

1751. *January 10.* JAMES KINLOCH *against* The KING'S ADVOCATE.

No. 24.

A tailzie not recorded did not save against forfeiture.

Sir David Kinloch of that ilk, in 1686, tailzied his estate to himself in life-rent, and James his eldest son, and the heirs-male of his body in fee ; whom failing, in like manner to his second son ; whom failing, to his own heirs whatsoever ; prohibiting alienation, &c. with the proper fencing clauses ; but the tailzie was never recorded in the register of tailzies, though infestment followed upon it

Sir James Kinloch the institute disposed the estate under the same tailzie to his son in his contract of marriage, who was never infest either on this title, or upon his father's death, as heir ; but engaging in the Rebellion, was attainted, and the estate surveyed.

James Kinloch, son to the last Sir James, claimed, as heir of tailzie, the estate, to be by him entered upon, after the death of his father, who had therein no more than an estate for life.

Answered : The tailzie was never recorded : consequently Sir James had the power of disposal over the estate, and so of forfeiting it.

Pleaded for the claimant : Proprietors, before the act 1685 regulating tailzies, were empowered, by the common law, to tailzie their estates, as was found in the case of Stormont, Sect. 3. *h. t.* ; that act which introduced the necessity of recording, was a correctory law, and limitation of what was formerly competent ; and so has been strictly interpreted ; for tailzies made before it are good though not recorded : In like manner the act requires the prohibitory and irritant clauses to be inserted in the titles of all the heirs, otherwise the deeds done by them to be effectual ; but this obtains only where the heir has in him a complete title by infestment ; for if he having only a personal right, shall alienate the same, though these clauses were not engrossed in his general services carrying that right, the alienation is void ; and the reason is, that the statute regarding only rights by infestment, and ordaining the clauses to be engrossed therein, tailzies upon personal rights are regulated by the common law, by which the contraventions of them were void ; as was found by the House of Peers in the case of Denham of Westshiels, Sect. 3. *h. t.* Sir James Kinloch had only a personal right to the estate by disposition from his father ; and this being under an entail, he could not dispose of it ; consequently the claim is good.

2dly, Supposing he could have alienated the estate, it does not follow it was forfeitable for his treason ; to have done so would have been a fraud, and he would have been liable in damages ; an estate, the tailzie whereof is recorded, may in fact be put away by the heir, by his neglecting to insert the clauses in his sasine ; but he will be liable to the next heir ; and all claims good against the heir, are good against the forfeiture ; the rights of all third parties are preserved by the act 26th Henry VIII. ; and by the vesting act 20th Geo. II. personal rights and debts are good, notwithstanding these may in fact be disappointed.

Pleaded for the King's Advocate: It is not true that the act 1685 regards only tailzies whereon infestment has followed, and not personal rights; nor was this found in the case of Westshiels; but there an heir, in personal right, who had not inserted the clauses in his general services, having disposed it, the Lords found the purchaser could not object to the conditions of his own right; but here the case is different, as the tailzie was not recorded, whereby it was no tailzie; besides, there has infestment followed upon it, in which Sir James, abstracting from his disposition, was apparent heir, and could thereupon alienate; the principle whereupon it was found in the case of Park, 16th November, 1750, No. 60. p. 4728. that heirs of tailzie only forfeited for their life, was, that they had only in them an estate for life, which they could not alienate; and therefore, where the estate may be alienated, it may be forfeited; the claimant can only take it as heir to the attainted person, whose obligation which he urges was to let it descend to him as heir; but the attainted person can have no heir; and he cannot insist as creditor, this claim not being founded on any irritancy.

No. 24.

The Lords found that the tailzie upon the estate of Kinloch, not being registered in terms of the act of Parliament 1685, no claim could be sustained thereon; and therefore dismissed the claim.

Clerk, *Murray*.

D. Falconer, v. 2. No. 177. p. 211.

1751. January 10. DAVID KINLOCH *against* The KING'S ADVOCATE.

David Kinloch of Kilrie, son to Dr. James Kinloch of Labathy, the brother of Sir David Kinloch, claimed the same estate, upon an irritancy incurred by the first Sir James, by disposing part of the estate, whereby he forfeit for himself and the heirs of his body; which irritancy, by an absolute disposition, was not purgeable; and therein this case differed from that of Park, No. 60. p. 4728; and though the tailzie was not recorded, it was obligatory against the heir succeeding by virtue of it, and the irritancy might have been declared against him.

No. 25.
An irritancy not declared before forfeiture, is not proponible to evict a forfeited estate.

Answered: There is no difference betwixt this case and that of Park; as the irritancy might have been purged by the purchaser's re-disposing; but here also there is no tailzie; the estate was forfeited by Sir James; and the claimant, who could not have taken it from a disponee, cannot over-reach the forfeiture.

The Lords found, That the tailzie upon the estate of Kinloch not being registered in terms of the act of Parliament 1685, and the irritancy not being declared before the conviction of the late Sir James Kinloch-Nevay, no claim can be sustained thereon; and therefore dismissed the claim.

D. Falconer, v. 2. No. 178. p. 213.