1741.

PRINGLE
v.
PRINGLE.

'Court, and that the said Court of Session do pro-
'ceed thereupon, according to law and justice.'

For Appellant, *W. Noel, A. Hume Campbell.*
For Respondent, *William Hamilton, W. Murray.*

This reversal is not noticed in any of the reports of the case.

KENNETH M'KENZIE, - - *Appellant;*
WILLIAM URQUHART, *et alii*, - *Respondents.*

26th January, 1741.

TAILZIE.—ACT 1685, c. 22.—An entail completed by infeftment, but not recorded in the register of tailzies, is not effectual against the creditors of the heir of entail.

[Elchies, *voce* Tailzie, No. 13.]

No. 60. GEORGE VISCOUNT TARBET in 1688 executed an entail of the estate of Cromarty in favour of his second son, Sir Kenneth M'Kenzie, but reserved to himself a right of redemption upon payment of a certain sum. This entail contained all the necessary clauses of a strict entail, and was registered in the register of entails. Resignation followed—a crown charter was expede, and infeftment was taken by Sir Kenneth.

In exercise of the reserved right, Lord Tarbet did, in 1695, redeem the lands according to the

usual formalities, and the grant of redemption was registered in the register of sasines and reversions. Lord Tarbet then made another strict and complete entail, in terms of the former one; (only leaving out some lands, and disponing others,) also in favour of Sir Kenneth, with other substitutions. The entail was registered in the books of Council and Session, but not in the register of entails. Resignation followed; a charter was expede, and infeftment taken and recorded, and all the clauses of the entail were enumerated in the resignation, in the charter, and in the sasine.

Sir Kenneth continued in possession till his death in 1728, after having contracted large debts. His eldest son, Sir George, obtained possession upon a general service, as heir to his father, and also contracted large debts.

The creditors, (the respondents) who had used diligence upon their debts, then brought an action of sale for payment of their debts. The appellant, Sir Kenneth's second son, and next heir to Sir George, objected to the sale, on the ground that the debts were contracted in manifest contravention of the entail.

The creditors answered, that the former entail of 1688 having been extinguished by the recorded order of redemption, the claim of the creditors, and that of the heir of entail, depend entirely upon the effect of the entail of 1695; and that this entail not having been recorded in the register of tailzies, as required by the act 1685, is ineffectual against onerous creditors.

Upon the report of the Lord Ordinary, the Court found, (17th July, 1740,) 'that the entail 'not having been recorded in the register of

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'tailzies, as directed by the act 1685, can have no 'effect against onerous creditors upon the estate, 'who have affected the same by proper diligence.'

The appeal was brought from this interlocutor of the 17th July 1740.

***Pleaded for the Appellant*:**—The judgment proceeds upon so strict an interpretation of the act 1685, as seems inconsistent with the principles of law and justice. Although the entail was not recorded in the register of tailzies, it was recorded in the books of Council and Session, which is a more ancient and a better known register than that appointed by the act of Parliament referred to.

The necessary clauses are also properly published, by being inserted in the charters of resignation and infeftments, and every other requisite has been complied with, except that of the recording in the register of entails, as to which the appellant contends that the statute has not been rightly understood nor justly interpreted:—because, although a register is appointed for entails, yet the act does not declare that the entail shall be ineffectual against creditors if not recorded, which would have been done if this had been intended. This is expressly provided in the case of the omission to insert any of the clauses in the rights of the several successive heirs of entail. The act declares that, in case of such omission, these clauses shall not militate against *bona fide* creditors; whereas, there is no such provision with regard to the non-registration of the entail.

***Pleaded for the Respondent*:**—Where an entail is not recorded in the register appointed by the act, creditors contract *bona fide* with the possess-

ors of the estate, and, as has been frequently found, the entail can have no effect against them.

The statute expressly declares that such entails only shall be allowed, where the original entail is once produced before the Lords of Session judicially, who are thereby ordered to interpose their authority thereto, and where it is recorded in the register book kept for that purpose.

After hearing counsel, "it is ordered and adjudged, &c. that the interlocutor complained of be affirmed." Judgment, 26th Jan. 1741.

For Appellant, *James Erskine, Alex. Forrester.*
For Respondent, *Ch. Areskine, W. Murray.*

THOMAS BURNET of KIRKHILL, - *Appellant;*
MAGISTRATES of ABERDEEN, - - *Respondent.*

10*th March*, 1741.

TACK.—TEINDS.—A lease of teinds having been granted to A and his wife for their lifetime, and to their son for three nineteen years, the entry of the son, as well as of the father and mother, being in one clause declared to be at the day and date of the lease, and it being declared in another that he was to enjoy the lease for the foresaid space, "next and after "baith their deceases,"—found that the tack to the son commenced at the same date with the liferent tack, and not at the expiration of it.

A tack of teinds being granted during the currency of an existing tack, with a declaration that the remaining years of the current tack should run after the termination of the new tack, —it was found that this was not an effectual grant of the additional years at the end of the new tack.

William, bishop of Aberdeen granted in 1576, No. 61.
a lease of the teinds of the parish of St. Nicholas