1758. *December* 14. JOHN PHILP *against* The EARL of ROTHES.

No. 138.
Whether a tailzie prior to the act 1685, must be recorded?

In January 1684, the Countess of Rothes made a settlement of the estate of Rothes, in favour of herself, and the heir-male of her then marriage; which contained a procuratory of resignation, and was fenced with all the prohibitory, irritant, and resolutive clauses usual in strict entails.

The Countess did not expede a charter upon this entail until the year 1687, nor took infeftment until the year 1689; nor did she ever record the entail at all.

The Countess was succeeded by her son Earl John; who contracted large debts; and, among others, a debt to John Philp. Earl John was succeeded by the present Earl; against whom Philp brought a process for payment of this debt.

The Earl's defence was, That he took his estate under the entail 1684, and therefore was not liable for the debts of his predecessors.

Objected for Philp, *1mo*, The settlement of 1684 could not protect against creditors, in respect it was never recorded in the register of entails; and entails made prior to the act 1685, were by that act required to be recorded, as well as those made posteriorto it.

Before the act 1685, it had been doubted, whether entails were good at common law. Even supposing them to have been good, it was observed, that there was no register for recording them, and that creditors and purchasers might be entrapped by the latency of them. To remove that doubt, and give validity in law to entails, and to remove this danger, and prevent creditors and purchasers from being entrapped, the act 1685 was made. This act, which declares it "lawful for his Majesty's subjects to tailzie their lands and estates," does also, for the security of purchasers, and of just and lawful creditors, expressly declare, That "such tailzies shall only be allowed, in which the aforesaid irritant and resolutive clauses are insert in the procuratories of resignation, charters, precepts, and instruments of sasine, and the original tailzie once produced before the Lords of Session judicially, who are ordained to interpose their authority thereto, and recorded in a register appointed by this act to be kept for that special purpose." As this register can be inspected easily, and at small expence, no purchaser or creditor can be insnared. The general register of infeftments is only searched, in order to discover the incumbrances on an estate; and is no security against entails, which cannot be there discovered, but with difficulty, and at great expence. The act thus chiefly regarding the security of purchasers and creditors, certainly intended, that all tailzies, as well those prior as posterior to the act, should be recorded in this register. And there is no reason to suppose, that its provisions do not extend to tailzies executed prior to this act: It must have appeared great injustice, to leave creditors to be ensnared by these ancient latent deeds, when it could be remedied by the easy method of recording them in a particular register. —The reason of the thing, the danger to creditors and purchasers, and the necessity of a provision to prevent that danger, apply equally to entails made before as to entails made after the act; and therefore the act must be presumed to have been intended to apply equally to both.

No. 138. The reason and spirit of the statute are confirmed by the words of it. The statute enacts, as to all tailzies in general, without any distinction of past or future ones, which it certainly would have distinguished, if it had meant a distinction; and as it enjoins a form possible to be observed, with regard to tailzies already made, as well as those to be made, the general directions of the act must be complied with. For the clause above mentioned, That such tailzies shall only be allowed as are recorded, does plainly put a negative upon, and exclude from the benefit of the act, all those which shall not be so recorded.

The 33d act 1690, intitled, Act for security of creditors, vassals, and heirs of entail of persons forfeiting, enacts, "That heirs of entail, where their infeftments are affected with irritant and resolutive clauses, shall not forfeit the entailed estate by their treasons, providing the right of tailzie be registered, conform to the act of Parliament 1685." From whence it is evident, that forfeiture took place, without distinction, whether the tailzie was executed prior or posterior to the act 1685, unless where the entail was duly recorded; and as no entail, though prior to the act 1685, unless recorded, could bar a forfeiture, the same rule ought to take place with equal reason in the case of just and onerous creditors.

