

Pleaded for the Respondents.—1st, That the powers of the Court of Teinds, in this matter, cannot admit of doubt, which were, “to determine in all valuations and sales of teinds conform to the rules laid down, and powers granted by the 19th act of Parliament 1633,” &c. And by the Act 1633 they had powers “to receive the reports from the subcommissioners within each presbytery, of the valuation of whatsoever teinds led and deduced before them, and to allow or disallow the same.” 2d, That prescription, positive or negative, does not apply to this case, as the subcommission sufficiently barred any such. 3d, Undoubtedly leases had been from time to time granted of the tithes, but at a lower rate of valuation, than that in the decree of valuation, so that it was impossible to infer from these leases, a desertion of the real valuation, or that the decree of valuation was awarded. Even if a different valuation had been afterwards adopted, it could not possibly affect the interests of the whole landholders of the parish, who are not to be presumed to have surrendered so valuable a benefit; and all the objections urged by the appellant have been, by various decisions of the Court, overruled, and this upon an equitable construction of the acts of Parliament.

1758.

 Act 1707.
 HEPBURN, &c.
 v.
 CONGALTON.

After hearing counsel, it was,

Ordered and adjudged that the interlocutor complained of be affirmed.

For Appellant, *C. Pratt, Ro. Dundas, C. Yorke.*

For Respondents, *Al. Forrester, Al. Wedderburn.*

Not reported in Court of Session.

[M. 15507.]

JOHN, JAMES, GEORGE, and ANNE HEPBURN,	}	<i>Appellants;</i>
and their TUTOR <i>ad litem</i> ,		
CHARLES CONGALTON, and Others,	-	<i>Respondents.</i>

House of Lords, 6th Dec. 1758.

ENTAIL.—RESOLUTIVE CLAUSE.—Imperfect resolute clause appearing in an entail: Held, the entail not good against debts contracted in contravention of the prohibitions. But that the next heir-substitute succeeding to the contravener had good action against him and his representatives to purge the estate of such debts.

The entail of the estate of Humbie, executed before the act 1685, with prohibitions against selling, disposing, wad-

1758.

 HEPBURN, &c.
 v.
 CONGALTON.

setting, or burdening the estate, was objected to by the creditors of an heir of entail in possession, who contracted debt against the prohibitions.

1st, That the entail was not recorded in terms of the statute 1685 ; 2d, That it had not a sufficient irritant clause, and, in particular, 3d, That it had no resolute clause, annulling and determining the right of the person contravening ; and that the clause, which declared “ it lawful for the next heir “ of tailzie, to enter and infest themselves as heirs of tailzie “ in the estate ; and to enjoy and possess the same, without “ being liable for, or acknowledging the bonds, dispositions, “ deeds, or other facts or rights, as shall happen to be done, “ contrary or derogatory to the provisions or restrictions “ above mentioned,”—was not a sufficient resolute clause.

Feb. 8, 1758. The Court repelled the objections as to the recording, and also as to the irritant clause, holding, that it was properly inserted in the entail, but sustained the objection to the resolute clause, in respect that the entail contained no sufficient “ resolute clause, forfeiting the right of the heirs of “ tailzie, who should contravene the conditions and provisions “ thereof.”

Both parties appealed to the House of Lords, the respondent, on the point as to the non-recording of the entail, in terms of the Act 1685.

After hearing counsel, it was

Ordered and adjudged, that it appears to this House not to be necessary, in the present cause, to determine the question arising from so much of the said interlocutor as is complained of, by the cross appeal ; and it is therefore ordered that the said cross appeal be dismissed ; and it is further ordered and adjudged, that the said original appeal be, and is hereby dismissed, and the interlocutor complained of, affirmed.

For Appellants, *Al. Forrester, Fred. Campbell.*

For Respondents, *C. Yorke, Al. Wedderburn.*

Note.—Lord (Chancellor)* Hardwicke, has this note on his appeal case. “ Macdowal, B. 2. Tit. 3, p. 370, material. “ When the tailzie contains prohibitive clauses to contract debts, but does not bear any *irritancy* of the contravener’s right, the debts are effectual ; *it being against* common justice that the debtor should retain his full right, and his creditors lose their payment ; but in that case the next, or any other substitute, who may succeed as heir of entail to him who contravenes, has good action against him and his represen-

* *Vide* Preface.

tatives, whereby to oblige him to purge the tailzied estate of debts, as was just said of a tailzie, with irritant clauses not duly recorded.— On the original appeal affirmed, on the point, of the want of a sufficient resolute clause to irritate the right of Mr. Hepburn's debtor; and dismiss the cross appeal, with a declaration, that it was unnecessary to determine, in the present cause, the points thereby brought in question."

1759.

LITTLEJOHN
v.
STRATON.

ALEXANDER LITTLEJOHN of Woodstone, *Appellant*;
ARTHUR STRATON - - - - - *Respondent*.

House of Lords, 1st February 1759.

SALMON FISHING—RIGHT.—A party's grant of fishing was described as bounded along the shore between certain points therein described; held that this does not exclude another, whose right is prior, though general in its terms, from acquiring possession of part of the fishings within the points so marked out and described.

By Crown charter granted in 1588 to James Keith, the appellant's predecessor, the lands of Halwoodstone, Hillend, and Fisherhill, part of the barony of Woodstone, situated in the county of Kincardine, was conveyed with a salmon fishery in these terms; "cum piscationibus tam piscium alborum
"quam rubrorum super arenas vulgo vocat St. Cyrus sands
"enter semitem vulgo vocat priestis-rod fute ab oriente, et
"torrentem vulgo vocat the burn (rivulet) of Mauchrie, ab
"occidenti, aut eo circa jacen in Baronia de Woodstone."*

By regular progress of titles these lands, with the fishings as above described, came, through successive owners after Keith, to be acquired by the appellant; and, in virtue of these titles, and the above charter, he had possessed a fishing on the sands of St. Syrus, within the points above expressed, as contained in the said crown charter, as well as subsequent, charters of the same.

The respondent held his lands, which extended along the sea shore, under charter "cum piscationibus et piscariis tam
"alborum quam rubrorum piscium cum singulis suis pertin-
"entis, jacens infra regalitatem de Lindores et Vicecomita-
"tem de Kincardine." Under this charter of alienation from a subject; and also, charter of alienation from Alardice to the Earl of Montrose in 1588; and charter of alienation from the Earl to the respondent in May 1630; and charter from the crown in 1631, the respondent claimed the fishings opposite

* So written in the charter.