectual real burdens upon the settlement; but when it mentions these clauses to be repeated, the words are rights and conveyances, which points at new dispositions and resignations, not retours; for an heir who bruiks by virtue of a service, enjoys the estate upon the right to which he is served, services and retours thereon being properly transmissions of the old rights; and thus the Legislature prevented an absurdity that might have otherwise followed, by the heir of entail's taking out a new charter upon his own resignation, leaving out the irritant clauses, and then selling off the estate.

It was duplied, That the words in the beginning of the act of Parliament are, *statutes and declares*, which plainly were intended to give authority to prior entails, whereof there was some doubt if effectual before that statute; and if it were otherwise, tailzies made before the act would not only be in a better case than those made after it, though authorized by a special statute, but the care and anxiety which the statute discovers, to prevent the ensnaring of strangers contracters, would be rendered ineffectual, because there can be no security but that in some part of the progress of an estate an entail may have been and may be brought out, to exclude creditors who had contracted *optima fide*. 2*do*, By the words rights and conveyances is meant, that the irritant clauses must be repeated in the subsequent titles, establishing the tailzie in the heirs, whether services, charters, precepts, &c. for the reason of the Legislature is mentioned, *viz.* that creditors might contract *bona fide*, when they saw that the heir was seised of an estate, and no express limitation upon him from contracting of debt.

"The Lords found, that the act 1685 regulates the transmission of tailzies made before the said act, as well as those made since; and found, that the general reference in the sasine was not sufficient to interpel creditors according to the act 1685."

Act. *Ja. Boswell* & *Jo. Crawford, jun.* Alt. *Dundas* & *Pat. Boyle.* Clerk, *Murray.*

Edgar, p. 202.

1726. *February* 1. STEWART *against* DENHAM.

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The provisions and irritant clauses by the act 1685 must be repeated in every conveyance of the tailzie, even in a general retour, if that is the title of the heir's possession.

Rem. Dec.

*** This case is No. 94. p. 7275. *voce* IRRITANCY.