It was thereafter ARGUED for the defender, That the money belonged to him, as heir whatsoever to his sister, in virtue of the substitution contained in the original bond of provision, which he contended was revived by the note or docquet on the bond: and insisted that these words, "with which alteration, I hereby ratify and confirm the said bond of provision in all other points as it stands;" imported a ratification of the original substitution to heirs whatsomever in the first bond, and an alteration of the substitution made by the separate deed in favours of the children of the first marriage. He founded likewise his pretensions on the deed 1722; from which he alleged, that his father's design of giving Marion's portion to him, did plainly appear.

To which it was ANSWERED, That the occasion of the note or jotting on the bond, was purely on account of the alteration with respect to the 3500 merks uplifted, and in place of which, my Lord had substituted another bond; so that as to the other sums assigned, there was no alteration: and it could not be construed an alteration of the total destination the father had made in January 1719; for it was an uncontroverted rule in law, that where a deed is solemnly and deliberately executed, the same cannot be understood to be revoked by any deed consistent with it, but there must be an express revocation. And the note on the bond being every way consistent with the substitution, in favours of the children of the first marriage, it could not infer a revocation; yea, even in so far as the docquet ratifies the bond, it must be understood to do it only in the shape the bond was then in, viz. limited, explained, and amended by the deed of substitution in January 1719.

As to the settlement in August 1722, it was made with a certain view, and upon a condition which never did exist; for Marion died unmarried, and therefore it could not at any rate influence the present question.

The Lords found, That the settlement and substitution made by the Lord Fountainhall on January 8, 1719, was not altered or revoked by any posterior deed.

Act. Ro. Dundas, *Advocatus;* and Sir Ja. Stewart. *Alt.* Ja. Graham and H. Dalrymple. Lord Newhall, *Reporter.* Hall, *Clerk.* *Page* 65.

1724. *December* 8. JAMES WILLYSON, Merchant in Glasgow, *against* The CREDITORS of DORATER.

IN the ranking and sale of the estate of Dorater, it was disputed betwixt Mr. Willyson, the heir of tailyie, and the creditors of his brother (who had forfeited his right to the estate, as observed 25th June, 1724,) whether or not the estate of Dorater, being tailyied with irritant clauses in the procuratories and precepts, but the tailyie not recorded, in terms of the Act of Parliament 1685, did exclude the creditors from payment of their debts.

The defence made for the heir of tailyie was, That the prohibitive, irritant, and resolutive clauses in the tailyie, being ingrossed in the procuratories of resignation, charters, and infeftments standing upon record, the creditors were not *in*

bona fide to contract with his brother; and, therefore, that the tailyie was effectual against them, though the same was not registrate in the register of tailyies: in support of which it was argued, that the act of Parliament was not a corrective law, but declaratory; and extended the powers of making a tailyie, by granting privileges of inserting clauses which formerly could not have been done; but in other respects, what were formerly principles of law with respect to tailyies still subsisted; such as, when one affects by diligence a qualified right, he can only carry that right with the qualities and irritancies which affect it. *2do*, That the clause of the Act, which declares such tailyies shall only be allowed, does noways respect the registration, but simply the case where the clauses irritant and resolutive are not repeated in the procuratories and precepts; and the necessity of registration respected only such tailyies which contained clauses beyond what was the established law before. And this appeared from the certification in the law, viz. That if the said provisions and irritant clauses shall not be repeated in the rights and conveyances, the same shall not militate against the creditors or other singular successors, who shall happen to contract *bona fide* with a person who stood infeft in the estate, without the said clauses in the body of his right; but there is no such certification in the statute. If the tailyie should not be produced before the Lords of Session, and, if the reason of the thing is considered, creditors are fully certiorated by inspecting the ordinary record, where they may see their risk and hazard from the irritant clauses in the person's right with whom they contract.

