1752. *July* 1.

SIR KENNETH MACKENZIE, Baronet, *against* JOHN STEWART, Esq.

No. 65.
Effect of an act of Parliament obtained for authority to sell part of an entailed estate for payment of debts.

By a deed of tailzie executed in the year 1688, George Earl of Cromarty disponed the lands of Royston to Sir James Mackenzie, his third son, (afterwards one of the Senators of the College of Justice, and known by the name of Lord Royston), and to the heirs-male of his body; whom failing, to Sir Kenneth Mackenzie, (second son of the tailzier), and to the heirs-male of his body; whom failing, to certain other substitutes. This disposition contained prohibitory, irritant, and resolutive clauses, declaring, that it shall not be lawful for Sir James Mackenzie, or the other heirs of tailzie, to alter the order of succession, to encumber or alienate the said lands. In 1739, Lord Royston, with concurrence of his only son, George, and of Sir George Mackenzie, (son of Sir Kenneth), obtained an act of Parliament enabling him to sell the lands of Royston. The act proceeds on a narrative, that the lands of Royston were burdened with certain debts, contracted by the tailzier himself, for payment whereof the lands might be adjudged and carried off: That these debts could not otherwise be discharged than by a sale of the lands: That such sale, though for the advantage of the heirs of tailzie, could not be affected without the aid of Parliament, &c. Therefore, the act empowers certain trustees, in concurrence with Lord Royston, to sell the estate, and apply the price in payment of the above sums with which it stood burdened: As also, to lay out the surplus money in the purchase of other lands, to be settled for the use of Lord Royston, and the other surviving heirs of tailzie, in terms of the deed 1688; and the act contains a *salvo* of the rights of all persons "except the said Sir James Mackenzie and the heirs-male of his body, the heirs-male of the body of Sir Kenneth Mackenzie, and the other substitutes in the entail."

In consequence of this authority, the estate of Royston was sold, and by payment of the debts narrated in the act of Parliament, the price was exhausted. After the death of Lord Royston and of his son, Sir George Mackenzie, having obtained himself served and retoured heir-male of tailzie, brought an action of count and reckoning against John Stewart, Lord Royston's heir of line, and against the trustees, subsuming, that the debts narrated in the act did not affect the tailzie, and concluding, that they should be decerned to apply, in terms of the act, the surplus price of the lands of Royston, after payment of the debts affecting the tailzie. Sir George having died, his brother, Sir Kenneth, insisted in this action, as heir of tailzie.

The defender endeavoured to show, that the debts narrated in the act were indeed a real burden upon the tailzie; yet he insisted chiefly in the preliminary defence, that the act of Parliament was final, and excluded all examination into the reality of the debts.

Pleaded for the pursuer: This action is not barred by the act of Parliament. The act expressly bears, that it would be for the advantage of the heir of tailzie

No. 65. that the estate of Royston were sold, and the debts affecting it paid. Now, it is neither agreeable to the words, nor the purview of the act, that the price of the estate should be applied for the clearing of debts with which the tailzie was not burdened; for this, instead of benefiting the heirs of tailzie, would disappoint them of their just right. It is also to be considered that, by act 18. Parl. 1. Ja. VI. the Lords of Session are declared judges competent in the reduction of infeftments ratified in Parliament; for this obvious reason, that the law did not intend to hurt third parties, whose rights had not been particularly examined in Parliament; and it is a rule in the interpretation of all British statutes, that no innocent person suffer by a literal construction of the law.

Answered for the defender: The act of Parliament avers, that the debts in question were just debts, and which affected the tailzie; it also declares the pursuer to be a party to it. No Court of law can try the truth of its averments, the justice of its conclusions, or the equity and expediency of what it directs. Were such powers given to Courts of law, their institution would be inverted, and judges, from being executors of the law, and administrators of justice, according to law, would become law-givers themselves. The act 18. Parl. 1. Ja. VI. can have no influence in the present case; for the act *salvo jure cujuslibet*, which passed every session of Parliament in Scotland, reserved the rights of all persons who were not parties in the ratifications obtained in Parliament, and the decision in such cases was left to common law; yet even in Scotland ratifications were sometimes excepted from the act *salvo jure*, and parties thereby prejudiced were left without remedy from any Court of law. This appears from the exceptions mentioned in the act *salvo jure* subjoined to the acts of Parliament 1633, and from the decision, 25th March, 1631, Bishop of Dunkeld against Lord Balmerino, No. 1. p. 9892.; but whatever may have been the practice of the Scots Parliament with respect to private acts, it is certain, that a private act of the British Parliament differs, not in authority, but in extent, from a public act: The right of all those who are not made parties to it are reserved entire; yet, *quoad* those who really are, or whom the act declares to be parties to it, it has all the efficacy of a public law.

"The Lords found, That those debts that, by act of Parliament, are appointed to be paid out of the price of the estate of Royston must be stated to exhaust the said price; and that, the price of the estate being exhausted by those debts, there is no ground for a further count and recknoning." See No. 164. p. 7443.

Act. *Hay*. Alt. *R. Craigie*. Reporter, *Leven*. Clerk, *Kirkpatrick*.

D. *Fac. Coll. No.* 19. *p.* 37.

*** This case was appealed. The House of Lords "ORDERED, That the interlocutor complained of, 1st July, 1752, be reversed, and that the Court of Session do proceed according to justice and the rules of that Court, without prejudice to any question that may hereafter arise concerning the relief to which the appellant may be entitled, and against what persons or subjects such relief (if any) ought to be extended."