1758. *November* 15. Tod *against* ———.

[*Fac. Coll. II.* No. 123.]

In this case it was decided unanimously, that a bill must be protested for not payment upon the third day of grace at farthest; and if it was a Sunday, or other holiday, upon the second: and a protest upon the fourth day signified nothing in a question concerning the recourse. This was finally decided in the case of *Mitchell of Colpney*, in the year 1751, after much variation of judgment among their Lordships, and is now considered as established law.

Another question here was, Whether the acceptor of the bill, stopping payment two days before, was any reason for not protesting the bill in due time. It was said that the protesting, after the acceptor had stopped payment, could be of no use to the creditor, because the debtor having taken out a statute of bankruptcy, his whole effects were, from the time of his stopping payment, vested in the trustees under the commission. But the Lords were of opinion that the strict forms of negotiating bills were not to be dispensed with on any pretence of their being useless for operating payment. *Dissent. tantum* Kaimes.

Lord Auchinleck said, that, as that whole matter of negotiation and recourse was contrary to the common rules of law, which required only that the cedent of the debt should warrant *debitum subesse*, and was entirely governed by custom, that custom he thought ought to be religiously adhered to.

1758. *December* 13. Lord Rothes *against* His Creditors.

[Kilk. 14th December 1758; *Fac. Coll. II.* No. 145.]

In this remarkable cause it was debated, Whether a deed of entail, not completed by infeftment before the Act 1685, but kept in the possession of the granter till about the year 1690, ought to have been recorded, according to the directions of that statute, in order to be effectual against creditors and purchasers?

It was pleaded for the creditors,—That the tailyie ought to have been recorded, 1*mo*, Because the regulations of the statute extend to all tailyies that are now in being, even those completed by charter and sasine before the statute; 2*do*, That these regulations extend at least to such tailyies as were not completed, neither by infeftment nor publication, till after the statute.

On the *first* point it was pleaded by Pitfour,—That, before the statute, an opinion had prevailed among some lawyers of this country, and which also had received the sanction and judgment of this Court, that limitations might be imposed upon property that would be effectual against creditors and purchasers. How these limitations were to be expressed, and what different clauses were necessary for the purpose, was not a point very well settled, as

there was no law in the case, nor any decision except one: but one thing appears to be certain, that, as the common law of Scotland stood then, and as it stands now, there was no necessity to insert any real burthen upon lands in the sasine: It is enough that it be contained in the charter, or disposition, which is the most material part of the feudal right, and ought naturally to contain all the conditions and qualities of it, the sasine being no more than the tradition of possession. Another thing is certain, that, before the 1685, it was far less necessary to insert the limitations in the subsequent retours and infeftments: it was sufficient that it was in the original constitution of the right, to which creditors that would lend their money were obliged to carry back their searches. In this state were entails before the Act 1685, the intention of which was to give force and effect to tailyies, but under such provisions and conditions as might make them least prejudicial to credit and commerce. For that purpose the statute first required that all the limitations should be engrossed in the sasine, and not only in the first sasine, but in all the subsequent conveyances; and, for further publication, as sasines were only registered since the 1617, so that, before that period, they were only to be seen in private hands, or in the protocols of notaries, and as, even after that period, it was troublesome to look through the registers of different counties where the lands might lie, or through the general register, this statute appoints that there shall be a particular register of sasines kept for tailyies, and it enacts *that such tailyies shall only be allowed* as are produced before the Lords of Session, their authority interposed, and the tailyies recorded in that register. Now, as these words are general, including all tailyies, made or to be made, and the reason of the law is the same as to both, by what rule of interpretation can they be restricted to future tailyies? This is not giving a retrospect to the law, or annulling deeds *retro*; for the creditors admit that all the tailyies made before the act, as the law then stood, are valid, and that the debts contracted contrary to the prohibitions of these tailyies are ineffectual, and that all the statute requires is, that, in order to have their effect for the future, they must be recorded; so that the act plainly regulates what is to happen in future times, not what is past, and requires no more than what might be done by every tailyier, or every heir of tailyie in possession, or, if such heir should not incline to registrate, by any remoter substitute who might have applied to the Court of Session then, as well as now, in order to force the registration.

On the other side, it was SAID for the heir,—That all statutes, unless the contrary be expressed, have no retrospect to any thing that happened before them; that the words plainly relate to future tailyies, for they say that *it shall be* lawful to his Majesty's lieges to tailyie their lands, &c.: that this appears to have been the general sense of the nation, for, of all the many entails made before the 1685, some of which, particularly the tailyie of Buccleuch, was as early as the 1650, none are recorded except about 17. And it was further said that it had been so decided in this Court.

To which it was ANSWERED,—That the clause in the statute, above-mentioned, relates to the form and manner of conceiving the entail, with respect to the clauses irritant and resolutive, and this part of the act only respects entails to be made, for, as to entails made before, it allows them to be governed by the aw as it then stood; but the clause of registration is general, and relates to all

tailyies, as well as the clause immediately subjoined to it, which requires that the limitations should be inserted in all the subsequent conveyances. This clause, by a solemn decision of the Court, in the case of *Garnock*, was found to relate to all entails, and there is the same reason for both: and, as to the decisions of the Court, there is but one, in the case of *Borthwick*, which was reversed in the House of Peers: And as to what is said of so few tailyies being recorded that were made before the act, it is only to suppose the tailyier dead, and then it is easy to see a good reason why the heir did not record the tailyie.

Upon the other point, it was argued for the heir,—That what the Act of Parliament speaks of is a tailyie, and by that is understood the deed of settlement itself, though not completed by infeftment: that, though it was not a delivered evident, nor obligatory upon any body before the Act 1685, yet the rule of law is, that, whenever a deed is completed, it is held to be of the date which it bears. In this manner a sasine is not a complete deed in its kind till it be registered, but, the moment it is so, it is held to be a complete deed from its date: at least this is the rule of the common law, and it required a particular statute to make it effectual in a competition only from the date of the registration; and, in general, the rule is, that wherever the law requires any thing for the completion of a deed, as soon as that requisite is adhibited, it is held to be a complete deed from its date. As to the deed being in the power of the granter till it was completed either by delivery or infeftment, that is the case of every deed bearing a power of revocation, and yet such deed is complete from its date.

To which it was ANSWERED for the creditors,—That a tailyie, in common language, is such a deed as secures the estate to the substitutes against creditors and purchasers: that it may be very true that, where law requires any requisite for the completion of a deed, if that requisite is adhibited, the deed is held to be a complete deed of its date; but this holds only where the deed is, of its own nature, a finished deed before, only the law requires, for reasons of expediency and conveniency, that something should be superadded, as, in the case of a sasine, which is in itself completed by the delivery of earth and stone; but the law requires further, for the security of creditors and purchasers, that it should be recorded: but this will not apply to the case of a deed which is in itself absolutely unfinished, which is the case of a tailyie neither delivered nor published. Such a tailyie is really, properly speaking, no deed, no more than the intention to make a tailyie, kept within one's own breast, with this difference only, that it may be sooner put into execution than the simple intention. As to the deed bearing a power of revocation, that will not apply neither; because such a deed cannot be revoked without another deed, which shows that it is a deed complete of its kind, whereas the tailyie in question could have been annulled by putting it into the fire, which plainly shows that it was not even a disposition of tailyie completed.

The Lords did not put two separate questions upon the two points, but only one, namely, Whether the deed in question, not being recorded, was effectual against creditors? And it carried, by a great majority, that it was not; *dissent. tantum Præside,* Justice-Clerk, Nisbet, and Woodhall.