To all which it was ANSWERED for the creditors,—That the Lords had found, that though the tailyie was not inserted in the proper register, yet the irritancies take place against the heirs of entail; and if it should likewise be found, that these irritancies are effectual against creditors, the Act of Parliament establishing a new record for that purpose must be altogether vain and to no intent. That the Lords had found otherwise, particularly in the case of Borthwick of Hartside, and Wishart of Logie, where the present question was expressly determined in favours of the creditors. In the case which gave rise to this statute, it was complained of as a hardship, that creditors, when they lent their money on the faith of their debtor's being in possession of an opulent estate, and were not bound to know the qualities and conditions of his right; it was hard that they should be forfeited of their debts, when there was no certain law to regulate the nature of tailyies. That the statute 1685 was correctory, appeared from that clause in it, where it enacts, "That such tailyies shall *only* be allowed," &c. where the requisites thereafter enjoined by the law are observed: of which this is one, that the tailyie be inserted in the particular register appointed for that purpose; and being so inserted, the same should be effectual both against the heir and creditors; which word *only* shows the statute to be as much correctory, as if it had proceeded on a narrative, "That whereas it "was doubted, that tailyies were effectual against creditors, as well as heirs; "therefore it is statute, that such tailyies shall be effectual against creditors as "well as heirs, providing that the requisites mentioned in the statute are observed." That the word *only* respects the registration, appears from the immediate subsequent clause, and being so insert, &c. declares the same to be real and effectual. And as to the certification touching the omission of the clauses irritant, it had no-

thing to do with the present question, where the tailyie is not registered. On the contrary, the law supposes, that the tailyie had been once perfected, and that some of the subsequent heirs of entail, to be free of it, should omit to ingross the irritant clauses when they received their rights: the once producing the tailyie before the Lords, was sufficient for all the subsequent heirs of entail; yet every heir of entail was obliged to renew the irritant clauses in his charters and infeftments.

The Lords found that the tailyie not being registrate in terms of the act of Parliament, cannot prejudge the creditors.

Act. Ja. Fergusson, sen. for Willyson. *Alt.* Ja. Graham, sen. Hall, *Clerk.*

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1725. *February* 16. JAMES HALIBURTON Writer in Edinburgh, *against* WILLIAM KER, &c. and the EARL of MARCH.

IN a process at Mr. Haliburton's instance, against the debtors in certain bills, which had been indorsed to him by Sir George Weir, compearance was made for the Earl of March, who craved to be preferred to the sums in the bills, upon the following ground, That Sir George being his factor, had taken these bills in his own name, though in truth they were for debts owing to the Earl; and Sir George not having made up his accounts, if the Earl would be preferred to him in a competition for the contents of the bills, he must likewise be preferred to the pursuer; because he being Sir George's doer and agent, the indorsations must be presumed gratuitous, and that he was in the knowledge of the bills being granted for debts owing to the Earl. 2*do, et separatim,* That the indorsations can be of no effect, because the bills, bearing annualrent and penalty, could not have the privilege of ordinary bills, being out of the common style, and therefore not transmissable by indorsation, but were only imperfect securities for sums due to the Earl; and though it might be contended that they were not so much as probative, yet since the Earl was persuaded that they belonged to him, it was not his business to plead that point.

It was ANSWERED for Mr. Haliburton,—1*mo,* That his being agent for Sir George, did not establish a presumption that the indorsations were gratuitous, but rather that Sir George was in his debt, which was so in fact; and it was denied, that when he got these indorsations, he knew what was the foundation or grounds of the debts [due] by the defenders to Sir George. 2*do,* The bills were good, because they were in the form and nature of bills, having drawer and accepter; and the adding of annualrent and penalty could not hurt them, both being due by law; *et utile per inutile non vitiatur.*

The Lords found the Earl of March had no interest to compear, and sustained the bills for the principal sums and annualrents, but restricted the penalties to the expenses of this process.

Act. Arch. Hamilton. *Alt.* Alex. Hay. Lord Milton, *Reporter.* Gibson, *Clerk.*

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