"firmance thereof be, and the same are hereby "affirmed."

1731.

BORTHWICK v. BORTHWICK.

For Appellant, *C. Talbot* and *J. Grahame.*

For Respondent, *Dun. Forbes* and *Will. Hamilton.*

LILIAS BORTHWICK, *Appellant;*
JOHN BORTHWICK of Cruikston, Esq. *Respondent.*

19*th March*, 1731.

TAILZIE.—Act 1685, c. 22. An entail, containing prohibitory and irritant clauses *de non contrahendo debitum,* having been executed before the date of the act 1685, but not followed by infeftment until after it, and not recorded in terms of that act,—found not to debar the heir from granting bonds of provision to his younger children.

[Fol. Dict. II. p. 434. Mor. Dict. p. 15556.]

No. 13.

By an entail of the lands of Overshiels, bearing date the 23d May, 1685, the heirs are prohibited under irritant and resolutive clauses, "to contract any "debts, or yet to do any deed whereby the same "may be apprised or evicted or adjudged from "them." There is no mention in the deed of any power of making provisions for wives or children. The deed which contained a clause dispensing with delivery, remained in the granter's custody until his death in 1687. It was registered in the books of council and session on the 7th January in that year, but was not recorded in the Register of Tailzies.

1731.

BORTHWICK
v.
BORTHWICK.

John Borthwick (the appellant's father) having succeeded as heir under this entail, granted a bond of provision, whereby he bound himself, his heirs of entail and successors in the said estate, to pay 7000 merks to his daughter Lilias. He was succeeded by the respondent.

The appellant brought an action to have it found that she was entitled to the above portion, and that it was a burden on the estate of Overshiels. She pleaded, that by the general prohibition upon the heirs of entail to contract debt, they are not restrained from giving reasonable provisions to their children; that this was no entail before the act of Parliament 1685, because not completed by infeftment before that period, and therefore was undoubtedly liable to the regulations of that act, and could not be allowed unless recorded in terms of it; that supposing it had really been an entail before the date of the act, yet until it was recorded, the prohibitory and irritant clauses thereof could not be effectual.

It was answered, that the provisions and prohibitions of the entail must be effectual against the appellant, and all the other creditors of the granter of the bond of provision and his heirs of entail, because although the entail was not recorded in terms of the act 1685, yet being four days prior in date to that act, it did not fall within its effect.

February 11, 1730.

The case being reported by the Lord Ordinary, the Court found "that the deed of entail is to "be considered as made before the act of Parlia- "ment 1685, and that the said deed of entail dis- "ables the heir of entail from contracting debts, "and granting bonds of provision to their child-

"ren;" and remitted to the Lord Ordinary to proceed accordingly, who assoilzied the defender, and decerned.

The appeal was brought from these interlocutors of the 11th and 21st February, 1730. Entered March 5, 1730.

Pleaded for the Appellant:—1. As there is a natural obligation on parents to make provision for their children, a reasonable provision made in execution of that obligation, cannot properly be called contracting debt, and consequently does not fall under the prohibition, which is intended only to hinder incurring debt unnecessarily; and this the rather that when it is intended to limit heirs of entail, in respect to their power of providing wives or children, particular clauses are usually inserted, disabling them to give larger provisions than are in the deed of entail specified. There being no such clause in the entail in question, it seems a necessary inference that the granter intended to leave his successors at liberty in this respect.

2. The entail not having been registered in terms of the act 1685, the prohibitions contained in it, which otherwise might affect the appellant, must fall to the ground. For even admitting that this statute does not affect entails that were perfected before the date of it, yet the deed in question, though signed four days before the date of the statute, was not perfected by infeftment, so as to make the conditions of it conditions of the fee until many years afterwards; it having remained in the granter's hands till his death, subject to a power of alteration, and also capable of being made effectual by registration. It cannot therefore be said that this deed constituted an entail at the date of the act of par-

1731.

BORTHWICK v. BORTHWICK.

liament; and if, after that statute, the granter had intended to carry on his design to perfection, he ought to have registered it.

Pleaded for the Respondent:—1. The prohibitory clauses in the deed are general against all debt and deeds, by which the lands entailed, or any part thereof, could be evicted, and consequently comprehend bonds of provision to children as well as other debts; and however it might be a duty for the appellant's father to provide for her, yet that provision ought to have been out of his own estate only. He had no power over the estate in question to charge it with debts; and the respondent does not claim under him, but by a title paramount to him.

2. The entail having been made four days before the date of the statute, (which regulates entails *thereafter* to be made,) is as much prior thereto, as if it had been made any number of days or years before, that act having no retrospect. If an act were to be carried back one day, it would be impossible to fix the period of its commencement. Besides, no act of parliament is by the law of Scotland to take place till forty days after its date; and it cannot be doubted, that entails made before that act were good and effectual, though not registered.

Every person dealing with the possessors of the estate, had sufficient notice of the restrictions under which they lay. The entail was recorded in the books of Council and Session in 1687. A charter was granted of the lands and sasine taken upon it, in which were contained *verbatim* the several clauses against contracting debts; which sasine was likewise duly registered.

After hearing counsel, "it is ordered and ad- "judged, &c. that the interlocutors complained of "be reversed; and it is hereby declared, that the "deed of entail made by Mr. John Borthwick, the "23d May, 1785, did not disable the heir of en- "tail from granting the bond of provision in the "pleadings mentioned to the appellant; and that "she is therefore entitled to the sum of L.388, 17s. "with interest, from the first term of Whitsunday "or Martinmas, after the death of her father; and "it is hereby further ordered that the said sum "with the interest thereof, be paid to the appel- "lant accordingly."

Judgment March 19, 1731.

For Appellant, *Dun. Forbes*, and *C. Talbot.*
For Respondent, *P. Yorke*, and *Will. Hamilton.*

This reversal is not noticed in the reports. It is mentioned by Erskine, (B. III. t. 8, § 30.) where he explains the doctrine involved in the judgment of the Court of Session. As, however, that judgment proceeded on the first branch of the argument given above, the decision of the House of Lords, (if it is rightly supposed to have proceeded only on the second branch of the argument,) would appear not to have the effect of interfering with that doctrine.

In the printed *Cases* reference is made to a previous decision of the Court of Session, in a question arising out of the same entail; (Jean Cant, relict of Borthwick of Hartside *v.* Borthwick of Crookstone; December 27, 1726. Rem. Dec. No. 90. Mor. Dict. p. 15554.) in which, being a claim by a widow (mother of the appellant) for a life-rent provision made to her by her husband, the heir of entail, "the "Lords found that the bond of annuity is comprehended under the "prohibitive clause in the tailzie, but sustained the said bond, in so "far as the same can be supported by a terce." The report further bears, that "betwixt these parties the question occurred—If tailzies, "made before the act 1685, fall to be regulated thereby, so as to be "ineffectual against creditors, if not registered." "The Lords sus- "tained the tailzie, though not recorded conform to the act of parli- "ament 1685, in respect the same was granted before the act." This case was not carried to the House of Lords; otherwise upon the principles which are supposed to have regulated the decision in the present appeal, the latter judgment would have been reversed.