Answered for the Earl of Rothes: No law can be presumed to have a retrospect without express words; and as there is no mention in this act, of tailzies executed prior to the date of it, none of the provisions of this act can be extended to these. The act so far respects old entails, that the provisions and irritancies must be repeated in every subsequent conveyance of the estate to any of the heirs of entail, which creditors and purchasers may see by looking into the other common records, without great trouble or expence. But the act does not make the validity of the entail, before the transmission, depend upon the registration of it in the register of entails. If it had, the act would have put it in the power of all the proprietors of the old entails at the date of the act to have destroyed them, by refusing or neglecting to put them into the register of entails.

The words of the act, critically considered, confirm this. It statutes and declares, "That it shall be lawful for his Majesty's subjects, to tailzie their lands and estates, and to substitute heirs in their tailzies, with such provisions and conditions as they shall think fit." These words are so far from creating a retrospect, that they clearly relate only to future entails, and to those who shall thereafter make them.

This interpretation is confirmed by the analogy of law. The act of 1617, which requires sasines to be registered within sixty days of their date, has not been understood to have a retrospect, or to regulate sasines taken before the act, which as the law stood previous to it, were completed without registration.

Objected for Philp, 2*do*, The settlement of 1684 not having been confirmed by infeftment prior to the act 1685, and only confirmed by infeftment after it, was no entail prior to that statute: It was only an inchoated, not a complete deed; it did not become an entail till after the statute; and therefore required registration, like other entails made after the year 1685.

Answered for the Earl of Rothes, The error of this objection arises from not attending to a distinction betwixt a real deed and a complete one. Till infeftment, the settlement of 1684 was not a real right; but by the Countess' signature it became a complete deed. Her son, the next heir, could have been compelled to make up his titles upon that entail if he had refused to do it; and when he did it, the infeftment is drawn back to the date of the signature, and validates the whole. No. 138.

"The Lords found, That the tailzie in question ought to have been recorded, in terms of the act of Parliament 1685, concerning tailzies."

Act. *Hamilton Gordon, A. Pringle, Ferguson.* Alt. *Miller, Advocatus, Lockhart.*

J. D. *Fac. Coll. No. 145. p. 261.*

*** This case was appealed. The House of Lords ORDERED and ADJUDGED, That the interlocutors complained of be affirmed.

1761. *November* 26. LORD KINNAIRD *against* HUNTER.

No. 139.
An entail, though prior to the year 1685, must be recorded.

The late Lord Kinnaird set in tack to Hunter two of his farms for thirty eight years. After his death, the present Lord his heir, brought a process before the Court of Session to have these tacks reduced, founded principally on this reason, that as he was an heir of entail, it was not in his power to grant leases for such a term of years, so as thereby to deprive the succeeding heirs of the management of their own estate.

Hunter's defence was, that the entail of the estate of Kinnaird could not bar the late Lord from granting the tack in question, because it never was recorded: That, though it is prior to the act 1685, yet it must be recorded, otherwise the onerous debts and deeds of every heir of entail must be good against it; and that this was expressly determined by the decision in the case of Rothes, *supra*, which was affirmed by the House of Lords upon an appeal.

Pleaded for Lord Kinnaird, That the present case differs from the case of Rothes. Though the entail of Kinnaird never was recorded, yet an infeftment was expede upon it in 1679, and in 1694 this charter was recorded in the register of entails; and it contains all the different limitations and provisions, and the clauses irritant and resolutive. In the case of Rothes no infeftment had passed before the year 1685; and therefore, as the entail was not completed, it behoved to be recorded. The entail of Kinnaird was completed by charter and sasine before the statute; and therefore was undoubtedly good without registration: and it was upon this medium that the Court decided in the case of Rothes.

It cannot be sufficient to destroy the entail, that the original deed itself cannot now be produced. The above charter contains the names of the maker of the tailzie, and of the heirs of entail, the designations of the lands, the provisions and conditions, and the clauses irritant and resolutive, and that is all the act 1685 requires. There had been possession upon this charter for double the years of prescription; and therefore it must stand in place of the original entail, and must