

1735.

CRAWFORD
v.
LORD GAR-
NOCK.

The HONOURABLE JOHN CRAWFORD,
commonly called Master of Gar-
nock, an Infant, by JOHN CRAW-
FORD, his Uncle, and the said JOHN
CRAWFORD for himself, - - - } *Appellants;*

PATRICK VISCOUNT of Garnock,
and his Creditors; and JAMES,
MARGARET, and ANNE CRAW-
FORD, his Brother and Sisters, } *Respondents.*

28th April 1735.

TAILZIE.—TITLE TO PURSUE.—An heir under an entail, which was not properly recorded, having possessed without inserting in his infestments the fetters of the entail, and contracted debts; the next heir (who had made up his titles in the same manner,) brought an action to have it declared that these debts were chargeable on the estate, and that he might lawfully sell a part of it in order to pay them. It was found that he had no power to sell,—the right of the creditors to bring proper actions for affecting the estates being reserved.

SIR JOHN CRAWFORD of Kilbirnie executed, in 1662, a strict entail, whereby he settled his estates of Kilbirnie and Drumry upon Margaret his youngest daughter, and the heirs male of her body; whom failing, certain other substitutes. It was particularly provided; under strict irritant and resolute clauses, “ that it should no ways be lawful to the said Margaret Crawford, or the heirs of her body, nor to any other of the heirs of entail, at

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“ any time thereafter, to sell, dispose, or wadset, or
 “ put away any part of the said lands and barony,
 “ or other lands particularly therein mentioned, or
 “ any part thereof, or any annual rent or yearly
 “ duty, to be applied out of the same, or to con-
 “ tract debt, or do any other fact or deed, where-
 “ by the same or any part thereof might be ap-
 “ prised or evicted from them,” &c. ; and these re-
 strictions were appointed to be engrossed in the
 infestments to follow thereon.

Upon this deed Margaret was infest, and her in-
 festment duly confirmed. But the entail was not
 recorded in the Register of tailzies.

Upon her death she was succeeded by her son
 John, created Viscount of Garnock, who possessed
 in fee simple his paternal estate of Glengarnock.
 He was served and retoured next heir of provision
 to his mother in the lands of Kilbirnie ; and in the
 lands of Drumry, he was infest upon a precept of
clare constat from the Dutchess of Lennox, superior.
 Neither these infestments, however, nor their war-
 rants contained the prohibitory, irritant, and reso-
 lutive clauses, directed by the entail to be inserted
 in them, but only this general reference to them as
 engrossed in the charters of confirmation in favour
 of his mother ; “ secundum formam et tenorem pri-
 “ orum infeofamentorum dict’ terrarum sub pro-
 “ visionibus et conditionibus in iisdem content.”

Viscount John died in 1708, after having contract-
 ed considerable debts. He was succeeded by his
 son, Viscount Patrick, who duly made up titles as
 heir to his father, both in the fee simple property
 of Glengarnock, and in the entailed estates ; but

the conditions of the entail were not repeated in his infestment. Being advised that, in consequence of the omission to insert in his father's titles the fetters of the entail, as well as because the entail was not recorded, the estates were subject to his debts, he granted bonds of corroboration to the creditors, by some of whom adjudications were afterwards raised against the estate, and decrees obtained in 1722.

Viscount Patrick then brought an action of sale of part of the entailed estate before the Court of Session; the debts greatly exceeding in amount the value of the fee-simple lands. To this action his eldest son, the master of Garnock, and the creditors were made parties.

The Court found, (25th June, 1725,) "that the foresaid tailzie of the said estate of Garnock* was not effectual against the creditors, and therefore that the pursuer, the Viscount of Garnock, had power to sell for payment of the creditors."

Upon advising a petition against this interlocutor for the master of Garnock, in which it was pleaded, 1st, That the entail was not subject to the regulations of the act 1685, having been executed prior to its date; and 2dly, That the reference to the entail in the infestments was sufficient and as effectual against creditors as if the clauses had been engrossed *verbatim*, the Court adhered, and found, (28th July, 1725,) "that the act of parliament 1685, regulates the transmission of tailzies made before the said act, as well as those made since;

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* The lands contained in Sir John Crawford's entail.

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“ and that the general reference in the sasine is not
“ sufficient to interpel creditors according to the
“ act 1685.”

A proof was then allowed of the rent and value of the lands, and of the extent of the debts, which, being reported by the Lord Ordinary, an articulate interlocutor was (28th February, 1734) pronounced in terms thereof.

Entered
Feb. 7, 1735.

The appeal was brought from these interlocutors of the 25th June and 28th July, 1725, and the 28th February, 1724.

(It is unnecessary to state the arguments in this case, as the judgment of the House of Lords proceeded upon a ground which was not pleaded by either party in the printed papers.)

Judgment
April 28,
1735.

After hearing counsel, “ it is declared by the
“ Lords Spiritual and Temporal in parliament as-
“ sembled, that the said *Patrick* Lord Viscount of
“ Garnock not having inserted in his enfeoffment
“ the prohibitory, irritant, and resolute clauses,
“ contained in the original settlement made in the
“ year 1662, called a Bond of Tailzie, the said in-
“ terlocutory sentences of the Lords of Session,
“ complained of in the said appeal, be, and the
“ same are hereby reversed ; but without prejudice
“ to the question of law, in case proper suits be
“ brought by the said creditors in order to recover
“ their respective debts.”

For Appellants, *Ch. Areskine* and *Will. Ham-
milton.*

For Respondents, *Dun. Forbes* and *W. Murray.*