

1715. July 26.

MRS JEAN ANDERSON, Lady LOGIE, *against* NINIAN WISHART of Logie.

## No 50.

An estate was tailzied, excluding courtesy, terce, &c. The sasine was recorded, but not the tailzie itself. A relict insisting for her terce, a defence on the tailzie was repelled, because not recorded.

THE estate of Logie being tailzied under a quality, excluding all courtesy and terce, and the late Logie infest thereon, and his infestment recorded, but the tailzie never recorded, as is enjoined by the act of Parliament; when the deceased Logie's relict comes to insist against the present heritor, to have her terce ascertained, this clause and quality of the tailzie was objected to her.

*Answered* for the Lady, That the said tailzie not being registrated, it can have no force in law, as is expressly statuted by the act 22d of Parliament 1685. And thus the LORDS found in a parallel case betwixt Borthwick of Hartside and his Mother and Sisters, who pursued for an annuity and payment of bonds of provision, and he having *excepted*, That both were excluded by express clauses in his tailzie, and they *answering*, That it was not recorded, the LORDS found him liable.

*Replied* for Logie, *imo*, That suppose it had been a provision by contract, yet she would have been excluded by the tailzie and infestment, because her deceased husband stood publickly infest upon the tailzie before the marriage, which infestment being in the public record, interpellled all persons from contracting; and so it was found in the case betwixt the Creditors of Annandale and Stormont, that this infestment was like a public interdiction. And the act 1685 does superadd a public record of tailzies, yet it has not been decided, that there must be both record of tailzies and infestments, which were a double publication. The record of tailzies seems to be for publication, ay and while the infestment be taken and registrated, so that a purchaser must search both; for often there is occasion of publishing the tailzie, which cannot be got easily by completing the infestment, and yet it was necessary to tie up the fiar, which could not be done but by some publication of the tailzie; but so soon as it is completed by infestment, and recorded, it is then as sufficient as if the tailzie had been recorded, yea, it is the more ancient and known publication. And without this interpretation of that act, the appointment of the record of tailzies would have been superfluous, especially that there is no nullity subjoined to that clause of the act which appoints the record, nor any time prefixed; whereas a nullity is subjoined to the clause anent creditors and singular successors, and to the clause appointing the prohibitory and irritant clauses to be repeated in the retours, &c. *2do*, There is a difference betwixt creditors or purchasers, and those who come in by terce or courtesy; for the act was indeed made to interpel the first; but the others are not such, but only enjoy the privileges of law, according to the circumstances of the person and nature of the property, as it stands with respect to heiress or husband; so that the case falls nowise under the act 1685, as being neither the case of creditor nor purchaser, but only the division of an estate, as ordered by

## REGISTRATION.

13571

by law, upon the dissolution of the marriage. For then the Lady, as being neither creditor nor purchaser, must only take her division, in case the nature of the subject will allow of a division, which in the present case it does not.

THE LORDS repelled the defence on the tailzie, the same not being registered in the particular books appointed for registration of tailzies.

Act. *Sir James Nasmyth.* Alt. *Sir Walter Pringle.* Clerk, *Mackenzie.*

*Fol. Dic. v. 2. p. 332. Bruce, v. 1. No 128. p. 167.*

1716. July 20.

JOHN BEAUMONT, and JAMES FAIRHOLM, *against* The Earl of CASSILLIS.

IN a competition of the Creditors of the deceased Earl of Cassillis, there being an interest produced for John Beaumont, viz. a bond after the English form, and an accepted bill for James Fairholm, both dated in November 1698, and upon both which adjudication followed some years thereafter; there was likewise produced, for the now Earl of Cassillis, articles of marriage betwixt the deceased Earl and his son Lord Kennedy, on the one part, and my Lady, now Countess of Rutherglen, on the other, dated in June 1697, whereby, among other things, the fee of certain lands are provided to the Lord Kennedy, and the heirs-male of the marriage; and whereupon there was a contract of marriage in the Scots form extended, dated in September 1698, whereupon a sasine is taken on the 10th, 11th, and 12th of October, and registered the 6th of December thereafter, whereunto the present Earl has right as heir of tailzie.

It was *alleged* for Beaumont and Fairholm, That their debt being contracted before registration of the sasine on the contract of marriage, though, after the date of the articles of contract, and even the sasine itself, establishing the fee in the Lord Kennedy's person, they ought to be preferred, by reason that our law has fixed upon the registration, as the publication to interpel creditors from contracting with parties who were previously in the right of the subject conveyed; and so the 13th act of Parliament 1693 declares, That, in all competitions, sasine shall be preferred according to the date and priority of their registration: And the act immediately following proceeds upon a narrative, that, through the not keeping the minute-books of registration in good order, (that purchasers and creditors might know with whom they may safely contract), the lieges have been greatly prejudged; and therefore by that act it was statuted, that the Keepers of the registers shall keep minute-books of all writs presented to them in order to be registred, and that the minute be immediately signed by the presenter of the writ, and also by the keeper, to be patent to all the lieges who should desire inspection of it, gratis; from which it appeared, consequently, that parties might safely contract, when they knew the party

No 50.

No 51.

Whether registration of a sasine is to be accounted from the signing of the keeper's minute-book, or from the time of inserting it in the record?