

Answered: That entails were valid before the act 1685; and, when regularly guarded by prohibitory and irritant clauses, did bar all alienations. No. 131.

An attempt to sell, or contract debt, was a forfeiture; after which, the right granted was truly *a non habente potestatem*: That it was not the intendment of the statute to alter the law, but to give new force to it, with respect to such entails as should be made thereafter: That the entail in question was made preceding the act; and the minute of sale charged on was a forfeiture of Lord Maxwell's right; consequently, the suspender cannot be bound to pay the price, when any right flowing from the charger would be *a non habente*. As for the clause in the statute, "that tailzies shall only be allowed which are recorded," the meaning is, that tailzies not recorded shall have no countenance or support from the act. Did it mean, that all tailzies were to be cut down that were not recorded, it would necessarily follow, that they would not be good against heirs nor creditors; 2do, Taking the statute to respect creditors only, leaving entails not to affect heirs, which is commonly understood to be the meaning of it, yet still, upon that footing, the suspender is not safe, as he cannot plead a *bona fides*, being now in a process about this very entail; and if the person who contracts with the heir of entail acknowledges he was intimately acquainted with the deed of entail, there is no pretext for his having the benefit of the statute.

Replied: If an entail not recorded be not good against creditors, neither ought it to be effectual against a purchaser; and if a creditor could carry it off by adjudication, so may a purchaser, who is truly creditor to the seller; more especially ought this to hold in this case, where there is no prohibition on the charger to suffer adjudications to be led. And as to the suspender's private knowledge putting him *in mala fide* to accept of a disposition from the charger, it was answered, That if, by the public law, a tailzie not recorded is not good against third parties, private knowledge will not hurt:—if a writing is executed, but not so as the law directs, nobody is bound to pay any regard to it, but in full safety to act as if no such thing were.

The Lords suspended the letters, on this ground, That the case was doubtful, and that the proper contradictors were not in the field; and, therefore, that the suspender could not be bound to accept of the bargain.

*C. Home, Na. 252. p. 406.*

1744. July 5.

MURRAY against MURRAY.

No. 132.

An heir of entail, in whose sasine the irritant, prohibitory, and resolute clauses, were not repeated, but referred to, having contracted debt, these were found a burden upon the estate.

\* \* Kilkerran's report of this case is No. 20. p. 15380.; C. Home's is No. 212. p. 9881. *voce* PASSIVE TITLE.