

1753. *February 2.* GAVIN MORE of Shawhead, Supplicant.

No. 133.

A summary application for recording an entail is not competent at the instance of a substitute.

A substitute in an entail presented a petition to the Court, with the deed of entail, craving the authority of the Court for recording the same in the register of tailzies.

“ The Lords were unanimous that this demand was not competent by a summary application ; that when a substitute makes such an application, it must be by a process, in which the heir in possession must be made a party, and in which he may have an opportunity to make his objections against recording ; this in particular, that if the maker of an entail chooses not to record the same himself, nor lays his heirs under an obligation to record it by a clause in the deed, no substitute is entitled to demand the same to be recorded.” See No. 135. p. 15605.

Sel. Dec. No. 36. p. 41.

1753. *February 9.*

JAMES HAY, Clerk to the Signet, *against* HIS MAJESTY'S ADVOCATE.

No. 134.

An estate found to be carried by forfeiture from the whole substitutes of an entail, where the tailzie was not recorded, and contained no clause irritating the contravener's right, or prohibiting to sell.

Mr. Adam Hay, in the year 1726, executed an entail of his lands of Asleid, and others, in favour of Adam Hay, his grandson by his eldest son Andrew Hay, then deceased, and the heirs-male of the said Adam's body ; whom failing, to James Hay, the tailzier's second son, and the heirs-male of his body, under most of the usual prohibitory clauses, and a clause irritating the debts. But the tailzie neither contains any clause irritating the contravener's right, nor a prohibition from selling.

Further, the tailzie was not recorded as directed by the act 1685 ; but a charter was expedite upon it, on which no infeftment followed.

Adam Hay, upon the death of his grandfather, in the year 1727, attained possession of the tailzied lands ; and, having joined in the Rebellion in the year 1745, he was attainted of high treason, and the lands were surveyed, by order of the Barons of Exchequer, in terms of the statute of the 20th of the King.

James Hay, the tailzier's second son, entered a claim to the Court of Session, as directed by the said statute, praying the Court to find, “ That only an estate for life of the said Adam Hay was forfeited to his Majesty by the said attainder ; and that, upon the death of the said Adam Hay, the lands of Asleid, and others, will belong to the claimant.”

His Majesty's Advocate objected to the claim, *1st*, That the tailzie was not recorded in terms of the act 1685, and therefore can have no effect against the Crown, or against any third parties.

2dly, That there is neither any provision in the entail for irritating the contravener's right in case of transgressing the prohibitions ; nor any clause prohibiting to alien.