No. 50. 1753, Feb. 9. JAMES HAY *against* HIS MAJESTY'S ADVOCATE.

MR ADAM HAY, Minister, tailzied his lands of Aslead to Adam Hay his grandson by his eldest son deceased and heirs-male of his body, whom failing to James Hay his second son, with irritant and resolutive clauses of all debts and deeds to disappoint the heirs of tailzie, but without an express prohibition to alien, or irritancy of the contravener's right, upon which a charter passed by the purchasers of the estate of Mar, superiors, but no infeftment was taken, nor the tailzie recorded in the register of tailzies. Adam Hay the disponer was attainted of high treason, and James Hay entered his claim as heir of entail, or rather as having right to the remainder, agreeably to the judgment of the House of Lords in the case of Captain Gordon touching the estate of Park. Answered: As the tailzie was not completed either by infeftment or registration, it was not effectual against creditors and far less against the Crown. It contained no irritancy of the contravener's right, nor even a prohibition to sell, and several claims have been dismissed for not being registrate, and for not being effectual against creditors, which makes a material difference betwixt this tailzie and that of Park, which was completed in all the forms requisite by the law of Scotland. Replied: When these claims were dismissed, the Court thought that these cases behoved to be judged according to the law of Scotland, and therefore sustained Captain Gordon's claim simply, but the House of Lords gave a different judgment. They thought with the Judges of England, that they must be judged by the law of England, and therefore sustained the Captain's claim only to the remainder after failure of the sons of his brother the forfeiting person; and it is notour that in England there is no register of entails nor is any irritancy or even a prohibitive clause neeessary to complete the right in remainder. 2dly, So long as the tailzie remains a personal deed, it is good against creditors even without registration, as was found by the House of Lords in the case of the estate of Denholm of Westshiels; and in the case of Riccarton they found a tailzie effectual thought it contained no irritancy of the contravener's right. Answered: The very foundation of saving remainders and reversions in England is that they consider these as a separate estate in the lands vested in the remainder-man and donor * at the very first constitution of the entail, and which never was in the heirs in tail, and which therefore these heirs cannot alien or prejudge; and how soon the estate tail is spent and determined by failure of issue of the tenant in tail, the remainder-man takes the estate not by descent or succession to him, but as a purchase; and though by the device of fine and recovery, that is by certain simulate proceedings and judgments in Courts of law, that tenant in tail may dock the entail and bar the remainder, yet he cannot by any deed of his own alien the estate or prejudge the remainder, and therefore it is in the eye of law still unalienable; and as he is not heir to the tenants in tail, but considered as a stranger having a separate estate of his own in the lands quite independent of them, therefore in the act 33 Henry VIII., when all estates of inheritance were made forfeitable (as well as by 28 Henry VIII.) when rights of third parties were saved, among these remainders and reversions were also named. But that cannot be applied to heirs of tailzie in Scotland, when the tailzie is not complete in all the forms, and when notwithstanding thereof the

* This is erroneously printed "donee" in the corresponding passage of the text.

forfeiting person could by his deed have effectually alienated the subject. To the second: That in this case the forfeiting person was also heir-at-law to the maker of the entail, and, in such a case, to make a latent entail not completed and not recorded effectual against forfeiture would make it almost impossible to forfeit lands in Scotland, especially if a naked substitution is sufficient; and the claimant's argument from the law of England would go so far. But such a substitution, though it were conceived in the same words, is not at all the same kind of right in Scotland as it is in England; which happens also in other technical words, as "conjunct-fee to a man and wife," which in Scotland gives the whole fee to the husband, which would be forfeited by his treason, whereas in England it could only forfeit the half; so liferent in Scotland sometimes imports an *usus-fructus casualis*, that is, the property, which he would forfeit, whereas in England it signifies only an estate for life; and there was one case since the judgment of the House of Lords, where this Court dismissed the claim upon the like objection of not registration, viz. Mercer of Lethindie. The Lords dismissed the claim, *renit.* Dun, Drummore, *et* Kames. For the interlocutor were President, Kilkerran, Milton, Minto, Murkle, Shewalton, Woodhall, Elchies. Strichen did not vote.

No. 51. 1753, July 20. W. GORDON *against* CREDITORS OF CARLETON.

THE questions here were two; first, Whether William Gordon a remote substitute in the entail of Carleton could stop the process of sale, though the succession had not devolved to him? 2dly, As the heirs were allowed to contract debt to the extent of half the value of the estate, and there were expired adjudications on these debts, whether that was sufficient for carrying on the sale? And there was also a third point, Whether the irritant and resolutive clauses were good against creditors, though the tailzie was not on record, it being made before the act 1685, and still remaining a personal deed? As to the last we seemed to be of the opinion of the judgment of the House of Lords in the case of Denholm of Westsheils that the limitations were effectual. As to the first, I observed that if we found William Gordon had no title to oppose the sale, we must at least reserve his right entire, whenever it should accrue; and I doubt if any body would purchase under such an embargo, and therefore put to the Bar, Whether they woud insist on their objection? and Mr Lockhart passed from it. Then I observed, that if the debts contracted agreeably to the tailzie were with the interest now proved above the value of the estate it might be sold on the act 1681; but if they were not, an expired legal would not warrant such a sale, where the debts did not exceed the value; for even when the estate was bankrupt, if the legal of the adjudication was current, it could not (till the act 1695) have been sold on the act 1681, without the debtor's consent. And therefore we remitted to the Ordinary to enquire as to the fact and report. 21st November 1753 Adhered. (See No. 37.)

No. 52. 1733, Aug. 9. MAJOR FORBES AND MISS MAITLAND.

See Note of No. 3, *voce* RETOUR.